First Nations and the Canadian State

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In Search of Coexistence

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

John Crosbie, former Conservative cabinet minister (Crosbie 2003).

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FOREWORD

Professor Alan Cairns delivered a public address on "First Nations and the Canadian State: In Search of Co-Existence" as the Kenneth R. MacGregor Lecturer in Intergovernmental Relations in October 2002. This publication is the revised and much expanded text of that presentation.

Alan Cairns has long been one of Canada's pre-eminent scholars and a distinguished contributor to the literature on federalism and issues surround-

including its intergovernmental complexities, in particular as the federal Superintendent of Insurance (1953 to 1964), and President of Mutual Life Assurance of Canada (1964 to 1973). He was also a member of the Queen's University Board of Trustees.

Other previous MacGregor Lecturers have included Robert Stanfield, Peter Lougheed, Allan Blakeney, Albert Breton, Gordon Robertson, Daniel Elazar, Roger Gibbins and Richard Simeon.

The Institute of Intergovernmental Relations is delighted to be able to publish this very important contribution to the study of federalism and intergovernmental relations in Canada.

Harvey Lazar
Director, Institute of
Intergovernmental Relations
June 2005

ACKNOWLEDGEMENTS

I wish to thank the Institute of Intergovernmental Relations and the Canadian Network of Federalism Studies for sponsoring this lecture, and also Mutual Life of Canada and Friends of Kenneth MacGregor for funding support. I owe special thanks to Harvey Lazar, Director of the Institute of Intergovernmental Relations, for inviting me.

This is my second MacGregor opportunity. I gave a series of three MacGregor lectures in 1987, which led to *Charter versus Federalism* in 1992 (Cairns 1992*a*).

RÉSUMÉ

Depuis près de 50 ans, principalement en raison du nationalisme québécois, les Canadiens ont entrepris un processus quasi-ininterrompu d'introspection constitutionnelle en quête des moyens institutionnels susceptibles de leur procurer un sentiment d'unité au sein d'une fédération à la fois très étendue et très diversifiée. Mettre les Premières nations et autres peuples autochtones à l'ordre du jour constitutionnel a donné une nouvelle dimension et prédominance aux questions de la citoyenneté canadienne et de l'unité nationale. Nous nous trouvons donc au milieu d'un conflit entre un État canadien démocratique qui s'occupe d'immigration, laquelle constitue une exigence fonctionnelle de sa capacité à régner efficacement, et un peuple autochtone nationaliste frustré par les contraintes de ce projet de développement de pays. Dans cette dissertation, Alan Cairns trace le portrait de cette lutte et suggère une manière de penser qui pourrait nous mener à un terrain d'entente viable.

Cette dissertation illustre essentiellement une vision scientifique et politique qui permettrait aux peuples autochtones et non autochtones de partager la moitié d'un continent. Cette vision s'appuie sur quatre états de faits particuliers. Le premier est celui du mouvement anti-colonial mondial des peuples autochtones dans les sociétés colonisées, perçu comme étant la deuxième phase de l'anti-colonialisme qui a fait suite aux populaires mouvements d'indépendance du Tiers-Monde. Le deuxième décrit diverses réalités autochtones au Canada telles que la population autochtone vivant en milieu urbain, le nombre élevé de mariages entre autochtones et non autochtones, la petite taille des communautés des Premières nations et le grand nombre de gens dont les ancêtres sont autochtones, mais qui ne s'identifient pas à ces derniers. Le troisième présente une étude sur l'aliénation constitutionnelle autochtone en ce qui à trait au Parlement, aux élections, au système fédéral (en particulier les provinces), à la Chartre et à la citoyenneté canadienne. Enfin, le quatrième et dernier état de fait tente, considérant les difficultés liées au statut d'autochtone, de faire la synthèse de deux perspectives plutôt contradictoires qui rallient l'unité nationale et la diversité

multinationale, et qui sont toutes les deux associées au philosophe Charles Taylor. Dans ses commentaires intitulés « A Recipe for Living Together », le professeur Cairns fait une série de recommandations pratiques sur la manière dont les autochtones et les autres Canadiens pourraient se bâtir un avenir commun.

