SOCIAL DEVELOPMENT

AND

FIRST NATION JURISDICTION

COMPREHENSIVE RESEARCH REPORT

Prepared for
the Assembly of First Nations Aboriginal Strategic Initiative

by

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1. INTRODUCTION.

This discussion paper is intended to assist the ASI in its consideration of issues related to First Nation social development and jurisdiction. The structure of this document reflects the key issues which must be taken into account in considering jurisdiction over social development in a First Nation context.

Chapter 2, **First Nation Jurisdiction**, attempts to provide a working definition of the terms social development , social programming , and to consider the matter of jurisdiction in this context. It goes on to review changing legal and policy orientations of the Crown in relation to these matters. It concludes with a synopsis of relevant legal arguments for First Nation jurisdiction and fiscal resources, drawing from international and domestic law.

Chapter 3, **Historical Context**, traces the events which led up to today s situation, with particular emphasis on policy, material and fiscal transfers, and development issues. It traces the emergence of First Nation dependency and the growth of social programs in the period following Confederation.

Chapter 4 surveys the **Current Situation**, focussing on existing conditions, as well as the policy and fiscal environment. Projections based on current trends and demographics are also sketched out.

Chapter 5, **The Way Ahead**, takes into account the preceding sections and offers commentary and analysis, with particular emphasis on barriers to effective policy change, and ways of breaking down those barriers. Critical issues which need to be considered by the parties are identified, as well as some possible options for further action.

A **Bibliography** can be found at the end of this paper, containing the key secondary sources which were consulted in the preparation of the document.

This paper should be considered as a work-in-progress. We have reviewed and built on existing research, and expect that this will continue. Much information is presented here which needs to be absorbed and considered more fully. At the same time, this paper is only one among many that have been commissioned by the ASI project. The process of tying the analysis together and developing concrete plans of action still has to run its course. There are a number of suggestions and observations contained in this paper which point to further research or analysis that is pertinent to the issues.

It is hoped that this document will assist in the process.

2. FIRST NATION JURISDICTION.

2.1. Introduction.

The quotes below summarize and analyse the colonial relationship which has been, and remains, the basis of Canada - First Nation relations. Furthermore, these quotes also describe the dehumanizing conditions suffered by and afflicting the parties to the relationship.

> [...] **the Canadian government is unable either to let go its control or to bring forth new policies that will assist growth in a significant way. Government itself is one of the factors holding back development; it is part of the problem when it should be finding solutions.**
>
> Indian people and their leaders have a clearer perception of the problem. They don't see the future narrowly in terms of economic development (although development is wanted, of course), nor do they all want the same thing; but they do know why the programs aren't working. David Courchene caught the essence of it more than twenty years ago: **"The real tragedy of the treaties and the practices of public policy by succeeding governments over the past century has been to destroy that element essential to all people for their survival, man's individual initiative and self-reliance ... A century of pursuit of [such policies] finds Indian people on the lowest rung of the social ladder, not only suffering deprivation and poverty to a greater extent than any other Canadians but also suffering from psychological intimidation brought about by this almost complete dependence upon the state for the necessities of life."**
>
> **The qualities** which have been eroded under the Department's long reign **can only be rebuilt by the people themselves, and then only in a situation which gives them the room to do so. The government can best assist by stepping out of the way and by providing the resources for rebuilding.**
>
> Put another way, Indian people need to regain the **responsibility** they once had for running their own affairs. It is a right claimed by all who see themselves as a distinct society, but the more so in this case, since the dominant society has not found ways to end Indian poverty and alienation. [...]
>
> The Penner Report has shown how little power the bands have to change programs, and their frustration with administering tired old programs that patently don't change the situation. Penner's committee saw this not as peripheral, but as the central problem, requiring a shift from the federal government to the people themselves, giving them the power to run their own affairs. Its major recommendation was "that the federal government establish a new relationship with Indian First Nations and that the essential

element be recognition of Indian self government.""1 (emphasis added)

> **In my own opinion there will always be a liberal ideology in Canadian Politics that will guide attempts to eliminate special status for Indians.** Ironically, this is the same force that will bring to public attention, as it did in the 1960s, the injustices and inequities of the treatment of Indians. **The implication of this for Indians is that if they want to retain special status, they will have to counteract this force by fully rationalizing their own position with each change in the political climate.** This book demonstrates that an accurate rationalization of Indian positions cannot be done within government by ministers and civil servants whose liberal ideology and personal ambitions distort the Indian viewpoint.2 (emphasis added)

Clearly, the aspirations of the Canadian state and the First Nations are opposed. They are locked in the same struggle between the colonizer and the colonized which has typified relations between the European powers and the indigenous people of Africa, Australasia and South America over the past centuries.

> This, then is the great humanistic and historical task of the oppressed: to liberate themselves and their oppressors as well. The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves. Only power that springs from the weakness of the oppressed will be sufficiently strong to free both. Any attempt to "soften" the power of the oppressor in deference to the weakness of the oppressed almost always manifests itself in the form of false generosity; indeed, the attempt never goes beyond this. In order to have the continued opportunity to express their "generosity," the oppressors must perpetuate injustice as well. An unjust social order is the permanent fount of this "generosity," which is nourished by death, despair, and poverty. [...]3

The First Nations are pursuing a dual objective: restructuring their relationship with Canada, perhaps on the basis of restoring the original relationship; and striving to receive the entitlements from Canadian governments which will aid them in their restorative quest and in securing their future. Moreover, we are of the view that this is best achieved through the decolonization of their relationship with Canada.

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1 Helen Buckley, *From Wooden Ploughs to Welfare*, (Montreal-Kingston: McGill-Queens University Press, 1992): p. 150-151.

2 Sally Weaver, *Making Canadian Indian Policy, The Hidden Agenda 1968-70*, (Toronto: University of Toronto Press, 1981): p.xii.

3 Paulo Freire, *Pedagogy of the Oppressed*, (New York: Continuum Books, Seabury Press, 1973): pp. 28-29.

What is colonization? A dictionary definition presents a rather neutral image:

> Colonize: To plant or establish a colony or colonies in; to people with colonists; to migrate to and settle in.4

However, in real terms, colonization describes the process through which a state or a people settle a territory already occupied by others. This is done by appropriating the lands and resources of the colonized, and relegating them to a marginal position in the new colony (ie., de-legitimize their laws and political institutions, and destabilize their economic and social institutions). The ultimate purpose of colonization is to take lands and wealth away from the colonized peoples, and to award those benefits to the colonizers. There is no room for sharing the wealth in this scenario.

The situation of the First Nations in Canada fits this description perfectly: they have been colonized - first by the Imperial Crown, and since 1867 by the Canadian state. Despite recent talk to the contrary, the reality in 1998 is that First Nations remain colonized peoples, under the control of the Canadian state.

In this context, decolonization assumes a reversal of this situation:

> Decolonization: the action of changing from colonial to independent status.5

The government of Canada has always been very uncomfortable when confronted with these facts. When pressed, the response of governments in Canada has been (and continues to be) a vague form of recognition that First Nations are different, with rights and claims that set them apart from ordinary citizens. Nevertheless, the preferred strategy of Canadian governments in dealing with First Nations is:

>avoidance of substantive discussion or action regarding First Nation rights or priorities;

> the imposition of limitations on First Nations rights and remedies as a way to protect their liberal-democratic values of equality;

>the application of fiscal restraints; and

>by deception, the continued pursuit of assimilation as the most effective method of dealing with the rights and claims of First Nations peoples over the long term.

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4 Hypertext Webster Gateway: (http://work.ucsd.edu:5141/cgi-bin/http_webster?).

5 *Ibid.*

The examination in this part of the paper will include:

* establishing First Nation law and practices in the area of social welfare, and demonstrating that such has its own cultural circumstance and theoretical framework which is relevant today when arguing that First Nation jurisdiction in this area must be expansive; and

* an examination of Canadian government policy initiatives and developments in Canadian common law relative to certain time periods;

* the challenges, by way of legal tests, that may be raised by naysayers in so far as First Nation jurisdiction is concerned;

* establishing non-Indian cultural circumstances and history as defining the current state of Canadian social welfare which is presently applied to First Nations, and perhaps, is intended for the future;

* the legal basis in support of First Nations jurisdiction and financial resource base in the area of social policy.

2.2. Prior Social Organization And Distinctive Cultures.

In recent Supreme Court of Canada case law such as *Calder* (1972), *Van der Peet* (1996) and *Delgamuukw* (1997), there are statements within the judgements which confirm that Aboriginal peoples in North America exercised a sovereign right to govern themselves before European contact. Unfortunately, such statements always seem to be presented as describing Aboriginal societies in the past tense. In addition, discussion about the extent of such sovereignty is absent.

However, it confirms that No society can exist without law. Laws grow from the customs, traditions and rules of a society of people. They exist to inform people what that particular society considers to be acceptable and unacceptable 6, and that:

> The traditional laws of most Aboriginal peoples are customary and usually unwritten. They are embodied in maxims, oral traditions and daily observances and are transmitted from generation to generation through precept and example. This practice is often misunderstood. Some outside observers, accustomed to thinking of the law as rules laid down by legislatures and embodied in written

6 Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, vol. 1, (Winnipeg: Queen's Printer, Province of Manitoba, 1991): p. 22.

statutes, have denied that custom truly can constitute law.7

It is not easy to present examples or details about the traditional laws of Aboriginal societies to show how they exercised their sovereignty or self-governance powers as proof of their social order and cultural distinctiveness. Furthermore, the details or examples that may exist will differ from one nation to another. Therefore, it is necessary for each Aboriginal society to do its own investigations and substantiations. This is also consistent with the court s expectations about how issues of Aboriginal rights and Aboriginal title have to be dealt with, which is on a case by case basis.

Nevertheless, there are some generalities and commonalities about traditional Aboriginal societies which lend themselves to discussion about traditional social policy laws and customs, and which could have modern day expression and practice. As the Royal Commission on Aboriginal Peoples concluded,

> Aboriginal nations need a strong and durable foundation upon which to build self-government. That foundation is the people - healthy, educated individuals, strong in body, soul, mind and spirit. [...]
>
> The subjects addressed in this volume - family life, health and healing, housing, education and cultural policy - all fall within what we identified [...] as **the core jurisdiction of Aboriginal self-government**. These core matters have a direct impact on the life, welfare, culture and identity of Aboriginal peoples. Therefore, Aboriginal nations are free to proceed with policy-making in these areas without waiting for agreements to be worked out with federal, provincial or territorial governments. They can start now.8 (emphasis added)

Although talking about individual and community well-being in the context of the future and to those issues which impact on such, these matters also had considerable importance in traditional Aboriginal societies:

> [...] The idea brought forward perhaps most often was that health and welfare systems should reflect the interconnectedness of body, mind, emotions and spirit - and of person, family, community and all life - which is essential to good health from an Aboriginal point of view. Further, this reflection should be substantial, not simply rhetorical.
>
> Classic Aboriginal concepts of health and healing take the view that all elements of life and living are interdependent and, by extension, well-being flows from balance and

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7 Canada, RCAP, 1996, vol. 2, part 1: p. 120.

8 Canada, RCAP, 1996, vol. 2, part 1: p. 3.

harmony among the elements of personal and collective life:

> The Native concept of health [...] is said to be holistic because it integrates and gives equal emphasis to the physical, spiritual, mental and emotional aspects of the person. The circle is used to represent the inseparability of the individual, family, community, and world ... The circle (or wheel) embodies the notion of health as harmony or balance in all aspects of one's life ... [Human beings] must be in balance with [their] and physical and social environments ... in order to live and grow.. Imbalance can threaten the conditions that enable the person ... to reach his or her full potential as a human being.9

And how was this traditional law exercised?

> Families and clans fulfilled a number of essential governmental functions. They determined who belonged to the group, provided for the needs of members, regulated internal relations, dealt with offenders and regulated use of lands and resources. They also imbued individuals with a sense of basic identity and guided them in cultivating their special gifts and fulfilling their responsibilities.10

One of the most important things for individuals and ultimately the community was a positive self-perception and strong sense of group identity which was promoted through various methods:

> [... the Indians..] maintained a good view of themselves and saw themselves as the norm and the more the European differed from the Indian, [...] the more ridiculous that European appeared.[...]
>
> The values and practices of the Plains people were all shaped by the hunt. The most basic element in the culture, a strong sense of group identity, reflects the fact that the hunt was a group effort. It had to be, for even the best hunter, if he went alone, would not always be successful; individual survival depended on the survival of the group. Various customs reinforced this group identity; the deeply ingrained practice of sharing; the importance attached to behaving in ways approved by society. [...]
>
> Even the good schools tended to work poorly for most young people because in the end, they came back to the reserve with no real opportunity to make a living or any roots in their own culture. The dilemma has been explained in recent times with reference to the Crees at James Bay. **The children went off to boarding school at an age when they**

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9 Henry Zoe, Dogrib Treaty 11 Council, 9 December 1992, quoted in Canada, RCAP, 1996, vol. 3: p. 205-206.

10 Canada, RCAP, 1996, vol. 2, part 1: p. 128.

> **were beginning to learn the skills used in their society and acquire its values of cooperation, generosity, and self-reliance.** They would spend the next six to twelve years in classrooms where competitiveness, something that had no part in Cree life, was promoted and rewarded. Many came back unable to speak the Cree language, in conflict with their parents, and with severe problems of identity. [...] (emphasis added)
>
> [...] This kind of suffering was imposed unwittingly in the nineteenth century, since **education** had not yet come to be seen as it is now, **as a process that performs much the same function in all societies: transmission of the values and beliefs of that society and preparation of its youth for the work that is done.** In traditional Indian society, education took place in the context of everyday life. The children watched while tasks were performed and learned by example; the adults had a vast fund of stories which told the children who they were, what was right and wrong, and how they should behave.11 (emphasis added)

It is not surprising to expect that self-pride and community pride was a natural consequence of freedom and self-sufficiency:

> [Indian Agent] Butler saw the strength in the Indian culture and admired the people because they lacked the white man's greed. His portrait of a typical individual shows something of the beliefs and customs that were so deeply ingrained in the Indian culture.
>
> He holds all things in common with his tribe - the land, the bison, the river, the moose. He is starving and the rest of the tribe want food. Well, he kills a moose and to the last bit the coveted food is shared by all. There is but a scrap of beaver, a thin rabbit or a bit of sturgeon in the lodge; a stranger comes and he is hungry; give him his share and let him be first served and best attended to. If one child starves in an Indian camp you may know that in every lodge scarcity is universal and that every stomach is hungry ... The most curious anomaly among the race of man, the red man of America is passing away beneath our eyes into the infinite solitude. The possession of the same noble qualities that we affect, to reverence among our nations makes us want to kill him. If he would be our slave, he might live; but as he won't be that, won't toil and delve and hew for us, and will persist in hunting, fishing and roaming over the beautiful prairie which the Great Spirit gave him; in a word, since he will be free - we will kill him.
>
> Butler admired what so many of his contemporaries found backward and out of step. Whites also tended to criticize the simplicity of the Indian people's wants, although this, too, was the way they had lived. **Beyond what was necessary in the way of food, clothing, and shelter, they turned to family life and social pleasures, the beauty of**

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11 Helen Buckley, *From Wooden Ploughs to Welfare*, (Montreal-Kingston: McGill-Queens University Press, 1992): p. 29-30; 39.

nature and their spiritual heritage. Family values were strong in Indian society: children were cherished and old people respected.12 (emphasis added)

2.2.1. Aspects of traditional culture relating to social policy .

What aspects of traditional Aboriginal social order and cultural distinctiveness might be regarded as touching on social policy?

>self-sufficiency;

>sharing or distribution of wealth;

>collectiveness or communal responsibilities and obligations;

>political and social organization promoting individual, and communal, wellness and harmony;

>connection to lands and resources to social policy objectives (ie., the land provided important tools, goods, etc.; it also provided the wealth that was required to meet the social needs of the people);

>holistic viewpoint that established physical (food, shelter), mental (education), spiritual and emotional (health) necessities as ingredients for a healthy human being;

>that such customs and practices were designed to maintain the integrity of First Nations' societies; and

>that a decent standard of living was a right for all members of the community rather than for a few good hunters.

The object in defining social policy outside of the usual confines of the Canadian definition is twofold: (a) to establish that social policy is an extensive area that encompasses many subjects; and (b) to be able to rely on the Aboriginal rights argument.

To achieve the latter will require that First Nations social policy traditions be established as activity that is an element of a practice, custom or tradition integral to the distinctive culture of the First Nations, and to show that social policy in First Nations community and society have pre-contact origins. Further, that First Nations social policy did not arise solely as a response to European influences.

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12 Indian Agent Butler, quoted in Buckley, 1992: p.41.

The object should **not** be to attempt to illustrate First Nation traditional social policy values and practices in the context of Canadian social welfare legislation, because modern Canadian social welfare legislation is itself the result of evolution and changing societies. Aboriginal societies themselves also enjoy the right to evolve and change - it only makes sense that this should occur within an Aboriginal framework instead of an alien one which has only caused dislocation and underdevelopment.

Cast in the context of governmental responsibility to respond to community needs rather than regulating peoples conduct, therefore, even in the extremely limited perspective of the federal government's legal view of the inherent right of self-government (which is self-government through non-legislative internal self-regulation), it can be reasonably argued that First Nations traditions, customs and practices have always promoted principles of looking after the needs of individuals, wealth sharing and community protection, etc.

The responsibility and authority to redistribute the wealth and to meet the needs of the disadvantaged in First Nations communities is a responsibility that was deemed essential by the community. This shows how it is very difficult to address matters related to First Nation social development without also considering issues related to land, resources, and governance.

2.2.3. Power, Resources, Legitimacy.

There are other measures which apply to all governments. A discussion paper from the Union of Nova Scotia Indians deals the requirements for effective self-determination:

> To be effective any government must, at a minimum, have adequate power, resources and legitimacy. Terms which are defined as:
>
> (a) Power - is a legally recognized authority to act, including legislative competence, and jurisdiction. It may arise from the constitution, from legislation, from court decisions or even from custom/ The key issue is whether other governments and institutions recognize and respect what is done, in actual practise.
>
> (b) Resources - comprise the physical or economic means of acting, in particular financial resources, but also information, technology, human resources and natural resources needed for security and further economic growth. Resources are needed to use power, and satisfy the needs and expectations of citizens.
>
> Legitimacy - refers to public confidence in and support for the government. Legitimacy may arise from the way leaders are chosen, the extent to which they respond to public wishes, whether they succeed in satisfying public expectations, and whether they respect

human rights. Legitimacy enhances resources and power.13

Each of these elements needs to be considered by all First Nations in addition to matters that are specific to themselves.

2.3. Crown Policy And Common Law Perspectives: Pre-Confederation.

Even though the pre-Confederation period in Canadian history is often presented as the period in which Crown policy was in its most accommodating and humanistic character, there is still evidence of paternalism and the intention to expand the empire.14

> The Royal Proclamation of 1763 reaffirmed the co-operative nature of early white-aboriginal relations. It sought to establish British sovereignty over the unexplored interior of the continent, as well as to forge military alliances with powerful tribes. It also recognized aboriginal peoples as 'nations' under the protection of the king.15

The Royal Proclamation of 1763 publicly stated:

> 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.
>
> [...] we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.16

The courts in Canada, both historically and in a modern context, have interpreted the policy as generous:

> [...] The papers of Sir William Johnson [....] who was in charge of Indian Affairs in

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13 Union of Nova Scotia Indians, *Practicle Points for Discussing a Framework for a Mi kmaq Constitution* (Sydney: UNSI, n.d.): p.7.

14 See Chapter 3.2. in this report for more discussion on this period of history.

15 A. Fleras and J. Elliot, *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto: Oxford University Press, 1992): p. 40.

16 The Royal Proclamation 1763, in Bradford Morse, *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1982): p. 52.

> British North America, demonstrate the recognition by Great Britain that nation to nation relations had to be conducted with the North American Indians. [...]
>
> As the Chief Justice of the United States Supreme Court said in 1832 in Worcester v. State of Georgia, [....] about the British policy towards the Indians in the mid-eighteenth century:
>
> > Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.
>
> [...] This "generous" policy which the British chose to adopt also found expression in other areas. The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.17

Interpreting the policy as a nation to nation relationship was not all that was expressed or read into the relationship. There was also the need to ensure the policy was to express and be understood as a need to protect the Indians from evil forces:

> Certain it is, that our history furnishes no example, from the first settlement of our country, of an attempt on the part of the Crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.18

However one-sided the perspective is, it still represents an important legal fact that Crown policy in its earliest formulation did recognize a full measure of internal self-determination which in a modern context, but based on customary international law, may include the following elements:

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17 *R. v. Sioui* (1990), Supreme Court of Canada, quoted in Peter Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994): pp. 198-199.

18 *Connolly v. Woolrich* (1867), Quebec Superior Court, quoted in Canada, RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: CCG, 1993): at. p. 7.

i) right of peoples to choose freely their own form of government;

ii) right to determine their economic, social and cultural development;

iii) right to share in the natural wealth of the state;

iv) right not to be deprived of their own means of subsistence;

v) right to participate in the political life of the state;

vi) right to approve of territorial changes that directly concern them; and

vii) right to enjoy fundamental human rights and equal treatment and be free from discrimination on grounds of race, colour, creed or political conviction.19

Even treaty policy, in the past, recognized that the pursuit of self-sufficiency in Indian communities - and the manner in which it would be organized - was a matter to be determined internally.

For instance, the numbered treaties deal with matters relating to the ability of the Indians to continue their harvesting habits or avocations and that such was not interfered with by the Crown; that land allocations for farming was left to the Indians; that farming tools were to be shared. But government did not attempt to regulate individual or community access to tools provided in common.

2.4. After 1867: The Indian Problem.

> The great aim of our civilization has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit for the change. (Sir John A. Macdonald, 1887)20

The application of a policy of government intervention into the internal affairs of the Indians and measures to achieve cultural genocide were expedited after Confederation. After all, Confederation was the "founding event" of a new nation which would expand and swallow-up

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19 Grand Council of the Crees (Of Quebec), *Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada* (Geneva: Submission to U.N. Commission on Human Rights, Forty-Eighth Session, January 27-March 6, 1992): pp. 8-9.

20 Quoted in Fleras and Elliot, 1992: at p. 39.

the territory and the resources. This was a logical step in the colonization process.21

And for certain federalists like Sir John A. Macdonald it meant the inheritance of a burden, and the most effective way to deal with the burden was to eliminate it.

One of the most deceitful, yet effective methods that the Crown employed to achieve its greedy and inhumane objectives was to use the treaty-making process as an artifice. Indian people were being overwhelmed by trespass, loss of wildlife, disease:

> The government knew well enough that help was needed, but had already determined just what would be forthcoming. Among the many advantages it possessed was control over the process; it picked the meeting sites, summoned the bands, set the agenda and the terms - none of which was revealed in advance. [...]
>
> Thus Governor Morris at Treaty Six: "I see the Queen's Councillors taking the Indian by the hand saying, We are brothers; we will lift you up, we will teach you if you are willing to learn, the cunning of the white man. All along that road I see Indians gathering, I see gardens growing and houses building .22
>
> Treaty Six was signed by a second group of chiefs at Fort Pitt, including Chief Sweetgrass [...] but added an eloquent plea: "When I hold you hand and touch your heart, let us be as one; use your utmost to help me and my children so that they may prosper."
>
> Dissenting voices were raised at Treaty Seven in the year following, but by 1877 the Indian situation was deteriorating rapidly and Chief Crowfoot of the Blackfoot convinced the majority that a deal with the white men was the best course. And so the treaty was signed and treaty-making process on the Prairies came to an end, **having established the terms and entitlements that were to govern reserve life down to the present time** and perhaps for years ahead.
>
> The chiefs had done the best they could. Contemporary accounts - Governor Morris, in particular, left a full picture of events - convey their essential dignity, seriousness of purpose, and recognition that their people's future rested on the help they could get in establishing a new life. Yet none of them was in a position to judge the adequacy of the government's terms. With respect to farming, for example, the treaties provided two hoes, one spade, and one scythe for each farming family; one plough for every ten families; five harrows for every twenty families; and for each band, one axe, three saws (of

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21 See chapter 3.4. in this document for further discussion on the numbered treaties, assimilation, and the Post-Confederation period.

22 Buckley, 1992: p. 33.

different kinds), files, a grindstone, an auger, carpenter's tools, seed, one yoke of oxen, one bull, and four cows.

Even by the standards of the 1870s, **these provisions were minimal, shaped more by a wish to cut costs than by any real concern for the people or for what it might take to get them established in an occupation** that only a few of them had practised.

Good intentions and genuine concern were not altogether absent. Lieutenant-Colonel Provencher, one of the Indian Commissioners made clear his view that the government had a responsibility to instruct and civilize the people, not just to pay them a sum of money and leave them to be beggars once the hunting and fishing had gone. Governor Morris impresses us as a man who genuinely like Indian people and wished to help them, but it was not in his power to improve the terms of the treaties. This is the heart of the matter, that the terms were set with a view to minimizing obligations in the light of commitments already made to the construction of a railway and other costly enterprises. Influential voices in the business community at Red River and back east were pressing for speed, and the treaties were, in fact, rushed through too quickly to establish what the needs of the people really were.23 (emphasis added)

In a legislative and policy context the goals and methods were no less objectionable. With the sanction of the *Indian Act* and support from the politicians and public servants of the highest order, the eradication of the Indian problem was a foremost concern which was placed in the hands of missionaries, Indian agents and teachers who received their duties with enthusiasm.

Officially, the goal was assimilation, and it seems to have centred on the children who would acquire the new knowledge and values they needed by going to school. [...] Given the importance placed on "civilizing," the Church was a natural choice as senior partner in the venture and it was given particular responsibility for the schools. But the Department of Indian Affairs was to be the lead player; its plan encompassed civilizing along with most aspects of life on the reserves. The essence of the plan was a system that would take control of the people's lives, manage their affairs, and show them how to become useful citizens. [...]

The role assigned to the people for whose benefit the system was designed consisted largely of following instructions and refraining from making trouble. It was a demeaning situation for a people which had always managed its own affairs and taken pride in its many skills and ability to service difficult times. Their chiefs, now government-appointed, might have seemed less their own to the people than formerly; more importantly, they seldom had the power to help people in difficulty. That role fell increasingly to the agent. Many years later, in the 1970s and 1980s, when dependency

23 Buckley, 1992: p. 34-35.

> came to be seen as a major problem on the western reserves, few Canadians would realize just how early the seeds had been sown.24

Were the policies a success or failure? The "Indian problem" was not eradicated as we all know, but the government succeeded on some levels: by persuading Indians they were inferior; by displacing Indian governments; by withholding social and economic opportunities; and by driving Indian culture and spirituality underground where it was not accessible for many who needed it.

> Thus, the Canadian government charted an impossible course. It set out to make the people over so that they would think and act like white people, and this meant denying their culture, along with the right to manage their own affairs. It soon proved impossible, under this equation, to provide them with a livelihood. The result was poverty and a loss of self-respect and community cohesion. Even the caring qualities which Colonel Butler had admired were difficult to maintain on reserves, where the agent had a different agenda, practised favouritism, and ignored suffering. [...]
>
> Many officials believed that, with rare exceptions, they could not adapt and that the exceptions would be absorbed into the larger society. In reality it was the system which largely governed the ability to adapt [...] These were the years when programs were cut and lands sold off, as Canadian society turned its back on a people who failed to take advantage of the opportunities provided. And the years which followed brought few changes. One could say that the first fifty years of the twentieth century passed in a holding pattern: the schooling and the farming stuck in backwardness, with the Department as untroubled as the public indifferent.25

Nothing best captures the consequences suffered by Indians during this period than to say that they lost their freedom.

2.4.1. Unjust Relations In The Courts.

> There is no clear, evolutionary logic in the historical development of Aboriginal rights. [...] Sandwiched between two important moments when those rights were affirmed in limited ways - 1763 and 1982 - was a long period when the rights were sometimes recognized and more often than not ignored outright. The recognition and affirmation of Aboriginal rights cannot be seen as a progressive liberalization of society, as the latest step in a process by which every day, in every way, things are getting better and better. It is a history of sustained, often

24 Buckley, 1992: pp. 43-44.

25 Buckley, 1992: pp.60-61.

> vicious struggle, a history of losses and gains, of shifting terrain, of strategic victories and defeats, a history where the losers often win and the winners often lose, where the rules of the game often change before the players can make their next move, where the players change while the logic remains the same, where the moves imply each other just as often as they cancel each other out. It is a complex history whose end has not been written and whose beginnings are multiple, fragmentary and undecidable.26

For Aboriginal peoples the law, as spoken by the courts, has colluded with governmental power. The alleged independence and sanctity of the courts is seen to have legitimized the process of dehumanization. For many Aboriginal peoples going to the courts today is not an option because the battle was lost over a century ago.

The decision in the *St. Catherine s Milling and Lumber Company v. The Queen* was rendered in 1888. It provides the most important interpretation of the Royal Proclamation of 1763, and became the most important precedent in Aboriginal case law for over a century. Yet First Nations had no legal representation, made no intervention, and had no direct role in the proceedings.

> [...] That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependant upon the good will of the Sovereign. [...] There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian rights, but their lordships do not consider it necessary to express any opinion upon that point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.27

In this case Aboriginal rights were considered almost incidental. For certain the law was spoken in favour of the Crown through a legal fiction: the Crown owns all of the lands. And this fiction has stood the test of time.

At the trial level the judgment was filled with racist statements: As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any claim thereto as to interfere with the plantations, and the general prosecution of colonization. 28 This language from the trial judge was no doubt reflecting government policy and attitude at the time. The Premier of Ontario was the plaintiff's lawyer and he argued that "[...] Indians were an inferior race [...] in an inferior

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26 Kulchyski, 1994: p. 10.

27 Quoted in Kulchyski, 1994: at p. 27.

28 Olive Dickason, *Canada's First Nations*, 2nd Edition (Toronto: Oxford University Press, 1992): p.317.

state of civilization who had no government and no organization, and cannot be regarded as a nation capable of holding lands.29

The St. Catherine's Milling case succeeded in displacing the Indians from their lands, since all that stood in the way First Nation interests and Crown acquisition was the good will of the Sovereign. It also succeeded in ignoring centuries of Crown practice relating to indigenous rights and political relations. The following quote from the *Syliboy* case almost sixty years later illustrates the degree to which this doctrine had embedded itself in judicial reasoning.

> Treaties are unconstrained acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savage's rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.30

This passage - in a treaty rights case - coincided with major revisions to the *Indian Act* which the federal government adopted in 1926-27. At this point they seem to have reached the pinnacle in interfering with and regulating the lives of Indians, consistent with the reality that the *Constitution Act, 1867,* treats Indians simply as subject-matter.

Fortunately for the Indians, the Great Depression and World War II became the foremost concerns for the federal government between 1930 and the late 1940's.

2.5. Integration And Equality: After 1945.

After World War II, where Indians fought along side other Canadians, but received second class treatment at home, after the horrors of the Holocaust, and after the failed policies of assimilation, the pressure for changes in federal Indian policy began to become inescapable. As the Canadian social safety net was built after the war, the stark contrasts between evolving settler society and the relief system became too much for even the Department of Indian Affairs to ignore.

Therefore, the federal government sought to normalize relations with Aboriginal peoples by doing away with assimilation and separateness (reserves) in favour of the principle of assimilation through the integration and mainstreaming Aboriginal peoples.

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29 *Ibid.*: p. 316.

30 *R v. Syliboy* (1929), quoted in Morse, 1982: at p. 409.

2.5.1. Integration.

The first step was integration:

> In the larger communities, life was further disrupted by the advent of government agencies to deliver services. Staffed by whites, they offered little employment for the long-term residents, while taking over the management of their affairs and introducing set roles; white officials and their families on one side, native people on the other. Ironically, at a time when colonial powers elsewhere were booking passage home, a colonial society was establishing itself in Canada's northlands.31
>
> Social assistance had been brought in at a time when the Department was the subject of searing criticism, and it was portrayed as a stopgap measure while longer-term solutions were explored. [...] The most ambitious of the new directions was a basic change in education policy, designed to break the pattern of failure in the schools.
>
> This change had in fact begun in the mid-fifties, and was in part a response to representations from parents who felt strongly that their children had to get a better education. The new plan was to get children into provincial systems by bussing them to town and village schools [...]
>
> With so many factors against integrated schooling, it is now hard to understand why it engendered such high hopes in the Department in the first place. Changing the schools did not change the crowded houses in which the children lived, nor their feelings of being different. High school graduates were not very numerous on the reserves and the kind of jobs they saw the adults in did not encourage children to put their faith in schooling. As Harold Cardinal pointed out, "Education cannot operate in isolation from the people. Unless it is accompanied by adult achievement, it will have little meaning or appeal to the student." The experiment with bussing was, in fact, a repeat of the mistake the Department had made in the 1880s, when it believed that the schools, operating in isolation from the environment, could put Indian children on the white man's road. More than that, according to a recent departmental paper, it had the unrealistic objective. Integrated schooling was intended not merely to improve school programs and broaden education opportunities: "Above all, it was thought that the economic and social assimilation of Indians could be brought about by this means.32

The results from the policy of integration were no less damaging than the results from assimilation. The only real difference was that health and child welfare officials became the

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31 Buckley, 1992: p. 72.

32Buckley, 1992: pp. 97-98.

agents of assimilation. Countless numbers of children were seized and exported from First Nations communities to *save* them from poverty and neglect - as determined by the new missionaries.

2.5.2. Equality.

Another measure that was applied which had potentially devastating consequences was "equality":33

> Many events shaped the Indian problem in the 1960s, each casting a different light on Indians. The centennial celebrations fostered a national curiosity about the past, and in one sense the Indian problem took shape with the framework of historical reassessment. As Canadian identity strengthened, and as news of the civil rights movement in the United States dominated the press, liberal-minded people developed a concern for minority groups and their rights to cultural and linguistic expression. Equally powerful was the anti-poverty movement which focused public attention on the economic disparity between Indians and the general population. [...] As the citizen participation movement took hold, it focused public attention on the political marginality of Indians, bringing to light yet another aspect of the Indian problem.34

> The White Paper argued that 'equality' or 'non-discrimination' as it was often phrased, was the key ingredient in a solution to the problems of Indians, and that special rights had been the major cause of their problems. The goal of equality was to be achieved by terminating the special legislation and bureaucracy that had developed over the past century to deal with Indians, and by transferring to the provinces the responsibility for administering services to Indians. Henceforth Indians would receive the same services from the same sources as other Canadians after a transitional period in which enriched programs of economic development were to be offered. The large Indian Affairs bureaucracy would be dismantled within five years, and the federal government was to retain trusteeship functions only for Indian lands which would be administered through an Indian Lands Act. By implication, the result of the policy would see Indians with 'Indian problems' become provincial citizens with regular citizens problems. The policy was essentially one of 'formal equality,' to use Cairns' phrase from the Hawthorn Report (1966), but the question remained as to whether it would foster equality of opportunity for this disadvantaged minority. Cairns had argued three years previously that such a policy would not: 'The equal treatment in law and services of a people who at the present time do not have equal competitive capacities will not suffice for the attainment of

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33 See chapter 3.6.1. in this paper for further discussion on events leading up to and following the White Paper.

34Weaver, 1981: p.13.

substantive socio-economic equality'.35

It is noteworthy that in the past few years political movements like the Reform party have revived this narrow approach to equality and applied it once again to Indian policy.

For some of the key federal players, Indian consultation was to play a major role in this transformation. Minister without portfolio Robert Andras, who was also involved in the process leading up to the White Paper, was apparently more committed to consultation than his colleagues within the Department and the Privy Council Office. However, it was only because he felt that this would be the most successful vehicle for getting the Indians to buy in to the termination of their rights:

> [...] Indian consultation was basic to his scheme, for it was through this process that he envisioned Indians negotiating an end to all special rights with the government.
>
> [Andras] conditions for a successful termination plan were social development and Indian participation. The common theme of all these approaches was now obvious: equality was a goal they could all accept for the new policy.36

Indian reaction to the White Paper was overwhelmingly negative (see chapter 3.6.1. in this paper for more). Prime Minister Trudeau and Minister Chretien were forced to publicly withdraw it. However, Chretien s supposed conversion was only skin deep. The underlying assumption of assimilation and equality was still fundamental to his approach.

> Indian demands were hampered by [...an...] important obstacle. The simplistic view of ethnic minority survival lead some policy-makers to believe that 'the past' could be closed off in some fashion so as to reorient the Indian world view to 'the future.' This attitude was highly compatible with Trudeau's ahistorical position on policy-making. 'The future,' moreover, was envisioned largely as a white world, not one that recognized or accommodated Indian cultural values. Implicity in this thinking was the belief that Indian emphasis on special rights was basically a reaction to their being denied equal status - a defence mechanism based on their exclusion. Indians were viewed as poor 'aspiring whites' who preferred what they did not have. **To the extent that Indian cultural systems were recognized, they were cast in the past tense and viewed as outmoded**. The importance of these cultural systems to Indians, no matter how acculturated, was simply not understood. In short, Indians were viewed in terms of socio-economic class structure, not ethnicity.37 (emphasis added)

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35 Hawthorn, 1966: p. 392, quoted in Weaver, 1981: at p. 4.

36 Weaver, 1981: pp. 111; 114.

37 Weaver, 1981: p. 196.

So, despite the articulate interventions of the First Nations, and despite federal assurances that a new approach was to be taken, officials still managed to distort First Nation expectations to conform with their own narrow view and objectives. This impasse remains as one of the most serious barriers to change in First Nation-Crown relations.

2.5.3. The Court's View.

The courts put their own spin on the principles of equality:

> This case is cited as "Regina v. Drybones", S.C.C. (1969). Joseph Drybones had been found intoxicated at the Old Stope Hotel in Yellowknife, Northwest Territories [...] He was charged under the Indian Act, section 94. Since the Indian Act varied significantly from the territorial Liquor Ordinance, particularly in that the punishments under the Indian Act were stronger, Drybones's lawyers argued that his equality rights as a Canadian citizen were being violated. The crux of the case was the question of which piece of federal legislation had precedence: the Indian Act or the Canadian Bill of Rights (1960).
>
> [...] Ritchie wrote the leading judgement, arguing that the relevant section of the Bill of Rights:
>
> > means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offense or having been made subject to any penalty."38

It is somewhat ironic that the leading case on Indian "equality" dealt with facts relating to alcohol. The principle here was such that the Indian should not be subject to greater punishment - in essence a backhanded recognition of Mr. Drybones' basic human rights not to be discriminated against because of his race.

The courts did not have to intervene in the area of "integration" since the 1951 amendments to the *Indian Act* resulted in a new provision which incorporated and made provincial laws applicable to Indians:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in

38 Quoted in Kulchyski, 1994: at p. 48.

respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.39

The courts have upheld the validity of this provision despite the fact that it comes close to a delegation of federal legislative power to the provinces. A delegation of legislative power from the federal government to the provincial government would be unconstitutional.

2.6. First Nations Control/devolution.

In his analysis of Indian policy during the 1970's and 1980's, Murray Angus concludes that federal Indian policy has come to be dominated by one, overriding objective: its desire to get out of the Native business . This serves not only to reduce costs, but also to relieve Canada of legal obligations and liabilities related to First Nations. He goes on to explain:

> There are several reasons for this objective: First, Native problems are seen by many politicians as intractable, meaning no amount of federal effort will ever achieve the desired results. Politically, then they represent a no-win set of issues for a government, that is, Ottawa will never be able to do enough to satisfy Native demands, and the pay-off at the polls would never amount to much if they did. As one former Minister of Indian Affairs put it: There is no reward: it is a black hole.
>
> Second, the responsibility of serving Native people, as required by Section 91 (24) of the British North America (BNA) Act, is bureaucratically complex. As the Nielsen Report on Indians and Natives noted in 1985: The effect ... has been the creation of a department of the federal government which has attempted to provide a full array of federal, provincial and municipal services to status Indians . Maintaining such a monolithic department would not be consistent with the Tories's decentralist approach to governing; nor would it fit with its determined efforts to downsize the federal bureaucracy.
>
> Finally, there are economic reasons why the government would like to extract itself from its established obligations: simply put, Native programming is expensive, and threatens to be more so in the years ahead. Any government anxious to control its overall spending, as the Conservatives are determined to do (at least on certain fronts), will therefore have a strong incentive for wanting to escape from its traditional obligations to Native people.40

39*Indian Act*, R.S.C., 1985, c. I-5.

40 Murray Angus, *And The Last Shall Be First - Native Policy in an Era of Cutbacks*, (Toronto: NC Press, 1990): p. 2.

> Since the fiscal crisis became acute in the late 1970s, the federal government has been systematically searching out ways to reduce its long term obligations to Native people. This usually unstated objective can be discerned in practically every major policy initiative relate to Native people in the last decade. Theoretically, the government has two major options for achieving this goal: 1) It can either make direct and unilateral cuts in spending on Native programs (an approach with some political risks); or 2) It can transfer its responsibilities.41

In the ensuing years, Canada has done both (see chapter 3.7.1. for a full discussion). Although devolution is supposed to result in First Nation control, the reality is that Canada has maintained control not only over the purse strings but also over the nature and scope of First Nation government activities. Needless to say, these objectives are contrary to those of the First Nations. However, through its control over fiscal resources and policy, Canada has succeeded in advancing its agenda considerably over the past 15 years.

2.6.1. The Courts View, 1973-1997.

This is an era in the court's history where they seem to be willing to pursue an independent view, somewhat, with respect to Crown and First Nations relations. Rather than keep in step with the federal government they seem to show an impatience with the federal government's inability to be honourable in its dealings with the First Nations:

> Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'.42

The *Calder* case served to question the colonialist assumptions underlying governmental policy and thereby open up the debate about these issues by establishing:

> > that aboriginal rights existed in Canada;

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41 Angus, 1990: p. 24. He describes three strategies available to the Tories for transfer: transfer responsibilities to Native people through self-government and land claims negotiations; transfer responsibilities to the provinces, which the Nielsen Report implies should "normally" be providing many of the services. This strategy has been pursued implicitly through the constitutional process and self-government negotiations, and more explicitly in the negotiations to transfer program delivery responsibilities to the provinces [...]; transfer responsibilities to the territorial governments [...]. In the event, all three strategies were (and are) employed by Canada.

42 *Calder v. Attorney General of British Columbia*, S.C.C. (1973) quoted in Kulchyski, 1994: at p. 61.

> that the extinguishment of rights had to be shown based on a plain and clear intention; and

> to acknowledge the possibility of self-government.

In 1984, the Supreme Court makes another contribution to the debate through its decision in *Guerin v. The Queen* which established that the federal government does have fiduciary or trust-like duties to First Nations in dealing with their lands and that the interest is "sui generis", which probably means that the Indian interest was not understood to be in the nature of existing common law concepts of property, therefore, they should not be made to fit if the fit wasn't appropriate.

A substantial pronouncement on Canadian First Nations treaty law came on the heels of *Guerin* in another Supreme Court of Canada decision in the *Simon* case, whereby the Court considers the treaties law afresh, and again, not wanting to pigeon hole them into international treaty or domestic contract law designates them as sui generis. Furthermore, the Court specifically notes that earlier case law such as the *Syliboy* case which described the Indians as savages was reflective of the perspectives of another era and would not be tolerated in a modern context where there was a growing sensitivity to the rights of Indians.

In 1990, within a period of a week the Supreme Court of Canada handed down two significant judgements on aboriginal and treaty rights. In the *Sioui* case the Court did a substantial review of British policy and made reference to the recognition of Aboriginal self-government pursuant to such policy. However, of equal significance is the fact that the court also affirmed the legal fiction of Crown sovereignty over First Nations and their lands without explaining it.