FIRST NATIONS AND THE CANADIAN STATE

IN SEARCH OF COEXISTENCE

INTRODUCTION

Marjorie L. Benson and Isobel M. Findlay; Kiera Ladner 2003*a,b*; Patricia Monture-Angus 1995; David Newhouse 2003; Mary Jane Norris and Stewart Clatworthy 2003; Mary Ellen Turpel 1989/90) — and their non-Aboriginal counterparts, who previously monopolized research on Aboriginal policy issues. Their university presence and visibility are reinforced by the emergence of Departments of Native Studies across the country. Aboriginal scholars bring to this subject an existential empathy that non-Aboriginal scholars cannot command. Occasionally, it is suggested that true knowledge/understanding of Aboriginal issues is unavailable to outsiders lacking lived experience.[4]

My own position is straightforward: the more disciplinary diversity the better. Disciplinary monopolies — even if only relative, and regardless of which discipline plays the lead role — always need supplementation by the divergent perspectives of other disciplines.[5] Moreover, the coexistence of Aboriginal and non-Aboriginal scholars within disciplines is a positive development, since it helps to overcome the historic hegemony of non-Aboriginal scholars from the majority society. An increase in the number of scholars of Métis and Inuit backgrounds would be welcome additions to the scholarly community addressing Métis and Inuit policy questions, subject areas that are relatively under-studied.

I write and speak as an older political scientist. I would like to say as an "elder," but it has been gently suggested that simply "old" is more appropriate. I place political science, especially if political theory is included, somewhat below legal analysis in terms of relative importance. As a political scientist, I am concerned with the overall viability of the constitutional order which emerges from the search for a rapprochement between First Nations, the Canadian state, and the non-Aboriginal majority population. I do not regard this concern as a capitulation to the status quo, but as a recognition of the inescapable reality that none of us has a blank slate on which we can write as we will.[6] A concern for constitutional viability and workability is an essential requirement of helpful policy-thinking.

This is a natural focus for a political scientist, especially a Canadian one, and more particularly a non-Aboriginal one. For nearly half a century, driven largely by Quebec nationalism, Canadians have engaged in an almost uninterrupted process of constitutional introspection, seeking answers to the question "Should we remain together as a people?" and if the answer is "yes," what rearrangements of our constitutional life and its institutional components are viable and appropriate? The emergence of First Nations and other Aboriginal peoples onto the public agenda has given the issue of our togetherness a new dimension and salience.

The combination of disciplinary rivalry, the disagreement over how we are to live together, the emergence of an Aboriginal scholarly community, the colonial background to contemporary debates, and the emotions that inevitably attend a policy focus in which nations and nationalism are central objects of analysis generate a policy discourse in which acrimony may overwhelm

civility, or political criteria may stifle discussion.[7] I will try not to succumb to these pressures.

One final *obiter dictum.* I apologize for focusing largely on First Nations, and thus for not engaging in what would have been a valuable comparative analysis of all three incumbents of section 35 of the

essay seeks to outline the contours of that struggle and to suggest a manner of thinking that might move us in the direction of a viable middle ground.

My goal is both ambitious and limited: ambitious in the territory I seek to cover, and the macro-perspective frequently employed and limited in that my answer to "What is to be done?" is, in fact, tentative, even though it is forcefully argued. The debate about alternative futures is sufficiently complex that a healthy dose of modesty is an appropriate trait.

Two readers of the first version of this paper suggested that I should translate the general argument of its concluding sections into more specific recommendations as to how Aboriginal and other Canadians could more fruit-

colonies, informs the decolonization process in every locale where it is underway.

Although Third and Fourth World peoples were both subject to the hierarchy of imperialism, the latter were never treated as peoples/nations on the road to independence. In Canada, Indian peoples were placed outside the standard working of the majority's constitutional order, and governed in geographically discrete communities by superintendents who were the domestic counterparts of district officers in British colonial sub-Saharan Africa. The system of Indian reserves could be thought of as transitional appendages to the mainstream constitutional order, while the policy of assimilation — for which church-run residential schools were key instruments — eroded cultural diversity. In the context of Canadian domestic imperialism, therefore, the governing logic of the state was that indigenous difference was transitional: to be overcome by state pressure and inducements.