In the *Sparrow* case the court had its first opportunity to consider the significance of section 35 of the *Constitution Act, 1982*. In the case the court approved the notion that the rules of the game had changed in 1982:

> [...] the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.43

Furthermore, the court addressed the issue of reconciliation in two ways: that section 35 provided a limitation on Crown sovereignty over Aboriginal rights, but that section 91 (24) still existed to allow federal regulation of Indians and their rights; and that section 35 served as a negotiating table for the Crown and Aboriginal peoples.

43Kulchyski, 1994: p. 227.

In 1996, the Supreme Court of Canada rendered a judgement in the *Van der Peet* case which established the test and definition for aboriginal rights as noted below.

More recently, in December 1997, the Court ruling n the *Delgamuukw* case established the quality of Aboriginal title which is that the resources form part of the Aboriginal interest in the land. In addition the court reaffirmed Crown sovereignty and its desire to see the parties negotiating these matters. It took the view that compromise was a key ingredient in finding solutions.

2.7. The Struggle Continues.

2.7.1. Legal Tests Or Standards & First Nation Jurisdiction.

The Constitution assumes and reinforces the existing federal governmental structure primarily through the division of powers in sections 91 and 92, *Constitution Act, 1867*. Thus it can be said that the Constitution confers on or confirms the rights to self-government of each of the provinces (through s.92 exclusive sovereign powers) as well as of Canada as a whole. This formulation, to which First Nations peoples were not party, results from a historical, evolutionary and bargaining process. The federal governmental system is accepted by the Canadian community, including the citizenry, politicians, judges, lawyers, bureaucrats, etc., and it is difficult for them to conceive of Canadian governmental order differently, as in the perspective that First Nations governments represent another order of sovereignty within the Canadian constitutional framework.

It is important to perceive the existing Canada as the product of a process rather than by creation because such perspective allows for the introduction of another perspective, that which has not been previously acknowledged. Nevertheless, the issue of acknowledgement itself places some obligation of positive conduct or action on the part of those not controlled by you to act accordingly for the acknowledgement to become a reality.

> It is our governments that have determined what access Native peoples would have to resources necessary for their own development. **It is our governments that determined what rules would have to be followed by Native peoples if they wanted to assert their rights** - or even if they should be allowed to do so. It is our governments that decided what limits would be put on Native peoples' freedom to travel, gamble, drink, fish, hunt, trap, sell pulpwood, exchange goods amongst themselves, trade with others, speak their own language, organize, own and control property. In short, it is our governments that have had most of the power to decide what place Native people would have in our society.44 (emphasis added)

44 Angus, 1990: p.1.

To this observation can be included the Supreme Court of Canada as a Canadian institution that has determined what tests have to be met by Aboriginal peoples to establish their rights. Furthermore, such tests are drawn from the advocacy of the federal Justice Department. So again the Canadian government is setting the rules for Aboriginal peoples.

From the Supreme Court of Canada we have this pronouncement as the most recent perception by the court on the matter of self-government:

> In the courts below, considerable attention was given to the question of whether s. 35(1) can protect a right to self-government, and if so, what the contours of that right are. The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. The parties seem to have acknowledged this point, perhaps implicitly, by giving the arguments on self-government much less weight on appeal. One source of the decreased emphasis on the right to self-government on appeal is this Court's judgement in *Pamajewon*. There, **I held that rights to self-government, if they existed, cannot be framed in excessively general terms**. The appellants did not have the benefit of my judgement at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellant advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1).
>
> The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the Report of the Royal Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without the assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.45 (emphasis added)

This decision leaves the question unresolved as to whether or not self-government is an existing Aboriginal right. However, it does provide important guidance to the effect that you cannot advance a broad and all encompassing concept of the right to self-government. Rather, the expectation is that the advancement of the argument should be specific to a particular subject-matter/activity.

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45 *Delgamuukw*, Supreme Court of Canada [1997]: p. 48-49.

There are other judgements from the court in recent years which provided additional clues about the court's thinking on this matter. Two of them are *Sioui*46 and *Van Der Peet*.

From the Supreme Court of Canada decision in *R. v. Van der Peet*:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when the Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s.35(1) does is provide the constitutional framework through which the fact that **Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures,** is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose: the Aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.47 (emphasis added)

The interpretation could very well be that the Court is prepared to defer to Indian interests of a traditional kind while deferring to federal and provincial interests in all other cases. Therefore, does social policy subject-matter fall into the traditional kind of interest?

In all likelihood the determination rests on how social services is defined and the facts available for application to the conceptualization of social services. Therefore, the real challenge is to define social services not in the traditional jurisdictional context, but down to the fundamentals. Such has been attempted in an earlier section of this part.

2.7.2. The Federal Government Legal Position.

> In sum, the Attorney General of Canada accepts that a right of self-government is included within the Aboriginal rights protected by. s 35(1) of the Constitution Act, 1982, but submits that no cognizable claim to such a right has been presented here.[...]48

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46 See chapter #2.3 in this paper re: *Sioui* and recognition of First Nation control over internal matters.

47 *R. v Van der Peet* [1996] 4 C.N.L.R. 177 at p. 193.

48 Factum of the Attorney General of Canada in *Delgamuukw v. British Columbia,* 27 March 1997: p. 54.

The Attorney General of Canada, on behalf of the Government of Canada is on record, by way of written submissions to the Supreme Court of Canada, as acknowledging that the right of self-government is an Aboriginal right. However, such position is not in support of the general proposition that First Nations communities have exercised or can exercise a power of self-government over all aspects of their societies.

The federal government legal position is, in fact, quite constrained because it seems only to contemplate that certain pre-contact traditional activity can be established as self-government activity:

> [...] the nature of Aboriginal rights [...] that protection of distinctive cultures is at their core. When self-government is understood as a mechanism for ensuring the preservation of the pre-existing cultures of the Aboriginal peoples, it is logical to conclude that a right of self-government comes within the protection afforded by s.35 (1).49

Furthermore, that establishing the activity as a right of self-government will have to be in accordance with: [...] identification of "the exact nature of the activity claimed to be the right".50

The federal government legal position also denies that the right to self-government is exclusive or paramount:

> [...] the recognition of a right of self-government, or of any other Aboriginal right, would not deny to Parliament or the legislatures any part of their authority in relation to a given subject-matter. Instead, that authority would continue, but where the exercise of that authority through enactment of a law had the effect of infringing an aboriginal right of self-government that had been established, it might have to be justified under the tests in Sparrow. In the event that such infringement could not be justified, the result would a restraint on sovereignty expressly contemplated by the Constitution, not a subtraction from legislative jurisdiction which would be inconsistent with sovereignty.51

This view of the right of self-government represents their interpretation of the Supreme Court of Canada's rulings thus far that shed light on the matter of self-government. However, it may represent the fact that the federal government has been quite successful in promoting it s desires in the treatment of this matter through it s efforts in previous litigation: i.e., that matters integral to the societies are what constitute their traditions, customs and practices and, therefore, their

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49 *Ibid.:* p. 50.

50 *Ibid:* p. 51.

51 *Ibid:* p. 51.

rights.

2.7.3. The federal-provincial policy position.

The federal and provincial governments have settled into a game of hot potato regarding jurisdiction and responsibility over First Nation social development.

> The federal government holds that provincial laws of general application apply to Indians except when these laws have been displaced by federal, Indian-specific legislation. There has been no such legislative federal occupation of the Indian social assistance field except, arguably, on a band-by-band basis through a few, specific, self-government agreements. From this flows the federal position that Indian social assistance, on and off-reserve, is a provincial fiscal responsibility, as per the general population. By this reasoning, Canada s 100% funding of on-reserve social assistance is under protest because the provinces refuse to accept a constitutional interpretation of primary fiscal responsibility. Federal policy has long been against exercising this option to legislatively occupy the constitutional field of Indian social assistance.52

A federal policy manual asserts a position that has only hardened with time:

> Under Section 91 of the British North America Act, the Government of Canada has a general responsibility with respect to Indians. Section 88 of the Indian Act provides that, subject to the terms of treaty or any other Act of Parliament, all provincial laws of general application should apply to Indians in the province except to the extent that they are inconsistent with the Indian Act. It is therefore a matter of policy rather than as a statutory or treaty obligation that the Government of Canada provides social services to Indians and, each year, the Department [...] has asked Parliament through the Appropriation Acts for the authority and resources. [...] it is expected that Indians residing apart from reserves will be provided assistance from the responsible municipal or provincial authorities and on the same basis as other citizens.[4]53

In this federal-provincial dialogue, there is no room for First Nation jurisdiction.

2.8. What Is The Canadian Definition Of Social Policy?

Social Welfare is a generic term that encompasses the network of legislation, social

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52 Moscovitch & Webster, 1995: p.38.

53 Social Assistance Program Manual, 1979, Cap. 1, 5. A comprehensive policy and procedure manual prepared by Alberta Region, Indian and Inuit Affairs Program, Department of Indian and Northern Affairs, quoted in Moscovitch & Webster, 1995 at p.42.

> policies, programs, institutions, resources, and services that exists in modern society to attempt to ensure that all people have access to those things necessary to permit them to develop their potential as individuals in a manner acceptable to themselves, with due regard for the rights of others.54

This perspective seems to promote the view that all citizens should be assured a certain quality of life. The material that follows is an attempt at discovering if the quote above represents the culmination of the evolution of social policy in Canada.

2.8.1. Eligibility and Need.

In chapter #3 we review the origins and evolution of social programs in the British context. Turner and Turner highlight two key principles which influenced the development of social programs in Britain and Canada over the past century which are relevant to this part of our investigation. These are the principles of less eligibility and perception of need.

> The principle of less eligibility came from The Report of the Royal Commission for Inquiring into the Administration and Practical Operation of the Poor Law in 1834. It stated that
>
> > the assistance provided for people in need must be such as to cause their condition to be less desirable, less satisfactory ... less eligible than the condition of the lowest paid labourer who was not in receipt of welfare.
>
> Able-bodied or employable men who wished to obtain relief along with their wives and children were obliged to go into a workhouse, in which men were housed in one section, women in another, and children still another. Families were broken up, and all members, including children over seven, were obliged to work in return for their bed and board. It is no wonder that Disraeli, the great British prime minister, felt compelled to say of this system, "It announces to the world that in England poverty is a crime!".
>
> The practice of relegating those in need to a second-class existence strongly influenced the development of social welfare in Britain, the United States and Canada. [...]
>
> The second principle, perception of need, is concerned with how people view other people who are in need. There are two ways of looking at need: people are in need because of their own personal failure, or because of the failures of society and its economic system.55

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54 C. Turner, & F. Turner, *Canadian Social Welfare*, 2nd Edition (Don Mills: Collier Macmillan Canada, Inc., 1986): p.

55Turner and Turner, 1986: pp. 51-52.

From a constitutional and jurisdictional point of view, the division of powers in the *Constitution Act, 1867* seems to establish that the provinces have the primary jurisdiction in social welfare, pursuant to the general power of provincial legislatures to make laws on all matters of a merely local or private nature in the Province.

The federal role in social policy can be explained as measures arising from necessity and a desire for a national agenda and a national policy:

> The post-war era saw a radical transformation of the government's role in Canadian society. Buoyed by an expanding economy and supported by the new economic theories of Keynes, the government assumed a more activist role in the management of the country's social and economic affairs.56
>
> [...] The other significant new area of spending during the post-war era was social programs. As Moscovitch notes, these programs served a dual functions. On the one hand, they were meant to support the post-war policy of full employment "through a range of education, employment, family and child support and family regulation policies." On the other hand, they were intended to "deal with a relatively wide range of society's casualties" through unemployment insurance (1952), old age security (1952), disability pensions (1954), hospital insurance (1958), medicare (1966) and social assistance (1966).57

2.8.2. Tradition of Local government responsibility.

There is also a history with respect to where the social policy has been placed in terms of responsibility for delivery:

> Although social welfare programs were aimed at assisting individuals, **local governments' original role in health was to protect the community as a whole.**58 (emphasis added)
>
> Until the 20th century, municipal governments were the major government providers of social welfare services. These services consisted of welfare or "relief" payments, provided only on a short-term and case-by-case basis. Services very much depended on

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56Angus, 1990: p.8.

57 *Ibid.*

58Canadian Council on Social Development (CCSD), *The Role of Local Government in the Provision of Health and Social Services in Canada* (Ottawa: Love Printing Services, 1987): p.?????

the organization and generosity of the community in question. There were often no formal standards, either in terms of the level of assistance or the eligibility criteria . Commonly, citizens' boards considered each case on the individual merit (One Stop Service, 1984). **The lack of formal government policy or programs was consistent with onus on individuals and families to provide for themselves.**59 (emphasis added)

The 1960s brought economic prosperity and massive expansion of social services. The new programs went beyond conventional social assistance to meet the needs of groups other than the poor. The elderly, disabled, children and other special needs groups benefitted from the surge of welfare programs. This expansion, parallelled in other industrial countries (Flora and Heidenheimer, 1981), was the result of public concern over rights, equity and human dignity. Governments at all levels responded, **in an attempt to redistribute opportunity, income and wealth** more evenly in Canada as evidenced by the federal Canada Assistance Plan, [...]60 (emphasis added).

Advocates for a greater role [for local governments] point to Sweden, West Germany, other Western European countries and, in some in some respects, the United Kingdom, where local authorities have a considerable role in providing a wider range of what economists call "merit goods". These include education, housing, health, hospitals, as well as facilities and programs for the old, homeless, deaf, blind, disabled, mentally handicapped and needy women and children. Subsidizing rents for low-income families is a also common in these countries.61

Allowing local governments to become more deeply involved in the administration, planning and delivery of health and social services should enable them to **better integrate these services.**62 (emphasis added)

- Subsidiarity.

In connection with the issue of local control, some discussion of the concept of *subsidiarity* is required. This principle has applied within the European Community as the basis of their movement towards political and economic integration for the past number of years. The Maastricht Treaty which is the basis for the emerging European Union adopts the principle of subsidiarity: that responsibility for any particular matter should fall to the level of government

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59CCSD, 1987: p. 14.

60CCSD, 1987: p. 16.

61CCSD, 1987: p. 60.

62CCSD, 1987: p.77.

best able to manage it:

This concept has also been picked up by radical reformers in Canada as the basis for discussions on the revision of the Canadian federation:

> The principle of subsidiarity states that government should be a close as possible to citizens: powers or competences should be delegated to the lowest level of government where they can be effectively exercised. This implies a bias toward decentralization. However, if the nature of the service or the activity means that it cannot be carried out efficiently at the local level, then a higher level of government should assume responsibility.63

> Local government, in principle, has much to be said for it. It is better informed about what electors want, and it is more accountable. But centralisation may sometimes make sense [...] If subsidiarity is to be taken seriously, the burden of proof should be on the centralisers.64

Even setting aside considerations of Aboriginal and treaty rights, or the Constitutional status of the First Nations, the principle of subsidiarity suggests strongly that jurisdiction over social matters most effectively resides at the local or tribal level.

2.8.3. Canadian Standards.

The Canadian principle seems to be that a decent standard of living is a privilege (those who have jobs while those who don't will have to due with less/relief). Furthermore, the total effect is an institutional framework within which the formulation of a unified strategy for welfare policy is extremely difficult, let alone for the development of coordinated planning combining economic policy and social policy. Therefore, First Nations have no lessons to learn from the white system. Social planning in Canada has been reactive to social problems - the problems of non-Indian society. There needs to be a pro-active approach which is based on First Nation society and practice.

> The secondary or residual status of social policy derives from traditional views deeply held by many people and makes itself evident in many ways. [...] the predominant value system in Canadian society includes at its centre the view that a job is the only moral certification for income; that, except in the case of the aged and the clearly disabled, income ought to be 'earned'. Such basic opinions are reflected both in government legislation and in the language and concepts of ordinary citizens. For instance, few

63 Courchene, 1996: p. 9.

64 *The Economist*, Figuring out Subsidiarity , 27 November, 1993: p.58.

> Canadians question the right of an unemployed person to support himself and his family from benefits received from the national unemployment insurance program because he contributed to the fund while he had a wage-earning job. When, however, entitlement to benefits is exhausted - the maximum period is 52 weeks - the same person is likely to be referred to in a derogatory fashion as being 'on the welfare rolls' or on relief' (which he supported) through taxes. **Canadians and their governments act as if they believe that welfare policy should 'not be based on the assumption that assistance to a decent standard of living is a right'.** When those involved in economic policy formation are paramount in setting overall priorities in spending and investment for the entire government and in deciding the criteria to be applied, achievement of a unified and balanced economic and social strategy is difficult.65 (emphasis added)

The issue is about individual, family and community needs and responsible governmental response rather than about the exercise of regulatory authority.

Local governments are the first to respond to local crisis and they are in the best position to decide which crisis they should respond to and how.

In short, the Canadian system of social welfare and the definition is that:

> [...] the essential services provided by a province are shaped so much by the cultural values of the community that nothing short of separate services can accommodate the demand for self-government.66

2.9. Legal Arguments for recognition & financial support.

In light of the above, there should be two angles to any consideration of the law. First, what are the legal arguments for First Nation jurisdiction in the area of social development? And second, what are the legal arguments for adequate financial support?

2.9.1. Domestic Law.

- Section 91 (24), *Constitution Act, 1867.*

By virtue section 91(24) of the *Constitution Act, 1867*, Canada was given legislative responsibility for Indians and lands reserved for Indians . This section is found in Part VI,

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65 *Developing Social Policy in Conditions of Dynamic Change*, Report of the Canadian Committee of the International Conference on Social Welfare, 1972: p.10.

66Noel Lyon, *Aboriginal Self-Government, Rights of Citizenship and Access to Governmental Services*, (Kingston: Institute of Governmental Relations, 1986): p. 21.

Distribution of Powers :

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-- [...]
>
> 24. Indians, and Lands reserved for the Indians.67

The meaning and potential of 91(24) have been the subject of vigorous debate and given rise to a variety of opinions.

> Parliament's exclusive legislative authority over the criminal law could be invoked to support prohibitory enactments aimed at protecting public health. Further, **federal legislative authority over certain special groups of persons could be taken to include power to legislate for their health and welfare. Thus, the Act conferred upon Parliament exclusive legislative authority over the military, and over Indians** and aliens, as well as concurrent authority over immigrants.68 (emphasis added)
>
> [...]-- the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples [...]69

This will be discussed in later parts of the paper.

- Section 36, Constitution Act, 1982.

Part III, Section 36 of the *Constitution Act, 1982* deals with Equalization and Regional Disparities.

> 36. (1) Without altering the legislative authority of Parliament or of the provincial

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67 *Constitution Act, 1867,* Part VI, s.91(24).

68 Rt. Hon. Pierre Elliot Trudeau, *Income Security and Social Services* 16-58 (1969), a working paper presented by the federal government to the fourth meeting of the Constitutional Conference on 8 December 1969: quoted in Atkey and Lyon, 1970: at p. 785.

69Chief Justice Lamer, *Delgamuukw* [1997]: p. 50.

legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;
(b) furthering the economic development to reduce disparity in opportunities; and
(c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.70

This is an acknowledgement that one principle of Confederation is the redistribution of wealth among the regions to ensure a reasonably level playing field and quality of service across the country.

In the words of the Royal Commission on Dominion-Provincial Relations: Not only national duty and decency, if Canada is to be a nation at all, but equity and national self-interest demand that the residents of these areas be given average services and equal opportunities - equity because these areas may have been impoverished by the national economic policies which enriched other areas, and which were adopted in the general interest .71

A theory can be constructed on s. 36 of the Constitution Act, 1982 [...]

[....]This section conceives of Canada as a commonwealth in which all citizens are to enjoy essential public services of reasonable quality. While it is true that the framers of this provision had in mind the federal division of Canada and levelling out of great disparities in resources and tax revenues, the aboriginal peoples can assert their right to a share in common wealth on the basis of having provided the entire land base that supports it. For much of that land base they have never been compensated, and even where they have there are questions of propriety and adequacy to be dealt with.

Collectively or by individual tribes or Inuit communities, the aboriginal peoples have a fair claim to share the goods and services by virtue of a major contribution that has not yet been fully paid for. To put the matter in conventional legal terms, they are asserting claims as landlords, in some cases against squatters and trespassers who have been

70 *Constitution Act, 1982*, Part III, Section 36.

71 Pierre Elliot Trudeau quoted in Atkey and Lyon, 1970: at p. 791.

> occupying and exploiting their lands for decades without recognizing their rights or paying rent. And governments may have been the dominant offenders, using the supernatural powers of "The Crown" to give an aura of legitimacy to their occupations of aboriginal lands."72

It would appear that the Supreme Court of Canada s recent ruling in *Delgamuukw*, by recognizing that Aboriginal title encompasses a real property right, and by calling for compensation when such title is infringed, adds weight to this line of argument.

- Section 35, Constitution Act, 1982.

Section 35 of the *Constitution Act, 1982* is found in Part II, Rights of the Aboriginal People of Canada :

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.73

Section 35 found its way into the Constitution following its patriation from Britain, and only after a series of long and difficult negotiations between the Aboriginal leadership, the federal government, and the provinces.

> This means that the practice of imposing a common system of aboriginal self-government by Act of Parliament has been superseded by a constitutional right in each native group to work out its own arrangements for self-government under the Canadian constitution. It is a difficult conceptual threshold to cross because we are so conditioned to the federal hierarchy in which local government exists and functions at the pleasure of a legislature, exercising only delegated powers. The authority for the emerging system of native self-government comes from within residual sovereignty, and that system will be legally

72 Lyon, 1986: pp. 10-11.

73 *Constitution Act, 1982*, Part II, Section 35.

> anchored in s. 35 of the Constitution Act, 1982. The elaboration of each community's government will be more akin to the framing of the federal constitution than to the framing of municipal legislation.74
>
> This cultural diversity, together with the sharp differences between all native cultures and the majority culture in Canada means that the model of self-government we seek must be fairly comprehensive, capable of responding to each particular community and to the basic needs of its members. It is up to each community to determine for itself the Form of government, the process for establishing it and the priorities and levels of services in basic matters like health, housing, education, social services and economic opportunity.75

- Conclusions re: Domestic Law.

A full consideration and assessment of the legal issues bearing on social development jurisdiction is beyond the scope of this paper. We have however, framed some issues and questions which deserve further discussion and specific legal advice as may be determined.

-Grey Zone.

First Nation jurisdiction over social development remains in a legal grey zone which itself is subject to political dynamics and imperatives (see chapter #3.7.3.). Other governments have refused to concede responsibility although there are legal arguments for either federal or provincial roles. At the same time, other governments have so far refused to recognize First Nation authority in these areas. The courts have reluctantly provided more detailed direction and definition over the past 15 years, but still within the context of colonial assumptions and institutions, and not specifically in the area of social development.

-*Van der Peet* & Aboriginal rights.

Particularly in *Van der Peet*, the Supreme Court of Canada has laid out the tests to be met to prove and Aboriginal right (which would include rights of self government in the area of social development). These tests are onerous and right-specific. If provided with the time and resources, individual First Nations could probably meet the tests, but it boggles the mind to consider the prospect of every First Nation litigating every right which it asserts in the area of social development (or self government generally, for that matter). And even with the best fact situation, there is the risk that unfavourable rulings could result.

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74 Lyon, 1986: p. 8.

75 Lyon, 1986: p. 4-5.

This does not mean that the legal basis for First Nation jurisdiction in the area of social development cannot be proved, just that it will be a long and very complex process.

The courts, acknowledging this, have indicated that s.35 of the *Constitution Act, 1982* should be used as a basis for negotiation where there are disputes or legal uncertainty.

-*Delgamuukw* & Aboriginal title.

The recent Supreme Court ruling in *Delgamuukw* also needs to be taken more fully into consideration. Although *Delgamuukw* is ostensibly about land and resources, it acknowledges the important connection between land and resources on the one hand, and cultural, social and political institutions on the other. In this context it could reasonably be argued that control over social and political institutions and well-being is integral to maintenance of a connection to the land. The Court s emphasis on the economic dimensions of Aboriginal title could be used to seek adequate resources for social development programming. It s finding that title encompasses other Aboriginal rights incidental to, or connected with title, may also have the effect of providing an entry point jurisdiction over (and funding for) social development.

Even though *Delgamuukw* was the result of litigation over Aboriginal title, it would also appear to have some effect on the prospects for treaty areas as well. The Court s validation of oral history as a source of evidence casts the issue of spirit and intent in a whole new light (particularly regarding what was negotiated at the time of treaty and the Crown s undertakings - see section #3.4.2. below). As well, the Court s definition of title gives a much more precise indication of the nature of the Aboriginal interest which was being negotiated at the time of the treaties. This has an obvious effect on interpreting the treaty terms themselves. These observations relate both to the matter of jurisdiction and resourcing.

-The Treaties.

As we detail in chapter #3, the provision of presents from the earliest treaty councils until after Confederation demonstrates that material transfers and developmental assistance were key components of the treaty relationship from earliest contact (see chapter #3.2., 3.3.). In the numbered treaties, supplies and assistance for survival and development were also guaranteed (see chapter #3.4.2.). This indicates a consistent pattern and practise which placed material and fiscal transfers for social development squarely within the boundaries of the treaty relationship.

These facts, combined with the increased weight accorded to oral history as a result of *Delgamuukw*, should be enough to set aside Canada s long-held position that these are matters of policy and not duty or lawful obligation.

-Fiduciary Duty.

The fiduciary duty of the Crown is another matter for further consideration, particularly in the financing and design of social development initiatives. In chapter #3, we describe the degree to which the Crown assumed almost total discretion over First Nation assets, financing, and programming. In chapters #3 and #4 we document the result. The Crown s unilateral actions and undertaking give rise to fiduciary obligations. We also observe the fact that the Crown s treaty obligations also give rise to fiduciary duties. Moreover, the continued practise of taking responsibility can give rise to legal obligations based on reasonable expectations. Transfer of responsibilities and changing in resourcing formulas cannot be undertaken without factoring in the fiduciary and trust obligations of the Crown.

-Section 36.

Canada has come to accept the principles underlying equalization, at least among the provinces and regions. In connection with arguments for adequate resourcing, it would appear that the discussion might benefit from further consideration of established principles and practises related to equalization.

-Section 91(24).

Another area for continued thought is section 91(24) of the *Constitution Act, 1867*. As we show in chapter #3, the original use of the prerogative and legislative powers was to protect First Nation interests and rights. As time progressed, these responsibilities were increasingly used to interfere with and infringe Aboriginal and treaty rights. However, there still remains an opportunity to explore the positive uses of the federal government s s.91(24) responsibilities. After all, if these powers were used to add s.88 to the *Indian Act* in 1951, they could also be used to remove that same section today.

Government, and the power of government, are mandates which carry with them the responsibility to govern for the welfare of the people. Such governmental responsibility ought to be measured by a desire to implement not only its domestic constitutional, legal and treaty obligations, but also international standards and obligations.

2.9.2. International Human Rights Standards.

The relevance of these standards is such that as a minimum and as a guide the government should conduct itself with a view to observing basic norms and acting responsibility to further the interests of Aboriginal peoples.

In reaching decisions on human rights matters, Canadian courts have on numerous occasions

considered the norms in international instruments.76 The following listing of international instruments and standards impact in the social policy area.

- Freedom.

Article 1 of the United Nations *universal Declaration of Human Rights* states that:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.77

The preamble of the United Nations *International Covenant on Economic, Social and Cultural Rights* adds:

> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.78

- The right of self-determination.

Article 1 of the *International Covenant on Economic, Social and Cultural Rights*:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.79

76Assembly of First Nations, *Violations of Law and Human rights by the Governments of Canada and Newfoundland in Regard to the Mashuau Innue: A Documentation of Injustice In Utshmasits (Davis Inlet)*, (Ottawa: Submission to the Canadian Human Rights Commission, May 1993): p. 19.

77Article 1, Universal Declaration of Human Rights, in *Human Rights, A Compilation of International Instruments* (New York: United Nations, 1983) p. 1.

78Preamble, International Covenant on Economic, Social and Cultural Rights, in United Nations, 1983: p. 3.

79Article 1, International Covenant on Economic, Social and Cultural Rights, in United Nations, 1983: p. 3.

Commentators have noted how circumstances may make it inappropriate for national governments to argue that democratic institutions of the state accommodate the interests of indigenous peoples:

> Where a group has always inhabited a particular territory which is intimately linked to its communal way of life, it may well not be sufficient to guarantee to the members of the group the right to participate in public affairs in the State at large. [...] Especially where the group is a small minority within the State, the right to participate in public affairs on this basis is likely to be a recipe for assimilation, for the extinction of the group as a community, irrespective of its wishes.[...] there may be a violation of democratic principles in not extending a measure of autonomy or self-government to a distinct community within the State. In such cases, the right to self-government is perhaps not inherent in the strict sense.80

- Social welfare, progress and development.

It should be noted that there is a significant difference between social security and social development . In the Canadian context, as we have shown, social security has come to mean below-the-poverty-line maintenance - essentially a floor below which no one should fall. On the other hand, established and emerging international norms go far beyond this, to enshrine the principle of social development as a measuring stick by which to judge to progress of nation states and their constituent elements. In this light, social development includes the right not simply to survive, but the right to grow and prosper.

> As a foundation of Indian self-government, economic development must be understood as part of a larger developmental process aimed at improving both the material and qualitative conditions of a nation, people or community. Development requires meeting basic human needs such as food, housing, employment, education and medical services. But development also includes:
>
> > Meeting non-materials needs like the desire for self-determination, self-reliance, participation in the making of decisions that affect workers and citizens, national and cultural identity, and a sense of purpose in life and work [Kindervatter, 40]
>
> [...] Development involves more than improving a peoples material circumstances or meeting economic needs. It cannot be reduced to the acquisition of wealth or narrowly-defined economic growth. Above all, development represents the ability of a people to

80James Crawford, *Aboriginal Self-Government in Canada*, (A Report For the Canadian Bar Association Committee on Native Justice, 1988, unpublished).

master its own historical destiny. [...]

With this understanding of development in mind, it is clear that Indians cannot develop, economically or otherwise, as recipients of development programs defined by anyone other than themselves. Control of the development process is an essential precondition for achieving development goals; it is also a fundamentally important expression of a peoples right to self determination.81

The United Nations *Declaration on Social Progress and Development* emphasizes the connection between economic and social development:

Mindful of the pledge of Members of the United Nations under the Charter to take joint and separate action in co-operation with the Organization to promote higher standards of living, full employment and conditions of economic and social progress and development, [...]

Emphasizing the interdependence of economic and social development in the wider process of growth and change, as well as the importance of a strategy of integrated development which takes full account at all stages of its social aspects, [...]

Article 1

All peoples and all human beings, without distinction as to race, colour, sex, language, religion, nationality, ethnic origin, family or social status, or political or other conviction, shall have the right to live in dignity and freedom and to enjoy the fruits of social progress and should, on their part, contribute to it.

Article 2

Social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice, which requires:

(a) The immediate and final elimination of all forms of inequality, exploitation of peoples and individuals, colonialism and racism, [...]

Article 7

The rapid expansion of national income and wealth and their equitable distribution among all members of society are fundamental to all social progress, and they should

81 Thalassa, 1983: pp. 6-8.

therefore be in the forefront of the preoccupations of every State and Government.82

- Rights of persons belonging to minorities.

The *International Covenant on Civil and Political Rights*:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their groups, to enjoy their own culture, to profess and practise their own religion, or to use their own language.83

> Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,
>
> Article 1
>
> 1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
>
> 2. States shall adopt appropriate legislative and other measures to achieve those ends.
>
> Article 4
>
> 1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
>
> 2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of nation law and contrary to international standards.84

82 Declaration on Social Progress and Development, in United Nations, 1983: pp. 133-134.

83 International Covenant on Civil and Political Rights, in United Nations, 1983: p. 12.

84Alexander Blades, *Article 27 Of The International Covenant On Civil And Political Rights: A Case Study On Implementation In New Zealand*, [1994] 1 C.N.L.R. p.1 at p. 36-37-38.

- Prevention of discrimination.

The United Nations *Declaration on Race and Racial Prejudice*:

> Convinced also that racial discrimination harms not only those who are its objects but also those who practise it [...]
>
> Article 3
>
> 3. Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.85
>
> Article 5
>
> 1. Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are equal in dignity and rights, but also to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international context, it being understood that it rests with each group to decide in complete freedom on the maintenance, and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity.86

- Culture.

The *Declaration of Principles of International Cultural Cooperation* (article 1):

1. Each culture has a dignity and value which must be respected and preserved.
2. Every people has the right and the duty to develop its culture.87

- Draft Declaration on the Rights of Indigenous Peoples.

85United Nations Declaration on the Elimination of All Forms of Racial Discrimination, in United Nations, 1983: pp. 22-23.

86 Declaration on Race and Racial Prejudice, in United Nations, 1983: pp. 53-54.

87 Declaration of the Principles of International Cultural Co-operation, in United Nations, 1983: pp.143-44.

For over a decade, the United Nations, through the Working Group on Indigenous Populations, has been developing a draft declaration relating to indigenous peoples rights. This declaration is now in the final stages of consideration by the United Nations. It offers an indication of where international standards and norms are going with respect to social, economic and political development.

> Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests, [...]
>
> Convinced that control by indigenous peoples over development affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs, [...]
>
> Article 1. Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms which are recognized in the Charter of the United Nations and in international human rights law;
>
> Article 3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
>
> Article 4. Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics as well as their legal systems while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State;
>
> Article 21. Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation;
>
> Article 22. Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.
>
> Article 23. Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples

have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions;

Article 31. Indigenous peoples, as a specific form of exercising their rights to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions;

Article 37. States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice;

Article 38. Indigenous peoples have the right to have access to adequate financial and technical assistance, from State and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development, and for the enjoyment of the rights and freedoms recognized in this Declaration;88

- International Labour Organization Convention 169.

ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries was developed in the 1980's and early 1990's as a revision of the earlier ILO Convention 107. As of this writing, the government of Canada has not yet ratified ILO Convention 169.

Recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and [...]

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systemic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for: [...]

88[1994] 1 C.N.L.R. p.40.

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. [...]

Article 5

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

Article 6

1. In applying the provisions of this Convention, governments shall:

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.89

As noted above, Canada has yet to ratify ILO Convention 169, although both the Department of Foreign Affairs and the Department of Indian Affairs were actively involved in the negotiation of the text at the time it was developed and adopted by the ILO.

89[1989] 4 C.N.L.R. p. 49-53.

Rule of Law.

Successive Canadian and provincial governments have commonly resorted to the rule of law argument in connection with civil unrest and claims.

> Declaration of Bangkok [...]
>
> **It recognizes that the Rule of Law and representative government are endangered by hunger, poverty and unemployment; that, in order to achieve social, economic and cultural development, sound economic planning is essential; that, in particular, measures of land reform to assure fairer and its most economic utilization may be necessary; that successful planning depends on the maintenance of administrative efficiency** and the elimination of corruption at political and administrative levels; that proper means of redress should be available where administrative wrongs are committed; [...]90 (emphasis added)

- UN Quality of life award.

The United Nations has developed an approach to measuring the quality of life of nation states for the purposes of comparison. For more than one year in a row, Canada has ranked the highest among all other nation states on this index. Of course, this result masks the conditions and quality of life of the First Nations. It would be useful to apply the same formula the UN uses in its evaluation to First Nations, to see where they might end up on the index.

- Conclusions on International Standards.

From the preceding, it can be seen that international forums have adopted an expansive definition of social rights, acknowledging a right to development. They have also make a decisive connection between economic, social and political rights. International bodies have also begun to develop standards and principles with specific application to the circumstances of indigenous peoples. (It should also be noted that there is a significant body of international instruments and standards related to the matter of decolonization. We have not had the opportunity to review them here, but they should be considered as work proceeds on these issues.)

From the perspective of First Nation social development, it is apparent that Canada does not meet the standards which have been established (and are emerging) at the international level. Certainly the government of Canada can be challenged to meet these standards and apply their principles to its conduct of First Nation policy and relations. Unfortunately, there are no binding mechanisms at the international level to obtain enforcement of these instruments against states.

90Atkey, R. and Lyon, N., *Canadian Constitutional Law in a Modern Perspective*, (Toronto: University of Toronto Press, 1970): p. 6.

At the same time, Canada is not a party (and therefore not bound) to all of them (ie., ILO Convention 169).

Nonetheless, Canada s continued non-compliance with international standards related to indigenous peoples and rights to development generally can be used to demonstrate the bankruptcy of the status quo, and to point to the kind of approaches that need to be considered in connection with social development.

3. HISTORICAL CONTEXT.

Too often, the policies and practises of today ignore what preceded them. In approaching the matter of First Nation jurisdiction over social security and development, we decided to begin by reviewing the history to better determine the facts of the situation. Our literature review found that their is a lack of historical research and analysis from the social development perspective, particularly for certain regions of the country. Although there is a significant body of material covering the period following Confederation, and in particular after World War II, little has been done to track Imperial policy and practise from first contact.

What follows are the results of our review. Where secondary sources were scant, we have tried to rely on primary sources to fill in some of the gaps in the analysis. This section does not purport to be a comprehensive treatment of the history - that must await future research and analysis. However, we have tried to present key issues and events related to these issues, as a means of informing the discussion on jurisdiction. This section will review some of the key milestones to set the proper historical context for the discussion of more contemporary issues & events.

The following highlights are important to keep in mind:

* There is a direct causal relationship between the dispossession of lands & resources, the destabilization of indigenous social and economic institutions, and contemporary dependency.

* Through treaty undertakings and by unilateral acts, the Crown has established a long practise of providing material and developmental assistance to First Nations. Social and economic security have consistently been a key motivating factor in the treaty relationship, for both parties. This began well before Confederation and continued through the numbered treaty process.

* Despite its undertakings, fiscal restraint has always been a major concern of government officials in relation to Indian expenditures , without adequate weight being given to First Nation needs, or the unintended consequences of dislocation & dispossession. This has contributed to the cycle of dependency and the lower class of service provided for programs historically.

* Despite efforts by other governments to interfere with Aboriginal institutions, laws and practises, First Nations have maintained their unique collective identity.

* Current First Nation dependency (and jurisdiction over social development and security) cannot be treated or considered in isolation from its root causes. This requires clear linkages between social and economic development, and political freedoms.

3.1. Original practice.

As we observed in chapter #2, traditional societies incorporated social development as one element in the whole constellation of activities dedicated to ensuring cultural survival and prosperity into the future - this approach was (and remains) dynamic, adaptive, and opportunistic. First Nation social development , from a traditional perspective, is an expansive area of jurisdiction because it is so closely tied to the land and economic practices.

3.2. Contact to 1763.

In the period between contact and 1760, First Nations held the balance of power between the rivalries of the French and English. The European powers relied on the alliance or neutrality of the First Nations to press their own claims of sovereignty as against other European nations. At the same time, they realized that they were dealing with self sufficient and independent peoples. In *Sioui*, the Supreme Court of Canada recognized that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations .91 It went on to find that the conduct of the Imperial government was such to demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians. 92

In practical terms, this meant that Britain recognized the authority of the First Nations to conduct their own foreign policy and to govern their internal affairs - including those matters now considered under the heading of social development . This policy of non-interference left it to First Nation political and social structures to take care of community needs and development. The economic benefits of the fur trade and continued control over the benefits of their traditional lands and resources ensured that First Nations had the material resources which were required to support social development and community well-being.93 (See chapter 2.3. for more discussion on these matters.)

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91 *R v. Sioui*, SCC, Reasons for judgement, 24 May, 1990: p.29.

92 *Sioui*, 1990: p.30.

93 See Thalassa Research, *Nation to Nation: Indian Nation - Crown Relations in Canada* (Vancouver, a report prepared for the Royal Commission on Aboriginal Peoples, 1 December, 1994) at p.124: During this stage of the treaty process, negotiations were primarily related to economic and political rights. Generally speaking, these were the days before colonial administrators actively sought the assimilation of Indian nations, and before non-Indian incursions had dealt serious blows to the cultural and social integrity of the Tribes. At that time, then, it was primarily through securing agreements on political and economic matters that the protection of social rights was obtained.

3.2.1. Political relations, the treaty process, and material transfers.

However, this period also saw the beginnings of fiscal and material transfers from European powers to the First Nations beyond those strictly associated with the exchange of fish or furs. Consistent with prior Aboriginal practise, the French and later the English employed the use of presents as a signal of alliance, as an element of trade protocol, or to confirm treaty arrangements. The presents - often consisting of some combination of guns, power & shot, cloth and provisions - were regarded by both parties as payment for services rendered and alliance, and were integral to the renewal of existing treaties or the ratification of new ones. In times of war, they were provided to support the warriors and their home communities, and in times of peace they were intended to assist with economic activities.94

It is important to note that the presents were physical evidence of a political process that was underway - the treaty relationship. Treaty obligations [...] were accepted through protocols such as gift giving, which acted as a form of ratification of the obligations outlined orally .95

Prior to the Conquest, the French had made ample use of presents and material transfers to solidify the fidelity of their Indian allies. In retrospect, it was considered a weakness in British policy that the Imperial government had not attached the same importance to the issuance of presents at an early stage in their relations with the First Nations.96

Many commentators assert that the British practice of supplying the Indians was in direct response to the French way of doing things. The French relationship with Indians was based largely on diplomacy and sometimes familial relations, in which gift-giving and gift-exchange played a large role. The British attempted to establish a much more structured relationship, one that did not fit into Indian conceptions of the world nearly as well as did the French. The basic difference was that the French empire in North America was founded largely on trade; the British empire in North America was founded largely on settlement. From the Indian point-of-view, French pretensions to Indian land were minimal; British threats to the Indian land base were very real.

3.2.2. The Atlantic.

The British found the French policy of providing presents to the Indians difficult to understand

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94 Thalassa Research, 1994: p.89. See also Paul Williams and Curtis Nelson, *Kaswentha* (report prepared for RCAP, January 1995).

95 Canada, RCAP, 1996, Vol.1: p.123.

96 For instance, see *The Annual Register, or a View of the History, Politicks and Literature for the year 1763* (London: R&J Dodsley, 1764): pp. 18-24.

and difficult to compete with. In 1718, Nova Scotia governor Richard Philipps told London:

> [...] the traffic [trade] with the natives which (as represented) is too considerable to be neglected, the French thought it worth their while to gain those people to their interest by yearly presents which consisted chiefly in apparel of Blue and Red Bayes [baize] or coarse Serges, some Arms and Ammunition and to the value of 5 or 600, if your Lordships shall advise an essay [attempt] of that kind to be made the Governor will take care that they be delivered in the best manner to procure the effects proposed.97

At about the same time, Nova Scotia Lieutenant-Governor John Doucette told London that the Indians expected annual presents and that "their is no mean's better than Presents to gain them to our Intrest."98 London responded to these particular concerns by sending Indian presents with Philipps when he took residence in Nova Scotia as governor in 1719.99 The Royal Instructions provided to him dealt specifically with the matter of presents:

> [...] And whereas we have judged it highly necessary for our service that you should cultivate and maintain a strict friendship and good correspondence with the Indians inhabiting within our said province of Nova Scotia, that they may be induced by degrees not only to be good neighbours to our subjects but likewise themselves to become good subjects to us; we do therefore direct you upon your arrival in Nova Scotia to send for the several heads of the said Indian nations or clans and promise them friendship and protection in his Majesty s part; you will likewise bestow upon them in our name as your discretion shall direct such presents as you shall carry from hence for their use.100

Half-yearly provisions may have been a long-standing expectation of he Mi'kmaq in the treaty relationship, if not a consistent practice of the British. In 1732 in a general report on the state of the colony, Governor Philipps told London that a considerable government expense was "Presents and supplying of Indians who never fail twice a year to come to ye Governor under pretence of renewing ye Peace, & expect to be dismiss'd with presents."101 (As with other word usage in the 18th century, "pretence" should not be read in its narrow modern meaning of

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97 Philipps to Lords of Trade, c.1718, C.O. 217.

98 Doucette to Lords of Trade, Feb. 10, 1718, C.O. 217.

99 Lords of Trade to Lords Justices, June 4, 1719, C.O. 218, v.1, 206r-208r.

100 Leonard W. Larabee, ed., *Royal Instructions to British Colonial Governors, 1670-1776*, 2 vols. (New York: D. Appleton-Century Comp., 1935), Vol.2, #673: p.469; quoted in RCAP, *Partners in Confederation* (Ottawa: CCG, 1993) at p.14.

101 Philipps to Lords of Trade, Jan. 24, 1732, C.O. 217.

"pretend" but in its older, more general meaning of claiming.) In the documentary record, there are a few other references much like this one during the first half of the 18th century. But it is impossible to say how consistent the practice or demand was.

But the English had caught on. Presents became an integral part of British diplomacy and treaty making with the First Nations.

When Mi'kmaq chief Jean Baptiste Cope arrived in Halifax in September, 1752, to talk about the cessation of hostilities and renewal of the treaty relationship with the British Crown, he had only one demand to make, as it was recorded: "That the Indians should be paid for the land the English had settled upon in this Country."102 He must have been delighted with the response of the new Nova Scotia governor, Peregrine Thomas Hopson. The British, Hopson told Cope,

> [...] will not suffer that you be hindered from hunting or fishing in this Country as you have been used to do, and if you shall think fit to settle your wives and children upon the River Shubenacadie [where Cope's band lived] no person shall hinder it, nor shall meddle with the lands where you are.103

That was clearly a promise to protect Mi'kmaq land rights, and not to infringe on Mi'kmaq territory. There was no direct response recorded to the demand for payment for land the British settled. But Hopson told Cope that as long as the treaty relationship lasted, Mi'kmaq chiefs would receive annual presents and "you shall be furnished with provisions for you and your Familys every year."104 Coupled with the promise not to interfere with Mi'kmaq land, that must have sounded like a promise of annual rent for land the British settled. Hopson signed his proposals, Cope signed his acknowledgement of them and then returned to his people to seek advice.105

About a month later, Cope was with his band on his way back to Halifax, camped at Beaver Harbour, a long distance northeast from Halifax on the Atlantic coast. The British were anxious to get the treaty relationship renewed. They dispatched a ship to Beaver Harbour to pick up Cope and his men. The ship also carried three weeks' provisions for 50 people, reckoned to be the total of the wives and children of the men the ship would bring back to Halifax. The ship's master was to tell Cope's band that all families who renewed the treaty relationship would receive immediately six months' "full provisions." In addition, each person would receive a blanket and a

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102 N.S. Executive Council minutes (NSEC), Sept. 14, 1752, PANS, RG-1, v.186, pp.214-5.

103 NSEC minutes, Sept. 16, 1752, PANS, RG-1, v.186, pp.216-9.

104 *Ibid.*

105 *Ibid.*

quantity of flour, rum, and cloth.106

On November 22, 1752, Cope and four other representatives signed a renewal of the treaty relationship. Hopson and his executive council signed for the British. The Mi'kmaq were given provisions for six months for 90 people, the total of Cope's band. The provisions were substantial: 80 blue blankets, four red and one laced blankets for Cope and the other signers, 5,600 pounds of shot, 216 pounds of tobacco, 8,640 pounds of pork, 15,656 pounds of flour, 280 pounds of bread, 36 bushels of maize (corn), and 6,480 pints of peas.107

The treaty articles of agreement of November 22, 1752, formalized what the Mi'kmaq had been promised regarding provisions and presents. Article Five guaranteed half-yearly provisions "necessary for the Familys." Article 6 of the that treaty illustrates that there was a clear connection in British minds between the presents, service, and mutual obligation:

> That to Cherish a good harmony and mutual Correspondence between the said Indians and this Government His Excellency [...] hereby promises on the part of His Majesty that the said Indians shall upon the first day of October Yearly, so long as they shall Continue in Friendship, Receive Presents of Blankets, Tobacco, some Powder & Shott, and the said Indians promise once every year, upon the said first of October, to come by themselves or their Delegates and Receive the said Presents and Renew their Friendship and Submissions.108

In Nova Scotia, the British appear to have distinguished between provisions or supplies that would be given for sustenance and presents that would be given on ceremonial occasions such as treaty talks. That may be a significant difference from the practice in neighbouring Massachusetts. There, presents were given on treaty signings, but provisioning does not appear to have been done to any great extent except during actual treaty conferences. That may reflect differences in British-Indian relations between the two colonies or differences between the Mi'kmaq and their Abenaki cousins to their southwest. In Massachusetts, the British had an often stormy but long relationship with the Indians that was generally reasonably well understood by everyone. In Nova Scotia, the British had much less consistent contact with the Indians and did not well understand them. As well, the Mi'kmaq in the 18th century were a fishing, hunting, and trading people. The Abenaki were much more settled in their lifestyle, having agriculture as part of their economic base.

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106 Cotterell to Piggot, Oct. 25, 1752, PANS, RG-1, v.163, pp.25-6.

107 NSEC minutes, Nov. 24, 1752, PANS, RG-1, v.186, pp.255-6.

108 *Mi kmaq Treaty Handbook* (Sydney: Native Communications Society of Nova Scotia, 1987): pp.20-21: Treaty or Articles of Peace and Friendship Renewed, Halifax, 22 November, 1752. See also NSEC minutes, Nov. 22, 1752, PANS, RG-1, v.186, pp.250-4.

The 1752 treaty articles were the only ones with the Mi'kmaq to mention provisions and presents explicitly. However, both provisions and presents appear to have been distributed during the treaty relationship on virtually an as-needed or as-wanted basis. Colonial officials sometimes grumbled about the practical difficulties and London sometimes grumbled about the cost. But there is nothing in the documentary record to suggest that the Mi'kmaq were ever refused. Indeed, there is much evidence that the British sometimes went to considerable trouble to supply the Indians, sometimes transporting the goods long distances when their own provisions were low.

3.2.3. Central Canada.

In 1760, immediately after the conquest of Montreal, and recognizing the pivotal role that the First Nations had played in assuring this victory to the British, General Amherst reported that I gave our Indians, as a Reward for their behaviour, as many necessarys and trinkets out of the Stores, as Sr. Wm Johnson thought necessary, and ordered them home .109

However, tied as they often were to military alliance, the issuance of presents took place against a backdrop of war and economic & social dislocation. In some cases, even at this early stage, dependency was emerging as an issue, and material transfers from the Crown were sometimes becoming more of a necessity than a bonus. In June 1761, a deputation of Chiefs from Kanesatake, Kahnawake and other locations in Lower Canada met with Crown representatives and highlighted this point:

> We have now done the business we came on, in behalf of the sev'l Nations in our Country, according to our Custom we can't help letting you know that we are in want of every necessary of life, & beg you'll order us a few Guns, & Powder & Lead, Kettles & Cloaths, to enable us to hunt for our provisions going home. [...] On all occasions when we formerly visited our Fathers, the French, they listend to our requests & always pitied our necessities; we hope brother you'll do the same, as we are a poor people, & can't well subsist without your assistance. [...]110

This message from the Chiefs gives an indication of the profound dislocation that followed the turmoil of the French and Indian wars. But it also demonstrates that they viewed the presents as a supplement to assist in their subsistence activities, and as a part of their relationship with the Europeans who had come to live among them.

Another example can be drawn from the Ojibwa to the west. At a Council with the English following the Conquest, Chief Minavavana from Michilimackinac highlighted the connection

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109 NAC CO5 Vol. 59 155711: pp.125-136: General Amherst to William Pitt, 4 October, 1760.

110 "The Papers of Sir William Johnson" Vol.10: pp. 302-304: Letter from Geo Croghan, 28 June, 1761.

between material transfers (the presents) and political relations:

> Englishman, although you have conquered the French, you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread, and pork and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains. [...]
>
> Englishman, your king has never sent us any presents, nor entered into any treaty with us, wherefore he and we are still at war; and, until he does these things, we must consider that we have no other father or friend among the white man, than the king of France [...] [...] you have ventured your life among us, in the expectation that we should not molest you. You do not come armed, with an intention to make war, you come in peace, to trade with us, to supply us with necessities, of which we are much in want. We shall regard you therefore as a brother; and you may sleep tranquilly, without fear of the Chipeways. As a token of our friendship we present you with this pipe, to smoke.111

The giving of presents was not restricted to the realm of diplomacy: the early French traders, and the Hudsons Bay Company all used presents as a means to attract Indians to their trading posts. In some instances, this led to the near ruin of would-be fur barons.112 For most trading posts, however, it was simply a matter of routine custom.113

3.2.4. English Poor law tradition.

The social safety net as we now know it is relatively new - in fact, it did not emerge in a major way until well after WWII. At the time Canada was being colonized, social security, such as it existed, was based on English *Poor Law* traditions, and these in turn arose in response to the economic changes that came about as Britain emerged from the Middle Ages.114

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111 See Wilbur R. Jacobs, *Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748-1763* (Lincoln: University of Nebraska Press, 1966): p.75, quoted in John J. Borrows, *Traditional Use, Treaties and Land Title Settlements: A Legal History of the Anishnabe of Manitoulin Island* (North York: thesis submitted to the Graduate Programme in Law, Osgoode Hall Law School, York University, 22 September, 1994) at pp.49-50.

112 In 1717-1718, French adventurers made an attempt to re-establish the French trading post in the Temiscamingue region, to draw furs from the English. Sieur Guillet was unable to pay his licence fees for eight years, given the considerable number of presents he was obliged to give out in order to attract the Indians. See NAC F-99, C11A, tome 99: pp.306-308: Letter and attachment from Marquis de Duquesne, Governor of New France, to Monseigneur, 30 October, 1754.

113 For instance, see HBCo Frederick House Journal, 1785-1787, H.B.C. Archives B75/a/1 & B75/a/2

114 Allan Moscovitch and Andrew Webster, *Social Assistance and Aboriginal People, A Discussion*

[...] the feudal system, which began in western Europe as early as the fifth century and flourished until the fourteenth century. This system was a form of land tenure based on the delegation of property by a lord to a subordinate servant or serf. This agricultural agreement provided "a social, political, military and economic structure to the society of that time." One negative aspect in this arrangement was that the serfs did not own the land, but worked it for the lord; but on the positive side, **this system met most of the serfs' basic needs. It provided a home, food, fuel, community, some independence, and usually someone to take care of them when they were unable to work due to sickness, accident or old age.** Often care was provided by the lord's household or by the local parish. Of course, the price paid for this security was the absence of freedom, for the serfs were bound to serve their lord in whatever way he saw fit, sometimes as soldiers but more often as farmers. They were also forbidden to leave their villages without permission and this permission was hard to obtain. Under the feudal system life was stable for the serfs. Its decline resulted in the dislocation of the labourer from the land. The end result was an increase in freedom, with an accompanying loss of security.

From the time this system broke down until the present, individuals, groups, and governments have been trying to create a system of social welfare in which people can have both **freedom and the security** afforded by the feudal system. To date, this has not been entirely successful.

[...] from ancient times, and during the feudal period, the Christian church carried a major responsibility for the organization of charity in western society. The state supported, or at least tolerated, that arrangement. A major change in this tradition occurred in England in response to the onset of plague, which killed two-thirds of the English population within two years (1348-49). The resulting shortage of labour and rise in wages compelled Edward III to issue the Statute of Labourers of 1349. This law order able-bodied labourers to accept employment from any master willing to hire them and it forbade them to leave their parish. Furthermore, citizens were not allowed to give alms to able-bodied beggars. This law was designed to prevent begging and to force the serfs to stay on the land.

In the sixteenth century. Henry VIII's break with the pope and the Roman Catholic church further weakened the tradition of the church caring for the poor, for in closing

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Paper (Ottawa: July 1995 - A report prepared for the Royal Commission on Aboriginal Peoples): p.4: The first British relief legislation - which was later incorporated into the colonial social welfare inheritance - was the 1349 Statute of Labourers. This statute was primarily concerned with labour shortage, and it forbade private and public charity on the grounds that it would encourage potential workers to remain outside of the labour force and engage in survival activity. The British rulers understood well that, as long as workers could survive outside the labour market, there would be little incentive for them to work for a merchant or industrialist at low wages. By this reasoning workers must be compelled to take a job.

monasteries and confiscating their properties and wealth he made it almost impossible for the Catholic church to continue as the principal reliever of economic distress. This lent urgency to a ongoing process, begun in 1349, in which the state slowly and reluctantly assumed responsibility for those who could not care for themselves. The end result was the use of public money obtained through taxation to do so. Karl de Schweinitz explained in these words:

> The experience of the years between 1349 and 1601 had convinced the rulers of England of the presence of a destitution among the poor that punishment could not be abolished and that could be relieved only by the application of public resources to individual need.

This realization led to a long series of measures known as the Poor Laws, many of which under Elizabeth I were formalized by legislation, and eventually through a lengthy series of modification led to the National Insurance Act and the Beveridge Report of 1943. The latter was the basis for the modern system of social security that exists in Britain today.115

In 1597, various English laws relating to charity and relief were consolidated into the *Poor Law*, which was based on a system of publicly mandated charity or relief. This was organized at the local level of the parish, for long the smallest unit of government administration. This was the single most important social welfare legislation in Britain and its colonies during the subsequent 237 years until its reform in 1834".116

The *Poor Law* was founded on a distinction between the *employable* and the *unemployable* - ie., if you are able bodied you have no excuse not to participate in the labour market, but if you are handicapped in one way or another, and therefore unable to work, relief will be provided to provide for your survival. A combination of punishment (for those who refused to work) and minimum charity (to provide for the basic maintenance needs of the unemployable), was established, paid for by a local relief tax and administered at the local level. Part and parcel of this approach was the assumption that poverty reflected a character or moral defect (ie., laziness) which had to be eradicated or punished, as the case may be.117

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115 Turner and Turner, 1986: pp. 51-52.

116 Moscovitch & Webster, 1995: p.5.

117 Moscovitch & Webster, 1995: pp. 6-7. Also at pp. 7-8: A key principle confirmed in the Poor Law is that, in a market society in which each person is free to sell his or her labour, one may not test this freedom by actually refusing to do work. A person is free to sell his or her labour, but not free to withhold it. If one is assessed as able bodied and unemployed, one risked being put to work as punishment. This principle's rationale was twofold: first, to ensure that there was no benefit to unemployment; and second, to assure employers of a steady supply of labour.

3.2.5. Conclusions.

A number of conclusions can be drawn regarding this period of history.

* Although for the most part these material transfers were simply a supplement to the existing Indian economy, dependency was beginning to emerge as an issue. In this sense, the presents began to act as a cushion against social and economic dislocation, providing some protection for the stability of indigenous social and economic institutions and well-being.

* Material transfers (in the form of presents) were not simply a matter of Imperial discretion: their provision was included in numerous treaty agreements between the English and the Indian nations in the period prior to 1763, and they were an integral part of the political and economic relationship which had been established.

The practise of giving presents, and its inclusion into the treaty relationship, impacts on the Crown s fiduciary duties, as suggested by the following passage which speaks of the special fiduciary relationship between the Crown and Aboriginal peoples as recognized by the Supreme Court.

> This relationship is grounded in historical practices that emerged from dealings between the British Crown and Aboriginal nations in eastern North America, especially during the formative period extending from the founding of the colonies in the early 1600's to the fall of New France in 1760. By the end of this period, the principles underlying these practices had crystallized as part of the basic constitutional law governing the colonies, and were reflected in the Royal Proclamation issued by the British Crown on October 7, 1763.
>
> [...] The overall effect is to affirm both the powers and the attendant responsibilities of the Crown relative to Aboriginal nations, as quasi-sovereign entities living under the Crown s protection.118 (see chapter #2.9 for more discussion on this point.)

The presents themselves were tangible evidence - to First Nations and to the European powers - of the reciprocal arrangements which had been established at the political level, and mutual recognition of the fact that their political, economic and social interests were becoming more closely linked.

Moreover, these relations which were established did not question First Nation jurisdiction in the

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118 Brian Slattery, *First Nations and the Constitution: A Question of Trust*, in the Canadian Bar Review, [1992] Vol.71: pp. 271-272.

area of foreign relations or internal affairs. First Nations were not expected to be bound by the emerging wage economy, Poor Law doctrine, or Crown policy towards settlers.

3.3. Alliance and Imperial Devolution: 1763-1867.

The period between the Conquest and Confederation saw significant changes in relations between the First Nations and the Crown, and in the economic and social conditions of the those Aboriginal peoples whose territory lay within the sphere of colonial settlement.

3.3.1. The 1764 Niagara Treaty.

In July and August 1764, following Pontiac s War, Sir William Johnson held a treaty council with representatives of over 20 different Indian nations at Niagara. Britain wanted to establish a basis for peaceful coexistence with the former Indian allies of the French, to provide stability for its own social and economic development on the continent.

The purpose of the treaty council was to formally present the terms of the Royal Proclamation of 1763, to seek agreement from the assembled tribes on the policy, and to seek agreement on the nature of the relationship that was to exist between the English and the First Nations. Consistent with traditional practice, wampum belts were made to record the event and the mutual engagements made. At that council, the British assured the tribes that in return for peace and coexistence, the British would protect the tribes economic interests, and maintain ongoing material support whenever such assistance was required.

> Johnson delivered a belt of the Covenant Chain to the Ojibwas, to keep on behalf of the entire Lakes Confederacy at Michilimackinak. He also gave them a long belt showing the 24 nations holding hands, with a ship at one end and a rock at the other. This was the symbol of the annual presents the King promised to send the participating nations. The two belts remained together, moving from Mackinack to Drummond Island to Manitoulin Island. They were kept at Manitowaning and Wikwemikong for more than a century.119

These commitments were later invoked on a regular basis at subsequent councils between various tribes and the British. At Drummond Island in 1818 for instance, Orcarta, an Ojibway Chief, held up the Belt of 1764 that his tribe had retained and said:

> Father, This my ancestors received from our Father, Sir W. Johnson. You sent word to all your red children to assemble at the crooked place [Niagara]. They heard your voice - obeyed the message - and the next summer met you at the place. You then laid this belt on a mat, and said, Children, you must all touch this Belt of Peace. I touch it myself, that

119 Paul Williams and Curtis Nelson, *Kaswentha* (report prepared for RCAP, January 1995): 54564.

> we may all be brethren united, and hope our friendship will never cease. I will call you my children; will send warmth [presents] to your country; and your families shall never be in want [...]
>
> Father, Your words were true - all you promised came to pass. On giving us the Belt of Peace, you said - If you should ever require my assistance, send this Belt, and my hand will be immediately stretched forth to assist you [...] 120

This was not a one-way understanding. In the years following, the Niagara Treaty was often invoked by Crown officials as well.121

The significance of the Niagara Treaty of 1764 has been underrated by many historians and forgotten by officialdom. It represented a formal presentation to the assembled nations of the Proclamation of 1763, and their agreement on the basis of the relationship that would follow. For the purposes of this discussion, its importance can be reduced to four elements: 1) the Crown committed itself to a policy of non-interference in the internal affairs of the First Nations122; 2) the Crown assured the First Nations that their economic security would be protected (ie., treaty procedure of the Royal Proclamation to protect their interest in lands, and recognition of economic rights), 3) the Crown undertook to provide material assistance to First Nations in times of need, and 4) the undertakings were to be perpetual. It should be noted that the Crown was not making these commitments without getting something in return. What Britain was seeking, and obtained, was a peaceful basis upon which to assure the social and economic security and development of its own citizens in North America.

These were not individuals thinking only of the moment. They were representatives of their respective nations, negotiating arrangements to provide for their mutual coexistence and prosperity into the future.

The end of the wars with the French did not halt European conflict in North America: it just removed the French as major players, and others came to occupy the field. Following the end of the Seven Years war, there came Pontiac s war, then the American Revolution, the War of 1812, and the Upper and Lower Canada rebellions of 1837. This was a time of upheaval and

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120 Captain TG Anderson, *Report on the Affairs of the Indians of Canada, Section III*, Appendix No.95 in Appendix T of the Journals of the Legislative Assembly of Canada, Vol.6: quoted in Borrows, 1994: at pp. 72-73.

121 For a more detailed discussion, see Borrows, 1994: pp. 64-93; also Williams & Nelson, 1995: 54526 and following.

122 Canada, RCAP, 1996, Vol.1: p.117: In short, the Proclamation portrays Aboriginal nations as autonomous political units living under the Crown s protection [...]. Aboriginal nations hold inherent authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement.

displacement, among First Nations and colonists alike. The central (Imperial) government was struggling with the political and financial costs of empire, and negotiating with local governments over powers and moneys. Major changes were being made with respect to settler jurisdiction over the citizenry, land and resources.

3.3.2. The Atlantic 1760 - 1867.

During and after the series of treaty agreements of 1760 and 1761, the British supplied the Mi'kmaq to a considerable extent with food, clothing, and such things as medical services.123 In 1766, the British government paid out 2,700 for miscellaneous Nova Scotia Indian affairs debt incurred in 1762 and 1763. Most of that amount had been spent in supplying Indians.124 In comparison, the total parliamentary grant to Nova Scotia in 1765 was 4,912.125

British liberality in providing Indian provisions and presents is clear during the formative period of the Mi'kmaq treaty relationship up to the American War of Independence. The British needed to do it in order to gain and maintain Indian alliance; it was an essential ingredient of the treaty relationship. After that, the practice either changed significantly or became an entirely different thing, depending on one's point-of-view.

Things really began to change after the American Revolution when large numbers of Loyalists began to settle in the Atlantic provinces. During this period, Crown - First Nation relations in the Atlantic took a different course. Unlike Canada West, the terms of the Royal Proclamation of 1763 regarding the sharing or cession of lands were never diligently applied. Unregulated dispossession was the norm, with little or no emphasis on accommodation or remedial measures.126 Widespread poverty and dislocation ensued.127

As well, there was no Imperial grant, and therefore no Indian Department, with its own staff, administration and activities. Colonial governors were left with the bleak prospect of seeking

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123 Indian affairs audits, January 17, 1768, C.O. 217, v.25, 15r-70r.

124 Simmons and Thomas, *Proceedings and Debates*, v.2, pp. 324, 349, Mar. 7, 13, 1766.

125 Lords of Trade to Wilmot, June 24, 1765, C.O. 218, v.6, 237v-238v.

126 Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: CCG, 1996), Volume I: pp. 141, 143-144.

127 Canada, RCAP, 1996, Vol.1: p.141: Former enemies of the victorious British, the Mi kmaq and Maliseet, were simply ignored, left to find their own way in the rapidly changing world. Dispossessed of much of their land, separated from resources and impoverished, they were also ravaged by disease, and in the early 1800s they seemed to be on the road to extinction.

cooperation and resources from local legislatures, whose interests were hostile to those of the First Nations. In both Nova Scotia and New Brunswick, there was an *ad hoc* system of local, unpaid Indian Commissioners, or leading citizens , whose role was to distribute relief as budgets allowed. A formal position - Chief Superintendent of Indian Affairs - was established in only in Nova Scotia, but it was often allowed to lapse.128

During the 19th century, the Nova Scotia colonial government did provide support to the Mi'kmaq. The motives for doing that were not to gain friendship and maintain the treaty relationship, but were more strictly humanitarian. The stated goal of encouraging Mi'kmaq self sufficiency (and therefore reducing relief expenditures) was reflected in the game conservation laws of the early 19th century that exempted Mi'kmaq or "other poor settlers" if they were hunting for food.

During the 1840's and 1850's, the policy of the Nova Scotia colonial government was one of minimal charity and some assistance to help the Mi'kmaq become "civilized".129 Blankets and coats were supplied, provisions for the very poor and sick, but not much else in the context of sustenance. Much emphasis was placed on educating Mi'kmaq, with uneven results. Agricultural equipment and supplies were provided sparingly and carefully, it being supposed the Mi'kmaq were likely to use them badly and waste them. For the government, the main thing was persuading the Mi'kmaq to settle on the reserves, build houses and plant crops.

Until the 1840s, the Nova Scotia government contented itself with providing an annual grant to the Mi 'kmaq that was distributed on an *ad hoc* basis. In 1842, the government resolved to put Indian Affairs on a more organized basis and concentrate more closely on making the Mi'kmaq self-sufficient and "civilized". This was done without a great deal of enthusiasm or optimism, but simply as a matter of humanity. Joseph Howe was appointed Indian Commissioner, and in his first report he told the Lieutenant-Governor:

> A given amount of money, skilfully and honestly applied, will make a road or bridge, which every passenger may recognize as a valuable improvement; but the civilization of barbarous tribes -- the eradication of habits and prejudices, the growth of centuries -- the substitution of one kind of knowledge, absolutely indispensable to success, or even existence, in a new state of society, for another kind, equally important in the old, is the work of time, that may be entered upon in a season, but which cannot be completed or yet much advanced, even under the most favourable circumstances, but by perseverance in a series of enlightened experiments running over a period of years. The French and

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128 John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department* (Ottawa: DIAND Treaties & Historical Research Centre, February 1985): Note #1, p.6. See also Milloy, 1992: pp. 64-70.

129 The annual Indian Affairs reports are found in each year s *Journals and Proceedings of the House of Assembly*.

> Germans, who inhabit portions of this Province, are still French and Germans in most of the essential characteristics, though surrounded by a British Population for nearly a hundred years -- it was not to be expected therefore, that any striking impression could be made among the Micmacs in a few months, or that much more could be done than to collect and arrange facts, and lay a foundation for future operations. Your Lordship, who is quite aware that the energies of the finest minds, aided by the most lavish expenditure, have been employed to little purpose in similar designs, though you may find no inducement, in the history of these experiments, to shrink from the prosecution of a work of justice and philanthropy, will I am quite assured, be disposed to turn from them with considerable discrimination to the little that may have resulted from my labours.130

The prevailing view was that the Indians had become degraded in character; their morals needed improving. Until this was done, there was little hope that government charity, however well-intentioned and necessary, would have lasting effect. This would best be done by educating young Mi'kmaq in the white man's mould, not leaving them to their former moral and social devices in which they were liable to adopt only the worst the white man had to offer rather than become immersed in the ways, thoughts, and morals of civilization. A committee of the Nova Scotia Legislature charged with overseeing Indian Affairs expressed the attitude particularly well in 1844:

> The surveying and marking off the Indians Reserves throughout the Province -- the procuring of other lands in the neighbourhood of Rivers, for their location -- the allotting and sub-dividing of lots for their several accommodation -- the erection of buildings or dwellings for their comfort and convenience -- the procuring of seeds and implements of husbandry for their comfort and convenience -- and the other means used to wean them from their migratory habits, and to render them capable of appreciating the advantages derived from tile cultivation of the soil, are all praiseworthy and commendable, and contribute, to a certain extent, to the amelioration of the character and condition of these unfortunate people, but, in the opinion of your Committee, do not strike at the root of the evils deprecated, are only temporary in their nature, and likely to vanish and disappear whenever Legislative aid is refused or withheld. To bring about the changes so desirable to be attained, and to accomplish the results which can alone alter the habits and improve the condition of the Indian tribe, we must take a broader survey of their natural character, and examine the causes which have led to their present degenerate state. All remedies to be applied, which can only operate upon the middle aged or the infirm, are temporary and ephemeral, and although these for a time may stimulate and promote industrious habits, and produce no serious and substantial results. In the present degraded state of the Indians of this Province, we can easily perceive that by their intercourse with the British population of the Country, they have unbibed many of their vices, without any corresponding virtues; they have become addicted to habits of intemperance indolence,

130 *Journals and Proceedings, 1843*, p.3.

> and sloth, and evince no disposition to the attainment of any thing which could conduce to their civilization and improvement. The nobleness of many occasionally seen in his savage state, has sunk into gradation resulting from the vicious propensities of a civilized race; and we look in vain amongst the Aborigines of this Province for that independence of thought and action, which have at times distinguished many of the Indians of the American Continent.131

Although it was realized that the white man had "seized upon and taken their country"132 and that the Mi'kmaq were owed something in return, the principle that regular material transfers were an essential element of the treaty relationship, or that the Crown had a duty to preserve Mik maq self-reliance (which was prominent during the formative period of the treaty relationship in the 18th century) had entirely disappeared. Nova Scotia officials did note that the Indians of Canada continued to receive annual presents from Britain, but none went to the Indians of Nova Scotia.133

Effort was expended in getting Mi'kmaq established as farmers on their reserves, and in preventing encroachment on the reserves, but these efforts were made amid a contradictory feeling that Indian reserves hampered progress.134 Indians should be helped, but those efforts should not be made to confirm them in an Indian lifestyle but rather to encourage them to give up their Indianness.

Reserves were granted as a result of petition or occasional set asides, but this land base was eroded in a number of ways. In New Brunswick, in the period leading up to Confederation, local authorities orchestrated the sale of thousands of acres of reserve land to raise funds for native relief payments. In 1844, the provincial legislature passed an *Act for the Management of the Indian lands, and the Settlement of Indians Lands*. It was intended that the proceeds from the sale of surplus reserve lands would pay for community development. In fact, most of the proceeds were spent on relief and the Indians capital - the land - was dissipated.135

In Nova Scotia, Lord Dalhousie (in 1820) and Sir James Kempt (in 1827) had tried to have reserves of not more than 1000 acres, set out in each county, but no funds were set aside for their survey, no administrative infrastructure was in place to prevent squatters and encroachment, and

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131 *Journal and Proceedings, 1844*, pp.163-164.

132 *Journal and Proceedings, 1847*, p.246

133 *Journals and Proceedings, 1854*, p. 379.

134 See the report of Crown Lands Commissioner Samuel Fairbanks, *Journals and Proceedings, 1860*, pp.392-398

135 Milloy, 1992: p. 69; 66.

there were no funds for improvement schemes, either. (Some schemes were tried in the period following 1840, but there was no money to sustain them).

John Milloy emphasizes that this lack of fiscal resources made conditions much worse in the Atlantic than they were in Canada West. Local legislatures were wheedled into setting aside small annual appropriations for relief supplies in each of the Maritime provinces. Mission societies also contributed to relief and education, but there were no organized civilization or settlement schemes like in Upper Canada.136

3.3.3. Central Canada.

- Material transfers and the treaty process.

The consolidation that took place following the American Revolution brought some respite and enabled the British to focus on colonial development instead of war. This in turn allowed them to revise their policy on the issuance of presents, based on expediency. Whereas before, they were clearly connected to past and future services rendered, and were intimately tied to treaty undertakings, the presents were now increasingly seen as an unnecessary draw on the treasury, considered to be a crutch that allowed Indian people to live a lazy life. As a result, government officials made attempts to take these matters out of the realm of treaty, and consign them instead to policy.137

At least as early as 1798 Crown officials in Upper Canada had adopted this view, as noted by Ian Johnson:

> Lord Portland [...] urged that the presents distributed to the tribes for military service should be considered rewards for good behaviour rather than accruing from any right. If the tribes co-operated they would receive presents, if they refused the presents would stop [...]:
>
> [...] the Messassague Indians [...] must be brought to consider themselves in no way entitled to those presents; that they are indebted for them to His Majesty s spontaneous bounty, and owe them solely to his Paternal regard for their Welfare and Comfort [...]138

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136 Milloy, 1992: 67-70.

137 John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas 1828-1858* (Ottawa: Indian & Northern Affairs Canada, Research Branch, 1985): pp. 44-45, 52.

138 Cruikshank, Vol. III: pp. 22-23: Portland to Russell, 6 December, 1798, cited in Ian Johnson, *British-Tribal Political Relations in the Colonial Period: the Early Mississauga Treaty Process* (Union of Ontario Indians, 1986, unpublished manuscript). He also shows how the withholding of presents was used as a coercive measure to ensure that the Mississaugas did not make unreasonable demands regarding the sale price of their lands.

The onset of the War of 1812, however, reminded the British of the necessity of maintaining good relations with the First Nations if they were to count on their alliance in times of military conflict.139 Britain once again found itself dependent on its military alliance with the First Nations to preserve its presence in North America. As a result, the annual presents again flowed freely.

However after the war, Imperial authorities once more became preoccupied with cutting the costs of maintaining a far-flung empire, and their policy towards the colonies began to focus on fiscal retrenchment and off-loading responsibilities. The Indian Department was singled out for attention. During the War of 1812, expenditures related to the Indian Department had risen from 60,000 to 125,000 per year. By 1821 this budget had been reduced to 21,000 per annum.140

The cost cutting continued in subsequent years:

> A ceiling of 20,000 per year was placed on Indian Department expenditures [...] in the year 1829. A considerable demand was placed on this fund. Presents [...] consumed half to two-thirds of the budget. The fixed costs of salaries and pensions to the Superintendents and other personnel (4,150) left almost no money in the treasury for implementing the departmental projects.141

Indeed, Above all the other policy issues connected with Indian peoples during the 1820's, this [fiscal retrenchment] was the dominant concern .142 The increasing costs of maintaining the system of presents were rooted in one simple fact: First Nations within the sphere of the settled colonies were experiencing severe economic and social dislocation as a result of the dispossession of their lands and resources and economic changes in which the fur trade was rapidly losing its importance. The culture of dependency was gaining ground.143 However, the

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139 In 1808, Sir James Craig wrote to Francis Gore: The Indian Nations owing to the long continuance of Peace have been neglected by us, and from the considerable curtailments made in the Presents to those People it appears that retaining their attachment to the King s interest has not of late been thought an object worthy of serious consideration. NAC CO 42 Vol.136: Craig to Gore, 10 March, 1808, cited in Johnson, 1986.

140 John Milloy, *A Historical Overview of Indian-Government Relations, 1755-1940*, (report prepared for the Dept of Indian & Northern Affairs, 7 December, 1992): p. 26.

141 Peter Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991): pp. 166-167.

142 Leslie, 1985: p.9.

143 Leslie, 1985: p.10: The Indian people attached great symbolic value to the receipt of annual presents as a tangible expression of the King s Bounty , a commitment of continued Crown support, and formal recognition of their Indian status. As well, the presents had actually become an early form of government welfare. With the

Imperial government s reaction was simply to reduce expenses, without considering the root causes of this dependency.

In response to pressure from the Treasury to reduce costs, officials in Canada made it clear that it was more than simply a matter of cutting expenses. Lt. Governor Maitland explained that the Indians had been led to expect the presents based on a long history of Crown practice. Moreover, the presents were an important tool in ensuring their continued alliance in the face of continuing efforts by the United States to subvert British interests in North America. And finally, he acknowledged that Indian military service during the War of 1812 was decisive in maintaining Upper Canada as a British possession.144 Maitland s arguments carried the day, at least in the short term.

In 1827, however, the new Colonial Secretary, Viscount Goderich, ordered a review of the Indian Department, with particular emphasis on winding its operations down and terminating the presents.145 Major General Darling prepared a report which highlighted the role that the Department played in protecting Indian interests in land, which he described as the key to their long term security. He went on to conclude that without protections for their land and a continued role for the Indian Department in this connection, only three outcomes could result:

> 1st. They must be entirely maintained and supported by Government.
> 2nd. Or they will starve in the streets of the country towns and villages, if they do not crowd the gaols of the larger towns and cities.
> 3rd. Or, they will turn their backs with indignation on their father, on whose promises of protection they have with confidence for so many years relied, and will throw themselves

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decline of the Quebec fur trade in the 1760's, gifts of clothing, household goods, and hunting equipment had become indispensable items for daily existence. See also Canada, RCAP, 1996, Vol.1 at p.138: [...] as Aboriginal economies declined because of the loss of the land, the scarcity of game and the continuing ravages of disease, relief payments to alleviate the threat of starvation became a regular feature of colonial financial administration. In short order, formerly autonomous Aboriginal nations came to be viewed, by prosperous and expanding Crown colonies, as little more than an unproductive drain on the public purse.

144 Leslie, 1985: p.18, quoting from NAC CO42/370, Maitland to Wilmot Horton, 20 November, 1823: The Indians, he explained ... have been led to hope for a continuance of the King s Bounty. Their claim to annual presents was based upon usage and necessity... , a necessity which, if the allocations of the American government ... to secure their influence over those Indians who inhabit the territory contiguous to ours , were checked temporarily, had not dissipated since the War of 1812. Indeed the gradual reduction of presents since 1815 had already created very serious apprehension as to the light in which their Claims on His Majesty s consideration, are hereinafter to be regarded . Should the Treasury terminate the presents this would amount to an impolitic gesture of ingratitude since ... it was at least doubtful whether without the cooperation of the Indians who combatted with us in the defence of their own soil against invaders, this Province would have been preserved to the Empire .

145 Leslie, 1985: pp.18-19.

[...] into the arms of the Americans.146

History has borne out Darling s predictions. This debate between the Colonial Office and the Treasury on the one hand, and local officials in the provinces, would continue right up to Confederation, without resolution. The First Nations were not offered a role in this discussion.

- Land and the treaty process.

Although as early as 1763, the Imperial government had adopted a formal policy for obtaining the use of Indian lands through treaty making, it was not really until after the American Revolutionary War that land cession treaties were pursued vigorously in Canada, and even then unevenly. In Lower Canada, for instance, land cessions did not as a rule precede settlement. In Upper Canada however, treaty making for land began in earnest in the period following 1783, to provide for the re-settlement of Loyalists and for the members of the Six Nations who had fought with the English.147

Initially these treaties were made for relatively small tracts of land, in return for a one time payment in goods. There were no provisions for ongoing payments or assistance.148 As the system of presents faded, however, the land cession treaty process also evolved, and in some ways picked up the slack. By 1814, land cessions were being paid for through annuities distributed on a regular basis from the proceeds of land sales.149 (It should be noted that the annuities were not generally paid in cash, but in goods.150)

In 1818, William Claus held a treaty council with the Mississauga regarding the proposed sale of lands around Rice Lake. Claus explained that one-time payments were to be replaced by ongoing assistance and support, in addition to the annual presents. It is noteworthy that he casts this commitment in terms of perpetuity: [The King...] does not mean to do as formerly, to pay you at once, but as long as any of you remain on the Earth to give you clothing in payment every year, besides the presents he now gives you. 151

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146 NAC RG10 Vol.5: Darling to Dalhousie, 24 July, 1828, quoted in Leslie, 1985 at p.20.

147 John Milloy, *A Historical Overview of Indian-Government Relations, 1755-1940* (Report prepared for Indian & Northern Affairs Canada, 7 December, 1992): p.17.

148 Stephen Aronson and Ronald C. Maguire, *Federal Treaty Policy Study* (Report prepared for the Royal Commission on Aboriginal Peoples, 2 November, 1994) in *Seven Generations* [RCAP CD-ROM] at para 62582.

149 Aronson & Maguire, 1994: at 62582.

150 Leslie, 1985: p.79.

151 NAC RG10 Vol.489: pp.281-283 - Claus to Major Bowles, 10 November 1818. Quoted in Johnson, 1986.

Bauckaquaquet, a leading Chief in the area, made clear that his people were seeking economic and social security through the treaty process:

> From our land we receive hardly anything & if your words are true, we will get more by parting with them than by keeping them. Our hunting is destroyed [...] We hope that we shall not be prevented from the right of Fishing, the use of the waters & hunting where we can find some game. We hope that the Whites who are to come among us will not treat us ill.152

In 1829, in response to continued Imperial pressure to reduce costs, the new Lt. Governor, John Colborne, proposed that a network of centralized communities be established, funded from the proceeds of land sales, to promote Indian civilization and to cut costs. In making this proposal, however, he noted that the consent of the tribes would be required:

> [...] They will be able probably to persuade the Chiefs to give their consent, that the sums due to them for the lands sold to the Government should be expended on their houses and in furnishing them with Agricultural implements and Cattle.153

In the period following 1830, education, relief, development assistance and health care were increasingly paid from Band trust funds containing the proceeds of land sales. These funds, which ostensibly were to provide a capital base for future social and economic security, were used instead as a piggy bank by officials, not only to cover the short term costs of maintenance, but also to cover the general administration of provincial governance:

> Upper Canada could only afford to purchase Indian land by paying a small annuity to the tribes which could be offset by reselling the land to settlers at a profit and investing the return. In fact the annual payment to the tribes was often less than the interest earned by the government on the principal. This scheme saved the government a great deal of money and eventually earned a large enough profit to finance the administration of the province.154

In 1830, the Indian administration was transferred from military to civil jurisdiction155, a clear signal that military alliance and international diplomacy were no longer regarded by the British

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152 NAC RG10 Vol.790: pp. 67-70, *Minutes of a Council with the Chippewa Nation*, November 5, 1818, quoted in Johnson, 1986.

153 NAC CO42/388, Colborne to R. Hay, 3 May, 1829, quoted in Leslie, 1985 at p.23.

154 Lillian Gates *Land Policies of Upper Canada* (Toronto, University of Toronto Press, 1968): p. 230.

155 Robert S. Allen, *His Majesty s Loyal Indian Allies* (Toronto: Dundurn Press, 1992): p.183.

as the basis for Crown-Indian relations. By 1836, the annual presents were consuming over three-quarters of the Indian Department s annual appropriation156, despite ongoing efforts to reform the system and reduce costs, and despite the efforts to raise funds through land sales.157

Over the next 30 years, the treaty process would evolve from an ongoing one predicated on political relations and material transfers to one focussed on increasingly larger land sales and one-time agreements. The Manitoulin treaties of 1836 and 1862, the Saugeen purchases and the Robinson Treaties of 1850 are all points on this path. However, even in these treaties, the principles of mutual benefit, continued self sufficiency, and social and economic security were explicitly agreed upon by the parties.158

- Civilization Policy.

In Central Canada, the reduction of the Indian presents took place parallel to the introduction of the Department s civilization programme. The stated objective of this programme was to turn Indians from wandering warriors, hunters, fishers and traders into sedentary farmers, so that eventually they would become self sufficient and civilized. The unstated purpose was to reduce Indian related expenditures by using the proceeds from land sales to pay for education, agricultural development and maintenance.

So, instead of being a goal in itself, the civilization programme was to be a vehicle for expenditure reduction.159 This first began in the 1820's with the Mississaugas of New Credit and the Six Nations160, and became formal policy in 1830 when the Secretary of State for the Colonies, Sir George Murray, announced his intention to pursue this new approach across the board, and described it s objective as the settled purpose of gradually reclaiming them from a state of barbarism and of introducing amongst them the industrious and peaceful habits of civilized life .161 This was backed up by a formal commitment from the Imperial Treasury for

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156 Leslie, 1985: p.44.

157 In fact, the Department s management of the proceeds from land sales was notoriously haphazard at best, and subject to widespread abuse at worst. It was so bad that the stated purpose - long term financial self-sufficiency - was never realized. See Leslie, 1985; Schmalz, 1991; Johnson, 1986; Aronson & McGuire, 1994.

158 For a full discussion of the Robinson treaties, see James Morrison, *The Robinson Treaties of 1850: A Case Study* (report prepared for RCAP, 31 March 1993). See Borrows, 1994 re: the Manitoulin treaties of 1836 and 1862, and Schmalz, 1991 re: Saugeen and the Bruce Peninsula.

159 Milloy, 1992: pp. 25-27. See also Robert S. Allen, *His Majesty s Loyal Indian Allies* (Toronto: Dundurn Press, 1992): p. 180-182.