What is striking and far too infrequently noticed in this domestic imperial history is that, in traditional policy terms, the basic constitutional order was sacrosanct. Indians were either outside the constitutional order that applied to the majority — defined and treated as wards — or were subsequently to be fully within it as standard citizens, although their route to citizenship would differ from that travelled by other Canadians. Contemporary First Nations nationalism renders the traditional policy obsolete. It rejects both wardship and legislated inferiority as well as the disappearance of Indians into the majority society. These rejections mean that the institutional framework of the constitutional order can no longer be taken for granted, as it was from a traditional policy perspective.

Indian peoples have rejected both the historic practice of stigmatized exclusion and the historic assumption that it was to be ended by their assimilation and disappearance. In traditional policy terms, domestic empire and internal colonialism were to end by Indians, as individuals, entering the ma-

nations is identical: the colonized status of subject peoples. Further, both Third and Fourth World nationalist movements took those in power by surprise, which suggests a very volatile policy area buffeted by passion.[11] Nevertheless, although the Fourth World response to internal colonialism builds on the earlier response to overseas colonialism of Third World peoples, the lessons of the latter lack immediate applicability to Fourth World conditions. This is beautifully illustrated in a newspaper account noting that the Haida Nation in British Columbia has filed a writ with the BC Supreme Court laying claim to all the lands in the Queen Charlotte Islands, plus resources in and under the sea. Haida President Guujaaw asserted that the Haida believe they are an independent nation and are owners of the land. However, "practical realities being what they are, the Haida, [he said], are willing to accept a 'lesser' designation of having aboriginal title to the land under Canadian law because 'there are other people living on the land now' … The alternative, to 'decolonize' Haida

in spite of the different assumptions and hopes that drove them, were all responses to the ongoing process of ending formal European hegemony over much of the world. As such, they were responses either to the achieved (Third World) or anticipated (Fourth World) triumph of anti-imperialism. In sum, the end of the British empire in India and elsewhere and the subsequent collapse of other European empires removed a crucial justification for the wardship status of Indian peoples in Canada. Wardship status, no longer part of the natural order, became an anachronism almost overnight.

The colonial nationalism which overthrew empires and the less ambitious internal indigenous nationalism in settler colonies now underway were and are similar responses to similar indignities. The most basic was the ultimate indignity of being placed under the paternal authority of others, ostensibly for one's own good. Indigenous peoples' control over their own future was removed. In both cases the non-indigenous rulers complacently assumed the justice of this usurpation. Overseas colonies were maintained under a system of tutelage. Internal indigenous minorities in settler colonies were defined and treated as wards. Both were subjected to the hegemony of European peoples, and to the disparagement of their cultures. In a famous phrase, Nehru spoke for both when he defined one of the nationalist goals as freedom "from contempt" (Perham 1970, 184).[12]

of international opinion on the illegitimacy of internal colonialism. In a comparative analysis of indigenous peoples and the state in Canada, Australia, New Zealand, Denmark and Norway, Frances Abele notes the remarkable fact "not that the wronged [indigenous] group remembers and seeks redress, but that significant numbers in the dominant group wish to acknowledge the injustices and to work on recuperation and reparation" (Abele 2001, 145).

available outcome is a compromise that requires some rapprochement between the successors of the former imperial majority and the formerly colonized indigenous peoples.[18] These populations have to live together within the same polity, a reality that will inevitably be experienced as a frustration from the nationalist indigenous perspective.

Successful Third World anti-colonial movements transformed the international system by changing the numbers and the composition of the players. Statehood gave voice to the new players, resulting in a transformed international conversation about the nature and norms of a post-colonial world. Hedley Bull's summary is apposite: Third World states "have overturned the old structure of international law and organization that once served to sanctify their subject status. The equal rights of non-western states to sovereignty, the rights of non-western peoples to self-determination, the rights of non-white races to equal treatment, non-western peoples to economic justice, and non-western

Although the transformed international climate has been a crucial factor

large Métis element, especially in western Canada, and a non-status component. The non-status component of the First Nation urban population will grow rapidly, fed by the contribution of high intermarriage rates in urban settings and the loss of legal status for the children of two successive out-marriages in the grandparent and parent generation.