160 Leslie, 1985: pp. 10-15.

161 NAC CO42/27, Murray to Kempt (No.95), 25 January, 1830, cited in Milloy, 1992 at p. 23. See also

an annual grant of 20,000.162

The idea was to settle Indians on reserves, divide reserve holdings into individual allotments, educate the adults in farming, and educate the children in white ways. Land sales would provide the required funds. However at this time, civilization was not seen as requiring that First Nation political institutions or collective identity be dismantled, or that First Nation jurisdiction over their internal affairs be infringed upon. This was to come later.

> The goal of financial liberation for the imperial government was to be approached through the progressive improvement of native communities. They were to be civilized, that is, they were to reach a state of self-sufficiency based on agriculture and developments [...] fuelled largely by their own resources, funds from land sales and the commutation of their presents, and by charity, funds that could be raised by the missionary societies.163

Over the next few decades, experimental communities were established at Sarnia, Coldwater, Manitoulin Island, and at Riviere Verte in Lower Canada (however, none met with success in the long term). The change in Imperial policy could not go unnoticed by the First Nations. Not all of them wanted to change their way of life and give up living on the land; rather, they wanted the government to live up to its previous undertakings. But there did appear to be consensus that education was required for the youth.

In 1836, a Committee of the Executive Council of Lower Canada, as part of its investigation of Indian Affairs in that province, held councils with various First Nations and asked them if they would be prepared to have the annual presents commuted to cash only, with a portion of that amount dedicated to education. It should be remembered that unlike Upper Canada, no land treaties were concluded with the First Nations in Lower Canada. Only a few settled Bands had their own revenues from leases or sales of reserve lands.

> At every Council, the Indians rejected the money commutation [...] They admitted their dependence on the articles of clothing and utensils and feared that additional money would lead to increased drunkenness. [...] virtually all the Chiefs were in favour of

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Leslie, 1985: pp. 22-24.

162 Leslie, 1985: p.24.

163 Milloy, 1992: p. 31; Allen, 1992: pp. 178-180. See also Aronson & McGuire, 1994: para 62618: The financial solution was subsequently found by using the proceeds from the sales of additional land surrenders, whether of traditional First Nation territories or of individual reserves. The interest alone covered the costs of the annuities and the principal paid for the presents and departmental administration. It wasn't long before even the direct payment of annuities to the First Nations was discontinued. The moneys were applied instead to the costs of their schooling, agricultural implements and clothing. See also Leslie, 1985: pp. 95-100.

> educating their children, realizing the future benefits. However, the bands were so poor they could not afford any alteration in the annual presents, even if that meant their children could not attend schools.164

This dialogue continued for some time. The following excerpt comes from a petition sent to the Governor of Lower Canada by representatives of the Iroquois, Nipissings and Algonquins in 1837. They explain their understanding of the presents (that they were part of a Crown obligation), and also describe the dispossession which was undermining their material prosperity and their social and economic institutions:

> [...] My father, these presents (since we have been taught to call them thus) are not in fact presents: they are on the part of the Government a sacred debt promised to our parents by the Kings of France to pay them for the lands they abandoned to them, and confirmed by the Kings of England since the cession of the country, and until now punctually paid and acquitted.
>
> Our ancestors were used to living from the fruits of their hunting, but that is impossible for us, and will be the more so for our descendants: the march of European immigration has invaded all our hunting grounds, and in cutting down the immense forests which coverred them, has chased away all the wild animals whose flesh served us as food, and whose rich furs made us a profitable commerce with the adventurers, which sufficed for all the other needs of our lives. Now that this resource has been ravished, what then will our children do, if already, before they are born, they are deprived of the only means of subsistence that they can hold from their fathers? [...]

The Chiefs closed by expressing their hope that [...] you will use your influence with our Sovereign so that he will not draw a line of distinction between his children and their fathers, and that he will continue to the former, if not as a debt, at least as a favour, the annual distribution of the equipment that the latter have the custom to receive. [...]165

The Committee of the Executive Council of Quebec concluded that it was not possible to commute the presents until the First Nations were self sufficient, noting at the same time that the dispossession of lands and resources would continue to undermine any efforts at engendering the stated goal of self-reliance.166 They rejected proposals from other officials that the presents be

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164 Great Britain, *Parliamentary Papers*. House of Commons, Vol. XXXIV: pp. 269-274, cited in Leslie, 1985 at p. 42.

165 *Correspondence respecting the Indians in the British North American Colonies between the Secretary of State and the Governors of the British North American Provinces since the 1st of April 1835*, (Ordered to be printed by the House of Commons, 1837): pp.62-63: Petition of the Chiefs of the Seven Nations to the Earl of Gosford, Governor in Chief, Lower Canada, 3 February, 1837.

166 Report to Earl of Gosford on the Indian Dept, from a Committee of the Executive Council of the

unilaterally withdrawn or that the Crown impose restrictive eligibility requirements: Instead the Committee adhered to Gosford s approach to consult with the Indian leadership through a series of formal councils .167

In their final 1837 report, the Committee highlighted the matter of Indian consent, and concluded that [...] an entire Discontinuance of the Presents (would be) an Act of Injustice and Impolicy, unless effected in the Way of Commutation, and with the entire Consent of the Indians themselves. 168

In the same year, Lord Glenelg wrote to Lord Durham and stated that the annual presents should be paid in agricultural supplies and implements instead of guns, ammunition and nets, to wean the Indians from those Habits and Associations which form the principal impediment to their Civilization .169 Here we see the view that Indian behaviour could be modified by transforming the nature of material transfers from the Crown to the First Nations.

In 1839, Justice James Macauley undertook yet another inquiry into the Indian Department and the annual presents. At that time, in Upper Canada 6,000 resident Indians (as well as 3,000 visiting Indians from the United States) were in receipt of the annual presents, and in Lower Canada 3,000.170 He concluded that the loyalty and alliance of the tribes was still required because of the continuing fallout from the 1837 rebellions, and ongoing threats from south of the border. Therefore, it would not be in the interests of the government to terminate the presents. He did state, however, that they should be gradually substituted for farming tools and European clothing, although not without the proviso that no deviation could be advised without their [the Indians] full consent and approbation .171

Province of Quebec, 13 June, 1837, in *Correspondence respecting the Indians in the British North American Colonies between the Secretary of State and the Governors of the British North American Provinces since the 1st of April 1835.* (Ordered to be printed by the House of Commons, 1837). See also Leslie, 1985: pp. 41-44.

167 Leslie, 1985: p.41.

168 Great Britain, *Parliamentary Papers*, House of Commons, Vol.XXXIV: p. 256, quoted in Leslie, 1985 at p.41. See also Leslie at p.42, where he notes Committee s view that the presents were [...] not only as compensation for land taken from the Indians, but were Proof of the continued Protection of the Crown . Unfortunately, this total dependence on the Crown had resulted in their helpless condition . [...] It would not be fair for the Crown suddenly to abandon the Indians and compel the non-Native citizens of Lower Canada to assume the heavy costs associated with Indian Administration.

169 British Parliamentary Papers - *Correspondence Returns and Other Papers relating to Canada and to the Indian Problem Therein*, Vol.12 (Shannon, Ireland: Irish University Press, 1839): pp. 233-237: Glenelg to Durham, 22 August, 1838.

170 Leslie, 1985: p.49.

171 NAC RG10 Vol.718, Macauley report of 22 April 1839: p.336, quoted in Leslie, 1985 at p.50.

The Bagot Commission of 1842-44 reiterated the view that the nature of the presents had to change, and went further - it recommended that entitlement be restricted and ultimately reduced through a number of measures: government was to develop and maintain a list of eligible Indians; half breeds would not be eligible; Indian women living with white men would be struck off; and children in industrial schools would not receive presents at all. Those Indians still engaged in hunting would still receive ammunition and blankets, but those on reserves would get farming implements and European clothing. As well, individuals who received location tickets to reserve lands would receive a one-time grant of farming implements in lieu of all further claims to presents.172

In recommending these measures, the Commission was repudiating the principle of non-interference that had for so long been a hallmark of Imperial policy. In the event, however, these recommendations were not implemented, except for a reduction in the amount of guns & ammunition, and an increase of more civilized products.173

By 1845, the Crown asked some of the tribes if they would agree to forgo that portion of the presents which they had received as gunpowder, and have the funds dedicated instead to education. The following year, Chief Clerk of the Indian Department George Vardon reported to the Select Committee:

> From the information which I have derived from the Superintendents in Upper Canada, the Indians are fully satisfied with the proposed arrangement; as regards Upper Canada some funds in lieu are to be applied to education [...] there is no settled communication in lieu of these allowances, but it has been held out to the Indians that something in the way of education would be done for them in return for a stoppage of the said supplies, with which they seemed satisfied.174

In 1852, presents in Upper Canada were commuted to a cash payment, which was diminished each year thereafter until they were finally terminated in 1857-58.175 Ignoring over a century of practise, Imperial representatives took the position that the Indian Department, and the presents, were simply matters of policy, and had never been established pursuant to any formal pledge on

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172 Leslie, 1985: pp. 85-86; 88.

173 Leslie, 1985: p.98.

174 Canada, *Journals of the Legislative Assembly of the Province of Canada, 1846*, Appendix to Vol.5: pp.1-2. See also Schmaltz, 1991: p.181.

175 Schmalz, 1991: p.167; Milloy, 1992: p.57.

the Crown s part.176 Indian consent was neither sought nor obtained.

We can see here a transformation of the nature and scope of fiscal relationship. Against a backdrop of dramatic dislocation and dispossession on the part of the Indian nations, and dynamic expansion on the part of the colonies, officials were using fiscal and material transfers as a means of obtaining changes in Indian practise and behaviour. At this time, the Crown was trying not only to reduce and eliminate the presents, but also change the nature of the transfer so that it would encourage the civilization of the Indian nations .177

- Devolution.

We have already mentioned how in the period preceding Confederation, the Imperial government began to devolve responsibilities to local governments - partly as a response to calls for more self government , but also largely as a response to the need for expenditure reduction. This process began in earnest during the 1820's, when the Colonial Office and the Indian Department were compelled to introduce measures to reduce costs. As we have already observed, fiscal retrenchment was a major rationale behind the Civilization programme which was adopted in 1830.178

In Upper Canada, this meant that by the early 1840's, the province had effective control over lands and resources:

> As far back as 1835, the British Colonial Secretary had pledged that the Canadian land system would be made subject to local legislation. In 1837, the Crown had assented to the first Public Land Act of Upper Canada. Under the Act of Union in 1841, the Crown surrendered control of land revenues to the provincial legislature in exchange for a *civil list* - that is to say, payment of the salaries and benefits of judges and other officials - though it required acts relating to the Crown lands to be reserved for royal assent. The latter stipulation would finally be dropped in 1854.179

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176 Milloy, 1992: p.57. See also NAC Quebec Indians Generally (Matheson Blue Book) at p.130, letter from Mr. Labouchere, Secretary of State for the Colonies, 15 August, 1856: "It has long been settled that the general presents to the Indian Tribes, which are in progress of Annual reduction shall cease in 1858. Before this decision was adopted, the two questions whether the continuance of the presents was required by good faith, and whether it conduced to the civilization and welfare of the Indians were fully considered and both were decided in the negative. This decision therefore will remain unaltered."

177 Thalassa, 1994: p.130.

178 Leslie, 1985: p.9.

179 Lillian Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968): pp. 256-57. Cited in James Morrison, *The Robinson Treaties of 1850: A Case Study* (report prepared for RCAP, 31 March 1993): at p. 14.

Both Leslie and Milloy argue that the trigger for increased devolution from the Imperial government was the decision in Britain in 1846 to opt for free trade as the economic model for the Empire, instead of the mercantilist economic system which had prevailed up to that point: Autonomy in trade opened the door for political autonomy and devolution.180 This process is very similar to current events in Canada - the structural adjustment which is now underway, free trade, globalization, shifts in federal-provincial powers, and fiscal retrenchment.

The Imperial government granted responsible government to the United Canadas in 1849. Up until then, settlers had relatively few powers of self government (this had led to the American Revolution and was also a factor in the Rebellions of 1837). Now, Britain was prepared to devolve more self government powers to the colonies, and in return the colonies would pick up the costs of such governance. Lord Grey, the Colonial Secretary, stated his objectives clearly to Lord Elgin: now the Canadians have self-Government so completely granted to them they aught also to pay all its expenses .181

This was to include the expenses of, and responsibility for, the Indian Department. The prospect did not sit well with many settlers, who did not want to pay the costs of maintaining the Indian Department themselves. It also aroused fears on the part of those whose sympathies lay with the First Nations, because it was a dramatic departure from the tradition of separating local settler governance from Indian Affairs. In Milloy s words, the imperial government was no longer prepared to continue an intervening, mediating role between colonist and native community. 182

This abandonment, along with the new emphasis on assimilation instead of simply civilization, would signal the next major change, which was an end to the official policy of non-interference. Direct legislative and operational intervention in the internal affairs of the First Nations, their economic, social and political institutions and practises, would become the norm. In 1850, the Legislative Assembly passed two pieces of legislation, *An Act for the Better Protection of the Lands and Property of Indians in Lower Canada*, and *An Act for the protection of the Indians in Upper Canada from Imposition, and the property occupied or enjoyed by them from trespass and injury*.

Generally, these laws were intended to regulate the conduct of settlers *vis a vis* Indians and

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180 Milloy, 1992: pp. 55-56; 61-62. See also Leslie, 1985 at p.120: The result, at least for Indian Affairs, was that Imperial financial retrenchment once again became a dominant theme and colonial resistance less feasible. The Colonial Office, driven by the devolutionist ideology of the Little Englanders , sought wholesale reductions in the costs of the civilization programme, which eventually forced Imperial authorities to abandon the programme altogether in 1860.

181 NAC CO 42/595, Earl Grey to Lord Elgin, 22 March, 1848: cited in Milloy, 1992 at p. 56.

182 Milloy, 1992: p.59.

Indian lands, and to provide a legislative basis for Crown protection of Indian interests. However, the Lower Canada legislation included, for the first time, a legal definition of who was (and was not) Indian 183, and thus began the first chapter in what was to be a long term intrusion into the internal affairs of the First Nations (often under the pretence of protection or advancement).

It is at this time that we see a marked change in Indian policy - instead of simply civilizing the tribes but leaving their collective identity and internal institutions intact, the new focus was on aggressive de-tribalization and the assimilation of Indians as *individuals*. In 1857, new legislation was adopted to provide a legislative base for this intrusion.184

> The *Act for the Gradual Civilization of the Indian Tribes of the Canadas* was intended to encourage the progress of Civilization among the Indian Tribes [...] and the gradual removal of all legal distinctions between them and Her Majesty s other Canadian subjects . Criteria for enfranchisement were established, and monetary and financial inducements were included to entice members. It is noteworthy that the focus was on individual Indians, and not on the collective.185

This legislation, a precursor to the consolidated *Indian Act* of 1876, went beyond the protective measures contained in earlier legislation and provided for the direct intrusion into the internal affairs of First Nations. Many tribes protested vigorously against this legislation, but government officials were no longer concerned about First Nation consent or dialogue.186

In 1858 the Imperial government made it known that the grant for the Indian Department would be reduced by 50% the following year, and eliminated completely by 1860. In the words of one Colonial Office official, the Province [...] should bear the burden of protecting the original possessors of the soil for it is they who enjoy the profits. 187 What it meant in practical terms

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183 Province of Canada, *Journals of the Legislative Assembly of Canada (JLAC):* Statutes of Canada (13-14 Vic., cap.74), 10 August, 1850; (13-14 Vic., cap.42), 10 August, 1850. See also Leslie, 1985: pp. 100-101

184 SC, 1857, 20 Vic, 3rd Session, 5th Parliament (Toronto: 1857): p. 84. See Milloy, 1992: pp. 41-44. At p.42: Clearly, as established by the Act, civilization took on a new meaning - assimilation. Tribal dissolution, marked both by the gradual reduction of tribal membership through enfranchisement and by an accompanying erosion of the tribes land base, became the goal.

185 *JLAC* Statutes of Canada (20 Vic., cap.6): 10 June, 1857, quoted in *The Indian Act: Protection, Control, or Assimilation? A Review of Crown Policy & Legislation, 1670-1996* (Ottawa: Assembly of First Nations, 16 September, 1996): at p. 8. See also Leslie, 1985: pp.131-132.

186 Milloy, 1992: pp.43-46. Also Leslie, 1985: pp.131-132.

187 FT Elliot, Assistant Under Secretary for the Colonial Office, quoted in John Leslie, 1985 at p.155.

was that the local government was responsible both for settler affairs and Indian affairs - a conflict of interest which was contrary to over a century of Imperial policy and practise. It was also contrary to the findings of the Pennefather Commission s inquiry of 1856-58, which called for the continued protection of the Imperial Crown: On [the] grounds of neglect and maladministration on the one side, and helplessness on the other, we believe that the Indians have an equitable claim to the special care and protection of the British Crown [...] .188

The Imperial government s stated intentions led the Provincial government to create a new legislative base for managing Indian Affairs, and to adapt the administrative system that was in place (such as it was). - *An Act Respecting the Management of Indian Lands and Property*, 1860 was passed by the Legislature, and the formal transfer of authority took place on June 1, 1860.189

> When the Pennefather Commission in 1858 was handed London's decision to discontinue outright in 1860 the yearly parliamentary grant for Indian Affairs, it suggested that the Indian peoples would have to be encouraged to cede all their unused lands to the Province of Canada in order to finance their government services. Once again the colonial administration intended to make the Indian Department financially self-sufficient through the sale of Indian lands. While Indians paid for their own benefits, they had no control over the expenditures.190

The process of devolution reached a high point in 1860-66 when the Province s Commissioner of Crown Lands administered Crown responsibilities not only for lands and settlement, but also for treaty making and Indian Affairs.191

Through devolution, the Imperial government during this period off-loaded not only its political and legal responsibilities to the First Nations, but also its fiscal responsibilities. In turn, the provincial government turned this situation to its advantage by using the proceeds of Indian land sales to finance not only Indian relief, but also provincial settlement schemes and general operations.192

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188 Province of Canada, *Journals of the Legislative Assembly of Canada*. Sessional Papers, Appendix 21, Report of the Special Commissioners to Investigate Indian Affairs in Canada (Toronto: 1858), Part III, quoted in Leslie, 1985 at p.133.

189 Leslie, 1985: p.144.

190 Leslie, 1985: pp. 145, 146. Province of Canada. Journals of the Legislative Assembly. Sessional Papers, Appendix 21, "Report of the Special Commissioners to investigate Indian Affairs in Canada", Toronto, 1858, Part III.

191 Thalassa, 1994: p.47.

192 Schmalz, 1991: pp. 166-174. At p. 166, after discussing the maladministration of monies from

- Conclusion.

We have dedicated so much space to developments in Upper Canada because at Confederation it was this model that was adopted by the new federal government and applied across the board to the management of Indian Affairs.193 At the same time, First nation - Crown relations during this period contained all the elements of dysfunction that would typify Indian policy after 1867.

Between 1828 and 1858, there were six Official inquiries into Indian Affairs, focusing on the deteriorating socio-economic conditions of the tribes in the Canadas, the role of the Indian Department, and the spiralling costs of dependency.194 The Bagot Commission, like its predecessors, although intended originally as a blueprint to reduce operational costs and make Indian people less reliant on government, became, in practise, just another milestone in the evolution and development of a more costly, permanent and expanded Indian department which would increasingly regulate and control the daily lives of Indian people in the Canadas. 195

Leslie s conclusions regarding these Pre-Confederation inquiries can be applied just as much to today s circumstances. In this respect, nothing has changed with time:

> [...] the one striking feature is the repetitive nature and unchanging content of the major issues: Imperial financial restraint, continuation or commutation of the annual presents, complaints about departmental administration, description of deplorable Indian conditions, tales of alcohol abuse and trespass by whites on Indian land, recurrent Indian claims and disputes [...]196

Leslie concludes in his study of the Pre-Confederation Commissions of Inquiry that one central

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Saugeen & Nawash land sales, Schmalz concludes: As a result the funds available to the Southern Ojibwa during this transition from hunters to farmers were inadequate. Although they had sold millions of acres to the government, many of them still had to go begging. The *Wesleyan Methodist Report* of 1857 clearly stated the problem: *Though they have many thousand pounds in the hands of others, yet very little is at their own command. The amount of annuities paid to each, is about six to ten dollars a year, which does not supply their real wants one month, the rest of the time they fish, hunt or beg.* See also Johnson, 1986 re: proceeds from Chippewa & Mississauga treaties.

193 Milloy, 1992: pp. 62-63. Leslie, 1985: pp. 175-176.

194 John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828 -1858* (Ottawa: DIAND, Treaties & Historical Research Centre, 1985). See also Aronson & McGuire, 1994: 62617-62619.

195 Leslie, 1985: p. 103.

196 Leslie, 1985: p.177.

fact stymied them all: Indian Affairs were always deemed peripheral to other more important concerns, which undermined the possibility that real solutions could be identified and pursued.

> Indian policy was thus formulated to accommodate admonitions for financial restraint, ensure military security and defence, and foster colonial economic development. The amelioration of Indian conditions formed only a portion of that assignment, and often it was considered the least important. [...]
>
> The paramount reason for the absence of sustained action in the civilization programme centred around the source of financing. For thirty years [ie., 1828-1858] this was an Imperial responsibility and it had a three-fold consequence. First, it confirmed further the special status accorded the Crown in the minds of Native people. Second, it removed responsibility for Indian affairs from local authorities, who therefore had no reason to concern themselves with formulating or even understanding Indian policy. Third, the Imperial government consistently looked to reduce expenses. Only in times of war did the purse strings open; in peacetime the opposite prevailed. Expressions of concern for Indian progress and the improvement of Indian conditions were not accompanied by a corresponding concern from the Treasury, even through Indian policy remained an Imperial responsibility.197

We shall see that these factors are at work today just as they were in the last century.

3.3.4. BC. 1849-1871.

BC did not enter Confederation until 1871.At that time, the Federal government inherited different practise and circumstances than existed elsewhere. The colony of Vancouver Island had been established in 1849, by Royal Charter to the HBCo. The Company entered into some treaties on Vancouver Island, paid for out of HBCo coffers, but generally left the tribes alone. In entering into these treaties, Chief Factor James Douglas - like his colonial counterparts in Central Canada - was faced with fiscal constraints imposed by his paymasters, who from almost the beginning expressed ongoing concern about the Indian expenditures .198

In 1858 the Imperial government passed an Act to establish direct rule over the Island and a portion of the mainland. It was no longer a Company domain, but Douglas had been named governor. As in central Canada, this was a time when the Imperial government was focussed on fiscal retrenchment and devolution, not additional costs and responsibilities. This included such

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197 Leslie, 1985: p. 176; 178-179.

198 Dennis Madill, *B.C. Indian Treaties in Historical Perspective* (Ottawa: DIAND, Research Branch, Corporate Policy, 1981): pp. 14-16

things as the costs of Indian Affairs and the purchase of Indian lands.199 In BC s case, the Imperial government took the position that treaties would be the proper course, but insisted that the local legislature should pay. The colony took the opposite position - that the Imperial government should pay. This impasse was left unresolved, and no further treaties were made.200

Although sporadic Catholic missions had operated in what is now BC as early as the late 1700's, it was only beginning in the late 1850's that concerted efforts to settle, civilize and missionize the local Indian population were carried out, and even then only on the settlement frontier. Although these efforts were evidently not as coordinated (or as well-funded) as similar initiatives in Central Canada, they shared the same objectives of centralization, education, and agriculture. They also attacked traditional systems of social support and income distribution such as the potlatch, although there is evidence that they also sought to protect some of the First Nation land base, and that they tried to foster an alternative economic base.201 However, unlike Central Canada, the missionaries efforts did not find support among BC s settlers or the colonial government (and in fact sparked some hostility).202

Reserves on the mainland were laid out by Governor Douglas in an effort to protect Indian interests. But after his retirement, and in the years leading up to the colony s entrance into Confederation, the new man responsible for Indian Affairs, JW Trutch, undid what measures had been put into place. Reserves were significantly reduced in size. Trutch focused on dispossession & marginalization, not on civilization or development. The result was a significant dislocation of social and economic structures, and dispossession of land. The terms of Union reaffirmed BC s colonial policy and committed Canada to following it.203

In August 1867 Trutch wrote that

> [...] the Indians really have no rights to the land they claim, nor are they of actual **value** or utility to them; and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them

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199 Madill, 1981: pp. 32-34.

200 Dennis Madill, *B.C. Indian Treaties in Historical Perspective* (Ottawa: DIAND, Research Branch, Corporate Policy, 1981): p. 33. For more detail, see also Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* Second Edition (Vancouver: UBC Press, 1992): pp. 151-153. The one anomaly was Treaty No.8 of 1899, which covered a portion of northeastern BC.

201 Fisher, 1992: pp. 119-145.

202 Fisher, 1992: pp. 143-145.

203 RCAP, Vol.I: p.145; Milloy, 1992: pp. 72-79.

> either to the Government or to individuals.204 [emphasis added]

This quote highlights the fact that the whole intention of the latter stages of colonization in BC was to dispossess the First Nations of their capital - the land - and to marginalize them from the benefits of development. This made it easy to later deny any connection between the loss of lands and the onset of dependency - in particular, when it came time to consider the costs associated with such dependency. In fact, the local government refused to fund any ameliorative or development schemes to counter the impacts of marginalization, or to extend even relief in any systematic way. Even inoculation against the ravages of diseases such as smallpox were provided to Indians only as a means of preventing the infection of the settler population.205 The result was that First Nation institutions of social and economic security were severely undermined.206

Trutch s hardline was reflective of aggressive settler interests which did not want to be encumbered with the niceties or the expense of an Indian administration or even a nominal effort at providing remedial measures to account for dislocation or the adjustment of social structures. Even monies received for leases of Indian reserves were apparently not dedicated to Indian interests, and used for general colonial expenses instead.207

All of this affected the Terms of Union which BC negotiated leading up to its entry into Confederation in 1871, and its conduct thereafter.208

> The introduction of responsible government in British Columbia shortly after Confederation only worsened the situation. Responsible government held no advantage to the Indians since no one in government was responsible to them. As in other colonies of

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204 Trutch, *Report on the Lower Fraser Indian Reserves*, 28 August 1867, B.C. Papers: p. 42, quoted in Madill, 1981 at p.34. See also Robin Fisher, 1992: p.164.

205 Fisher, 1992: pp. 115-116.

206 Fisher, 1992 at p.106 observes that international studies have concluded [...] there is a close correlation between losing land, depopulation, and social disorganization among indigenous peoples , and that in BC, there was a quite direct relationship between the Indians removal from their land and the loss of control over their society. Also at p.111: By depriving the Indians of land and making only limited use of Indian labour, the effect of the settlement frontier was to diminish Indian wealth. [...] Settlement [...] often had the effect of subtracting from Indian wealth and thus tended to stultify their culture.

207 Fisher, 1992: at p.170: Apart from taking their land and suppressing violence, the colonial government s policy towards the Indians was largely one of neglect. See also at p.172 re: lease monies from the Songhees reserve.

208 A motion for the protection of the Indians was defeated 20 to 1 in the B.C. Legislature and another, advocating the extension of the Canadian Indian policy to British Columbia was withdrawn. Madill, 1981: 35.

> the British Empire, protecting native interests seemed to be inconsistent with granting self-government to colonists. Neglect by the settlers meant that Indian administration in British Columbia remained a shambles in the two decades after Confederation. The 1870's and 1880's saw the continuation and consolidation of policies designed by settlers to meet their own requirements, while Indian needs continued to be ignored.209

In the years following BC s entrance into Confederation, Provincial officials made every effort to frustrate federal attempts to address First Nation rights or needs. The province staunchly refused to contemplate the extension of the numbered treaty process into the province (Treaty #8 of 1899 remains an anomaly). In doing so, it not only refused to acknowledge the value of Aboriginal interests in traditional lands, but also denied First Nations reliance on the assurances provided in the numbered treaties regarding social and economic development.210

3.3.5. Poor Law traditions continue.

How did settlers deal with their own social development during this period? Generally speaking, education, health and income-support were left to the churches, private charities and local governments. The Poor Law tradition was transplanted unevenly to the new colonies. Nova Scotia and New Brunswick passed their own *Poor Law* legislation in 1763 and 1786 respectively. After the conquest of Quebec, Imperial authorities tried to impose the system in that province, but with the passage of the *Quebec Act* in 1774, it returned to the system of church-managed relief which lasted until 1921. Upper Canada, on the other hand, was explicitly prohibited from passing its own Poor Laws by its 1792 constitution, partly because of the view that, being a frontier full of opportunity, there should be no poverty, and partly because the Imperial government didn t want to pay for it, and the colony did not have the money to finance the system itself . Relief was left to the charity of individuals, family, local communities and the church.

In 1834, there was a major amendment to the English *Poor Law* in response to the rapid industrialization and economic dislocation which Britain was experiencing, and the emergence of the modern labour market . Moreso than previous legislation, it emphasized the need to punish the poor for the crime of poverty .211

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209 Madill, 1981: p.37.

210 See Fisher, 1992 at p. 211: During the 1870's and 1880's the settlement frontier was firmly entrenched. [...] Indian objections to the treatment they received were ignored, and even Indian attempts to organize to help themselves were discouraged. The separation of the races was continued. Isolated in confined rural ghettos, most Indians were unwelcome in the society of settlers. Nor did the settler governments welcome attempts to have Indian rights recognized or Indian needs satisfied. The actions of the provincial government constituted an attack on traditional Indian society and did nothing to replace it with a new way of life.

211 Moscovitch & Webster, 1995: p.15.

> The modern system of public and private social work and social welfare was born out of the expansion of industrial capitalism in the latter part of the 19th century. By early this century, private markets had become the key to the organization of economic and social life. Most individuals and households became, and remain, dependent on the sale of their labour in the market. This new form of social organization created both wealth and economic insecurity. Paradoxically, the growth of this wealth or material abundance ensured that unemployed workers could be taken care of. This dependence on employment and markets created the widely shared risk of unemployment which we have today.212

These structural adjustments mirror the changes in markets and labour force management that are occurring today, in Canada and globally.

Reflecting this change in the mother country, by the mid-1830's, Upper Canada had begun to introduce legislation to manage the poor and displaced, and to provide funds directly to those organizations involved in caring for them. Other legislation provided local municipalities the option (but not the requirement) of collecting taxes to administer relief.213

3.3.6. Conclusions.

From the preceding, it can be seen that despite Imperial statements of policy (such as the Royal Proclamation of 1763), there were significant anomalies in Crown practise related to the First Nations, depending on local circumstances in each province or colony.

Regardless of these differences however, the results were similar if not exact: dispossession, marginalization and increasing interference in the internal affairs of the First Nations. Promises of mutual benefit contained in treaties, as well as promises of social and economic development assistance, were routinely left unfulfilled, or undermined by parallel events.

At the same time, the increasing cost of the Indian Problem was constantly the subject of Imperial scrutiny, while local provincial authorities, given more and more powers of self-government, had no interest in First Nations other than to ensure that they did not impede settler development. There were no institutional structures in place to respond to the results of underdevelopment and dependency in a substantive way. This is the backdrop for Confederation.

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212 *Ibid*: p. 11.

213 *Ibid*: pp. 14-15.

3.4. Confederation.

In 1867, four provinces joined together in Confederation: Ontario, Quebec, New Brunswick and Nova Scotia. Within ten years, British Columbia (1871) and Prince Edward Island (1873) would join them. The division of powers contained in the *BNA Act, 1867* did not consider or accommodate the jurisdiction or rights of the First Nations. Instead, all of the jurisdictional pie was supposedly divided between the federal and provincial governments. Indians were not completely forgotten however: s.91(24) granted the federal government legislative responsibility for Indians and lands reserved for Indians . At the same time, provincial governments were granted legislative responsibility for lands and resources within their boundaries, as well as responsibility for what would later become known as social development . But neither level of government would occupy their respective fields of authority fully for quite a number of years.214

Given the prevailing attitudes of the time, the exclusion of First Nations should not come as a surprise. The process which led to Confederation has been described by some commentators as a dividing of the spoils among factions of the settler community, in ways which subordinated or ignored Treaty rights, fundamental Aboriginal rights and the fiduciary obligations of the Crown. 215

At Confederation, Canada was a very different place than we know now. For one thing, it was tiny compared to today: Quebec and Ontario occupied only the lands to the south of the height of land separating the Great Lakes from the Hudson s Bay watershed (still part of Rupert s Land, the HBCo s preserve), and the country stopped at the Lakehead (now Thunder Bay). A group of committed expansionists, primarily from Toronto but also including a number of monied people from Montreal, set out to enlarge Canada to the west and north, beginning first with the transfer of the HBCo territory, then with the negotiation of BC s and PEI s entrance into Confederation.

3.4.1. Expansion to the West.

The inclusion of Ruperts Land into Canada was no easy task. There were protracted negotiations between the HBCo, the Imperial government and the federal government. In the end, the Company s three key principles were accepted by Canada: a large cash payment, ongoing

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214 Douglas M. Brown, Institute of Intergovernmental Relations, Queen's University, *Aboriginal Peoples and Canadian Federalism: An Overview* (Report prepared for RCAP, August, 1995) at para 110: For example, exclusive provincial jurisdiction over health, education and welfare -- the three largest categories of provincial expenditure since the 1940s -- were legislated if at all in the nineteenth century to preserve these activities in private hands.

215 Brown, 1995: para 54.

revenues from future development, and protection of its fur-trade operations .216 However, there were other interested parties whose expectations also had to be considered. The Red River Rebellion of 1869-70 and the Saskatchewan Rebellion of 1885 provided a backdrop of conflict which reminded the new colonists that the Aboriginal inhabitants of the new territories had to be dealt with. Without the support - or at least the neutrality - of the Indian tribes, the West could not be settled.

As it had been in the Atlantic and Central Canada, treaty making in the prairies was a response to the conflict and to the turmoil which often accompanies structural change. Efforts had to be made to ensure that suitable arrangements were made with the Tribes to allow for peaceful and orderly settlement.217 The objective, from the perspective of the settlers and the First Nations, was to provide for mutual economic and social security, and to obtain assurances - on both sides - that development opportunities would continue into the future.

So began the negotiation and conclusion of the numbered treaties. This process, as applied in the West, bore some similarities to earlier arrangements. The numbered treaties contain clauses for the setting aside of reserve lands, the payment of annuities, and protection of harvesting rights. At the same time, Crown officials stressed the objectives of self sufficiency and progress. The treaty process, however, was coupled with another, seemingly inconsistent goal: assimilation and the extinguishment of rights. We will review these two contradictory elements in the pages that follow.

3.4.2. The Numbered Treaties.

After Confederation, as one of its measures to facilitate the settlement and development of Canada s West and North, the federal government entered into treaty with many First Nations, through what are now known as the numbered treaties, 1 through 11.

These treaties were very similar to those in eastern & central Canada in a number of ways:

-they were a mechanism to prevent conflict, promote coexistence and facilitate economic & social security and development (ostensibly for both parties)
-they were to be perpetual in nature, and representative of a binding commitment for both parties
-the Crown assumed significant discretion over Indian social and economic welfare, and along with this, a fiduciary duty to the First Nations

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216 Frank Tough, Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada s Acquisition of the Hudsons Bay Company Territory , in *Prairie Forum* Vol.17 No.2 (Fall 1992): p.234.

217 Milloy 1992: pp. 80-88.

-the treaties took place on First Nation territory, incorporating First Nation law and practise

But these treaties also differed from those in Pre-Confederation Canada in a number of ways.

-almost invariably they contained explicit mention of social and economic development entitlements (ie., education, health, implements, hunting & fishing equipment)
-there was a quantification of reserve land base (but with no sunset clause on population)
-the written texts contained a basket clause asserting extinguishment and surrender of the First Nation interest in the lands & resources covered by the treaty
-they were viewed by government as one time deals, in contrast to the pre-Confederation treaties which were normally viewed as only part of an ongoing political & economic relationship
-entering into treaty signalled the introduction of the *Indian Act* regime (although the Indian parties were not told this)

The first phase of the numbered treaties began in Manitoba with Treaty No.1 (1871), and ended with Treaty No.7 in what would later become Alberta (1877). During this period, central government authorities were legitimately worried that the First Nations could seriously disrupt, and indeed prevent, the settlement and development of the territory.218

The second phase began with Treaty No.8 (1899, covering parts of what is now Alberta, BC and the NWT), Treaty No.9 (1905 & 1929, northern Ontario), Treaty No.10 (1906, northern Saskatchewan) and Treaty No.11 (1921, NWT). By this time, although the First Nations could disrupt development219, they no longer posed a serious military threat. These treaties, like their predecessors, heralded major changes and the onset of development, but they did not take place against the same backdrop of civil conflict.

It should also be kept in mind that each of these treaties is different: they were negotiated by different First Nations, each with a particular history and set of circumstances. This is evident from oral history, the Treaty Commissioners minutes, and the text of the treaties themselves. Nonetheless, for the purposes of this discussion there are some generalizations which can be made to provide evidence of the overarching issues that were at play.

First, it is clear that the First Nations were seeking economic and social security in entering into treaty with the Crown. At the same time, they were aware that settlement and major changes were coming sooner if not later. Therefore, they also sought guarantees of assistance for their

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218 Milloy, 1992: pp.84-85.

219 For instance, Treaty No.8 was largely intended to provide safe access for prospectors to the gold fields in the North.

continued economic and social development - including health care and education.220

> In making treaties both parties recognized and affirmed one another s authority to enter into and make binding commitments in treaties. In addition, First Nations would not consider making a treaty unless their way of life was protected and preserved. [...] The Crown asked First Nations to share their lands with settlers, and First nations did so on the condition that they would retain adequate land and resources to ensure the well-being of their nations. The Indian parties understood they would continue to maintain their traditional governments, their laws and their customs and to co-operate as necessary with the Crown. There was substantive agreement that the treaties established an economic partnership from which both parties would benefit. Compensation was offered in exchange for the agreement of First Nations to share. The principle of fair exchange and mutual benefit was an integral part of treaty making. First Nations were promised compensation in the form of annual payments or annuities, social and economic benefits, and the continued use of lands and resources.221

That both parties would seek these assurances - particularly regarding economic and social security and development - is self evident. This is entirely consistent with the liberal-democratic political theory developed by John Locke and others:

> To this day, in liberal-democratic theory consent remains the original source of all political authority. [...] What is important about Locke with respect to this consideration of Indian treaties are the economic motives which, he claimed, drove men to unite socially and politically. Consent was clearly tied to men s (and nations) perception of their economic self interest. As Locke explained, no rationale creature can be supposed to change his condition with an intention to be worse .222

Treaty #4 (1874, southern Saskatchewan & small portions of Alberta & Manitoba) provides an example of the context of the negotiations, the Indian demands, and the Crown s assurances which can be generally applied to most, if not all the numbered treaties. The focus on social & economic security and development is inescapable.

> At Treaty 4 negotiations, Commissioner Morris requested that the Queen s subjects be allowed to come and settle among them and farm the land. If the Indian nations agreed,

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220 Milloy, 1992: pp. 88-89. At p.88: The help was to be provided in the context of an adequate land base, with financial support for the process of transition, access to medical help and education by the provision [...] of schools and teachers.

221 Canada, RCAP, 1996, Vol.1: p.174.

222 Locke, IX: p.131, quoted in Thalassa, 1983 at pp.15-16.

> their Great Mother the Queen would see that their needs were met, and the Queen s power and authority would protect them from encroachment by settlement. Treaty commissioners took great care to emphasize the physical aspects of the caring relationship and emphasized that the Indian nations would benefit from treaties with the Queen. They were assured that no harm would come to them as a result of the treaty and that their way of life would be safeguarded.223

The Commissioner s report on the negotiation of Treaty No.6 (1876, covering what is now central Alberta & Saskatchewan) provides another example:

> A spokesman, Poundmaker, then addressed me, and asked assistance when they settled on the land, and further help as they advanced in civilization. I replied that they had their own means of living, and that we could not feed the Indians, but only assist them to settle down [....] I explained that we could not assume charge of their every-day life, but in a time of great national calamity they could trust the generosity of the Queen. The Honourable James McKay also addressed them, saying that their demands would be understood by a white man as asking for daily food, and could not be granted [...]
>
> At length the Indians informed me that they did not wish to be fed every day, but to be helped when they commenced to settle, because of their ignorance how to commence, and also in case of great famine. [...] They saw the buffalo, the only means of support, passing away. They were anxious to learn to support themselves by agriculture, but felt too ignorant to do so, and they dreaded that during the transition period they would be swept off by disease or famine - already they have suffered terribly from the ravages of measles, scarlet fever and small-pox.224

Although Lt. Governor Morris and his fellow commissioners regarded the some of the Indian demands as unreasonable , they did agree that support would be provided to assist in adjusting to a new economy, and that in times of need additional support would also be forthcoming.225 Treaty No.6 was not an exception. Social and economic security & development were key native objectives in all of the numbered treaties. In Treaty No.8, for example, livelihood concerns were the single most important issue to the Indians at the signing of the Treaty in 1899 [...] The Indian people were assured, and it was understood, that Treaty 8 would **protect** rather than threaten

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223 Canada, RCAP, 1996, Vol.1: pp. 167-168.

224 Lt. Governor Alexander Morris report on Treaty No.6, 4 December, 1876, in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based* (Toronto, Belfords, Clarke & Co., 1880) - Facsimile reprint (Saskatoon, Fifth House Publishers, 1991): pp. 184-185.

225 *Ibid.*, pp. 185-187.

their way of life. (emphasis theirs).226 (see chapter #2.9. for more on this)

The written text of Treaty No.6 (similar to most of the other numbered treaties) contains reference to many of the fiscal and material transfers and services sought by the First Nation parties. This was a departure from Pre-Confederation practise, where generally speaking, treaties did not include explicit reference to these matters.227 However in the written versions of the treaties, government draftsmen ensured that most (if not all) guarantees were either conditional, or left to the ultimate discretion of federal officials. The written terms of the treaties often bore little resemblance to what was negotiated and agreed upon at the time.

Some examples from the written text of Treaty No.6 follow:

> And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made **as to her Government of the Dominion of Canada may seem advisable,** whenever the Indians of the reserve shall desire it. [...]
>
> Her Majesty further agrees [...] that the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered [...] **subject to such regulations as may from time to time be made by Her Government** [...] and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government. [...]
>
> It is further agreed [...] that the sum of $15 per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition, and twine for nets, for the use of the said Indians [...] **in the reasonable discretion** [...] **of Her Majesty s Agent having the supervision of this treaty.**
>
> That in the event hereafter of the Indians [...] being overtaken by any pestilence, or by a general famine, the Queen [...] will grant to the Indians assistance of such character and **to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary** and sufficient to relieve the Indians from the calamity that shall have befallen them. [...]
>
> That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians **at the direction of such Agent.**

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226 Treaty No.8 Tribal Association, *A Report Prepared by the Treaty 8 Tribal Association for the Royal Commission on Aboriginal Peoples*, August 1993 (Intervenor Participation Program): p.32.

227 Milloy, 1992: p. 91.

> That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt [...] there shall, during three years, after two or more reserves shall have been agreed upon and surveyed, be distributed each spring among the Bands cultivating the soil on such reserves, **by her Majesty s Chief Indian Agent for this treaty, in his discretion,** a sum not exceeding one thousand dollars, in the purchase of provisions for the use of such members of the Band as are actually settled on the reserves and engaged in cultivation of the soil, to assist and encourage them in such cultivation.228 (Emphasis added)

Other terms related to fiscal and material transfers were not discretionary on the face of it, for instance, $5 annuity for each Indian person, or the $25 annual salary for Chiefs and $15 for Councillors. However, the unwillingness of successive federal governments to raise these rates to keep pace with inflation and the cost of living, and federal interference in matters related to membership and entitlements, demonstrate that these clauses too were ultimately subject to Crown discretion.

This discretionary power contained in the written text of the numbered treaties, combined with the powers bestowed by the *Indian Act*, gave the federal Crown almost unfettered latitude in determining how First Nation social, economic and political conditions would enter into the future. The degree of Crown discretion which would be exercised needs to be considered when one looks at the result (ie., social and economic decay among First Nations).

At the same time, financial priorities would also influence the Crown s perspective on its treaty commitments, and the exercise of its discretion over Indian affairs. Consistent with Pre-Confederation experience, the imposition of self serving fiscal restraints served to justify non-performance of the Crown s treaty commitments, including those related to social & economic development and security.229 Chronic underfunding even meant that the Department s assimilation schemes - like the residential school system - were never adequately financed.230

- Spirit & Intent and Oral History.

On the other hand, it is important to emphasize that the Crown was only one party to the treaties.

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228 Treaty No.6 - Canada, *Indian Treaties and Surrenders* (Ottawa: Brown Chamberlin, 1891) - Facsimile edition (Saskatoon, Fifth House Publishers, 1993) Vol.II: pp. 36-38.

229 Canada, RCAP, 1996, Vol.1 at p.177: The financial situation of the new country also played a large part in the non-fulfilment of treaties and often meant that treaty obligations were seen as a burden on the treasury, with costs to be pared down to the bare minimum.

230 Canada, RCAP, 1996, Vol. 1 at p.187: From the outset, there were serious problems with residential schools. There was never enough funding, and thus the buildings, often badly designed and constructed, deteriorated quickly. Bad management, unsanitary conditions and abuse of the children were more than occasional exceptions to the rule. See Vol.1 Chapter 10 for a full discussion of the residential schools.

The First Nations maintained their own understanding of what was said, what the parties agreed to, and the nature of the agreements reached. In general terms, it can be said that this included: recognition of First Nation authority and jurisdiction; mutual guarantees of non-interference; guarantees of social and economic security and development; a commitment to a perpetual relationship based on the treaty process; and continued access to, and benefit from, traditional lands and resources.

For many years, this understanding was dismissed or suppressed by Crown officials. Beginning in the 1980's however, the Canadian Courts began to recognize the validity of the Indian understanding of the treaties, and the importance of *spirit and intent* (ie., *Simon*, *Sioui*, *Taylor*, etc.). Then, after years of consideration, the Royal Commission on Aboriginal Peoples, in its final report and recommendations, concluded that the treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship , notwithstanding the presence of the so-called basket clauses in the numbered treaties. It also concluded that treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right .231

Since then, the Supreme Court of Canada s recent landmark decision in *Delgamuukw* made it clear that oral history must now be given much more weight than was previously the case:

> This appeal requires us to [...] adapt the laws of evidence so that the aboriginal perspective on their practises, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. [...]
>
> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the type of historical evidence that courts are familiar with, which largely consists of historical documents.232

All of these developments should strengthen the ability of First Nations to advance and justify their understanding of the treaty relationship between themselves and the Crown, including subject matter related to social security and development.

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231 Canada, RCAP, 1996: Vol.5, Appendix A, recommendation 2.2.4.: p. 149.

232 SCC, *Delgamuukw v. The Queen*, 11 December 1997: para. 84, para 87.

3.4.3. Assimilation and Extinguishment.

The Federal Crown.

At the same time the numbered treaties were being made, other measures were being put into place by federal authorities which seemed completely at odds with the commitments contained in them, and the treaty relationship itself. Assimilation became the primary goal of federal Indian policy. The Crown - First Nation relationship was not longer to be mediated by the treaties, but by federal legislation, specifically the *Indian Act*.233 It was assumed that Indians would either become extinct, or become assimilated: in either case, government assumed that any arrangements - by treaty or otherwise - were only of a temporary nature.234 Prime Minister John A Macdonald told Parliament in no uncertain terms that the federal government s objective was to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion .235

No substantive legislative measures were taken to ratify or implement the treaties. Instead, the legislative base for conducting the relationship became the *Indian Act* and related policies. The *Act* contained many elements of the protective role laid out for the Crown in the Royal Proclamation of 1763, but added to those almost unfettered powers to interfere directly in the internal affairs of the First Nations.

Increasingly intrusive measures would be applied through administrative and legislative actions, for instance the *Enfranchisement Act* of 1869; the first consolidated *Indian Act* of 1876; and the *Indian Advancement Act* of 1884.236 The appointment of Indian Agents and the imposition of *Indian Act* regime on reserve served to provide an administrative basis for the imposition of federal law and policy.237 Central to all of these was the illegitimization of First Nation governments and their jurisdiction over internal affairs.

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233 Milloy, 1992: p.94.

234 See Stephen Aronson and Ronald C. Maguire, *Federal Treaty Policy Study* (Report prepared for the Royal Commission on Aboriginal Peoples, 2 November, 1994): para 62514: Coincidental with most of the treaty-making activity was official Canadian government policy to eliminate First Nation cultures and to effect their total assimilation into Canadian society. [...] Canadian governments expected their treaty obligations to last only as long as there were treaty Indians left to assimilate.

235 Quoted in Canada, RCAP, 196, Vol.1 at p. 179.

236 For a full discussion of the *Indian Act*, see John Leslie & Ron McGuire, eds. *The Historical Development of the Indian Act* (Ottawa: DIAND, Claims & Historical Research Centre, 1978). Also Canada, RCAP, 1996, Vol.1, Chapter 9. Also Brown, 1995: paras. 143-144.

237 Milloy, 1992: pp. 92-94.

> The Department s argument, stated succinctly, was that if the various systems of development were ever to produce the civilized Indian amenable to enfranchisement, then native self-government had to be abolished. It had to be shouldered aside and replaced by new institutions allowing unchallengeable departmental control.238

This view had been finding its way to the surface for some time. Consider the recommendation of a Committee of the Executive Council of Quebec, which had investigated Indian Affairs in 1836-37:

> The Committee are of the opinion, that, as a necessary Part of any Change in the Management and in the Condition of the Indians, the existing Institution and Authority of their Chiefs and Councils (standing on ancient usage alone) must either be greatly modified or gradually but totally extinguished, without which the important Point cannot be attained of teaching the Indians to feel and value personal Independence both in Property and Conduct.239

Milloy summarizes:

> Self-government was abolished; the federal government took direct and extensive control of reserves and native nations. Traditional native government was dismissed and replaced by Indian agent controlled models of white government. The control of finance and land passed into federal hands. In brief, the few governmental powers left to native communities placed them, in the complex of Canadian federalism, well below the position of a respectable municipality. [...] Federal control, in fact, became the essence of Canadian-native constitutional relations.
>
> Ironically, though their lands, and what homelands were left to them, became part of the new nation, native communities were left outside Confederation. They could enter only as individuals, and then only as whites [through enfranchisement], having given up their culture in return for citizenship.240

These legislative and policy initiatives did not produce the intended result however: First Nations continued to resist assimilation, and dependency (and population) continued to grow. First

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238 John Milloy, The Early Indian Acts: Developmental Strategy and Constitutional Change , in *As Long as the Sun Shines and Water Flows*, eds. Ian Getty & A. Lussier (Vancouver: University of BC Press, 1983): p.60.

239 Great Britain, *Parliamentary Papers*. House of Commons, Vol. XXXIV: p.262, quoted in Leslie, 1985 at pp. 43-44.

240 Milloy, 1992: p.93, p.97, p. 102. See also Canada, RCAP, 1996, Vol.1, Chapter 9, The Indian Act .

Nation institutions were damaged, but not obliterated. But this failure was met with denial on the part of federal officials, who opted instead for greater powers and tools of control.

> [By the 1920's....] efforts were being made to modify the strategy, although initially the direction of changes was to tighten the screws of the system further than to consider alternatives. Thus, the *Indian Act* of 1927 contained stronger measures to intervene in and control the affairs of Aboriginal societies, including further efforts to develop an agricultural economy in the expectation that social and cultural change would follow in its wake.241

Increased intrusion into internal affairs did not remove the Indian Problem , however, it only made it more acute.

- The Provincial Crown.

These federal legislative and policy initiatives were complemented by the actions of provincial governments, who appropriated traditional lands and resources, and allocated them to other interests, without any regard for the impact on First Nation social and economic well-being. The effect of this dispossession has been well documented and need not be repeated here.242 The point to be made is that parallel to federal efforts at de-tribalization, provincial governments were actively marginalizing and destabilising the social and economic fabric of the First Nations through prejudicial land and resource allocation practises. Significant benefit went to provincial governments and their citizens, while First Nations were made to absorb the severe costs of economic and social decay, without compensation and without remedy.243

Because of the constitutional division of powers, provincial governments, fully aware of the damage being inflicted on First Nation societies and economies, simply pointed to the federal government in the expectation that it should pay for First Nation dislocation through relief.

As development moved north and west in the period following World War I, First Nations who had been relatively untouched found their social and economic security under attack from competing land use sponsored by provincial governments. There was no social safety net available to catch them.

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241 Canada, RCAP, 1996, Vol.1: p.191.

242 For an excellent review, see Canada, RCAP, 1996: Vol.1: pp. 183-184; Vol.2 Part 2, Chapter 4: Lands & Resources .

243 For instance, see Treaty No.8 Tribal Association, *A Report Prepared by the Treaty 8 Tribal Association for the Royal Commission on Aboriginal Peoples*, August 1993 (Intervenor Participation Program). Also, United Chiefs & Councils of Manitoulin Fish & Wildlife Project, *Submission to the Royal Commission on Aboriginal Peoples* (West Bay: 30 June, 1993) (RCAP Intervenor Participation Program).

Ontario provides an example. A report from the Nipigon detachment of the RCMP filed in March 1936 described a grim situation, one which was mirrored in every region of the country as development proceeded into the hinterland:

> During the past five or six months I have made a general survey of conditions among the Indians of this district, and find that considerable hardship and suffering was prevalent among them. [....] A large portion of this area is being prospected, with the result that wild game and fur bearing animals are very scarce. The Indians of this district are getting very discouraged and discontented, as it is practically impossible for them to buy sufficient food or clothing, with the result that they are continually going from one mining camp to another begging, or else applying for relief.244

When confronted with these circumstances, and the fact that the Robinson Superior Treaty of 1850 guaranteed continued (and unfettered) access to fish and game for economic use, the provincial government made it clear that it was not concerned with First Nation rights, treaty obligations, or the social, economic and human costs of its policy. Ontario took the position that fish and game were provincial property to be used for the economic benefit of non-Indians (particularly tourism), and that Canada should simply increase relief payments to maintain life-support for Indians. It certainly did not want to address matters related to the social and economic dislocation which resulted. Typical is a report of a meeting that took place between an Indian Affairs official and Ontario Deputy Minister of Game & Fish Taylor:

> Mr. Taylor was most emphatic in his assertions concerning the wanton destruction by Indians of sport game, particularly deer and moose, and the intention of the Province to put a stop to such practise by severe law enforcement. It was pointed out [...] that not infrequently Indians in the bush are compelled to kill game out of season for food to prevent actual suffering, and even starvation. Mr. Taylor suggested that it would be better in all cases to provide the Indians with sufficient relief.245

Ontario was not alone among provinces in taking this position.246 Ironically (and hypocritically), these same provincial governments now blame the federal government for expecting them to pick up some of the long term costs of this dispossession which they themselves brought about.

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244 DIAND File 492/20-7-7-50 Vol. 1: Corporal R.K. Alcock, Nipigon Detachment, RCMP to Indian Agent JG Burk, Port Arthur, 7 March 1936.

245 NAC RG10 Vol.6747 File 420-8X Part 2: Memorandum, TRL McInnes to H McGill, 26 April 1937. Ontario s intransigence led Canada to reach an agreement with the province to formally abrogate the terms of the Robinson Treaties as they applied to harvesting in 1939-40.

246 See Milloy, 1992: pp. 144-150. Also Canada, RCAP, 1996, Vol.2 Chapter 4 re: Lands & Resources.

At this point it would be useful to consider the linkages between land, resources, institutions of self-government and First Nation social development . One example comes from Quebec, circa 1943. Indian Affairs Fur Supervisor Hugh Conn was reviewing developments related to the establishment and management of Indian-only trapping areas in that province. In doing this, he provides a clear and concise summary of the important connections between the land, resources, and traditional institutions of social and economic security in the context of relief. He also demonstrates that regardless of federal and provincial efforts to undermine traditional institutions, they remained important in the day to day life of the Indian people.

> [The purpose of the game preserves in Quebec is to protect...] the welfare of the Indian. The depletion of fur bearers [...] has resulted in widespread hardship if not actual suffering among the natives and greatly increased relief costs to the taxpayer. This condition was viewed with alarm not only because of the cost but because of the demoralizing effect on the Indian. The dole does not solve any collective economic problem and, for the individual, only prevents death by starvation at the expense of self respect so it was necessary to seek some permanent means of subsistence for these very needy people. Indians who have subsisted by the hunt for centuries are unfitted by temperment and inclination for any other pursuit so the obvious answer to the problem was to restore the fur bearers. [...]
>
> [...] once the white man's practises of written leases and agreements are disposed of we adhere to Indian manners of procedure and pattern our organization after their sound, well established custom. The plan of organization used on our fur preserves is an adaptation and elaboration of the aboriginal plan of land tenure that from time immemorial has served the Indian population. [...]
>
> Under this system, every square mile in the forested portion of Eastern Canada, was owned and occupied by tribes, bands, finally, families of Indians even as we divide into provinces, counties, townships and lots. True there were no fences, surveyed lines, monuments or other artificial land marks separating the various land divisions but they were nevertheless rigidly bounded by such natural land marks as watersheds, rivers and chains of lakes with their connecting portages.
>
> Land held by families was rarely, if ever, sold in our sense of the word but was generally acquired by inheritance. In some cases it was acquired by donation when a hunter gave part of his grounds to a favoured son in law who would not be eligible to inherit because, generally speaking, the land passed from father to son. Occasionally it was held in trust by a widow for her sons who had not reached hunting age and once in a while passed from a widow to her new husband if she remarried.
>
> The ownership of such family tracts was, and in most cases still is, recognized by the other Indians. Within band areas a certain amount of tolerance was granted by owners to

other family groups of the same band. They were permitted to pick berries, fish and shoot moose or caribou for subsistence when passing through but this privilege was not extended to members of another band unless they were travelling to or from one of the periodic pow-wows, thus having a claim on the hospitality of the tribe they were visiting. Fur bearing animals, especially after the arrival of white traders, were regarded as the exclusive property of the proprietor and woe betide the man who trespassed in this respect. Inter-tribal wars and family feuds were the result of such trespasses in the old day and even today violent quarrels and sometimes fistfights occur over trapline rights. This whole system of individual ownership and exclusive rights is part of the recognized moral and economic code of the Indians where they have not had contact with the demoralizing effects of the white man's civilization.

Quarrels, feuds and even minor wars were the inevitable result of deliberate poaching but provision was made for the welfare of such band members who, due to cyclic fluctuations of fur bearers or such catastrophes as extensive forest fires, were unable to make a living on their own lands. In such a case the victim had only to apply to the tribal assembly to be given hunting grounds until his own recovered its full production level. This assistance was not infrequently volunteered by some of the well-to-do members of the band. This practise continues to the present time and as will be shown [...] has proved itself of inestimable benefit to our conservation scheme.247

These comments demonstrate the clear connections between social and economic security, and the continuing survival of First Nation traditional practises related thereto. Unfortunately, federal and provincial governments are not yet prepared to concede that their interference with land and resource use and Aboriginal institutions has any relation to First Nation dependency.

3.4.4. Social policy after Confederation.

- Provinces in no rush to occupy the field.

With Confederation, provincial governments were granted jurisdiction over property and civil rights , which would later be interpreted to include social welfare. But for a long time, provincial governments simply left the field vacant. As in the Pre-Confederation period, social welfare, health and education remained largely the domain of the charitable organizations and churches. Provincial governments did not occupy these areas of jurisdiction fully or consistently:

[...] exclusive provincial jurisdiction over health, education and welfare -- the three largest categories of provincial expenditure since the 1940s -- were legislated if at all in

247 NAC RG10 Vol.6752 File 420-10-1-3 Reel C-8107. Hugh Conn, Fur Supervisor: Report on Fur Conservation Projects in the Province of Quebec, circa 1943.

> the nineteenth century to preserve these activities in private hands. In Quebec in particular, governmental activism was eschewed in favour of a strongly independent role in social matters for the Roman Catholic Church. Not until the Great Depression of the 1930s did the need for public expenditures in provincial domains (and the ability of most provinces to provide them) become so acute that demand grew for a comprehensive approach to revenue sharing in the federal system.248
>
> [...] In 1867, the British North America Act assigned the responsibility for welfare provisions to the provincial governments. At that time welfare was not seen as a major function of government. In the early years after Confederation, public welfare under the provisions of the Poor Law was almost wholly the responsibility of the municipalities. [...]
>
> Between 1867 and 1900, social welfare legislation appeared with increasing frequency. Most of the provisions were concerned with the protection of neglected and delinquent children.
>
> [...] Canada's developing social welfare services in the late nineteenth and early twentieth centuries were influenced by the laissez-faire philosophy. Welfare was not seen as an urgent matter and was left to local government.249

During and following World War I, the role of the state in social programs began to expand. Only during the War did provincial governments begin to act to provide a legislative basis for cash payments to the worthy poor , with Manitoba s adoption of a scheme to provide veteran s pensions to widowed mothers.250

> In the early years of the twentieth century, it became obvious that the constitutional decision to allocate responsibility for welfare to the provinces did not fit the complexities of a modern welfare state, or the need for strong central planning in welfare matters. During the 1920s and 1930s, there were increasing demands for the federal government to assume responsibility for health and welfare matters. Yet under the law, it did not have the power to do so.
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> In 1926, the federal government tried to find a way around the Constitution by passing enabling legislation that allowed for cost-sharing between the federal and provincial governments in the funding of the Old Age Pension Act. This procedure set a pattern for

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248 Brown, 1995: para 110.

249 Turner & Turner, 1986: pp. 54-55.

250 Moscovitch & Webster, 1995: pp. 15-16.

> legislative initiative on the part of the federal government in the field of social welfare. In fact, this cost-sharing arrangement continues to be used, despite numerous proposals to improve it.251

Although Canada introduced the first legislatively-based old age pension program in 1926-27, cost shared with the provinces, and based on needs assessment, Indians were specifically excluded (the *Old Age Pension Act* (1927)).252 The system was expanded in 1937 to provide a pension for non-Indians over 40 with disabilities. Although Canada came up with annual appropriations during the Depression to assist the provinces in paying for greatly increased relief, federal authorities took steps to ensure that this would not be regarded as a precedent. In contrast, some provinces adopted legislation which would obligate them, for the first time, to provide continuing relief to the unemployed. 253

- The Indian relief system.

The Indian relief system was developed and implemented separately from these developments, with the Department of Indian Affairs taking an active role in civilization programmes and imposing a system of rewards and punishments to induce appropriate behaviour. Needless to say, European concepts of labour and markets were completely alien to traditional indigenous systems of social and economic order. But it helps to explain the approach to Indian policy that was taken by colonial officials in the 1800's.

> The 1834 amendment [to the Poor Law] was predicated on a deep-rooted loathing and fear of the destitute poor. The Canadian Indian policy - which was promulgated before the Indian relief policy - was also shaped by concerns over idleness, lack of discipline, and lack of industry.[...]
>
> During this period - from the latter part of the 19th century to the early part of the 20th - many Aboriginal people living within the geo-political boundaries of the new country of Canada are confined to something like a large scale workhouse. The reserve, which had first been called into being in the 18th century, becomes the central means of organizing the removal of Indian peoples from their homes to a defined territory. Run by white overseers, the purpose of the reserve was ostensibly to protect the Indian inhabitants from the incursions of the rapacious and violent white settlers. However, within the confines of the reserve the purpose was to change their character, correct their defects and retrain them for a new life. This new life must be either within the confines of the market system

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251 Turner & Turner, 1986: pp. 54-55.

252 Moscovitch & Webster, 1995: p.33.

253 *Ibid.*, p.16.

> and outside the reserve or within the reserve and confined to it. The market economy in Canada like that in Britain could not permit drop-outs - people who engage in a survival economy and do not participate in the wage economy.254

From this discussion, the linkages between social and economic security (and underdevelopment) are clear. We will discuss this at greater length later on in this paper.

Aside from its underlying assumptions, the Indian relief system borrowed a number of other elements from the *Poor Law* system - administration was a local (reserve or Agency-based) matter, and whenever a Band had enough in its trust fund account, costs were charged back against that Band s revenue fund. In fact, from the early 1800's until well into this century, the Department covered all social program costs from Band trust fund accounts whenever the monies were there: this included health care, education, economic development and relief.

Bands who did not have adequate revenue accounts had to line up with other have-not Bands and apply to their local Indian Agent, missionary or HBCo factor to access monies from the federal appropriation for seed, blankets and relief.255 In all cases, Departmental personnel and local Indian Agents had complete discretion over who would receive assistance, and in what amount. This, along with other powers such as the issuance of passes (for travel off-reserve) and quasi-judicial powers, put them in a perfect position to reward good behaviour and punish those who were seen as uncooperative.256 In any event, annual appropriations were never enough to meet growing needs resulting from increasing population and dispossession.

There were also anomalies in the application of the general practise outlined above. Evidence demonstrates that the Department of Indian Affairs did not in all cases restrict relief and medical assistance, or even education, to on-reserve residents. In Quebec, for instance, because many First Nation communities did not have reserves, these services (inasmuch as they were available) were distributed to First Nation people wherever they resided by a combination of Indian Agents, HBCo staff, and missionaries, up to at least the middle of this century.257

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254 Moscovitch & Webster, 1995: p. 9; p. 12.

255 See Canada, Indian Affairs Annual Reports, 1870-1930. See also Moscovitch & Webster, 1995 at p.26: The policy was simple: Indians shall pay the full costs of their own relief if they can afford it, and all other relief is at the discretion of the Dominion.

256 Moscovitch & Webster, 1995: p.26. See also Canada, RCAP, 1996, Vol.1: p.295.

257 However, local settler authorities clearly distinguished between Indians and non-Indians when it came to providing similar services themselves. As early as 1829, Indian Affairs officials reported the case of an Indian from the Lake of Two Mountains (Kanasatake) who was jailed for debt, and was starving to death. Local authorities had taken the position that he was not entitled to the usual prison ration of bread (because he was an Indian), and the Indian Department staff were seeking authority for 24 days' worth of provisions to keep him alive until other measures could be taken for his survival while inside. (NAC RG8 Vol.268: p.577: Lt Col Napier to Lt Col Couper,

The Province of Quebec also played a unique role in terms of providing financial support. In the early 1850's, the Province passed legislation258 setting aside a number of reserves throughout the province. This same legislation committed the province to provide an annual amount to the federal government (which became known as the Quebec Indian Fund), to be used for relief, education, medical services and economic development for Indians of the province. An annual appropriation was made by the government of Quebec and transferred to the Government of Canada to be spent for these purposes (although it never met the educational, health or developmental needs of Quebec First Nations). The provincial government continued this practise until at least the 1890's.259

In B.C., where Aboriginal title was never dealt with (excepting the Douglas Treaties and Treaty #8), the federal government took a novel approach to fiscal transfers. In the early part of this century, it began providing an annual payment in lieu of annuities for the benefit of B.C. Indians. In 1998, Grants to British Columbia Indian bands in lieu of per capita annuity still appears as a line item in the Main Estimates, in the amount of $300,000.00.260

Regardless, the relief system, in combination with the social and economic dislocation which we have described, had a debilitating effect on First Nation individuals, families and communities. It established and perpetuated a culture of dependency. The process of colonization looked almost complete.

- Costs Remain a Concern.

Because of the expectation that ultimately Indians would disappear, no serious thought was ever given to financing Indian programs , even as costs and dependency increased. We have already documented how Imperial and later federal officials were always concerned at the costs of the Indian Department. As the Native population began to grow once again in the first half of this century and become evermore dependent, this became even more of a concern, particularly since there was no method (aside from increasing annual appropriations) to raise the funds required to meet rising needs. As a result, fiscal restraint, in tandem with assimilation, has remained a hallmark of Indian policy up until today.

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2 September, 1829.)

258 *An Act to Authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, S.C. 14 &15 Vic., Cap.106.

259 See Canada, Indian Affairs annual reports, 1867-1892.

260 Canada, 1998/99 Federal Budget, Chapter 12, Indian Affairs and Northern Development : p. 12-5.

Annual appropriations never met actual need, despite periodic budget increases. Decisions about the provision of health care and relief were not based on the requirements of the situation, but on available dollars.261 This is why, from before Confederation, Bands own trust funds were used wherever possible to cover social development costs. Moscovitch & Webster state that The Department s control of Indian moneys was essential to the relief policy. 262

These financial constraints (along with the wish to modify the behaviour of Indians) led to rigorous criteria: [...] relief was conditional not upon being miserably poor, but upon actual suffering. The principle of actual suffering guided Indian relief from the 1880's to the 1950's .263

The imperative of cutting costs pervaded all aspects of Departmental operations and policy throughout the late 1800's and 1900's. For example, much of the push for Indians to adopt farming in western Canada was prompted by a more general concern that they become more self-sufficient, so as to reduce the drain on federal expenditures. 264

In reviewing federal Indian policy from Confederation to 1940, John Milloy concludes that

> One of the universal factors that underlies the failure of the department to function effectively in any sector, to successfully push forward its agenda, was the persistent lack of funds that militated efficiency and undercut the development and delivery of programs to serve native communities. From the beginning to the end of this period this was an

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261 For instance, see NAC RG10 Vol.2953 File 202,318 Reel C-11,302: Re: appointment of Doctor for Indians living in Upper Gatineau.

262 Moscovitch & Webster, 1995: p.26. They add, This control [...] appeared a promising tool for advancement. The Department was given full powers to seize and manage Indian moneys whether on- or off-reserve, with a view towards paying for relief, education, and other matters of general welfare. Indian moneys could be used to cover the Department s costs incidental to management. (There was a long tradition of this before the 1880 amendments.) At p.27 they also note how the Dept. Required that Band funds be exhausted before application could be made for public funds to cover these costs, and that this led to a rapid depletion of both revenue and capital accounts, particularly in the 1930's. At p.29 they state that in the fifty years following the 1880's, 20-40% of Indian relief was paid for from Band trust funds.

263 Moscovitch & Webster, 1995: p.25. This often led to a callous attitude on the part of officials, as illustrated in the following letter sent to a local store keeper by Indian Agent Sam Devlin of Parry Sound in 1941: I have just received a wail from Charlie _____ to the effect that he is starving to death. If you think that they are really suffering it will be allright to issue them a couple of rations. (DIAND, Indian Field Records, Shannon Files, Georgian Bay District, Carton 15, Box #54: Devlin to Udy, 21 March, 1941)

264 Canada, RCAP, Vol.1: pp. 281-282. See also Milloy, 1992 at p.114 re: chronic underfunding of and partial application of programs .

unrelieved impediment.265

Using education and agriculture, (two of the government s stated goals) as an example, Milloy goes on to show how chronic underfunding compromised the attainment of these objectives.266

During the parliamentary hearings on *Indian Act* revision that took place in the 1940's, departmental officials - with apparent pride - gave an example of the degree to which fiscal considerations had driven federal approaches to policy and legislation:

> [...] by the alteration of the definition of Indian by the Statute of 1876 the Dominion very substantially reduced the number of people for whose welfare it was responsible and by that action passed the responsibility on to the provinces for thousands of people, who, but for the statute of 1876, would have been a federal responsibility for all time.267

The focus on behavioural modification and expenditure reduction was used to justify evermore increasing interference in matters internal and integral to First Nation culture and institutions, but they did not achieve the desired end. In fact, they only made things worse. But the underlying attitudes and assumptions remained: even into the 1960's, the Department took the view that Reserves and Indian status were transitional devices on the road to absorption within mainstream society. Assimilation was still the goal, although it was now solidly recast in the more felicitous language of citizenship and equality [...] 268

- Relief rises with economic and social dislocation.

Needless to say, these developments were taking place as a result of - and parallel to - severe economic and social dislocation. The RCAP final report and many of the submissions made to the Commission during its mandate only add to the wealth of research that documents how Departmental interference in First Nation social and political institutions, combined with provincial actions that undermined First Nation economic security, worked together to perpetuate deteriorating circumstances.

Economic marginalization only added to dependency and relief costs.

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265 Milloy, 1992: p.126. For more detail using Manitoba a an example, see pp.127-128.

266 Milloy, 1992: pp.129-133 (education), and pp. 133-138 (farming). See also RCAP, 1996, Vol.1, Chapter 10 re: residential schools.

267 NAC RG10, 577-127-33 Vol.1A, quoted in Canada, RCAP, 1996, Vol.1 at p.304.

268 Canada, RCAP, 1996, Vol.1: p.315.

> The restrictive constitutional circle drawn by Confederation era legislation around native nations was duplicated in the economic sector by the special licence and by other sections of the Indian Acts which cut native people off from access to the established channels of business and finance making them dependent solely on the federal government.269

At the same time, education and health services, as they were introduced, did not respect the cultural integrity or practises of the First Nations. From the late 1800's through to the middle of the 20th century, health care was provided first by the RCMP, missionaries, Indian Agents and occasionally professional doctors & nurses on contract, all constrained by fiscal limits imposed by the Indian Dept. Responsibility transferred from Indian Affairs to National Health & Welfare in 1940. By the 1950's, NH&W was operating a network of 33 nursing stations, 65 health centres, and 18 small regional hospitals for registered Indians and Inuit . However, these services ignored or infringed upon indigenous customs and practices.270

The assimilation policy adopted by Canada after Confederation was a complete and utter failure. Its two main objectives (assimilation through enfranchisement and native self-sufficiency) were completely unmet.271 However, even though First Nations maintained their collective identity and their own practises and customs, their institutions were sorely damaged, and dependency increased.

3.5. Post-War Canada, 1945-1969.

In the period following the Second World War federal and provincial governments focused on national reconstruction and modernization of the institutions of government. This included the creation and evolution of the social safety net . Ultimately, it also included the dismantling of the old relief system, and increasing provincial involvement in the delivery of services to Indian people.

3.5.1. Development of the social safety net.

The creation of a modern welfare state required a number of legislative and philosophical changes on the part of government.272 Foremost among these was the notion that regardless of

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269 Milloy, 1992: pp. 110-111.

270 Canada, RCAP, 1996, Vol.3: p. 114. For a fuller discussion, see RCAP, 1996, Vol.3: pp. 111-115.

271 Milloy, 1992: p.113.

272 Moscovitch & Webster, 1995 at pp.16-18 outline four legislative & policy changes that characterize the establishment of welfare states : 1. Transformation of minimum income programs from a form of punishment to

an individual s character, income support, educational, social and health programs should be universally accessible. This movement began in earnest after World War II, when the federal government focussed on national reconstruction and a re-alignment of the Canadian state.

In the area of social development, this would mean a combination of 100% federally funded national programs, as well as others which were to be cost shared with the provinces, focussed on income support and social development.

In 1940, the federal government adopted the *Unemployment Insurance Act*, the first social insurance against unemployment in Canada . A constitutional amendment was needed to give the federal government the authority to establish it as a national program (however, it was administered directly by municipalities and provincial governments273). Interestingly from a First Nation perspective, certain categories of employment were excluded from this scheme, including seasonal workers in farming, timber, fishing, hunting and trapping, although Indians were not explicitly excluded.

> [...] in the early 1940s. Leonard Marsh, then director of social research at McGill University, was asked to prepare the report. His study, the Report on Social Security for Canada, was presented to the House of Commons Special Committee on Social Security in 1943. It has been described as a pivotal document in the development of war and post-war social security programs [...]
>
> Two important themes emerge from this excellent document. First, provisions for unemployment are the greater need in any social security program designed for a modern industrial society. Second, there is a clear distinction between universal risks, which apply to all persons, and unemployment risks, which apply to wage-earners only. **Marsh's report was a declaration that society must provide for those needs that are beyond the control of individuals; it was a rejection of the concepts of laissez-faire and worthy and unworthy poor.** (emphasis added)
>
> At the Dominion-Provincial Conference of 1945, the federal government submitted proposals to the provinces to develop a comprehensive welfare program, a rearrangement of fiscal resources economic policies and health and welfare services . The conference, however, did not succeed and the Liberal hopes for a complete package deal for health and welfare services were disappointed.

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a response to need. ; 2. Acknowledgement that unemployment is a function of the market, not a result of poor individual character (this transforms income support from a matter of charity to a matter of right); 3. Linkage between labour market and the household (ie., payments based on numbers); 4. The development of global public social, educational and health services, universally accessible.

273 *Ibid.*, p.20.

> Instead, the federal government proceeded to add piecemeal to the welfare services, as quickly as rapidly rising expectations and a developing sense of social justice allowed. In the first two decades following the war, an impressive, if at times unco-ordinated, series of social welfare legislation and improved social services emerged. At least eight major pieces of social legislation were passed by the federal government in the 1950s and 1960s.274

In 1944-45, the *Family Allowance* was introduced, providing cash directly to families based on the number of children in each household, regardless of income. Indians could benefit, but special arrangements put the administration of this program under the Indian Department, and benefits were most often paid as goods-in-kind. Nonetheless, the impact was significant: the monthly allowance provided for even one child was larger than what had regularly been available annually under the Indian relief system .275

In 1946, Indian Affairs began to move toward formal agreements with local and provincial hospitals to provide hospital care for Indians (although arrangements had been made on an *ad hoc* basis since at least the mid-1800's). Three years later, the Department announced that it would begin to enter into agreements with local school Boards to integrate Indian children into provincial schools. In the same year, B.C. included Indians in the *Hospital Insurance Plan* on the same basis as other residents. In 1950, Canada and B.C. signed the first federal-provincial agreement designed to integrate Indian children into the provincial school system. 276

During this period, amendments to the *Indian Act* provided an entry point for increased provincial intrusion into First Nation affairs. In 1951, s.87 of the amended *Act* (now s.88) provided that:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.277

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274 Turner, & Turner, 1986: pp. 56-57.

275 *Ibid.*,pp. 18-19; p. 34.

276 John Leslie, *A Historical Survey of Indian-Government Relations, 1940-1970* (Ottawa: December 1993 - Paper prepared for the DIAND Royal Commission Liaison Office): Annex C, pp. 61-63.

277 S.C. 1951, c.29.

Since that time, Canada has pointed to s.88 as evidence of provincial jurisdiction over First Nation social development programs.

Between 1947 and 1956 the system of national programs grew through new or amended legislation: the *Blind Persons Act*, the *Old Age Security Act*, *The Old Age Assistance Act,* the *Disabled Persons Act*, and the *Unemployment Assistance Act* (the latter establishing a federally administered program to provide assistance to persons who are in need 278). Most (but not all) of these were based on federal-provincial cost sharing.279

Provincial governments realigned their own legislation to take advantage of federal monies available through these initiatives. Depending on the program, this meant bringing provincial laws into line with federally-devised national standards. It also meant that if provinces wanted to take federal monies for cost-shared programs, they had to provide services and spend a portion of their own monies on Indian people off-reserve. They were reluctant to do so, but were told that there would be no federal monies at all unless they agreed.

At a time when the treasury appeared to be flush with cash, the federal spending power was used as both a carrot and a stick to obtain provincial participation in the evolving social safety net.

3.5.2. Canada seeks increased provincial role.

The combined impact of these measures made the old Indian relief system indefensible. A 1958 Treasury Board Minute on Indian relief authorized Indian Affairs to replace rations with cash. A further Treasury Board decision in July 1964 approved the [...] Department s proposal to adopt provincial or local municipal standards and procedures for the administration of relief assistance to Indians, as being in line with the recent Cabinet decision on the extension of provincial services to Indians . Primarily, this directive was seen as an interim measure to improve standards of assistance for Indians pending negotiation of federal-provincial cost-sharing arrangements which would provide for inclusion of Indians in provincial welfare programs .280 The Cabinet decision referred to above was made in May of that year, when it had authorized the Department to enter into agreements with provincial governments to extend welfare and

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278 Moscovitch & Webster, 1995: p. 19.

279 The pension legislation, like the *Unemployment Insurance Act,* required a constitutional amendment to permit the federal government to undertake what had been interpreted as under provincial authority .

280 Canada, *Federal-Provincial Relations (Attempts to arrive at a mutually acceptable division of responsibility with the provinces in respect of status Indians)* (Ottawa: DIAND, Treaties & Historical Research Centre, September 1976): p.3. The 1964 Treasury Board Minute remains as the primary authority for federal spending on Indian social assistance.

community development services to Indian people, based on reimbursements of 95% (for welfare) and 100% (for community development). That October, a Federal-Provincial Conference on Indian Affairs was held to obtain provincial agreement, but the provinces were not ready to accept Canada s proposals without further study. Nonetheless, all parties agreed that the time had come to find a basis on which the widest possible range of federal, provincial and municipal services could be extended to Indians .281

As the federal government negotiated the extension of cost-sharing programs for the general population in areas of provincial authority, one of its objectives was to have First Nations integrated into the provincial delivery system. At the time, this was not necessarily a matter of simply wanting to off-load costs (although this certainly was part of the motivation): instead, Canada was using the opportunity provided by its increased involvement in provincial programs to advance its long term goal of assimilation and the elimination of federal responsibilities respecting First Nations.

But this objective was not met in any consistent manner across the country. In the ensuing years, only Ontario went ahead to sign an agreement with Canada on Indian welfare, with Canada providing 100% reimbursement to the province for delivery of welfare services on reserve. However, a number of provinces did sign master tuition agreements with Canada to provide for the education of Indian children within the provincial system.282

In 1966 the *Canada Assistance Plan Act* consolidated existing federal income support programs under one open-ended cost-sharing arrangement to cover social assistance, child welfare and related social services, on a 50-50 basis with the provinces. Part I of the plan implicitly included off-reserve Indians - if provinces wanted federal dollars, they had to pay 50% of the costs for these people. Part II provided for additional agreements with the provinces to administer programs to on-reserve Indians, but none of them did (excepting Ontario, which had already signed an agreement the preceding year).283 In 1977, Canada introduced the *Established Programs Financing* program (EPF), which consolidated federal transfers related to health care and education. The EPF, along with CAP, became the basis for federal-provincial fiscal transfers in the area of social development. Canada was able to use its spending powers to intrude into areas of provincial jurisdiction and to set standards and norms for provincial-level policy and delivery.

As we have discussed in chapter 2, Indian policy during this era was based on the assumption that all Indians needed was equality to improve their lot. A quote from former Minister of

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281 *Ibid.*, Summary, p.1; p. 3.

282 *Ibid.*, p.5. See also Moscovitch & Webster, 1995: p.40.

283 Moscovitch & Webster, 1995: p. 41.

Indian Affairs Arthur Laing shows the degree to which paternalism was still a central feature in Indian affairs policy in the 1960's: The prime condition in the progress of the Indian people must be the development by themselves of a desire for the goals which we think they should want. 284

Pressure was mounting for major changes in Indian policy.

> Even before Trudeau came to power there were pressures inside government for a policy review in Indian Affairs. Early in 1967 dissatisfaction with current Indian policy arose in the Privy Council Office (PCO) [...] the deputy minister [John MacDonald] had suggested that the department improve its information services for the public, implying that the problem lay in the public's misunderstanding of the department, not in the department's policies. In the winter of 1967 the department's persistent denial of the seriousness of the situation [Indian poverty] finally provoked strong comment from a senior PCO official:
>
> > I would never suggest that improved information services are a substitute for effective policy ...
> >
> > If the [deputy minister] believes that he can reverse or significantly change this trend by reorganizing his Information Division, I must dissent. If he believes that the government's position with respect to Indians be cured by more effective information, I can only despair. [...] I cannot help point out, however, that certain facts about Indian problems and government solutions will never be covered up by better organized information services. For example:
> >
> > 1/ Indians are deplorably poor; on the Prairies the cash income is $350 a head.
> >
> > 2/ Indians are deplorably unhealthy; their life expectancy is half the national average.
> >
> > 3/ Indians are badly under-educated; their attainment is less than half the national average.
> >
> > 4/ Indian housing is scandalously bad; present government programs will a require a generation for correction.
> >
> > 5/ While Indians are becoming relatively poorer, the federal bureaucracy and federal expenditures are becoming greater.
> >
> > 6/ The percentage of Indians on relief is rising every year; in 1962 it was 32 %; in 1965 it was 39%.

284 Quoted in Weaver, 1981: at p. 48.

> 7/ The government is allocating $16 million to Indian relief and something like $4 million to Indian economic development.285

In 1967, the federal Cabinet considered recommendations regarding changes to the *Indian Act* and the role of the provinces in service delivery. The proposed policy had two central aims:

> (a) To prepare and enable Indian band councils and individuals to take more responsibility, authority, and initiative in municipal type government and economic development.
>
> (b) To facilitate arrangements and understandings with provinces and the territorial governments which would permit the extension of their educational, welfare, health, municipal and other services to Indians according to the same legislation and standards that apply to non-Indians.286

The same memorandum to Cabinet went on to provide a rationale for the transfer of service delivery responsibility to the provinces. It stated that although the *British North America Act, 1867* gave Parliament exclusive legislative jurisdiction for Indians and lands reserved for Indians, and although Canada had been in the practise of providing some services, this in no way meant that Indians were the sole responsibility of the federal government:

> It is true that the provinces are constitutionally incapable of making valid laws in relations to Indians or lands reserved for Indians. However, in the absence of any federal Indian legislation provincial laws of general application apply to Indians. The fact that Indian needs have historically been met by federal policies and programs is also not evidence of constitutional responsibility on the part of Canada. Federal involvement arose initially to carry out treaty obligations entered into by the Imperial government and in part because at Confederation a substantial portion of the Indian population resided on federal Crown lands. [...]
>
> The long range federal objective is to see all services, available to citizens of a province, extended to Indians on and off reserves. The proposed revision of the Act is designed to enable Indians to be treated in accordance with the law and custom of the province in which they reside.[...]287

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285 Quoted in Weaver, 1981: at pp. 51-52.

286 *Memorandum to Cabinet: The Indian Act: Proposed Revision* (draft #3 15 November 1967).

287 *Memorandum to Cabinet*, Draft #3, 15 November 1967.

The memorandum went on to explain that the provinces were generally resistant to the notion of spending money on Indians who did not pay tax, and who were a federal responsibility, but proposed a plan for ensuring a smooth long term transition:

> In view of the provincial attitude and since Canada has traditionally provided and/or paid for most services to Indians, in order to achieve the long range federal objective Canada will likely have to offer interim or transitional financial assistance to provinces undertaking to extend normal services to Indians. It may in fact be necessary to assume the full cost for some period of years. In the long term normal federal-provincial cost-sharing policies should apply and where necessary arrangements can be worked out to offset the tax-exempt position of reserve lands.288

Over the next two years, federal officials engaged in wide ranging consultations with First Nations regarding a renewed Indian policy. Consistent with the past, the First Nation leadership emphasized the treaty relationship, land rights, self government and economic and social development as the bases upon which any new policy should be founded. But, federal officials proved to be just as consistent in their own approach: they ignored First Nation priorities and solutions, and instead stuck to their original plan. The result was the 1969 White Paper on Indian Policy.289

Federal efforts at integrating First Nations into emerging federal-provincial arrangements climaxed in the summer of 1969, when then Minister of Indian Affairs Jean Chretien introduced the White Paper on Indian Policy.290 It called for the complete and final assimilation of First Nations into the Canadian mainstream. Part of this was to be achieved by eliminating any legislative or constitutional recognition of First Nation collective rights and jurisdiction, in order to dismantle the nations and transform them into simply a collection of individuals. This was consistent with Prime Minister Pierre Elliot Trudeau s vision of a Canada that consisted solely of individuals with individual rights, without collectivities like First Nations (or the Quebecois) with collective rights.

The federal government s responsibilities relating to First Nations would be wound down - the Department of Indian Affairs was to be dismantled, the *Indian Act* repealed, Indian reserves abolished, and the treaties terminated. Aboriginal title did not even figure into the policy announcement, since at that time Canada s position was that it was meaningless in law (this

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288Memo to Cabinet Draft #3.

289 For detailed discussion of events leading up to and following the White Paper, see Harold Cardinal, *The Unjust Society: The Tragedy of Canada s Indians* (Edmonton: Hurtig Publishers, 1969); and Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda* (Toronto: University of Toronto Press, 1981).

290 Canada, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: DIAND, 1969).

position did not change until the Supreme Court of Canada s 1972 ruling in *Calder*).

The provinces would take complete responsibility for delivering the full range of generally available services to Indians, on and off-reserve. Canada proposed to continue paying for these services initially, with its contribution declining over time until the provinces themselves would pick up all of the costs. As a transitional measure, a series of economic development initiatives would also be implemented, to bring First Nations out of dependency and into the provincial mainstream.

Similar to the original Pre-Confederation civilization schemes, the abolishment of First Nation institutions and practises was required to achieve the desired result of assimilation and dispersal. These ideas had been percolating through government for a number of years already, and in this regard, the White Paper was simply another step in a long progression of policy and legislative measures that had begun following the Second World War.

It is interesting to note the different approaches to consultation that were taken by the various federal players. Clearly, Indian Affairs officials and Minister Jean Chretien were not concerned with involving First Nations as substantive players in the process of policy reform. However Minister without protfolio Robert Andras, who involved in the process leading up to the White Paper along with Minister Chretien, was apparently more committed to consultation than his colleagues within the Department and the Privy Council Office. But this commitment was only because he felt that it would be the most successful vehicle for getting the Indians to buy in to the termination of their rights:

> [...] Indian consultation was basic to his scheme, for it was through this process that he envisioned Indians negotiating an end to all special rights with the government. [... Andras] conditions for a successful termination plan were social development and Indian participation. The common theme of all these approaches was now obvious: equality was a goal they could all accept for the new policy.291

Despite their differences in relation to tactics, all of the federal players shared the same ultimate vision with respect to the solution to the Indian problem : termination of rights, equality , and assimilation.

3.6. The Recent Past, 1970-1997.

3.6.1. White Paper response, programs & services.

First Nation reaction to the White Paper was unanimously negative, and led to significant

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291 Weaver, 1981: pp. 111; 114.

political mobilization. The provinces (for their own reasons) also rejected the notion of having to absorb the costs and administrative responsibilities of delivering ever increasing services to Indian communities. The reactions were so strong that Prime Minister Pierre Elliot Trudeau was forced to publicly disown the White Paper in 1970/71. Government had to contend with forceful policy alternatives coming from the First Nations292, as well as the provinces general reluctance to consider wholesale transfer of responsibility.

Government took on a new tone in its discussions with First Nations, and stressed a new cooperative relationship. In the following passage, Sally Weaver describes First Nation reactions and expectations when the White Paper policy was publicly withdrawn:

> The delegates were delighted with Chretien's reply, and [Harold] Cardinal welcomed the response as an indication of a new relationship between government and Indians: We are happy with the recognition of yourself that we in this meeting have entered into what you call a new era. Because for the first time our people as a whole are proposing to work with you on a basis of partnership rather than on a basis of directives from your officials. [...] The meeting had demonstrated Indians' hope that the authoritarian, paternalistic approach to policy-making had been abandoned in favour of a constructive partnership between them and the government.293

Indian scepticism remained, however. In response, Minister Chretien began to change the tone of his message in speeches and public statements. He began to emphasize a new ideology in Indian Affairs, stressing cooperation between the department and Indian organizations. Joint examination of problems and mutual support would be in order [...] 294

For instance, in his Unfinished Tapestry speech on March 17, 1971, Chretien stated:

> Indian grievances are legion. Their remedy is a prerequisite for improving their social lot. As long as the grievance persists, the Indian people will be unable to improve their own condition. It is useless to suggest that when social conditions have improved, the grievances will fall away. As long as the grievance persists, the Indian people will not be fully able to come to grips with the problems and will not be able to help themselves to the fullest extent. Unless they do, the problems will remain: for no one but the Indian

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292 See *Wahbung, Our Tomorrows* (Manitoba Indian Brotherhood, October 1971); *A Declaration of Indian Rights: The B.C. Indian Position Paper* (Vancouver: Union of B.C. Indian Chiefs, 17 November 1970); and *Citizens Plus* (Indian Chiefs of Alberta, June 1970). The latter document, also known as the *Red Paper*, was adopted as a position paper nationally by First Nations.

293 Weaver, 1981: pp. 148-149.

294 *Ibid.*: p.186.

people can find solutions to many of them. 295

However, this did not mean that the long term policy objectives of the White Paper were abandoned. Rather, Canada simply opted for a longer term and lower-key approach to meeting its goals.296 In the spring of 1970, David Munro, the Assistant Deputy Minister responsible for Indian consultation and negotiation, wrote his Deputy Minister a long memorandum on the prospects for the White Paper policy, and concluded that:

> [...] we need not change the [White Paper] policy content, but we should put varying degrees of emphasis on its several components and we should try to discuss it in terms of its components rather than as a whole. [...] I have suggested that **we should adopt somewhat different tactics in relation to policy, but that we should not depart from its essential content**.297 (emphasis added)

Munro s advice was that the entire package should be broken down into discrete parts which would then be advanced individually, without losing sight of the long term objective (also known as the stealth approach). But timelines would have to change. The initial White paper timetable for dismantling of the federal role and transfer to the provinces was five years. It was clear that was now unrealistic, if it ever had been. The Department decided to take the longer view and to adjust its expectations as well as its program response.
Canada did not want to enter into substantive discussion on matters related to jurisdiction, self government, or the treaty relationship as proposed by the First Nations in their responses to the White Paper. Instead, the federal government offered program delivery and administration with an emphasis on local control , tied to federal or provincial laws and standards. A veritable deluge of policies and initiatives began, first within Indian Affairs and then across other federal departments. Resources were made available to establish and sustain Indian political and service organizations. Devolution of administrative responsibility to First Nations joined increased transfer to provincial governments as part of the overall federal strategy.

These events took place against a larger backdrop of relative prosperity for Canada. The 1960's and early 1970's were in many ways the golden age of interventionist Big Government - massive public spending in all sectors, megaprojects, and a program for everything. Although there were concerns about the costs of Native programs, these were not paramount given the overall context of program expansion and loose dollars. This was not to last.

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295 Quoted in Weaver, 1981: at p. 187.

296 For more information, see Harold Cardinal, *The Rebirth of Canada s Indians* (Edmonton: Hurtig Publishers, 1977), and Weaver, 1981.

297 Memorandum from David A. Munro to Deputy Minister, Indian Affairs, 1 April, 1970: p.10.

3.6.2. Dependency continues to grow.

The rapid extension of programs and services, however, did nothing to stop dependency from increasing and First Nation health from deteriorating further.298 Although money was being spent, it was not on the scale required to meet needs, and it was not targeted at the sources of dependency. It also continued to infringe on matters internal and integral to First Nation culture and practises.

In a 1983 research paper prepared for the Special Committee on Indian Self Government (Penner report), Thalassa Research noted that:

> In the Department s own words, the effect of the federal government s policies towards Indian people have been to foster dependent and alienated Indian societies which demonstrate many of the characteristics of underdeveloped nations in Africa, Asia and Latin America [...] More importantly, there is evidence to suggest that Indian socio-economic conditions are deteriorating:
>
> > [...] current trends suggest that socio-economic conditions in Indian communities are actually worsening. At the same time, if federal expenditure patterns continue to be shaped by the present policy framework, costs are likely to increase during this decade wihtout producing any appreciable impact on Indian poverty. 299

In the same report, Thalassa highlighted the apparent contradiction in federal spending priorities, with social maintenance costs far exceeding expenditures on economic development:

> In 1978-79, Indian and Inuit Affairs program expenditures (grants, contributions, transfer payments) for social assistance and support accounted for 22.3% of its budget. In comparison, 6.6% of IIAP expenditures were allocated for Indian economic development. In 1981-82, the figures were 27% and 7.5% respectively, showing a consistency of DIA spending priorities.300

As we shall see in chapter #4.1., this spending bias continues up to today.

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298 For specific evidence of the causal link between the extension of programs & services and increased First Nation dependency, see Paul Driben and Robert S. Trudeau, *When Freedom is Lost: The Dark Side of the Relationship between Government and the Fort Hope Band* (Toronto: University of Toronto Press, 1983).

299 Canada, DIAND, *Indian Employment and Economic Development Memorandum* (Discussion paper), quoted in Thalassa Research, *The Econonomic Foundations of Indian Self Government* (Victoria: 1983 - report prepared for the House of Commons Special Committee on Indian Self Government), at pp. 46-47.

300 Thalassa, 1983: p.47.

Another important factor at play during this period was that federal authorities were re-assessing the whole basis of the social safety net that had grown up since World War II:

> During the 1970s, the emphasis shifted from developing new social welfare programs to an evaluation and reorganization of already established programs.301

Federal approaches to First Nation social policy were influenced by this more global process.

> The Trudeau government's response to [... the...] fiscal crisis during the 1970s had four main thrusts: [...]
>
> Second it began to search for ways to reduce its long-term direct spending obligations. Since social programs were among the most visible - thanks to the efforts of the business community to influence public opinion - they became a focus of government attention. While governments could see the inevitability of reducing such expenditures in the long term (if the country was going to rely on the private sector to drive the economy, the needs of investors would come first), cuts could not be accomplished quickly or easily. Most of the government's major social spending obligations were statutory, meaning they would require highly visible legislative action to be changed.

3.6.3. Constitutional uncertainty.

The patriation of the Canadian constitution in the 1980's was resisted by First Nations who wanted their relationship with the Crown clarified before any steps were taken to bring the constitution home . One result was the inclusion of s.35 in the *Constitution Act, 1982*, by which the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed . However, the parties could not reach agreement on defining the nature and scope of these rights. A series of First Ministers Conferences were intended to provide a definition of self-government (among other things), but they were terminated by the government of Brian Mulroney in March 1987 without producing any further constitutional amendments or definition.

This left First Nations at an impasse with other governments, who continued to insist that there were no rights of self government independent of what federal and provincial legislatures were prepared to delegate to First Nations. On the other hand, First Nations continued to insist that they had an inherent right to self government, based in Aboriginal rights and confirmed through treaties. They also insisted that Aboriginal and treaty rights provided a basis for federal obligations and for First Nation powers of self government. The chasm between the positions of the parties was not bridged, and it was largely left to the courts to break new ground in this area. (See chapter #2.)

3.7. The Recent Past: 1984-1997.

3.7.1. Fiscal Retrenchment I: the Mulroney years.

After 1984, fiscal concerns once again began to dominate the national discourse, and a major shift took place in assumptions about the role and nature of government generally. Events in Canada followed those in the United States and Great Britain, where Ronald Reagan and Margaret Thatcher championed small government and business interests, attacking the social safety nets and high deficits that had developed in each of those countries.

The newly elected Tory government of Brian Mulroney came to power promising to reduce government spending and also to reduce the size and role of government generally. As part of this, Deputy Prime Minister Erik Neilsen was directed to undertake an across the board review of government programs & services, known as the Task Force on Program Review (also known as the Nielsen Report and the Buffalo Jump of the 1980's). One component of this review focused on Native programs.303

303 Much of the this section is borrowed from *Fiscal Transfers, Programs & Services: The End of the Line?* (Ottawa: Assembly of First Nations, 17 September 1996): pp. 16-18.

The Native Programs study team s mandate did not consider the Crown s fiduciary duties or the treaty relationship in connection with programs and services. Instead, it focussed on identifying areas of overlap between federal and provincial governments, and programs which could be eliminated, reduced, or shifted to another level of government.304

The report noted that although federal expenditures on Indians had increased to about $3 billion by 1984/85, the money had at best a marginal impact on Indian living conditions: negative indicators still dominated the landscape. It concluded that The continuing dilemma of high government expenditures and socio-economic inertia demands significant adjustments to government policy. 305 The report also stated that Services have been provided far beyond the federal government s constitutional and legislative responsibility .

> After establishing the "need" for structural changes in the relationship between Ottawa and Native people, the [Nielsen] report examines the patterns in federal spending to determine where such changes could be made.306

It asserted that only 25% of these expenditures were directly connected to treaty or *Indian Act* obligations; another 38% would normally be statutory provincial responsibilities; leaving 37% as purely discretionary spending.307

> This breakdown provides the government with the analytical framework to develop long-term strategies for reducing spending on Native people. Translated, it clarifies for the government: 1) its minimal obligations (the 25 per cent stemming largely from treaty and land claims obligations); 2) what might be appropriate for other levels of government to pay (the 40 per cent allocated for health care, housing, and education, which provinces normally provide to Canadians); and 3) what it could cut, if politically acceptable (the 35 per cent it has no legal obligation to spend).308

Some of the Task Force recommendations included:

* Establishing exit-strategies for some programs (code talk for elimination of programs).

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304 See *Indian and Native Programs: A Study Team Report to the Task Force on Program Review*, April 1985 (Ottawa: Dept of Supply and Services, 1986).

305 *Ibid.* p.21.

306 Angus, 1990: p. 26.

307 *Indian and Native Programs....* 1986: pp.21-22.

308 Angus, 1990: p.26.

* Enhancing and consolidating federal-provincial arrangements (by 1985 there were 634 different federal-provincial agreements related to Aboriginal people). This would include getting provincial governments to assist in the management of Indian lands, and eventually having them deliver health services and welfare programs on-reserve.

* Reduce expenditures in the areas of health (particularly non-insured benefits) and education (particularly post-secondary).

* Increasing private sector involvement in program delivery.

* Capping expenditures and turning the responsibility back on native communities to resolve their problems for themselves .

* Reduce standards applied to infrastructure and capital to minimum standards, instead of national standards, to prevent the continued creation of modern suburbs in the northern bush . Introducing user-pay schemes, making Bands pay for a portion of their own capital and O&M. Remove incentives (ie., housing assistance) for families to remain in areas of high unemployment (ie., on-reserve).

* Clarifying the beneficiary issue - ie., who is entitled to programs & service (code talk for reducing entitlements).309

The authors of the Task Force report acknowledged that Indian people would initially resist such changes, but expressed the view that they would get used to it:

> The growth pattern of programs and federal expenditures for native people has created a massive administrative superstructure. In Indian communities it has also nurtured an entire sub-economy as well as a generation whose avocation is to exploit these programs. Instant elimination of this artificial economy would be like the post-war phenomenon of economic readjustment.... Over several years, however, the native world would right itself again with a new structure (e.g. Self-government) with much clearer lines of accountability between the self-governing bodies and their constituents.310

The study team left it with Cabinet to determine how far and how fast the changes should be implemented. Cabinet decided to take the incremental approach.

On April 12 1985, Nielsen tabled the results of the Task Force on Native Programs with the

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309 *Study Team Report:* pp.32-38. See also Memo to Cabinet of 12 April 1985.

310 *Study Team Report, April 1985*: p.38.

federal Cabinet. He noted that the Report needed to be considered in connection with other outside factors - such as constitutional discussions and self government. He also highlighted the fact that the federal government s need to reduce expenditures was an important consideration in the Task Force s work .311

In light of this last directive, Nielsen recommended that:

> .... unlike other Task Force studies, the objective for the Indian and native study should not be immediate expenditure reductions **but the reduction over time of the rapidly escalating trend in federal expenditures.** .... The important financial aspect of these recommendations... is to contain the rapid escalation of future costs that would derive from leaving existing programs unchecked.312 (emphasis added)

This is the same policy position the current Liberal government has taken as a result of the Program Review exercise of 1994/95 (see #3.7.3.1. below).

Most of the Study Team s recommendations were included in the Cabinet submission, although some of the more drastic ones were slated for long term, phased-in implementation. One of the fundamental strategic objectives adopted by Cabinet was:

> **Devolution of native problems to native communities from the federal government** for resolution through negotiation of local community plans based on community priorities and funded on a multi-year block basis.313 (emphasis added)

Implementation of the recommendations was underway soon after Cabinet considered them. In November 1986, Indian Affairs sought and was granted formal authority from Treasury Board to devolve, over time, to the greatest extent possible within existing legislation and current administrative arrangements, its programs and services to Indian people .314 Treasury Board was assured that devolution would not result in any enrichment of existing programs & services. It was also told that devolution as proposed would advance projected expenditure reductions and departmental downsizing:

> The departmental downsizing plan provides for a net reduction of 1230 person-years and

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311Memorandum to Cabinet *Report of the Ministerial Task Force on Native Programs*, April 12, 1985: p.1.

312*Ibid.*

313*Ibid.*

314*Decision of the Treasury Board Meeting of November 27, 1986* re: Devolution Plan.

> approximately $36.0M in annual expenditures (excluding reductions in the Northern Affairs Program). **While part of these reductions is independent of program transfers, other parts are either directly or indirectly contingent on program transfers.**315 (emphasis added)

Other initiatives consistent with the recommendations of the Nielsen Task Force Review were begun in parallel during the same period: Alternative Funding Arrangements (AFA); the Community Based Self Government process; transfer of DIAND programs to specialist departments (policing, economic development, fisheries), etc.

In promoting each of these initiatives, Canada emphasized the benefits to First Nations - increased local control, more flexibility in targeting expenditures, certainty over funding levels, etc. At the same time, many First Nations were told that these changes were inevitable in any event, so that it would be in their interests to go along. This is all true. But at the same time, Canada chose not to disclose how these initiatives were connected to its fundamental long term objectives: expenditure reduction, off-loading to the provinces (with off-loading to First Nations too), reduction of its fiduciary and trust duties, etc. Because Canada was selective in its disclosure, First Nations were not in a position to consider these offers in light of all the material facts.

> One of the central themes of the [Nielsen] report (second only to the reduction of expenditures) is the need for greater local control by Native people of their own affairs. While this theme is always presented in terms of its assumed advantages for Native people, Ottawa would also stand to gain significantly. To an informed public, a transfer of responsibility to Native people would make the government appear responsive to Native demands to "get government off our backs." It would also leave Ottawa less accountable politically and legally for the conditions of Native people - "they're managing their own affairs now."316

None of these efforts considered the issues of dependency and underdevelopment in a holistic manner, or took into consideration First Nation views and aspirations. In this respect, it was simply more of the same, but with a new, cost-cutting imperative driving the agenda.

3.7.2. Increased Obligations a setback.

At the same time, other events were taking place which would make these policy objectives more difficult to achieve. In 1984, the Supreme Court of Canada rendered its decision in *Guerin*, which found that the Crown did owe a legally enforceable fiduciary duty to the First Nations -

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315 *Ibid.*: pp. 12-13.

316 Angus, 1990: p.26.

specifically with respect to the management of reserve lands, but also in a more general sense. This put to rest Canada s long held position that despite its almost complete discretionary powers over First Nations, their assets and their futures, it could not be held legally accountable.

Guerin represented a major setback for the Neilsen Task Force programme, since it generated new liabilities for Canada, and would require significant new operational costs (for instance, to ensure proper management of lands and assets, estates, membership rolls, etc.).

In 1985, Parliament passed a series of amendments to the *Indian Act* known as Bill C-31, whose stated purpose was to remove the sections of the *Act* that had discriminated against women, and to restore status and membership rights. First Nations expressed serious concerns about the impact of Bill C-31 as it was proposed, and some actively challenged it in the courts. At the time, then Minister of Indian Affairs David Crombie publicly gave the assurance that no Band would be worse off as a result of the amendments.

> By 1990, around 80,000 Indians had obtained (or regained) status as a result of C-31, adding 25% to the Registered Indian population. This exceeded DIAND s projections by almost 50%. Needless to say, the unexpected numbers wreaked havoc with DIAND s implementation plan and its budgets. The government s commitment to expenditure reductions in the area of Indian Affairs now ran the risk of running off the rails.
>
> In 1985, the Department had estimated that the total costs for C-31 implementation would be $300 million (including Medical Services Branch (MSB)). By 1989, this figure had been revised upwards to $2 billion, **not including MSB**.317 The costs were substantial. Between 1985 and 1990, expenditures for C-31 non-insured health benefits grew from $2.5 million to $39 million. During the same period, C-31 post secondary education costs ballooned from $900,000 to $27.9 million.318 It has been said that the cost-impacts of C-31 were intentionally under represented by DIAND in order to ensure Cabinet and Parliamentary approval of the Bill, although this has not been independently confirmed. Nevertheless, there is no doubt that the actual impacts must have come as a shock to the officials at DIAND and the Treasury Board.319 (emphasis in original)

Even in the best of circumstances, Bill C-31 and *Guerin* stood to derail the federal government s expenditure reduction targets related to Native Programs. Add to this the fact that the Native

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317*Report of the Auditor General* (Canada, Ottawa, 3 December 1991): pp.334-335.

318*Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Information about government programs & statistics* (Supply & Services Canada, 1990): p.71.

319 Assembly of First Nations, *Fiscal Transfers, Programs & Services: The End of the Line?* (Ottawa: Assembly of First Nations, 17 September 1996): pp. 18-19.

dependency and ill-health were continuing their historic upward trend, and the challenges facing federal policy makers becomes clear.

Over the next few years, efforts were made to salvage the long term objectives of the Neilsen Task force on a number of fronts. The Lands, Revenues and Trusts Review of 1987-1990 was, on a number of levels, an attempt by Canada to determine how it might best contain and/or off-load the fiduciary duties (and costs) arising from *Guerin*.320 Attempts were made to aggressively reduce expenditures in certain areas to make up for increases in others. Part of this involved reducing entitlements and off-loading program costs to provincial governments unilaterally.

> In mid-1993, Treasury Board ordered a halt to off-reserve social assistance charge-backs (with some exceptions), immediately cutting Indian welfare expenditures by 20%, and increasing provincial expenditures accordingly.321 In Manitoba alone, the additional cost to the provincial government was in the neighbourhood of $20 million annually.322 Gone were the old days when Canada used its largesse as an enticement to get provinces to deliver services to Indian people: now it was unilateral off-loading of responsibilities and costs, without apology.323

Devolution plans were also accelerated in many cases, to capture the benefits of the projected expenditure reductions associated with them. As well, many programs were simply eliminated (such as core funding for political associations and Native Communications societies).

More evidence could be presented here, but the main point is that unforseen costs and responsibilities stemming from Bill C-31 and *Guerin* (among other developments) did not sway Canada from the long term objectives of expenditure reduction and off-loading related to Native programs which were contained in the Neilsen Task Force Report. Instead, these impacts were accommodated by making cuts or accelerating the long term plan in other areas. 324

During this period, although the Community Based Self-Government policy had been

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320 See Assembly of First Nations, *The Indian Act: Protection, Control or Assimilation?* (Ottawa: AFN, September 1996).

321 Andrew Webster, *The Impact of the Spring 1994 Federal Budget Changes in INAC on First Nations* (AFN, 26 February 1994): p.7.

322 Yngve George Lithman, *The Feathers of a Bird and the Frosts of Winter - Portability of Treaty Rights in an Era of Restraint and Off-Loading* (1994 - A report prepared for the Royal Commission on Aboriginal Peoples): p.80.

323 AFN, *Fiscal Transfers...*, 1996: p. 19.

324 *Ibid.*

introduced, there was no substantive movement on the issue of First Nation jurisdiction. Federal negotiators took the position that First Nation governments could only obtain delegated authority to administer programs and services, and that moreover these programs and services would remain essentially intact. Efforts were made at constitutional reform (Meech Lake, Charlottetown Accord), but these did not meet with success. The issue of jurisdiction, and the relationship between the treaties, Aboriginal title, and economic & social programs, remained at an impasse.325

3.7.3. Fiscal Retrenchment II: the Chretien Years.

In 1993, Canada elected a Liberal government under the leadership of Jean Chretien. They had a number of major issues to contend with. For one, they inherited major financial problems from their Tory predecessors. Despite Mulroney s professed commitment to deficit reduction, the deficit - and the national debt - had ballooned during his watch.

As well, conventional wisdom regarding the role of government had also changed significantly since the last time the Liberals were in power. Increasing globalization was giving more power to corporate interests, lenders and bond-rating agencies. They were pushing for deficit reduction and smaller government. At home in Canada, political movements like the Reform party were attacking big government and special interest groups , and demanding massive cuts to government programs and spending.

Repeated failure on the constitutional front had not removed the need for some realignment of federal-provincial arrangements. There was increasing pressure from the provinces (this time not just Quebec) for more powers and less federal intervention in provincial areas of jurisdiction. Some provincial governments - like those of Ralph Klein in Alberta and Mike Harris in Ontario - were undertaking their own massive cuts to reduce their size and responsibilities, and expecting the federal government to do the same.

Program Review I & II.

In the spring of 1994, the Liberal government created a Cabinet Task Force under the leadership of Marcel Masse, then Secretary to Cabinet and Minister of Intergovernmental Affairs.326 The Task Force, reporting to the Privy Council Office, was directed to carry out a government-wide review of programs, policy and services with the dual objectives of (a) cutting government spending and reducing the deficit, and (b) overhauling the bureaucracy and cutting down the

325 For detailed information on this period, see Murray Angus, *And the Last Shall be First... Native Policy in an Era of Cutbacks* (Toronto: NC Press, 1990).

326 Peter Di Gangi, *Federal Program Assessment & Review: Buffalo Jump II?* (Report prepared for the Union of B.C. Indian Chiefs, 15 November 1994).

actual size of government. Similar in scope and intent to the Nielsen Task Force that had been carried out at the beginning of the Tories first term, Program Review became central to Canada s policy directions and budgetary planning.

Unlike the Nielsen Task Force (which had been conducted by outside consultants), Program Review was done internally by government officials. Each policy or program group in each federal department was requested to apply seven tests to their area of responsibility:327

1. The public interest test: is the policy or program in the public interest?

2. The role of government test: Is the policy or program one that government should be involved in? Why?

3. The federal test: Should the federal government deliver the program or service? Does it intrude on provincial jurisdiction or spending power? In the case of overlap, should responsibilities be handed over to the provinces? (Areas under consideration included environmental assessment & regulations; social housing; labour market training; health.)

4. The partnership test: Could the program or policy be delivered by the private or non-profit sector? (Code talk for privatization.)

5. The efficiency test: Could the policy of program be run more cheaply and efficiently? (ie., Identify areas in which to reduce cost.)

6. The affordability test: Is the program affordable in today s climate of fiscal restraint? What are the returns?

7. The consequences test: What are the political consequences of terminating or withdrawing a particular program or policy? (Note: this last test did not appear in the information materials which were circulated publicly, but it was central to the internal government process of assessment.)

Although Program Review was publicly characterized as an effort to renew government and make it more responsive, there was little doubt that its real objective was to find ways of reducing expenditures and federal responsibilities. It was a budget-driven exercise from the beginning.

From a First Nation perspective, Program Review suffered from the same deficiencies that

327 *Canadian Federal Government Handbook* (Globe Information Services, Toronto, 1994): p. vii.

affected the Nielsen Task Force process (and the LRT Review). Being focused primarily on expenditure reduction and down-sizing, it did not consider key issues like the Crown s fiduciary and trust duties, the treaties, or Aboriginal rights. At the same time, it was an internal exercise, marred by conflict of interest: how can a fiduciary who has been negligent be trusted to review his own conduct? Notwithstanding these shortcomings, DIAND carried out Program Review between the spring and winter of 1994.

No formal consultations with First Nation leadership took place, during its development or its implementation (in this respect it was similar to the Nielsen Task Force process).328 However, the documentation which was released by DIAND indicates clearly that the Liberal s *Red Book* commitments regarding housing, the inherent right, post-secondary education, claims reform, and treaty process were considered not Red Book Commitments , but Red Book Pressures in the context of Program Review, and subordinated to the overall imperative of reducing costs and the reducing federal presence.329

The outcome of Program Review became apparent in the spring 1995 budget, as well as through subsequent announcements by then-Minister of Indian Affairs Ron Irwin. While other federal departments took significant reductions, DIAND s growth was only moderated to 6% in 1995/96, 3% in 96/97, and 3% again in 97/98.

However, Finance Minister Paul Martin soon made it clear that further reductions were needed to tame the deficit, and in 1995/96 Program Review II began. During that round, DIAND came under particular scrutiny and took additional hits. Budget growth was further moderated to 3% in 96/97 (consistent with the results of program Review I); 2% in 97/98 (a 1% cut from Program Review I); and 2% in 98/99 (an extension of the cap for an addtional year). At the time, Minister Irwin explained that everyone had to make sacrifices to meet Paul Martin s requirements: Fiscal restraint is a reality. All federal government departments and all segments of the Canadian population, including First Nations, are affected. 330

What Minister Irwin did not highlight was that this moderated growth represented a net reduction in the fiscal resources available to First Nations, in light of significantly growing needs. The rate of natural increase (ie., population growth excluding C-31) has averaged around 3% per year for the past decade. Add to this inflation (which has averaged about 1.5% per year

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328 In fact, DIAND refused to comply wtih Access to Information requests for the program reports which came out of the Program Review, on the basis that since they were prepared for consideration by a Cabinet Committee, they were exempt.

329 *Program Review: Programs & Activities Requiring Full Reviews and Strategic Action Plans,* Annex C (DIAND, 1995).

330*Results of DIAND Program Review and 1996 Budget* (DIAND Press release, 6 March 1996).

over the period 1993-97).331 This means that the rate of growth needs to be 4.5% annually just to maintain existing resource levels. Then consider the fact that in many sectors (ie., housing, education), First Nations needs are growing at anywhere from 8-10% a year, and the problems become clear.

Once again, First Nations fell victim to fiscal retrenchment without regard to need, and in the absence of any consideration of federal duties or obligations.

On the policy side, Canada has also worked to redefine (and therefore reduce) the Department of Indian Affairs mandate and responsibilities. This has been done by (re)defining DIA s core obligations to First Nations in connection with programs, priorities and budget planning. According to documents tabled with the Standing Committee on Aboriginal Affairs and Parliament, the Department s mandate is simply to ensure that basic needs are met . These duties are essentially maintenance-level: minimum infrastructure, social assistance, and education up to grade 12. They are also explicitly restricted to First Nation members residing on-reserve.332

Consistent with tradition, the treaty relationship and the Crown s fiduciary duties to the First Nations are absent from the Department s description of its core obligations .

- Federal-Provincial relations.

This federal emphasis on expenditure reduction has not only targeted First Nations. It is perfectly logical that, as the main recipients of federal transfers, provincial governments would also be in federal sights. This had already been in-process for some time: Brian Mulroney s Tories capped the growth of CAP transfers to the three richest provinces (Ontario, Alberta and B.C.) at 5% in 1990, and froze EPF cash transfer levels to all provinces in 1990.333

In the 1995 federal budget, Finance Minister Paul Martin announced that the existing basis of federal-provincial social transfers, CAP and EPF, would be phased out and replaced with the Canada Health and Social Transfer (CHST). Federal direct transfers to the provinces would be reduced by $7.4 billion between 1995/96 and 1999/2000, and replaced by tax points, leaving them to make up the difference by some combination of reduced services, user fees and/or taxation. In return, the CHST would be based on block funding, allowing provinces to fix their own spending priorities regarding health, post-secondary education and income support, so long

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331 Canada, Statistics Canada: Consumer price index, 1996 classification, annual average indexes for the five years 1993-1996. (See Statscan website: http://www.statcan.ca/english/Pgdb/Economy/Economic/econ09a.htm)

332 See Canada, *The Outlook on Priorities and Expenditures, 1995-96 to 1997-98* (Ottawa: DIAND, June 1995).

333 *Ottawa Citizen* Unravelling Canada s safety net , 18 December 1993: p.B5.

as they maintained minimum standards set by the federal government.

As we discussed previously, in the CAP and EPF era, federal cash transfers often made up 50% of total provincial costs related to social programs. However by 1997, reduced federal transfers caused the provincial/territorial share of funding for these social programs to increase dramatically, to over 80%. Generally speaking, these cuts were unilateral, with no prior consensus building or consultation with provincial or territorial governments.334

The provinces had become dependent on these federal transfers. They also had to contend with the impact of their own cumulative deficits accumulated in previous decades. This created signficant problems for them politically and financially, and fuelled their jurisdictional dispute with Canada. Ontario Minister of Intergovernmental Affairs Diane Cunningham explained it this way in 1996:

> Under the Constitution Act of 1867, parliament has the absolute right to spend money on whatever it chooses. Using this spending power, the federal government created cost-shared programs in a range of areas that are clearly the responsibility of the provinces such as heatlh, welfare and post-secondary education.
>
> In many areas such as health and child care, the federal government sets the rules that determine which services are to be delivered. But, the provinces have the responsibility for delivering the programs. Problem is -- the provinces don t have the flexibility to run the programs in ways which best respond to the specific needs of their population nor do they have predictable federal funding.335

Sound familiar? In considering approaches to First Nation jurisdiction in the area of social development, it is important to remember that the provinces are also having their fights with Canada over fiscal transfers and jurisdiction.

As a part of their response to the situation, the Ontario government of Premier Mike Harris commissioned a study by Professor Thomas Courchene of Queen s University entitled *ACCESS: A Convention on the Canadian Economic and Social Systems*.336 The paper was released to coincide with the Premiers meeting held in Jasper in August 1996, and although it did not receive formal endorsement from them, it did influence subsequent discussion.

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334 Provincial/Territorial Council on Social Policy Renewal, *New Approaches to Cnada s Social Union: An Options Paper* (29 April, 1997): p.1.

335 Diane Cunningham, Ontario Minister of Intergovernmental Affairs, 14 June, 1996 (www.gov.on.ca/MBS/english/press/intergov.html)

336 Thomas Courchene, *ACCESS: A Convention on the Canadian Economic and Social Systems* (Kingston: 1996 - A Working Paper Prepared for the Ontario Ministry of Intergovernmental Affairs).

Courchene based his proposals on the following assumption:

> Decentralization is a reality. Powers are in the process of being devolved. More ominously, financial responsibility, especially in the social policy arena, is also being devolved to the provinces. As a result, the federal-provincial economic and financial interface is in full evolutionary flight - there is no status quo.337

Challenging the Premiers and the federal government, Courchene called for a redistribution of federal-provincial powers based on an integrated approach to the economy *and* social programs:

> The end result [...] would be a full transfer from Ottawa to provinces for the design and delivery of health, welfare and education, including the development and enforcement of operational national social policy principles. In return, provinces would commit themselves to preserving and promoting the economic union as well as ensuring the portability of skills and accreditation across provincial boundaries.338

Courchene attacked Canada s continued insistence on enforcing national standards (particularly in Health and the prohibition of residency requirements for welfare) while at the same time dramatically reducing financial transfers. He proposed an arrangement whereby:

> -full responsibility for design & delivery of health, welfare and education would devolve to provincial governments; a complete withdrawal of federal cash transfers in these areas, replaced by tax points.
>
> -allow provinces to develop their own approaches, only bound by very general national standards
>
> -move labour market training to the provinces and integrate all programs related to UI, training, education, welfare at the provincial level
>
> -full economic union between provinces, including removal of interprovincial trade barriers, particularly those related to accreditation which prevent professionals and tradespeople from ease of movement between provinces.
>
> -effective dispute resolution mechanism, which could be triggered not only by governments, but also by corporations and individuals

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337 *Ibid.*: p. 38.

338 *Ibid.*: Executive Summary: p.1.

On an interim basis, he sought a federal commitment to place the oversight and policing role of the CHST cash transfers at the service of a federal-provincial monitoring and enforcement agency .339

Federal-provincial relations are in flux as those levels of government cope with the structural and economic changes taking place nationally and internationally. Provincial governments are actively seeking to ensure that they get more powers in the process. They are not overly concerned with First Nations rights and interests in this connection, except that they don t want responsibility or costs. We will discuss this further below.

- Federal-Provincial-Aboriginal relations.

Federal cuts to provincial cash transfers were accompanied by additional off-loading of responsibilities to provincial governments, including programs and services to First Nation citizens. Part of the redefinition of DIAND s core responsibilities which we have already highlighted includes restricting eligibility to on-reserve residents. The federal *Inherent Right Policy Framework*,340 announced in the summer of 1995, emphasizes the federal position: off-reserve Indians, as well as non-status and Metis people, are primarily a provincial responsibility, both in terms of spending and in terms of jurisdiction.

The reaction of the provinces has been predictable. In December 1995, the Premiers released a joint report on social programs and federal-provincial relations, which noted recent trends toward off-loading and advanced the position that the federal government accept full responsibility for all programming for Aboriginal people, both on and off reserve, with a gradual transfer to Aboriginal communities .341 Their use of the term Aboriginal peoples was intentional, and in stark contrast to the position taken by Canada.

In August 1996, after meeting in Jasper Alberta, the Premiers released a paper on social policy reform which laid out their expectations regarding key federal-provincial issues: health, income support, fiscal relations, labour markets & training, national standards, and - not surprisingly - federal off-loading of costs of services to Aboriginal people. In their words,

> A mixture of federal, provincial/territorial, and Aboriginal-delivered social programs provide for the needs of Aboriginal people in Canada. Financial responsibility for on-reserve costs is generally borne by the federal government. In decades past, federal

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339 *Ibid.*: p.36.

340 Canada, *Federal Policy Guide, Aboriginal Self Government* (Ottawa: DIAND, 1995).

341 *Report to the Premiers* (Ministerial Council on Social Policy Reform & Renewal, December 1995): p.10.

> financial responsibility also extended to Status Indians living off-reserve. However, the federal government has followed a pattern of continuous withdrawal from special financial arrangements to support programming for this group, leaving provinces and territories with an increasing and substantial share of these costs. This off-loading is occurring at a time when federal support for the funding of social programs in general is rapidly diminishing.
>
> This off-loading is also occurring at a time when the special needs of Aboriginal persons with respect to achieving full participation in the labour market are expected to grow over the next few years. For example, by the year 2001, one in four entrants to the workforce in some Prairie provinces will be of Aboriginal descent.
>
> The resolution of issues related to Aboriginal Canadians is vital to the future of our country. The federal government must honour its responsibilities and provide sufficient resources to ensure that services to Aboriginal Canadians are comparable to those provided to other Canadians. Social policy reform and renewal must ensure that appropriate directions are established for the future of social programs and services for Aboriginal people. These issues cannot simply be dismissed by the federal government.342

In making their case, the provinces are invoking Canada s treaty, constitutional, legislative and fiduciary duties to the First Nations to argue that all Indians are a federal responsibility. They go on to assert that the federal government has a general responsibility to cover programs and services for **all** Aboriginal people.343 This continues a long tradition of provincial practice, which is to deny any responsibility for the costs of maintaining Indian dependency, while at the same time, refusing to take responsibility for decisions which perpetuate that dependency (ie., denying First Nations equitable access to lands and resources).

At the same time, the provinces have been scolding the federal government for withdrawing funding while refusing to relinquish its policeman s role to enforce national standards:

> Through the use of the federal spending power, the federal government has unilaterally imposed conditions on programs delivered by provinces in areas of provincial jurisdiction, as a requirement for receiving federal funding. It does so despite the fact that the federal contribution to social programs has been substantially reduced in recent years. [...] provincial/territorial governments must have sufficient revenues to provide

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342 *Issues Paper: Social Policy Reform and Renewal* (The 37th Annual Premiers Conference, Jasper, Alberta, 21-23 August, 1996): pp.11-12.

343 *Ibid.*: p.20.

reasonably comparable basic social programming throughout Canada.344

To counter Canada s tendency toward unilateral action, the Premiers recommended that the provinces and territories themselves develop a national framework to guide the reform process in areas of provincial/territorial responsibility, including a mechanism for settling differences .345

In mid-April 1997, Provincial and territorial Ministers of Aboriginal Affairs met with the national Aboriginal organizations (excepting the AFN) in Regina to discuss social programs. The provincial representatives reiterated their view that the federal government accept their responsibilities for programming for Aboriginal peoples both on and off reserve .346

Later that same month, the Provincial/Territorial Council on Social Policy Renewal released an options paper on social programs.347 The Council made it clear that the provinces as well as the federal government had a role to play in developing and interpreting national principles for social programs, but that the roles had to be determined more precisely. They identified five key elements of a new partnership :

-a cooperative approach to developing and interpreting principles and standards, and monitoring outcomes, in key social policy areas
-establishing groundrules for intergovernmental cooperation
-clarifying the roles and responsibilities of each order of government
-preventing intergovernmental conflicts and developing dispute resolution mechanisms
-developing a new approach to the use of federal spending power.348

(It is noteworthy that this agenda, in many ways, identifies the same issues which First Nations want dealt with in connection with social development.) The paper called for a combination of initiatives, some of which would be inter-provincial (including the territorial governments), others which would be federal-provincial. It also advanced the principle that provinces would

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344 *Ibid.*: p.12.

345 *Ibid.*

346 Canada, Canadian Intergovernmental Conferences Secretariat, News Release, 18 April 1997 (Ref: 860-354/019).

347 Provincial/Territorial Council on Social Policy Renewal, *New Approaches to Cnada s Social Union: An Options Paper* (29 April, 1997).

348 *Ibid.*: p.2.

have to consent to any federal spending in areas of exclusive provincial jurisdiction. Aboriginal programs, and the role of First Nation governments, were not mentioned in this document.

In July 1997, in anticipation of the annual Premiers meeting, the Provincial-Territorial Council on Social Policy Renewal released a progress report to the Premiers.349 It noted that efforts to engage the federal government in substantive discussion on the broad range of issues identified had met with mixed success. With regard to federal off-loading of costs for Aboriginal peoples, the Council noted that although the matter had been discused with the Prime Minister, the federal government had refused to change its position that off-reserve Aboriginal people were a provincial responsibility, in terms of the provision of services and in terms of costs.350

The premiers, at their annual meeting in August 1997, reiterated their offer to negotiate a broad framework agreement on the social union to address cross-sectoral issues such as common principles, the use of the federal spending power and new ways to manage and resolve disagreements. They also called for negotiations to renew Canada s existing financial arrangements in tandem with the proposed discussions toward a national framework agreement on social programs. Not holding their breath, however, they committed to continuing their provincial-level work towards establishing common principles and objectives in these areas.351

Finally, with respect to Aboriginal programs and federal offloading:

> Premiers discussed the issue of federal off-loading, particularly with respect to federal reductions in services and support for Aboriginal peoples. Premiers emphasized their longstanding concern over the federal government s refusal to accept full treaty, historical, constitutional and fiduciary responsibilities for Aboriginal Canadians on and off reserve. As a result, provinces and territories face increasing pressure to make expenditures to meet the needs of Aboriginal peoples.
>
> Premiers agreed that transitional and implementation costs associated with self-government should be the responsibility of the Government of Canada.
>
> Premiers directed Aboriginal Affairs Ministers to begin discussions with their new federal counterpart [Jane Stewart] and national aboriginal leaders on a comprehensive approach to ensure the federal government meets its constitutional and fiduciary

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349 Provincial/Territorial Council on Social Policy Renewal, *Report No.2, Progress Report to Premiers* (July 1997).

350 *Ibid.*: pp. 7-8.

351 Canada, Canadian Intergovernmental Conference Secretariat, News release re: 38th Annual Premiers Conference, New Brunswick, August 6-8, 1997 (Ref: 850-061/009).

> obligations to Aboriginal peoples. The comprehensive approach must recognize that different provinces and territories have different circumstances with respect to the financing, design and delivery of programs and services for Aboriginal Canadians.352

Although the Premiers seem happy to pin jurisdictional responsibility on the federal government with respect to paying for Aboriginal programs, they do not appear motivated to acknowledge that First Nations hold any jurisdiction in these areas.

In September 1997, the Premiers (minus Quebec) met in Calgary where national unity topped the agenda. They developed a Framework for Discussion on Canadian Unity (better known as the *Calgary Declaration*), intended to address Quebec s concerns regarding the Confederation and announced a public consultation process on that issue. The Framework text stated that Canada is a federal system where federal, provincial and territorial governments work in partnership while respecting each other s jurisdictions. First Nation governments and powers were not mentioned - instead, Aboriginal peoples were lumped together in a separate catch-all clause related to multiculturalism.353

In November 1997, leaders of the national Aboriginal organizations met with the Premiers in Winnipeg. All participants reiterated their collective call on the federal government to acknowledge its constitutional and fiduciary obligations towards Aboriginal people, to acknowledge its responsibility to provide programs and services for all Aboriginal people and to end its policies of off-loading these responsibilities to other orders of government. 354

The participants also called on Canada to convene a meeting of Aboriginal leaders and First ministers as soon as possible to address the report of the Royal Commission on Aboriginal Peoples, and to address social issues related to Aboriginal people, a comprehensive process of social policy renewal, the needs of Aboriginal youth and issues related to the implications for Aboriginal people on administrative rebalancing of the Canadian federation . Minister of Indian Affairs Jane Stewart agreed to convene such a meeting, but provided no firm date or agenda. As of this writing, such meeting has not occurred.

Finally, the leadership of the national Aboriginal organizations tabled a Framework for

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352 *Ibid.*

353 Government of New Brusnwick, Premiers agree to consult Canadians on Unity , 14 September 1997 (www.gov.nb.ca/unite/nr1-e.htm)

354 Canada, Canadian Intergovernmental Conference Secretariat, News Release re: meeting of Premiers/Territorial leaders and leaders of National Aboriginal organizations, November 18 1997 (Ref: 850-067/08).

Discussion on Relationships with the premiers, in response to the *Calgary Declaration*. It pulled a clause directly from the Premiers document, with one significant addition:

> Canada is a federal system in which federal, provincial, territorial governments **and Aboriginal governments and peoples** work in partnership while respecting each other s jurisdictions, rights and responsibilities.355 (emphasis added)

The Premiers agreed to receive and consider the Aboriginal Framework, and to pass it on to their legislatures, but it was clear that they were not prepared to acknowledge First Nation jurisdiction in any general or specific sense.

The Premiers met with the Prime Minister and key members of the federal cabinet in December 1997, but Aboriginal programs did not figure prominently (if at all) in their discussions. Provincial leaders pressed for a cooperative framework in which to develop approaches to social policy which would include controls over unilateral federal spending in areas of provincial jurisdiction, but did not obtain substantive guarantees from Canada.

The Royal Commission had the following to say about provincial governments in connection with programs and services:

> Although provincial governments continue to insist that the federal government must assume its full constitutional responsibility for all Aboriginal people under section 91(24) of the *Constitution Act, 1867*, it is impotant to recognize that provincial governments have been major policy plauyers in Aboriginal affairs in the past, especially in urban areas, and do in fact have some financial responsibility for Aboriginal matters. There is a critical need for the federal and provincial governments to clarify their respective legal and fiscal responsibilities.356

From this review however, it appears that the provincial governments are not interested in dealing with Canada and First Nations on jurisdictional issues related to self government. Instead, they are preoccupied with costs.

- Canada-First Nation Fiscal Relations.

In preceding sections, we have documented how rising costs (in direct proportion to dispossession and dislocation) have been a consistent pattern in Indian Affairs , from Pre-Confederation times up to today. Pressure from the treasury to reduce costs related to Indian Affairs has been just as consistent. We have also shown how successive Imperial and federal

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355 *Ibid.*: p.2.

356 Canada, RCAP, 1996, Vol.4: p.545.

governments have used their control over fiscal and material resources in repeated attempts to transform First Nation behaviour - individually and collectively.

The same is true today. First Nation costs have grown significantly over the past twenty years for the variety of reasons already described. They are set to continue growing (see chapter #4.1. in this document). As a result, the federal government has once again taken steps to transform its fiscal relationship with First Nations. Similar to the approach taken with the provinces and the CHST, Canada has opted for moderating and ultimately reducing costs through a combination of block funding arrangements and arbitrary budget caps. This is a continuation of the policy adopted by Brian Mulroney s Conservatives in the wake of the Neilsen Task Force reports.

However, unlike the provinces (who at worst were dependent on Canada for 50% of the costs of social programs), First Nations are almost completely dependent on federal transfers for all aspects of individual and community life. At the same time, at least with federal-provincial relations there is some agreed upon understanding of the relative jurisdiction of the parties. First Nation-Federal fiscal relations have no such agreed-upon basis in policy or law. The federal position is, that aside from treaty annuities and some other legislatively-required entitlements, fiscal transfers have always been at the discretion of the federal government as a matter of policy. As a result, First Nations are in a vulnerable situation.

Recent efforts to transform the fiscal relationship can be traced back to the implemenation of the Neilsen Task Force recommendations in the late 1980's, when devolution and block funding were adopted as federal policy (see above). The Alternative Funding Arrangement (AFA) was portrayed to First Nations as a way of providing multi-year certainty over funding levels while also providing flexibility in terms of spending priorities. These are things which First Nations had been seeking for some time. Despite the fact that the AFA did go some way towards meeting First Nation concerns, the federal government s main objective was to use block funding as a way of moderating budget growth to meet expenditure reduction targets set by the Treasury Board. These expenditure reduction targets did not consider First Nation needs, federal treaty obligatyions, or federal fiduciary duties.

Throughout the late 1980's and early 1990's the federal government proceeded with the devolution of program & service administration, and experimented with a variety of funding mechanisms. In 1995/96 as a result of Program Review, a decision was made to consolidate funding arrangements under a new regime called the Financial Transfer Agreement (FTA).357

All federal transfers from all Departments and agencies to Councils or organizations are to be flowed through one master FTA. Provision is also made for the participation of provinces

357 For more on the FTA, see Andrew Webster, *Issue Summary: DIAND s New Funding Mechanism: The Financial Transfer Agreement* (Ottawa: Assembly of First Nations, 27 July 1996), and Peter Di Gangi, *Fiscal Transfers and Dismantling the Fiduciary Duty* (Sydney: Union of Nova Scotia Indians, 18 June 1996).

depending on circumstances. Like the AFA, Canada has highlighted the benefits of fiscal certainty, flexibility, and accountability, which are valid goals. However, once again, the change in the fiscal relationship is being used by Canada to meet expenditure reduction targets and/or budget caps set by Treasury Board and the Department of Finance, wihout due regard to First Nation needs or federal duties.358 The federal government is continuing its policy of selective disclosure to prevent First Nations from considering the implications in light of all the material facts.

The transformation which Canada wants to bring about through the FTA is very similar to what the federal government has done to the provinces with the CHST. It has changed open-ended funding commitments for social programs into subsidies, and capped the overall amounts available.

> The FTA brings about one very fundamental shift in fiscal relations between Canada and the First Nations. Federal financial support for established programs (such as education), which have normally been seen as open-ended funding commitments, will be capped and transformed into a *subsidy*. The federal contribution will be merely to *assist* Council in delivering that program. The First Nation or Tribal Council will now have primary responsibility for providing the service, and in the case of shortfalls, will be required to raise the monies from other sources. But Canada is making these demands without offering any serious opportunities to address the development needs of the First Nations.359

The fact that FTA s turn open-ended commitments into subsidies means that they are not required to consider need in establishing reference levels. Instead, these are determined arbitrarily, based on the overall Indian Affairs budget and specific regional allocations. The FTA process does not provide an opportunity to seriously discuss actual needs or appropriate reference levels. Those matters remain under Canada s discretion.

At the same time, FTA s include Minimum Delivery Requirements (MDR s) which must be met by the recipient. Depending on the program or service, these MDR s may be based on provincial laws and regulations (ie., social assistance) or federal laws, regulations, or policies. This

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358 See Canada, *Interim Evaluation of the Experiences to Date with Financial Transfer Agreements* (Ottawa: DIAND, Departmental Audit & Evaluation Branch, Corporate Services, October 1996) at p. 41: The earlier agreements provided for the adjustment of core funding through a formula generally based on the population change of the First Nation plus and inflation index. [...] These agreements were typically unidirectional, that is, they did not provide for instances where Department funding decreases. Newer agreements are now bidirectional and include reference levels that are usually tied to national or regional Departmental allocation levels, such as the growth rate in Indian and Inuit Affairs Program expenditures.

359 Assembly of First Nations, *Fiscal Relations - Dependency or Development* (Ottawa: AFN, 20 July, 1997): cover page.

represents an infringement of First Nation jurisdiction in those areas. However, the FTA process does not provide an opportunity to discuss matters relative to jurisdiction as between First Nations and the federal government. At the same time, some First Nations have found that Canada is not prepared to ensure that funding levels are sufficient to even meet the MDR s which are specified. It is foreseeable that in the case of shortfalls, First Nations will be required to exercise their flexibility by drawing from other programs to meet their MDR s. This is the same outcome which the provinces have been complaining about in their experience with the CHST.

In preceding sections we have observed that provincial governments, faced with declining federal transfers for programs such as social assistance, are pressing Canada to let them have more flexibility in designing and delivering those programs (witness the Mike Harris government in Ontario introducing *workfare*). This will further reduce the notion of national standards and give rise to a different approaches in different provinces, based on the political will of the local populations or the political ideology of the government in power. If Canada continues to tie First Nations to provincial standards and MDR s respecting social assistance, First Nations could find themselves drawn even further away from their own approaches to these programs. (This is already happening in Ontario where the Mike Harris government is insisting that First Nations implement *workfare* on reserve.)

On the other hand, Canada is already anticipating future adjustments based on the outcome of federal-provincial negotiations related to social programs. Some versions of FTA s which have been reviewed provide for funding reductions where a re-structuring or re-ordering of the federal mandate and responsibilities negatively impacts the funding available [...] 360

Canada is also focusing on own source revenues and seeking comprehensive audits which show all sources of Council income. However, this is not being done in conjunction with substantive discussions on access to lands and resources or the root causes of underdevelopment.361

3.8. Conclusions.

> Generally speaking, Canada s Indian policy was made up of three elements which were each dependent on the other s success: the appropriation of lands and resources; assimilation; and ultimately extinguishment and dispersal. The first element of the plan succeeded, resulting in the economic dislocation of Indian nations. The second element was an unmitigated failure - Indian nations were not assimilated, although their social and governmental insitutions were destablised. The policy of extinguishment has also failed:

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360 See DIAND s generic FTA draft #4, dated 18 January 1996.

361 DIAND, October 1996, at p.55: The later agreements [...] include specific reference to own-source revenue generation, recognizing that theintent of the agreement is to assist the Council financially in providing established programs, services and targeted projects.

> Indian nations continue to exist and moreover have grown considerably in size. They remain as a dynamic socio-political and physical reality on the landscape.362

It has been federal and provincial practise to ignore the historical record, or treat it selectively, when approaching matters related to First Nations and social & economic policy.

However, there is evidence of the following:

-Crown promised to ensure social & economic security and development, freedom. Often this was in the context of treaty relations.

-Crown assumed position of trust & exercised discretion to the maximum (it essentially suspended Indian political social & economic rights to act on their behalf and in their best interests). It interfered directly in matters internal and integral to First Nation culture and society, without justification or consent.

-the result was a political, financial disaster, and most important, a human disaster

-Crown has a duty to justify its actions and remedy the situation (or provide equitable process to obtain remedy)

-Crown has known this for some time, but refused to respond in a substantive or effective way

-Crown commitments (non-interference, social & economic security & development, etc.) versus Crown abrogation of commitments

-causal effect between federal/provincial action/inaction and First Nation dependency

-regardless of the policy taken in each region (and there are significant anomalies) the result was always the same: dispossession, marginalization, destablisation of economic, social & political institutions and community fabric - incalculable human cost

-denial/avoidance/delay of substantive discussion of the issues in a comprehensive (or even in a sectoral) sense

-preoccupation with cutting costs on the one hand, while on the other hand promoting or allowing actions that created more dependency & hence more costs...

-preoccupation with transfer of responsibilities and liabilities

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362 Thalassa, 1994: p.172.

None of the federal responses to date has led to any substantive improvement at the level of the individual, the family, or the community. As we shall see in chapter 4, First Nation conditions continue to worsen.

Canada, *Federal Policy Guide, Aboriginal Self Government* (Ottawa: DIAND, 1995).
Canada, RCAP, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: CCG, 1996) in 5 volumes.

Canada, *Guidelines for Federal Self Government Negotiators (Number 1): Language for recognizing the Inherent Right of Self Government in Agreements and Treaties* (Ottawa: Dept. Of Justice and Inherent Right Directorate, 22 March 1996).

Canada, *Interim Evaluation of the Experiences to Date with Financial Transfer Agreements* (Ottawa: DIAND,

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Robert S. Allen, *His Majesty s Loyal Indian Allies* (Toronto: Dundurn Press, 1992).

Stephen Aronson and Ronald C. Maguire, *Federal Treaty Policy Study* (Report prepared for the Royal Commission on Aboriginal Peoples, 2 November, 1994).

Assembly of First Nations, *Violations of Law and Human rights by the Governments of Canada and NewFoundland in Regard to the Mashuau Innue: A Documentation of Injustice In Utshmasits (Davis Inlet)*, (Ottawa: Submission to the Canadian Human Rights Commission, May 1993).

Assembly of First Nations, *Fiscal Transfers, Programs & Services: The End of the Line?* (Ottawa: Assembly of First Nations, 17 September 1996).

Assembly of First Nations, *The Indian Act: Protection, Control or Assimilation?* (Ottawa: AFN, September 1996).

Assembly of First Nations, *Jurisdiction and Social Development* (draft #2) (Ottawa: AFN, 1997).

Assembly of First Nations, *Fiscal Relations: Dependency or Development?* (Ottawa: AFN, 20 July 1997).

Assembly of First Nations, *1998 Budget Analysis* (Ottawa: AFN, 26 February, 1998).

Atkey, R. and Lyon, N., *Canadian Constitutional Law in a Modern Perspective*, (Toronto: University of Toronto Press, 1970).

Alexander Blades, *Article 27 Of The International Covenant On Civil And Political Rights: A Case Study On Implementation In New Zealand*, [1994] 1 C.N.L.R.

John J. Borrows, *Traditional Use, Treaties and Land Title Settlements: A Legal History of the Anishnabe of Manitoulin Island* (North York: thesis submitted to the Graduate Programme in Law, Osgoode Hall Law School, York University, 22 September, 1994).

Douglas M. Brown, Institute of Intergovernmental Relations, Queen's University, *Aboriginal Peoples and Canadian Federalism: An Overview* (Report prepared for RCAP, August, 1995).

Helen Buckley, *From Wooden Ploughs to Welfare*, (Montreal-Kingston: McGill-Queens University Press, 1992).

Canada, *Federal-Provincial Relations (Attempts to arrive at a mutually acceptable division of responsibility with the provinces in respect of status Indians)* (Ottawa: DIAND, Traeties & Historical Research Centre, September 1976).

Canada, *Indian and Native Programs: A Study Team Report to the Task Force on Program Review, April 1985* (Ottawa: Dept of Supply and Services, 1986).

Canada, RCAP, *Partners in Confederation* (Ottawa: CCG, 1993).

Canada, *The Outlook on Priorities and Expenditures, 1995-96 to 1997-98* (Ottawa: DIAND, June 1995).

be dealt with, particularly in terms of the possibility that future options regarding jurisdiction and financing may be foreclosed. Despite the rhetoric of the years, the reality is that a united front in First Nation discussions with Canada remains elusive.

5.2.3. Relations with the general public.

One final thought relates to the power which non-Indians have over their own governments. We have noted howe public opinion can drive fundamental policy change. We have also observed how the prevailing environment of ignorance and anxiety among the general public has been used to other governments advantage in undermining First Nation efforts at obtaining positive change.

A communications strategy for the general public must be seen as an essential component in any effort to resume jurisdicion in the area of social development, or to obtain guarantees of adequate resourcing.

Consent.

Despite the vast array of tools at its disposal, and the control which it wields over finances, Canada is still vulnerable to counterattack from the First Nations. It has been said before that the most effective weapon in the First Nation arsenal is the power of consent, and the witholding of consent. We know that Canada has come to use fiscal coercion as a means to exact First Nation consent, but this only highlights the lengths to which the federal government will go to obtain a release from the First Nations.

Strategic use of consent (and the witholding of consent) in connection with offensive or prejudicial policies deserves further discussion.

5.2.2. Relations among First Nations.

In preceding pages we have identified a number of areas where internal work among the First Nations is required. Some of these include:

-Development of First Nation standards and objectives re: social development, from a holistic perspective, taking into account economic and political dimensions.

-Strategic choices re: unilateral assertion of rights
-Strategic choices re: selective litigation
-Strategic choices re: withholding of consent

-Substantive discussion on the division of powers between Bands, Tribal Councils, nations, and larger political units.

-Community empowerment, focussing on legitimacy & accountability, and facilitating real community participation, understanding and ownership.

-Community awareness; informed decisions - do communities have the information and the opportunities for authentic discussion which they require in order to make the kinds of decisions that are now being asked of them? Do First Nation leaders have a fiduciary responsibilty to ensure that their members have what they need to make informed decisions?

-Intertribal coordination/strategic planning - Strategic planning and coordination among First Nations to take on other governments. Divide and conquer remains Canada s favoured strategy, and in this light, it is critical for all levels of First Nation governments to work together and encourage political coordination and strategic planning. This necessarily involves questions of political discipline. The fact is that regardless of First Nations reliance on without prejudice clauses, many of the new agreements being signed are indeed with prejudice. This reality has to

rights, and the fiduciary duty.

Another negotiation-based approach involves the joint development of policy frameworks, objectives and priorities. This would clear the deck of offensive policy, and assist in clarifying the nature and scope of federal obligations. It could also be used to set standards and principles and establish frameworks under which regional or locally-based negotiations could take place.

Legislation and s. 91(24).

In preceding sections, we have discussed the federal government s s.91(24) responsibilities, and observed that Canada has been loathe to entertain any discussion of an expanded role in this context. As we noted, initially, the prerogative powers and legislation were used to **protect** First Nation rights and interests. It was only later that these powers became primarily a tool for interference and infringement.

Despite its sordid past, the use of s.91(24) holds much potential if used positively and purposively. Taking into account the fact that in *Delgamuukw* the Supreme Court of Canada provided an expansive interpretation of Canada s s.91(24) responsibilities and obligations, this is even more true today than it was before.

The potential use of federal s.91(24) powers deserves more thorough discussion and investigation in connection with social development, from both a jurisdictional and a resourcing perspective. For instance, 91(24) could be used to to remove the provinces from the picture (remember, if Canada could use 91(24) to introduce s.88 to the *Indian Act*, it could also use this power to remove it). As well, these powers could be used to provide a legislative base for First Nation entitlements related to social development, or to formalize resourcing principles and mechanisms. 91(24) could also be used to provide a statutory base for treaty implementation (remember, Canada uses legislation to bring into effect international treaties).

More could be said along these lines, but we will leave this to the future. The point to be made is that s.91(24) offers a number of creative and positive options in connection with social development.

Obviously, however, pursuit of this avenue will require extensive discussion and re-education, among federal officials as well as among the First Nations themselves. On the one hand, successive federal governments have become accustomed to using s.91(24) only as a tool of oppression. They will need to be brought along to understand how federal powers can be used to decolonize and liberate First Nations, and to articulate federal responsibilities. By the same token, many First Nation citizens are highly suspicious of any discussion of 91(24) because of their long experience with the *Indian Act* and other offensive legislative measures.

Despite these challenges, we suggest that this avenue, in conjuction with negotiations, be the subject of further consideration.

Litigation.

In chapter #2, we reviewed existing case law and the tests to be met. Given the evidentiary burdens, the cost, and the risk, it does not appear that litigation offers a comprehensive solution to the current impasse over jurisdiction. However, this does not preclude the use of carefully targeted strategic litigation to establish building blocks on which to base subsequent discussion with Canada. We have outlined some areas for further legal research which will provide a clearer indication of the options in this regard, particularly with respect to financing.

Finally, it should be pointed out that the courts may provide remedies other than conventional adversarially-based litigation. With political will from the parties, the courts could perhaps play a role in clarifying matters which are the subject of dispute or legal uncertainty, without having to resort to the high-stakes adversarial litigation that has become the norm. *Delgamuukw* and other case law also suggest that the courts have a role to play in supervising negotiations to ensure that they are conducted in good faith.

Negotiation.

Even if the future does bring constitutional amendment or clarity through litigation, the fact remains that a final accommodation will only be reached through negotiation. We have noted how the structural adjustment which Confederation is now experiencing is being achieved not by constitutional amendment, but through a series of legislative, administrative and fiscal measures at the federal and provincial levels. First Nations must play a much larger role in this process if they are not to come out as losers once again. There are a range of negotiation-based approaches which could be used in this connection.

The agenda which the Premiers put forward in the spring of 1997 provides some ideas about the subject matter which could be addressed in this context:

> -a cooperative approach to developing and interpreting principles and standards, and monitoring outcomes, in key social policy areas
> -establishing groundrules for intergovernmental cooperation
> -clarifying the roles and responsibilities of each order of government
> -preventing intergovernmental conflicts and developing dispute resolution mechanisms
> -developing a new approach to the use of federal spending power.426

Needless to say, these objectives reflect provincial concerns and priorities. However, many of them mirror First Nation concerns. Additional subject matter from a First Nation perspective could include the nature and scope of federal obligations pursuant to the treaties, Aboriginal

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426 Provincial/Territorial Council on Social Policy Renewal, *New Approaches to Cnada s Social Union: An Options Paper* (29 April, 1997): p.2.

The inclusion of First Nations governments within the framework and maintenance of federalism (local autonomy being a critical principle), and in ongoing discussions regarding social reform is essential.

It is suggested here that, given the circumstances, the federal government must be the focus of First Nation action to begin addressing matters related to social development. It is difficult to see how provincial governments can be effectively engaged without first having a clear understanding of the nature and scope of federal obligations and responsibilities.

> First and foremost, effort must be dedicated to halting the existing policy directions and priorities of the federal government, and the pace at which they are currently being imposed. We have already explained how certain initiatives (such as the FTA regime) stand to foreclose jurisdictional options if they are allowed to proceed. History has shown time and again how the federal government will stall substantive negotiations while slipping in fundamental changes through the back door. There is a need for a moratorium until an agreed upon agenda and process is developed between Canada and the First Nations. This breathing space should allow for a full discussion of all the options, and should result in informed decisions being made.

> Second, the federal government, as a signal of its commitment to a new relationship , should agree to engaging in substantive discussion at the level of the Central Agencies, with Indian Affairs playing only a supporting role. In this process, existing federal policies and priorities **should not** be the starting point for discussions. The real test of federal commitment will be whether or not they are prepared to clear the deck and jettison the long term objectives of assimilation and dispersal.

There are a number of options which could be pursued as these issues become the object of substantive negotiations with Canada.

Constitutional Amendment.

Ever since section 35's inclusion in the *Constitution Act, 1982*, efforts at further articulating the nature and scope of those rights have not met with success. After the experience of Meech Lake and Charlottetown, Canadian governments have generally rejected the notion of further constitutional discussion in the near term. Ultimately, explicit constitutional recognition of First Nation jurisdiction and rights in the area of social development remains a goal, but for the foreseeable future, it does not appear likely.

paper, we strongly suggest that Canada s opinion is open to successful challenge.

It is noteworthy that Canada has remained silent regarding the Royal Commission s recommendation for substantive national-level dialogue on fiscal relations, leading to a national framework. The existing budget process does not serve the interests of the First Nations.

> Canada needs to be actively challenged on the matter of resourcing levels and standards, to engage in substantive discussion on these matters.

> Further work should be done to establish a legal basis (based on either treaty or Aboriginal rights, or the Crown s fiduciary obligations, as the case may be) for entitlements to adequate resourcing.

> With regard to resourcing, Canada should be measured by the degree of its compliance with basic human rights standards, especially those standards that impose governmental obligations to promote advancement and development.

5.2. Some Options.

As we stated at the outset, this paper should only be regarded as one way-point in an ongoing process of analysis and discussion. There are many matters presented here which require further thought and discussion, and some new areas of research which deserve to be pursued. Taking all of this into account, we do not expect to have identified all of the options or key issues which require attention.

Nonetheless, there are some closing thoughts presented here which may be of additional assistance at the ASI team and the AFN continue their consideration of the issues and determine appropriate strategies for proceeding.

There can be no doubt that fundamental change is occurring in First Nation - Canada relations. The key question is, on whose terms will this change occur? Up to now, the evidence demonstrates that Canada and the provinces are dictating the pace and the scope of change. This must be replaced with a dynamic that is First Nation-driven.

5.2.1. Relations with other governments.

In preceding pages we have detailed the jurisdictional grey zone affecting First Nation social development, and also how the federal government has successfully avoided being pinned down on the nature and scope of its obligations in this regard. We have also shown how today the federal and provincial governments are hammering out a new model of federal-provincial responsibilities in the context of Confederation.

Treasury Board Secretariat, and the Privy Council Office (and ultimately Cabinet). DIAND acts only as a messenger to implement the policy priorities set by these bodies. At the same time, it is the Department of Justice, not the Department of Indian Affairs, who determines what Canada s lawful obligations are.

In this light, DIAND s continued lead role in Indian policy and reform is itself a major barrier to movement on the issue of jurisdiction over social development. First Nations need to be able to engage the Central Agencies directly, without Indian Affairs running interference. In the transitional stage, it is obvious that there is a role for DIAND in the process, but it should not be the primary federal broker in these matters.

It is suggested here that Canada s willingness to open up substantive dialogue at the level of the Central Agencies should be regarded as a litmus test in its commitment to a new relationship and authentic partnership . If First Nation-federal dialogue cannot be established and maintained at this level, then there does not seem to be much prospect for beneficial change.

> Central Agencies should be directly engaged in substantive discussions regarding jurisdiction over social development and resourcing levels.This should be treated as a priority and as a litmus test for federal commitment regarding the new relationship .

5.1.10. Fiscal needs.

Chronic underfunding for Indian programs has been the norm, not the exception. We have shown, however, that this is becoming more critical with the advent of the FTA and changes in federal-provincial responsibilities.

One of the main barriers here is cost, and public perceptions which vote-dependent governments are very sensitive to. However, RCAP carried out its own cost-benefit analysis of the benefits that would accrue from an increased investment in First Nation communities. This work needs to be capitalized on.

At the same time, Canada s methods for establishing resource levels are an easy target for attack, because they are so arbitrary and prejudicial. Currently, Band allocations for Indian Affairs programming are determined almost solely on available regional budgets, which in turn are calculated as a portion of the overall DIAND budget. These calculations take no account of needs or standards, and simple math shows that they will perpetuate and increase First Nation underdevelopment. This is one area where international forums and standards may be of assistance. (see chapter #2.9.2.)

At the same time, Canada continues to insist that only a small portion of its annual budgets stem from legal or treaty obligations. Based on the historical evidence presented in chapter #3 of this

substantively. Meanwhile, individual communities and organizations are still being pressured to enter into FTA s, and the number of concluded agreements is growing. Once it reaches a certain threshold, Canada will have little or no incentive to enter into substantive discussions on social development because the numbers will be on its side. As a result, jurisdictional options may be foreclosed.

> Further work is to required to put into place mechanisms that will protect Bands from federal or provincial coercion so that jurisdictional and fiscal rights are not compromised while global policy discussions are taking place.

Another issue which must be considered more fully are the cities and off-reserve locations where more and more First Nation citizens are residing. Questions related to governance, representation and programming in urban and rural centres will continue to grow as ever more people continue the trend of increased migration to these centres.

> The off-reserve issue requires special attention in connection with jurisdiction over social development, particularly with respect to representation, governance, resourcing, program delivery, access and eligibility.

Perhaps most important, significant work is needed to empower community members themselves and include them in the process of renewal and decision-making. This is a responsibility of Indian governments at all levels.

> Accelerated strategies for community education, empowerment and accountability are needed. This will require human and financial resources.

5.1.9. Federal machinery of government.

The structure of the federal machinery of government also presents a barrier. Historically, the Department of Indian Affairs role has been to maintain First Nations in a state of colonial dependency and powerlessness. This tradition is too deeply embedded for it to disappear overnight. Today DIAND still acts as a buffer between First Nations and the real levers of federal power, preventing them from access to the forums where policy and budgetary decisions are made.425 That is one of the reasons why the Royal Commission on Aboriginal Peoples said DIAND should not be the federal agency mandate to manage the process of reform and renewal: because it was not well placed, and not properly designed, to access the levers of power.

Policy and spending levels are set not by DIAND, but by the Department of Finance, the

425 See Weaver, 1981. Also see Peter Di Gangi, *The Trojan Buffalo? Inherent Right, Federal Policy and the Bureaucracy: A Situational Analysis* (prepared as a joint project for the Union of B.C. Indian Chiefs and the Union of Nova Scotia Indians, June 1995).

policy decisions made by other governments.

Continued uncertainty over the definition of a First Nation , and the division of powers between Bands, Tribal Councils, nations, etc., remain as a barrier. RCAP recommended that the renewal of First Nations focus on the nation-level. At the same time, Canada continues (particularly in the area of fiscal responsibility) to direct dialogue at the local level, largely because that is where it holds the most leverage, and also because this is consistent with its long-held vision of self government along the municipal model.

> There needs to be substantive internal discussion among the First Nations and their representative organizations to address and resolve these issues. It is difficult to see how First Nations will be able to maximize their leverage against other governments without internal certainty over the distribution and delegation of powers.

5.1.8. Political organization.

As we have observed, other governments are well entrenched and hold many of the legal and fiscal levers necessary to impose their will and maintain First Nations in a state of colonized dependency. First Nation political institutions have been going through an evolutionary period over the past 25 years, recovering from generations of repression.

In the past decade, Canada has proved adept at playing off Bands against Tribal Councils, and regions against each other and the national organization. It does this by restricting dialogue, and through its spending powers.

> In order to effectively advance the resumption of jurisdiction over social development, First Nations will need to enhance existing processes for cooperative work, decision-making and delegation of authority. There is a need for more effective strategic planning and implementation at the national level, to coordinate efforts regionally and locally.

Another problem relates to the positions taken at the organization level (ie., AFN resolutions), and the actions of First Nations themselves. It is an accepted principle of the AFN that individual First Nations have the right to choose their own course. At the same time, however, lack of political discipline and coordination can hamper or derail national-level efforts at reform. Quite often this occurs not by choice, but because individual First Nations are vulnerable to coercion by other governments, particularly when fiscal resources are at stake.

It does nonetheless pose a barrier to effective movement on the issue of jurisdiction over social development. Take the FTA regime as an example. We have already discussed its intent and impact, and demonstrated how these will prove prejudicial to the First Nations. The AFN has a number of resolutions rejecting the FTA, and calling on government to revise its plans

federal government s Program Review, and the ongoing process of internal DIAND audits). The problem is, that they have never provided the First Nations with the ability to do the same from their own perspective, much less pay attention to the results. The process of evaluation and revision must not be directed or undertaken by bureaucrats - it must be done by the First Nations themselves.

The ASI project is, in its own way, an attempt to address this imbalance by undertaking a comprehensive review of the issues with a view to fundamental policy reform. The key question, however, is whether Canada is prepared to take the results seriously.

> As above, the evidence needed to attack this barrier are available - they need to be consolidated and integrated into a strategic communications plan.

5.1.6. Social + Economic + Political freedom.

Throughout this document we have provided evidence to show that social development and social security cannot be dealt with in isolation from economic security and political freedoms. RCAP reached the same conclusions in its final report: In dealing with the social and cultural concerns of Aboriginal people, we emphasize the need to place social issues in the context of political and economic relations with the rest of Canadian society. 424

The tendency for other governments, however, will be to continue avoiding this approach, as they have in the past. The reality is that the continued colonization of First Nations is dependent on keeping these matters disconnected and separate. It is suggested here that obtaining agreement to address these issues in a holistic manner will be a major step inm the process of decolonization.

> Ultimately, it will be up to First Nations to continue pressing for holistic approaches that integrate social, economic and political development.

5.1.7. Band, Nation.

This relates directly to the issue of identity, the legacy of *Indian Act s* focus on individual Bands, and other governments ongoing efforts to break up nations. We have noted that responsibility for social development best rests at the local level. At the same time, however, the exercise of jurisdiction over social development , particularly when taken holistically with economic and political development, will require economies of scale and a great deal of cooperation between and among individual First Nation communities. Moreover, it is only at the regional (or, most likely at the national) level that First Nations together hold enough power to influence the macro-

424 Canada, RCAP, 1996, Vol.3: p.664.

of existing systems and standards is the appropriate solution. This is completely wrong-headed and ignores all of the existing evidence. First of all, these programs and policies do not even work for their own people: by and large, existing institutions and approaches to social development have been discredited. In this respect, continued emphasis on transplanting a dysfunctional system onto First Nations cannot be seen as any kind of rational solution.

> [...] existing social policy is subject to attack on the grounds that it does not assist those in need and, in fact, **increases rather than alleviates poverty and alienation.**422

Nonetheless, other governments still appear committed to imposing their own models and standards on the First Nations.

> There is ample evidence to demonstrate that mainstream models do not work. This evidence needs to be marshalled and prepared as part of a more global communications strategy (more on this later).

> First Nations must develop their own standards and policies as a basis for changing the scope of the discussion.

5.1.5. Fragmentation.

The Indian social development industry that has emerged over past decades is founded on a sectoral, narrow, program-based approach to the issues, which ends up treating symptoms in perpetuity, never getting to the root causes of the malaise. In the words of the Royal Commission:

> The way social and community services are organized now contributes to fragmentation of effort, gaps in program coverage and conflict between governments on the extent of their responsibility. [...] In conceptualizing the form of new Aboriginal service organizations, it will be important to avoid replicating a problem-specific group of services.423

There needs to be a rationalization of existing (or emerging) institutions and programs in order to bring some semblence of holism back into the picture. It is important to note that other governments have done this for themselves many times over (ie., Neilsen Task Force, the current

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422 *Developing Social Policy in Conditions of Dynamic Change*, Report of the Canadian Committee of the International Conference on Social Welfare, 1972: p. 5.

423 Canada, RCAP, 1996, Vol.3: p.667.

deconstructed the treaty relationship, emptying it of its content and consigning key elements to matters of policy which they can control unilaterally. As well, Canada still insists that just because it has 91(24) responsibilities, this does not mean that it has to act on them. Finally, even in matters related to the core areas of the inherent right of self government, Canada has asserted that it can, as a matter of policy, dictate their nature and scope.

At the same time, Canada and the provinces continue to resist complying with the direction of the courts and international bodies regarding the standards that are to be applied to their conduct of relations with the First Nations. They make no attempt to justify their intrusion into matters that are internal and integral to culture & institutions. They make no effort to provide equitable remedies.

Recent developments (for instance, Canada s *Agenda for Action*) suggest that this may be changing. However, we have already outlined some of the reasons to be cautious about this apparent turnaround. Ultimately, if the federal government is serious about addressing these issues, it will have to take leadership and stop using the provinces as an excuse for inaction. It will also have to set aside its existing policies and priorities and begin anew in authentic partnership with the First Nations.

At the same time, previous rulings on the fiduciary duty, as well as the Supreme Court of Canada s recent discussion of good faith negotiations in *Delgamuukw,* would seem to provide a legal basis for compelling Canada to deal with these matters in an honourable and honest way, at the request of First Nations and not as a matter of discretion.

> Canada and the provinces need to be challenged publicly to address these matters in good faith. Delay and avoidance must be the subject of public comment whenever they occur.

> Further work should be done to see what legal remedies or processes may be available to ensure good faith negotiations on the part of other governments.

> The *Agenda for Action* should be read as a mandate for timely action and as a litmus test for federal commitment. Canada should be pursued on its commitment to partnership and reconciliation without undue delay. The path where existing policy leads does not serve the interests of the First Nations. A true test of authentic partnership will be whether or not the federal government is prepared to abandon existing policy and develop cooperative and holistic alternatives.

5.1.4. The system is dysfunctional.

Another barrier is that other governments continue to operate on the assumption that devolution

> Other governments must continue to be pursued aggressively on this issue.

> Further work should be done to articulate and enumerate social development in the traditional and modern First Nation context, tied to political and economic development. First Nations need to develop and articulate the specifics their approach to resuming and exercising jurisdiction over social development. This should include specific treatment of standards and objectives for programs and policies.

> Further thought should also be given to areas where First Nations are able and prepared to assert their jurisdiction unilaterally.

At the same time, neither level of government is prepared to accept fiscal responsibility for the *Indian Problem*.

There would appear to be numerous legal grounds on which to argue that the Crown has an obligation to provide adequate resources - not only to meet the maintenance-level needs of the First Nations, but to assist in their **development**. Either as a treaty commitment, as part of the fiduciary duty, or in recognition of First Nations ownership of unceded lands, the evidence suggests that the Crown has a legal duty in this respect.

> Further work should take place to develop more specific arguments re: the legal basis for adequate resourcing, and to assess the possibility of carefully targeted litigation in this respect.

International instruments and standards also provide a basis from which to argue that Canada has an obligation to provide adequate resourcing to meet the maintenance and development needs of the First Nations.

> Further work should be done to assess existing international instruments and forums in connection with standards to be applied in the area of social development. International forums should be utilized to bring Canada s conduct to the attention of other nation states and international bodies.

5.1.3. Bad faith and avoidance.

Aside from the jurisdictional uncertainty, another major barrier is simply the bad faith of other governments. The game of hot potato which Canada and the provinces have been playing with Indian social programs over the past decades, all the while avoiding substantive discussion with the First Nations, is the best evidence of this. Governments have taken the position that they are not **required** to negotiate these issues - that it is only a matter of **discretion**.

We have provided ample evidence to demonstrate how successive Canadian governments have

ill-advised programmes and/or half-measures. In light of the history, the conclusions of the Royal Commission on Aboriginal Peoples, and the federal response, would seem to indicate a continuation of this pattern.

> Other governments should be confronted with the consistent historical pattern and what comes of half-measures. The evidence shows clearly that unless adequate resources and political will are dedicated to the task, the ultimate costs can only grow until they will dwarf the cost of what would be required to address the issues effectively today.

5.1.2. The Grey Zone.

We have already outlined the problems inherent in the jurisdictional grey zone occupied by First Nation social development. This continued impasse only exacerbates an already bad situation. In an earlier paper for the ASI project, this issue was summed up as follows:

> As things presently stand, the federal and provincial governments have a lock-hold on jurisdiction related to social development. They are currently involved in a rapid re-distribution of jurisdiction and responsibility in this sector, without constitutional amendment. They do not appear to have any intention of taking this opportunity to finally give First Nation governments a piece of the jurisdictional pie. Instead, they appear to be relying on the legal limbo surrounding responsibility for First Nation social development to their own advantage. Their strategy calls for simply a delegation of powers in limited circumstances, with applicable federal and provincial laws prevailing, and a retreat from financial responsibility.
>
> This is the current policy and negotiation environment. Will this lead to acceptable outcomes? What are the long and short term impacts of concluding agreements under these conditions? What are the long and short term impacts of *not* signing agreements under these conditions?421

Neither the federal nor provincial governments seem prepared to move aside and provide First Nations with the jurisdictional room required to fulfil their responsibilities. This largely has to do with their own self interest. However, it also comes from the fact that First Nations themselves have not defined and articulated the jurisdictional space they choose to occupy in any specific sense. Until First Nations themselves develop and advance specific approaches, delivery systems, standards and principles, federal and provincial governments will continue to occupy the vacuum.

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421 Assembly of First Nations, *Jurisdiction and Social Development* (draft #2) (Ottawa: AFN, 1997): p. 18.

imposed unilaterally.

-In order to obtain substantive change which favours the First Nations, it will be up to First Nations to build and maintain the pressure on other governments and the public generally. What this will require is some strategic thinking and agreement among nations as to how to proceed.

5. THE WAY AHEAD.

For years the First Nations have pressed for a change in the status quo. The preceding chapter demonstrates without a doubt that the status quo is indeed changing. The problem for First Nations is that their participation and influence in this process is at best peripheral, and their needs and rights are not being taken into account. As has happened many times before, colonial governments are making decisions which will affect the First Nations, but without their participation or consent. The result stands to be highly prejudicial to the short and long term interests of the First Nations.

5.1. Barriers & Blockade Busters.

Listed below are some of the key barriers preventing First Nations from exercising their jurisdictional responsibility in relation to social development, along with some comments on possible strategies for breaking those barriers.

5.1.1. It s too big.

The size, cost and complexity of these issues has always been one of the primary excuses for avoidance or half-measures by other governments. And yet the problems only continue to get bigger. Witness the Macaulay report on Indian Affairs of 1839, which concluded that if Indian people were to advance, the major obstacles to the process, alcoholism, poor health, and lack of food and shelter, had to be overcome .419 Or, look at final report of Bagot Commission (January 1844), which painted a depressing picture of bungled departmental operations, deplorable Indian conditions, and unresolved policy questions. 420 At the time, a combination of fiscal restraint and ill-advised policies (civilization) prevented the removal of these obstacles. The same obstacles remain today, only worse.

All of the Commissions of inquiry since those times tell the same story. The response of successive governments, however, has consistently been to make things worse through a series of

419 Leslie, 1985: p.49.

420 Leslie, 1985: p.81.

effectively exercise jurisdiction over social development.
-First Nation population continues to grow faster than Canadian population, with a large percentage of youth who will be starting families and eligible for entry into the workforce . Also, migration off-reserve continues to grow. Problem: no resources, no jobs, no prospects. Result: increased dependency and dispersal.

-First Nation dependency and negative social indicators continue to rise notwithstanding programs & services. Federal resourcing priorities are stil biased towards social assistance and poverty-level maintenance, not economic development.

-Canada is not yet prepared to share fiscal dividend with First Nations, despite the fact that needs continue to grow. The FTA regime stands to impose a new status quo which leaves First Nations with additional responsibilities but no assurance of adequate resources or authority to fulfill those responsibilities.

-Canada is not yet prepared to seriously entertain recognition and implementation of the inherent right of self government. In fact, its intent is clearly **not** to define or recognize the inherent right, in any general or specific sense.

-Canada has not provided firm and unequivocal evidence to demonstrate that it is prepared to take the final report and recommendations of the Royal Commission on Aboriginal Peoples seriously. It has chosen not to recognize jurisdiction even in the core areas enumerated by the Commission.

-Provinces are not prepared to support or entertain First Nation expectations re: lands & resources or jurisdiction; they are far too concerned with carving out their own piece of the pie. The alliance that has developed between First Nations and the provinces over off-loading could well prove to be simply a tactical marriage of convenience from the provincial perspective.

-Public opinion remains largely non-committal or downright hostile. This is a result of ignorance and lack of information, which other governments are in no hurry to remedy. An ignorant and hostile general public is useful when it comes time to reduce First Nation expectations.

-At the same time, many First Nation members are disaffected and not fully aware of history, policy and current environment. They do not necessarily have faith in their own governments. There is a great need for community education and development to empower community members to take the future into their own hands and assist the leadership in going after other governments and interests hostile to the First Nations.

-Fundamental change in the relationship between First Nations and other governments **is** occurring, but not on terms set by the First Nations themselves, and not in a way that stands to benefit their long term interests. Instead, fundamental change is being determined by federal-provincial horse-trading and restrictive federal policies which are still being developed and

> (c) Legitimacy - refers to public confidence in and support for the government. Legitimacy may arise from the way leaders are chosen, the extent to which they respond to public wishes, whether they succeed in satisfying public expectations, and whether they respect human rights. Legitimacy enhances resources and power.418

An unfortunate reality is that under current circumstances, many First Nation governments do not have full credibility among their members. The federal government has highlighted the need for transparency and accountability in its discussion of both funding and self government over the past few years. First Nation citizens have been aware of the problem for some time.

This, however, is a logical outcome of the colonization process: Band governments, hedged in by federal and provincial laws, and financially dependent on the colonizers, are often unable to meet the needs or the priorities of their members. They are also stuck with an accountability loop that is directed not at their members, but at other governments. The result is that they often do not enjoy the legitimacy that is required to govern effectively.

This has given rise to all sorts of distortions which make the problems even worse. The repressive situation has bred all sorts of adaptive strategies, all focussed on manipulating the system. In the area of social assistance, for instance, it is well known that individuals and Band administrations often bend the rules or play the system to maximize their returns. This is one reason why Canada wants to use the FTA to explicitly tie Bands to provincial laws and regulations in the delivery of relevant services. Replacing one set of illegitimate rules with another set of rules that are just as illegitimate will not solve the problem, however - it will only foster new adaptive strategies based on manipulation.

4.7. Conclusions.

Taken together, the preceding summary of current circumstances shows the enormity of the challenges that First Nations face in any attempt to assert jurisdiction over social development. There can be no doubt that fundamental changes are indeed underway in the relationship between First Nations and other governments. The problem is that these changes are being driven by others, whose agenda is at odds with the First Nations.

At the present time, First Nations do not have the power, resources or legitimacy needed to

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418 Union of Nova Scotia Indians, *Practicle Points for Discussing a Framework for a Mi kmaq Constitution* (Sydney: UNSI, n.d.): p.7.

> intergovernmental transfers have shown a remarkable degree of flexibility over the years, and it does not seem impossible to devise a set of both conditional and unconditional payments to meet the needs of Aboriginal governments on principles of fiscal federalism similar to those which now prevail for federal-provincial arrangements. This being stated, such payments would almost certainly be less secure than own-source revenues and would need to be renegotiated on a frequent basis. Many of these issues fall into the domain of implementation and not of initial design, but it would be an empty scheme for Aboriginal self-determination which ignored the financial issues.416
>
> The autonomy of constituent units in federations need not be excessively compromised by fiscal arrangements. The degree of autonomy will depend not only on the degree of dependence on transfers as opposed to own source revenue, but also on the design of the transfers. Nonetheless, provincial autonomy is inevitably compromised where a province is dependent on the federal government for funding, and it is also compromised if the federal government, by virtue of its fiscal resources (spending power), undertakes expenditures in a provincial area of jurisdiction. Many federal programs while not regulating a sphere of provincial jurisdiction, have deeply affected the outcome of provincial policy through the exercise of the federal spending power. The problem has been partly resolved through the myriad of cost-shared programs and fiscal transfers where federal payments are tied to provincially designed and delivered programs.417

International standards and instruments should be investigated more closely to determine how they might be used to influence the development of agreed upon benchmarks and formulas for resourcing and standards.

One of the biggest barriers to addressing resourcing issues is the current organization of the federal government. Operating under the envelope system, the Department of Indian Affairs is simply a messenger, coming to First Nations with budgets already fixed arbitrarily. Direct engagement between First Nations and the key central agencies (Department of Finance, Treasury Board Secretariat, and the Privy Council Office) is required if First Nations are to have any significant influence over the budgetary process and the measures used to determine funding levels.

4.6.3. Legitimacy.

Even with power and resources, a government cannot function effectively if it does not enjoy the trust of its constituents.

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416 Brown, 1995: at para. 115.

417 Brown, 1995: at para. 112.

Throughout this paper, we have shown that historically and currently, other governments have steadfastly refused to allocate the resources required to meet First Nation needs, despite the fact that those same governments created the environment of dependency and underdevelopment that now exists.

> Legislative jurisdiction is meaningless if there is not the financial resources to exercise it. This includes the authority to tax, but of course it also assumes a base of wealth to tax. Federal systems of government usually undertake a variety of measures to transfer money from one level of government to another as well as for one government to collect revenue on behalf of another and to share the proceeds. This sharing principle is important not only for equity purposes but also to promote economic efficiency. All federations have, to a greater or lesser degree, imbalances between the ability of provinces to raise revenues and their responsibilities under the constitution to make public expenditures. This is a natural outcome of increasing economic integration through an economic union as the central government becomes the primary level of government able to effectively tax mobile labour and capital. Thus all federal systems have developed some form of fiscal transfers to meet the "vertical" fiscal gap between the central and constituent governments. Most federal systems also attempt to bridge the "horizontal" gap between richer and poorer units by providing funds to the poorer units to bring their financing up to some determined national benchmark.415

Our review of current efforts by Canada to impose a new fiscal regime indicates that the FTA model avoids dealing with both the vertical and horizontal fiscal gaps in First Nation resourcing. We have noted the problems that this will create.

There are at least two issues relevant to this discussion. The first has to do with developing agreed-upon standards and formulas for determing resource levels. The second has to do with reaching agreement on the mix of sources for fiscal transfers. For these two issues to be dealt with, other governments will have to give up their unilateral power over the budgetary process.

> Many Aboriginal Peoples look upon financial support for their governments as a basic Aboriginal or treaty right, an entitlement for sharing the land and its resources with non-Aboriginals Canadians. How this entitlement is realized is nonetheless a significant question given the shrinking public sector and the current financial crisis in the federation. One can envision a variety of approaches including resource sharing agreements, revenue sharing of tax bases such as sales and income taxes and gaming revenue, and specific compensation settlements and transfers of land, all of which can contribute to the independent revenue base of Aboriginal governments. For the remainder of the required funding intergovernmental transfers will be essential. Canadian

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415 Brown, 1995: at para. 111.

> people. It goes to the heart of everything to do with the Wet'suwet'en being confined to small reserves and subject to an imposed system of band council government. We want to see the Treaty acknowledge our jurisdiction and authority to govern ourselves, to make our own decisions about the future of our own people, lands and resources. The Wet'suwet'en Nation has a vision of taking back control over our own lives.
>
> The challenge of recognising and addressing this power imbalance is enormous. In other processes and at other times, we have felt very frustrated because of our lack of power at the table. Our vision is that all parties to this treaty-making process will examine and challenge their perceptions, building on the principles of recognition, respect and reconciliation.412

Federal and provincial governments must vacate the field in order to allow jurisdictional space for First Nations.

> If Aboriginal governments are to exercise powers within the federal system as a third order of government, there will have to be jurisdictional room for them to occupy. Legal doctrine to date has tended, in the absence of express constitutional enumeration of Aboriginal government powers, and often ignoring or dismissing other Aboriginal rights, to assume that the federal and provincial legislatures together exhaust the jurisdictional room. Unlike the eighteenth or nineteenth century when the regulatory power of the state was not in full throttle, making room for Aboriginal laws today will in many cases mean proactive removal of federal and provincial authority from the scene.413

Obtaining authentic recognition of jurisdictional power from other governments remains one of the major challenges for First Nations.

4.6.2. Resources.

Adequate resources are also a requirement for the effective exercise of jurisdiction:

> (b) Resources - comprise the physical or economic means of acting, in particular financial resources, but also information, technology, human resources and natural resources needed for security and further economic growth. Resrouces are needed to use power, and satisfy the needs and expectations of citizens.414

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412 Excerpt of a speech by delivered by Herb George for the Wet'suwet'en nation at opening of treaty negotiations, (n.d.) [http://vaughan.fac.unbc.ca/bc_aboriginal/wet/herb.html]

413 Brown, 1995: para.107.

414 Union of Nova Scotia Indians, *Practicle Points for Discussing a Framework for a Mi kmaq Constitution* (Sydney: UNSI, n.d.).

communities. Generally however, there is a real need for innovative and accelerated strategies to facilitate and sustain community understanding and mobilization.

4.6. Power, Resources & Legitimacy.

In chapter 2.2.3. we reviewed some of the basic elements that any government must address in approaching the matter of jurisdiction. We now return to these three foundations in light of the intervening discussion. To be effective, any government must at a minimum, have adequate power, resources and legitimacy.

4.6.1. Power.

The first element is power:

> (a) Power - is a legally recognized authority to act, including legislative competence, and jurisdiction. It may arise from the constitution, from legislation, from court decisions or even from custom. The key issue is whether other governments and institutions recognize and respect what is done, in actual practise.411

Other governments are preoccupied with carving out their own jurisdictional territory. They have not as yet indicated an honest willingness to serisouly consider, much less recognize, First Nation jurisdiction in the area of social development, because they see it as a threat to their jurisdictional spheres. This creates a power imbalance, encapsulated in the following excerpt from a speech by Herb George:

> The Constitution of Canada has never defined in detail the relationship of the Wet'suwet'en Nation and other Aboriginal governments to those of the Canadian federation or of the provinces.
>
> The Wet'suwet'en view section 91(24) of the Canadian Constitution, which makes the federal government responsible for Indians and lands reserved for Indians, as reflecting a nation-to-nation relationship between the Wet'suwet'en Nation and Canada. Nevertheless, Canadian courts and governments have usually taken the viewpoint that the division of powers in section 91 and 92 should be interpreted as taking up all of the available jurisdictional power and authority that there is in the Canadian Constitution.
>
> Much harm has been done by this interpretation. It has created a power imbalance between the First Nation, federal, and provincial levels of government and has given that imbalance the appearance of fairness. But the imbalance is not fair, and it has hurt our

411 Union of Nova Scotia Indians, *Practicle Points for Discussing a Framework for a Mi kmaq Constitution* (Sydney: UNSI, n.d.).

to assist in this process (and to adopt a policy of truth in that regard, instead of self-serving propaganda), but primary responsibility will probably fall to the First Nations themselves. Coordinated and sustained public education and communications strategies need to be developed and implemented in order to begin the process of education that is so sorely needed. Certainly, RCAP provides the justification for First Nation demands, and the raw material that can be used in any public education campaign. It provided the most focused and scholarly consideration of the issues in history, and concluded unequivocally on a number of issues, among them:

-the causal relationship between dispossession & disenfranchisement vs. rise of ill health and dependency.
-existing s.35 protection for core areas of self government & jurisdiction - these include much (if not most) of the subject matter of the *Indian Act* plus many of the grey areas (ie., social development)
-no need for more research or more evaluation - RCAP has done this

The facts, then, are no longer any basis for dispute, However, other governments must be challenged to participate actively in the process of public education and awareness to complement similar efforts by the First Nations themselves.

4.5.2. The First Nations.

A key element in any attempt to move forward First Nation jurisdiction are the citizens of the First Nations themselves. Without broad based community support and understanding, leadership will be without much needed leverage at the negotiating table.

Generally speaking, however, the proliferation of consultation and negotiation processes over the past 15 years does not seem to have significantly increased participation, understanding or commitment at the local level. First Nation leadership are still faced with the challenge of facilitating substantive discussion at the community level and mobilizing the powerful potential that exists among members. Part of the reason for this situation is that although Canada has spent large sums on consultation over the past decades, very little of it has focussed on sustained, intensive work at the local level. Normally, the federal government will insist that it does not have the resources to fund the kind of extensive community animation processes that are essential if communities are to make informed decisions and mobilize politically. But there is more to it than simple fiscal restraint. The federal government knows the power that resides within First Nation communities, and realizes that awareness and mobilization at the local level would significantly reduce the leverage that it currently has in negotiations with First Nations. In other words, a disaffected Indian public promotes federal objectives because it reduces the negotiating power of the leadership.

None of this is to say that many First Nations have not addressed this situation in their own

The last decade has seen a revival of the Right (we have already reviewed this in chapter 3 regarding deficit reduction and a contraction of the roles and responsibilities of government). This has been accompanied by a rise in intolerance, and by the emergence of leaders who have no qualms about pandering to an ignorant public by targeting First Nations publicly (ie., the Reform Party, Premier Mike Harris, the list could go on and on.). As a part of this process, the Reform Party and some of their provincial Conservative cousins have revived the argument about equality rights that was the hallmark of the Trudeau government s approach in the White Paper of 1969. (See chapter #2.5. and chapter #3.6).

Public opinion has hardened as a result of tough economic times, social and economic structural changes, and the uncertainty that is affecting all Canadians. Couple this with Canadians general ignorance of First Nation history and circumstances, and you get a receptive audience for the policy trash being generated by the Reform Party and various provincial governments. It is in their interest to maintain a public which is ignorant and hostile, since this provides the counterweight that is needed to reduce Indian expectations and aspirations.

These circumstances make it easy for the federal government to reduce First Nation expectations through lukewarm policy reform, while seeming liberal in comparison to other parties when it comes time to explain things to the public.

In this light, RCAP s recommendations regarding public education and the role of federal and provincial governments in that respect are very important. It is encouraging to see that Canada has identified public education as one of its goals in the *Agenda for Action*, but this commitment has yet to be realized in concrete terms. The federal approach to public education does not appear to be based on the whole truth and nothing but the truth . Instead, in line with the equality doctrine already discussed, it seems to be focussed on characterizing First Nations as merely a disadvantaged social group who require remedial programs, without acknowledging the complicity of successive provincial and federal governments in the colonization, dispossession and underdevelopment of Canada s indigenous peoples.

The provinces, on the other hand, make Canada look good when it comes to public education.

Finally, there is the media, which has yet to demonstrate that it really understands the history and circumstances of the First Nations. This is particularly true when certain interests who control large segments of the media stand to lose from any redistribution of lands, resources, or wealth (for instance, the Irvings of New Brunswick, who are major players in the forest industry, as well as the main media outlets in that province).

Clearly then, there is a need to influence public opinion in connection with First Nation social development, jurisdiction, and resourcing. Federal and provincial governments must be pressed

1990's and for the foreseeable future, Canada is going through fundamental structural change, but without constitutional amendment. Rather, these changes are occurring through administrative arrangements, legislation, and fiscal realignment.

Aside from an alliance of convenience with First Nations to battle federal off-loading, the provinces are not overly concerned with accommodating First Nation interests, needs or rights, let alone jurisdiction. They are far more preoccupied with carving out their own piece of the action. And although, as we have shown, the provinces appear prepared to work with First Nations to counter federal efforts at off-loading responsibilities and costs, they are not yet prepared to acknowledge that attacking First Nation dependency will require them to adjust their approaches to the allocation and management of lands and resources, or their approaches First Nation jurisdiction.

The Royal Commission on Aboriginal Peoples, in its final report and recommendations, made it clear that provincial governments had an important role to play in the renewal of the First Nations, particularly with respect to accommodating the land rights of the First Nations. It is significant that the Premiers have avoided this issue completely, and instead pointed to Canada.

Provincial and territorial Ministers responsible for Aboriginal Affairs stated in April 1997 that

> [...] the onus is on the federal government to take the lead in responding to and acting on the report of the Royal Commission on Aboriginal Peoples. [...] the federal government has constitutional responsibility for Aboriginal peoples and [...] the Royal Commission was constituted by the federal government.410

What all of this suggests is that the provinces are not at this time prepared to seriously consider how First Nation governments will fit into their new vision of the Confederation. This poses a significant problem for First Nations.

4.5. Public Opinion.

4.5.1. The Non Indian public.

Regardless of political intentions or the rule of law, ultimately it is public opinion that drives governments. The recent policy turnarounds forced on Premier Mike Harris (re: compensation for the surviving Dionne quintuplets) and Premier Ralph Klein (re: compensation for victims of forced sterilization) highlight this fact. This is particularly true in an area like Indian policy where the needs are great, the stakes are high, and fundamental change is required.

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410 Canada, Canadian Intergovernmental Conferences Secretariat, News Release, 18 April 1997 (Ref: 860-354/019).

In conclusion, despite the announcement of a new relationship , and despite First Nations sincere hope that this time the commitment is for real, there is as yet little credible evidence to demonstrate that Canada actually intends to put First Nations in the drivers seat regarding Indian policy, and much evidence to the contrary. It is true that the scene is now set for fundamental change, but the basis of that change remains the FTA and the inherent right policy, both of which are prejudicial to First Nations from a jurisdictional and fiscal point of view.

It will be important for First Nations to seek quick and tangible evidence of an authentic change in federal policy directions if the *Agenda for Action* is to become more than another chapter in the federal history of avoidance and deceit.

4.4. The Provinces.

Provincial governments entered the 1990's with their own problems. Similar to the federal government, they had accumulated significant deficits in the 1970's and 1980's. They had also become overly dependent on federal transfers for many of their programs and services. Therefore, they were in a vulnerable position when Canada started to reduce financial transfers and off-load additional responsibilities. Each province, regardless of the political stripes of the ruling party, has undergone radical re-organization as a result.

Moreover, certain provinces (particularly the haves - Ontario, Alberta, B.C.), taking a lesson from Quebec, are now making their own expansive demands regarding the nature of Confederation. Witness the following positions advanced by Dianne Cunningham, Ontario s Minister for Intergovernmental Affairs, in 1996:

> There are a number of questions which are central to the renewal process. What is the role of the federal government? What are the responsibilities of the provinces? How are the relationships between the two orders of government managed? [...]
>
> [...] we must, once and for all, bring clarity and precision to intergovernmental relations. [...] We believe we must, once and for all, determine which governments do what. [...]
>
> This is the time to design a modern federal system.408

As Thomas Courchene has observed, the federal-provincial economic and financial interface is in full evolutionary flight - there is no status quo .409 We have already noted that since the

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408 Speech by Ontario Minister of Intergovernmental Affairs Dianne Cunningham, Toronto, 14 June 1996 (www.gov.on.ca/MBS/english/press/intergov.html)

409 Courchene, 1996: p.38.

However, in connection with the subject matter of this paper, some points should be made. For one thing, federal promises of a new relationship and partnership have been made before, only to be consigned to the dustbin once attention turns elsewhere (witness the public turnaround of Chretien and Trudeau after the rejection of the White Paper, despite the fact that the bureaucracy had no intention of abandoning the White Paper s long term goals).

In this instance, Canada s general statements of good intention must be followed quickly by positive and concrete evidence that they are serious, or else they run the risk of following the predictable fate of previous commitments to reform.

On another level, the statements and objectives contained in the *Agenda for Action with First Nations* are phrased in such a way that they can mean very different things to different audiences. For instance, the *Agenda* contains nothing which is inconsistent with existing policies related to the inherent right policy framework or the FTA regime, and much that validates them. This, coupled with the fact that Canada chose not to use the occasion of its response to RCAP to publicly disown these policies (which have been rejected by AFN all Chiefs resolutions), suggests that Canada does not at this time intend to change the overall course which it set for Indian policy during its first term.

In addition, upon comparison, the *Agenda* does not appear to represent a significant departure from the commitments already made public in the 1993 *Red Book* and the 1997 Liberal election platform.407 There is, therefore, evidence to suggest that the *Agenda for Action* is simply a consolidation of federal priorities and commitments that have been made over the past five years, and not anything new.

Finally, it should be remembered that despite the best intentions of politicians, it is the bureaucracy which ultimately decides the nature and the pace of political commitments when it comes time for implementation. It is important to note that the existing Indian policy framework has evolved over the past fifteen years in a very consistent manner, with an undeniable focus on off-loading, devolution-without-adequate resources, expenditure reduction, and avoidance of substantive commitments regarding rights and jurisdiction. Regardless of what Ministers may say, nothing the current federal government has done indicates a significant change in these overall objectives in terms of its operations and priorities.

The Royal Commission anticipated this possibility when it stated that the Department of Indian Affairs, because of its dismal track record, should not under any circumstances be the federal agency responsible for implementing the new relationship. This advice was clearly ignored by the federal Cabinet, who instead handed the mandate to the very agency which has done the damage (and which has the most to lose in any change in the status quo).

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407 See Liberal Party of Canada, 1993; and Liberal Party of Canada, *Securing our Future Together - the Liberal Plan - 1997* (Ottawa: Liberal Party of Canada, 1997): pp. 78-83.

things that First Nations had been saying for years regarding jurisdiction and social development.

> -it called for immediate recognition of core areas of inherent jurisdiction (including most areas covered under social development & social security), and concluded that in these areas, First Nations could proceed in implementing their authority without agreement from other governments.
>
> -it recognized the singular needs of First Nations, and recommended that immediate measures be taken to provide adequate fiscal resources to meet maintenance-level needs **as well as** developmental needs.
>
> -it provided plan for transition, meeting short term needs while providing for long term objectives.
>
> -it consciously linked social development with economic & political development, and an increase in land base: Political empowerment and economic development must complement this health strategy .405

The long awaited Federal response to RCAP was announced in two parts. In January 1998, Minister Stewart unveiled a global plan for Aboriginal peoples generally (*Gathering Strength - Canada s Aboriginal Action Plan)*. In February 1998 she released the First Nation-specific portion, *An Agenda for Action with First Nations*.406

Both of these documents emphasize a commitment to a new relationship and partnership, and have been accompanied by significant efforts to publicly state the federal government s commitment to a new way of doing business. Unfortunately, neither of them contain any substantive indication of specific changes to existing policies or specific responses to the Royal Commission s recommendations. Instead, they lay out four theme areas, with general statements of intention under each heading: 1) Renewing the partnership, 2) Recognizing and strengthening First Nations governments, 3) Equitable and sustainable fiscal relationships, and 4) Supporting stronger First Nation communities and people.

Minister Stewart, self-conscious of the rather general nature of the federal response, has emphasized that it is only a starting point, and that substantive and specific reform will emerge from the process that has now begun. At this early stage, observers will must take these assurances on faith, and wait to see what actually transpires.

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405 Canada, RCAP, 1996, vol. 3: p.4.

406 Canada, *Gathering Strength - Canada s Aboriginal Action Plan* (Ottawa: DIAND, 1997); and Canada, *An Agenda for Action with First Nations* (Ottawa: DIAND, February 1998).

Upon election, these federal policy commitments were subordinated to expenditure reduction requirements, and the goal became First Nation containment, not First Nation empowerment. In fact, on almost all fronts, the new Liberal government adopted the policies and priorities of the Tories who preceded them - particularly the long term objectives contained in the Neilsen Task Force Report of the mid 1980's (which were updated through the Program Review process of 1994-96).

The *Inherent Right* policy framework announced in the summer of 1995, far from recognizing the inherent right, made it contingent on agreement from federal and provincial governments. At the time, it was rejected by the First Nations, but it has nonetheless become the basis for the federal negotiating position in **all** negotiations between Canada and First Nations, regardless of the sector.403 Moreover, the federal government s objective with respect to this policy framework is to ensure that it **does not** lead to any general or specific recognition of the First Nation inherent rights.404 This indicates that despite rhetoric to the contrary, Canada has no intention of changing its position regarding self-government and First Nation jurisdiction.

Bill C-79 (the *Indian Act Optional Modification Act*) in 1996 represented a blunt attempt to accelerate devolution of administrative responsibility to First Nations, while at the same time obtaining Indian consent to federal intrusion into matters internal and integral to First Nation culture and practise (ie., leadership, land tenure, membership, etc.)

The federal Financial Transfer Agreement (FTA) regime, discussed at length in chapter #3.7., is not intended to recognize or advance the inherent right, and is not intended to ensure that First Nations have the fiscal capacity to meet needs. As we have shown, the FTA is primarily intended to cap and ultimately reduce federal expenditures and obligations, leaving First Nations to twist in the wind.

4.3.2. RCAP and Federal Reponse.

The final report and recommendations of the Royal Commission on Aboriginal Peoples (November 1996) called for fundamental and immediate change, and validated many of the

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Party of Canada, 1993): chapter 7 re: Aboriginal Peoples. See also *Renewing the Partnership: Aboriginal Peoples Policy Platform* (Ottawa: Liberal Party of Canada, 1993). The latter document was released by party leader Jean Chretien in Saskatoon on October 8, 1993.

403 Canada, *Indian and Northern Affairs Canada - Performance Report for the period ending March 31, 1996* (Improved Reporting to Parliament - Pilot document) (Ottawa: CCG, 1996): pp. 23-24.

404 See Canada, *Guidelines for Federal Self Government Negotiators (Number 1): Language for recognizing the Inherent Right of Self Government in Agreements and Treaties* (Ottawa: Dept. Of Justice and Inherent Right Directorate, 22 March 1996): pp. 1-4.

building, it contains no significant changes in the overall mix of monies dedicated to welfare vs. economic development. At the same time, in all likelyhood the new monies are not new at all, but simply a portion of the savings that Canada has made on Native programs since Program Review was initiated. This should be a concern to all First Nations.

Despite assertions to the contrary by federal ministers and officials, the numbers indicate that Federal Indian policy remains driven by the perceived need to cut costs and devolve responsibilities. The so-called fiscal dividend is not, apparently, to be shared with the First Nations.

The federal commitment to apply 50% of future surpluses to social programs and 50% to debt reduction provides no assurance that these new resources will find their way into First Nations communities:

> -the provinces already positioning themselves to capture fiscal dividends to compensate for losses incurred through introduction of CHST
> -FTA s remain driven by the imperative to turn federal financial obligations into subsidies, without providing First Nations with any assurance that they will have adequate resources to meet the needs of their people
> -the federal government still not apparently prepared to fully recognize magnitude of problem or solutions
> -the federal government is not prepared to recognize that National debt includes major debt to First Nations (particularly in light of the Supreme Court s findings in *Delgamuukw* regarding Aboriginal ownership of unceded lands and resources).
> -the outstanding issue of responsibility for off-reserve Indians remains unresolved, and is being treated as strictly a monetary issue

So, although the deficit monster has now been slain, there are few (if any) positive indications that Canada is prepared to finally sit down with First Nations and seriously address matters related to social development and dependency. On the contrary, the evidence suggests strongly that it will be more of the same unless First Nations take aggressive action to advance their position.

4.3. Federal Policy Environment.

4.3.1. Since 1994.

The Federal Liberal government was elected in 1993 on platform which included recognition of inherent right to self government, and a stated commitment to improvement of Indian conditions and economic prospects.402

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402 See Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal

and continue budget caps).

4.2. Fiscal Environment.

> In its efforts to manage its fiscal position, the federal government has limited the growth of expenditures related to a number of existing Aboriginal programs by capping them. It has also cut funding for some programs and has generally been reluctant to implement new programs. This has resulted in pressure on the provinces to assume responsibility for some essential programs. In some cases, this pressure has been redirected to municipal governments. In all cases, this development has given rise to considerable tension between the federal government and the provinces.400

In an earlier chapter we reviewed recent trends toward fiscal retrenchment and the effects of shrinking budgets on First Nations and provinces alike. Since 1995/96, Indian Affairs programming budgets have been capped at a level far below the actual growth in needs or population. We have also reviewed the new fiscal regime (the Financial Transfer Agreement - FTA) which Canada is attempting to impose.

The FTA is to First Nations what the CHST is to the provinces: Canada has capped the growth rate of programs and services and opted for block funding as a way to reduce its costs in the medium-long term. It has taken open-ended funding commitments and transformed them into subsidies. It is using the mantra of more local control , certainty , and flexibility as a Trojan horse to obtain First Nation consent. But flexibility doesn t mean anything if you don t have enough resources to begin with. Canada is not fully disclosing its motivations to the First Nations, therefore preventing them from making informed decisions. It is using its fiscal powers over First Nations as a lever in obtaining First Nation consent to something which is prejudicial to First Nation interests. This conduct would seem to meet all of the criteria necessary for establishing sharp dealing on the Crown s part.

The much awaited fiscal dividend that resulted from the expenditure reduction of the past three years has finally arrived with the federal budget unveiled by Minister of Finance Paul Martin in February 1998. However, the pickings for First Nations were pretty slim, considering existing First Nation needs and the size of the federal government s cash windfall. In fact, despite announcements regarding new monies , the 2% cap on budget growth imposed as a result of Program Review II remains in effect, and has been extended into 1999/2000.401

Although the federal budget provides some new money for healing, language and capacity

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400 Canada, RCAP, 1996, Vol. 4: p.543.

401 See Assembly of First Nations, *1998 Budget Analysis* (Ottawa: AFN, 26 February, 1998).

estimated that by the year 2016, 12.5% of Manitoba s population will be Aboriginal, 13.9% of Saskatchewan s, and almost 6% of Alberta s.397

The east and central Canada have different numbers to consider. Aboriginal people make up a much smaller percentage of the total population (only around 1% in the Atlantic, Quebec and Ontario398). Although the Aboriginal population in the Atlantic and Quebec is expected to grow nominally relative to the non-Indian population over the next decades, in Ontario, the proportion of Aboriginal people is actually expected to decrease during this same period.399

For provinces or regions with a high and growing percentage of First Nation citizens, Native programs (and problems) will take on an increasingly high profile over the next decade. For these provinces, one would expect that this at least will ensure that they assign a higher priority to these matters. For provinces where First Nations are projected to remain as a small percentage of the total population (or actually fall as a percentage), there will be less of a visible basis for pressure to deal with the issues. This will not, of course, stall the growing dependency and fragmentation within these native communities - it just means that it will be easier for those provincial governments to avoid the situation.

- Conclusions.

Taken together, these statistics demonstrate that without radical changes in policy and circumstances, dependency among the First Nations will continue to rise well out of proportion to Canadian society as a whole, and that much of this dependency will occur in urban and rural centres, off-reserve .

The demographic make up of the First Nations is entirely different than for the non-Indian population. This means that policy solutions developed to respond to the needs and circumstances of the non-Indian public cannot be simply transplanted from sectors to the First Nations.

Moreover, there is a large group of youth that will be starting their own families and entering the workforce over the next 20 years. There is no indication that the federal government has accounted for this reality in its budgetary and policy planning (other than to accelerate devolution

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397 Canada, RCAP, 1996, Vol.1: Table 2.5, p.22.

398 Statistics Canada, 1998: p. 4, p. 11.

399 Canada, RCAP, 1996, Vol.1 Table 2.5, p.22: The Aboriginal population in the Atlantic is expected to rise to 1.5% of total population (+0.5), and in Quebec to 1.1% (+0.1). Despite the fact that Ontario has more Aboriginal people than any other province, (141,525), its Aboriginal population is expected to decrease by 0.1% in proportion to the general population of that province by 2016.

Although many urban and rural centres across the country are destinations, about 20% of Aboriginal people in Canada live in either Winnipeg, Edmonton, Vancouver, Saskatoon, Toronto, Calgary or Regina.391

Considered along with the federal government s practice of off-loading responsibility for off-reserve Indians to provincial governments, this only exacerbates the jurisdictional and fiscal debate that is already taking place. Media commentators are already saying that Provinces with large Aboriginal communities must radically overhaul education, job and social programs to deal with a predicted native population boom over the next 20 years [...] .392

This has obvious ramifications on the matter of jurisdiction and financing for social development programs. Are provincial governments capable of providing the required services, even if they were motivated to do so? Are First Nations able to address matters of delivery and representation in urban areas?393 Can they address these matters without adequate financial resources and jurisdictional recognition from other governments?

- Regional Variations.

However, even within these numbers there are significant regional variations that must also be considered. The West (Manitoba to BC) contains 62% of all First Nation citizens in Canada.394 The Prairies in particular are set to experience large increases in First Nation population relative to the non-Indian population.

Manitoba and Saskatchewan in particular will be undergoing major changes. Already, in those provinces Aboriginal people make up 12% and 11% of the total provincial population respectively.395 In these same provinces, Aboriginal children account for 20% of ALL children under the age of 15. In the NWT 75% of all children are Aboriginal.396 These numbers will grow over the next 20 years in line with the demographic projections reported above. RCAP

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391 Statistics Canada, 1998: p. 5.

392 *The First Perspective*, 29 January 1998, Provinces must overhaul programs to deal with Aboriginal population growth .

393 See Canada, RCAP, 1996, Vol. 3 Chapter 7: Urban Realities for detailed discussion on governance, delivery and representation.

394 Statistics Canada, 1998: p.11.

395 Statistics Canada, 1998: p.4.

396 Statistics Canada, 1998: p.8.

- Off-Reserve Migration.

This change in the demographic make up of First Nations is taking place against a backdrop of continuing migration off reserve to urban centres, for educational or economic opportunities, or simply to escape deteriorating conditions on reserve.

It should be remembered that the off-reserve issue is not a new one. In fact, provincial regulations preventing First Nation access to lands and resources off-reserve played a large part in the growth of Indian dependency in the first place. At the same time, the more recent trend towards migration to rural or urban centres needs to be put in the proper context: often it is not by choice, but because it may provide the only way individuals or families can seek opportunity or escape abuse.386 Today, however, much of the debate centres around the provision of services in rural and urban locations, and governance.

Over the past three decades, there has been a growing trend towards off-reserve migration. In 1967, about 21% of registered Indians lived off reserve. By 1987, this had increased to 35%, and by 1994 to between 41% and 50%.387 As of 1996, RCAP estimated that 42% (183,500) of the registered Indian population lived off reserve, and 100% of non-status Indians (112,600).388 In Saskatchewan, estimates from some quarters predict that by the year 2030 (ie., 32 years from now), 75% of the Indian population in that province will be residing off-reserve.389

The problems of economic and social dislocation do not go away with migration - ample statistics are available to show that reserve-based problems are simply transplanted to urban areas, and in many cases amplified because of the proportion of female single parents.390

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386 See Thalassa, 1994: pp. 169-186.

387 Thalassa Research, 1994: p.170. Assessment of these numbers must consider the fact that it has always been very difficult to obtain reliable statistical information regarding First Nations people, particularly off-reserve. Estimates of off-reserve populations vary significantly depending on the source of the information.

388 Canada, RCAP, 1996, Vol.4: Table 7.6, p.604.

389 Future Trends and Directions (Regina: Federation of Saskatchewan Indian Nations, July 1991): p.2; cited in Touchwood File Hills Qu Appelle Tribal Council, *Royal Commission on Aboriginal Peoples Report* (31 August, 1993) at p. 16.

390 Canada, RCAP, Vol.4: p. 609: On the basis of 1991 census data for Aboriginal household incomes in selected CMA s, Winnipeg, Regina and Saskatoon reported more than 60 percent of Aboriginal households below the low income cut-off. The situation was even more serious among female single parent households in these cities, where between 80 and 90 per cent were below the poverty line.

remains high - 70% greater than for non-Aboriginal population, and will continue to grow at a much faster pace than the non-Aboriginal population for the foreseeable future.381

- Demographics.

The demographic makeup of First Nations is dramatically different than for Canada as a whole. As with population growth, this means that both the problems - and solutions - are of necessity unique. In 1996, the Aboriginal population was on average ten years younger than the rest of the Canadian population. In the words of Statistics Canada, Over the next two decades, this will be reflected in large increases within the Aboriginal working-age population .382

Children under 15 accounted for 35% of all Aboriginal people, (and 38% on reserve) compared with only 20% of Canada s total population. Aboriginal people in the 15-24 years bracket made up 18% of Aboriginal population, compared to the figure of 13% for the general population. Finally, only 4% of Aboriginal population is over 65 years old, compared to 12% of the non-Aboriginal population.383

Within ten years [ie., 2006], Statscan projects that the number of Aboriginal people in the 15-24 age bracket will rise by 26%. During the same period, the 35-54 age bracket is expected to grow by 41% (and by 62% over the next 20 years).384

As well, almost one third of Aboriginal children in the 1-15 age range live in a one parent family, twice the rate among non-Indians.385 The percentage is even higher among Indians in urban areas.

These differences demonstrate that the present and future needs of the First Nations are categorically different than those of mainstream Canadian society. In addition to special requirements related to underdevelopment and dependency, programs and policy must also respond quickly and effectively to the needs of new families, new entrants to the job market, and the educational needs of a youthful population. This demonstrates why practices and programs cannot be transplanted from the non-Indian sector to the First Nations - they simply do not reflect the unique circumstances and needs.

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381 Statistics Canada, 1998: p. 8.

382 *Ibid.*, p.2.

383 *Ibid.*, pp.6-7.

384 *Ibid.*, p.8.

385 *Ibid.*, p. 8.

The Commission goes on to say that there is a direct causal relationship between ill health in Aboriginal communities and economic dependency:

> The research literature that asks What makes people healthy? consistently concludes that economic status - personal income and the general prosperity of communities and nations - is of great significance. [...] Aboriginal people are among the poorest in Canada. Based on the evidence we have reviewed, we are in little doubt that the stark economic facts of Aboriginal life are causally related to the stark facts on ill health.375

Other analysts have reached similar conclusions.376 Moreover, the Commission found that a continuation of the status quo of sectoral programs (each targeted at a particular symptom - ie., drug abuse, diabetes, etc.) will only serve to perpetuate current conditions.377 Instead they recommended a holistic approach that would address the social, economic and political conditions that contribute to ill health .378

4.1.3. First Nation population continues to grow.

In January 1998, Statistics Canada released a number of results from the 1996 Census relating to Aboriginal people.

- Population Growth.

Aside from the expansion of dependency and social fragmentation which is taking place due to structural and policy problems, the population growth of the First Nations adds more urgency to the situation. According to the 1996 Canada Census, there were at least 554,000 First Nation citizens resident in Canada, out of a total population of about 800,000 Aboriginal people.379 (However, these numbers are open to debate - Indian Affairs Minister Jane Stewart has put the number of Aboriginal people in Canada at 1.3 million.380)The birth rate for Aboriginal people

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375 RCAP, 1996, Vol.3: pp. 166-167.

376 Moscovitch & Webster, March 1995 at p. 9: The most alarming rates of social pathologies are associated with the worst economic and dependency conditions, particularly in the North.

377 RCAP, 1996, Vol.3: p.223: However much good a particular health or social program may do in the narrow sphere it addresses, it does not shift the overall picture of Aboriginal disadvantage - the pattern of poverty, powerlessness and despair - that determines health and illness.

378 RCAP, 1996, Vol.3: p.226.

379 Canada, Statistics Canada, *The Daily* 1996 Census: Aboriginal Data (Ottawa: 13 January 1998): p.1.

380 *Vancouver Sun*, Ottawa s aboriginal count fails to tally with census , 14 January 1998.

What these numbers confirm is that regardless of the extension of programs and services, economic development initiatives and income support measures, on-reserve dependency continues to escalate. Welfare dependency on most reserves, and in many other Aboriginal communities, has become an institution in its own right. 371 These trends show no signs of reversing themselves. In fact, when considered along with demographics and population statistics (see below), it appears that the trend can only continue in an upward fashion. This is particularly important when considered alongside Canada s ongoing efforts to reduce Indian Affairs expenditures during the same period (ie., since the Nielsen Task Force, 1984/85): dependency costs (mostly social assistance) are taking up a larger and larger proportion of shrinking annual budgets, leaving less and less monies for other priorities.

4.1.2. Negative social indicators continue to grow.

The RCAP final report provides a comprehensive statement of indicators and statistics regarding First Nations collective health. The definition of health which the Commission adopted is holistic, based on the concept of individual, family, and community *well-being*. Instead of being the managed outcome of a series of services , health is the natural outcome of community life based on social justice and the equitable distribution of Canadian wealth and resources 372:

> Whole health, in the full sense of the term, does not depend primarily on the mode of operation of health and healing services - as important as they are. Whole health depends as much or more on the design of the political and economic systems that organize relations of power and productivity in Canadian society. 373

Using this criteria, the Commission stated:

> We are deeply troubled by the evidence of continuing physical, mental and emotional ill health and social breakdown among Aboriginal people. Trends in the data on health and social conditions lead us to a stark conclusion: despite the extension of medical and social services (in some form) to every Aboriginal community, and despite the large sums spent by Canadian governments to provide these services, Aboriginal people still suffer from unacceptable rates of illness and distress. The term crisis is not an exaggeration here.374

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371 *Ibid.*: p.8.

372 RCAP, Health & Healing Policy Paper, (unpublished, Draft #5) 5 May 1994: p.12.

373 RCAP, 1996, Vol.3: p.315.

374 Canada, RCAP, 1996, Vol.3: p.119. See pp. 120-129 for Tables.

93, the total is more that $2.2 billion per year.366

RCAP concluded that The sum of our analysis is that unemployment and dependency on welfare are high and likely to get higher and that rising investment in social assistance, while necessary to provide a minimal income flow, is not an adequate response to the situation .367

Recent statistics bear out this conclusion. Between 1981 and 1992, on-reserve dependency (measured by the percentage of the total reserve population receiving social assistance) grew from 37.6% to 45.9%368, rising at a rate of about 12% per year on average.369 These figures mask considerable regional variations: in the Atlantic, on-reserve dependency was pegged at 77.2% in 1992/93, and in Alberta the number was 71.8%, compared with lows of 24.2% in the Yukon and 25.2% in Ontario.

On reserve dependency rates by region, 1987-1993.370

	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93
Atlantic	76.0%	77.3	78.6	75.0	71.1	77.2
Quebec	31.9	33.8	34.7	37.8	28.3	32.0
Ontario	23.4	22.1	23.6	25.8	26.6	25.2
Manitoba	60.5	58.6	56.7	58.0	57.3	67.5
Sask.	63.3	63.8	56.0	57.2	70.6	59.1
Alberta	33.6	34.8	35.6	42.0	47.5	71.8
B.C.	35.5	37.7	37.4	44.0	43.5	44.6
Yukon	19.2	24.8	20.2	21.3	23.2	24.2

366 Canada, RCAP, 1996, Vol.3: p.169.

367 Canada, RCAP, 1996, Vol.3: p.169.

368 Allan Moscovitch and Andrew Webster, *Aboriginal Social Assistance Programs* (Draft #3 - submitted for inclusion in *How Ottawa Spends (1995-96)*) (Ottawa: 18 March 1995): p.8.

369 *Ibid.*: p. 9.

370 Adapted from Moscovitch & Webster, March 1995: Figure 2.

4. CURRENT SITUATION.

4.1. Socio-Economic Indicators.

Anyone familiar with First Nation policy is well aware of the wealth of statistics that can be brought to bear on any discussion of Indian conditions.

4.1.1. Dependency continues to grow.

The extension of programs and services to Indian communities since 1970 has not reduced dependency. In fact, despite (or because of?) the existence of these programs, social assistance and other costs related to dependency have actually grown. This has a lot to do with historical spending priorities: traditionally, Relief took absolute priority over economic development in trust fund disbursements. Not until the 1950's were public funds made available for Indian business ventures .363 In previous chapters we have already documented how the bias toward maintenance programs has continued to dominate federal spending patterns related to First Nations over the past 30 years.

In the interim, little changed in terms of federal spending, as Thalassa noted in a 1994 report for RCAP:

> Perhaps not so surprisingly, in the past decade little appears to have changed. Combined expenditures by Canada on Indian economic development in 1992-93 amounted to around $377.4M. On the other hand, DIAND s social development 364 budget came in at $816M, more than double the amount allocated for economic renewal. Social development transfers accounted for almost 43% of the Indian & Inuit Affairs total expenditures in 1992-93.365

Social development costs continue to escalate:

> Allocations for social development in federal estimates for 1995-96, at $1,108 million, show a continuation of this [growth] trend. When provincial government expenditures on Aboriginal social development are added to federal expenditures and calculated for 1992-

363 Moscovitch & Webster, 1995: p.32.

364 A euphemism for minimum maintenance support .

365 Thalassa, 1994: p.99.