Urban natives have a more fluid population than reserve-based commu-

comparison of Registered Indians on and off reserve, found that the latter "fared substantially better" than on-reserve Indians in terms of the United Nations Human Development Index, measuring gross domestic product (GDP) per capita, educational attainment, and life expectancy at birth. This was true in all regions of the country (Beavon and Cooke 2003, 209, 217 and 219).[23]

Some of the relatively positive off-reserve data reflects what Guimond calls "ethnic mobility," or "ethnic drift," which refers to individuals changing their self-identification from non-Aboriginal to Aboriginal. According to Guimond, this ethnic mobility "is taking place outside Indian reserves, mostly in urban centres" (Guimond 2003, 100). Since these ethnic "drifters" have higher educational attainments than the stable Aboriginal identifiers the more positive educational statistics in part reflect identity mobility. Presumably, some of the other positive statements in the preceding paragraph are also products of ethnic mobility.[24]

The contradictory aspects of the Aboriginal urban reality described above and the limited research devoted to the urban scene argue for a much greater policy and research focus on urban Aboriginal life.

The disproportionate contemporary policy focus on reserve communities is over-determined by history, by the complications of federalism, by the federal government policy focus on reserve communities, by the diffuse nature of the urban Aboriginal presence, and by the fact that the heady language of nation more easily applies to reserve communities with their own government, and by other factors. (Cairns 2000*c*). This policy and research bias is, however, under-justified in terms of democratic criteria (the off-reserve numbers involved), in terms of the ill-understood contrast between ghetto realities and an emerging Aboriginal middle class,[25] and in terms of the stark reality that there clearly are two routes to the future.[26] "City life," as Newhouse and Peters report, "is now an integral component of Aboriginal peoples' lives in Canada" (Newhouse and Peters 2003*b*, 5).

Intermarriage

It is neither possible nor desirable to assess the future of and policy for the First Nations population without acknowledging the extent of intermarriage. Intermarriage rates, defined as marriage or cohabitation between a person with legal Indian status and one without that status, are very high; although the non-status person may, of course, be Aboriginal. Off-reserve figures for the five-year period ending 31 December 1995 hover slightly below 58 percent, while the on-reserve figure is somewhat less than 23 percent (Four Directions Consulting Group 1997, 20). When two out-marriages in a row result in a loss of legal status for the children, out-marriage rates threaten the long-run survival of the legal status population. By mid-century, the legal status population will begin to decline. A number of small bands near urban centres will legally disappear in coming decades. "In the long term," according to Clatworthy,

Bill C-31's rules concerning Indian registration "will lead to the extinction of First Nations (as defined under the *Indian Act*)" (Clatworthy 2003, 88).

Intermarriage verges on taboo status as an object of academic attention. The Royal Commission paid scant attention to it, and the academic community, with few exceptions, leaves it alone.[27] When I tried to draw attention to the obvious significance of intermarriage at a small seminar with RCAP commissioners, the mood quickly became uncomfortable and I was discouraged by the Chair from proceeding. This relative silence is extraordinary, given the fact that minority communities concerned for their own cultural survival typi-

and 44 percent of the latter were employed. Average total income for the former was $22,000, $6,000 more than for the Aboriginal Identity population (1996 figures). Unfortunately, the figures do not specify the location of this population as urban or otherwise (Siggner 2002).[28]

The most plausible reason for the commission's otherwise inexplicable unwillingness to analyze and report on the non-identifying Aboriginal ancestry population — a reason mentioned by various informants — is that this very large group could be portrayed as an example of successful assimilation, and thus employed as counter-evidence to the dominant and preferred nationalist discourse. Be that as it may, the lack of knowledge about and near systematic avoidance of the non-identifying Aboriginal ancestry category by the research community profoundly distorts our understanding of the Aboriginal reality that policymakers seek to influence. We would be much better informed about the identifying Aboriginal population if we had more studies of the Aboriginal ancestry population that does not identify as Aboriginal.

SMALL POPULATIONS AND OTHER PRACTICAL CONCERNS

The importance of population size for the quality and jurisdictional capacity of self-government also merits an extensive attention it has not received.[30]

The politics of nationalism gets in the way of the accurate presentation and evaluation of data capable of influencing the plausibility of various futures. This is evident in public discourse and academic literature that pays limited and inadequate attention to the small population of individual First Nations. RCAP should be partly exempted from this critique.[31] It was deeply concerned about the small size of Indian bands. It recognized that federal policy-making that chose bands rather than nations or tribal organizations as the basic political-administrative unit, "[broke] up ... Aboriginal and treaty nations into smaller and smaller units ... as a deliberate step toward assimilation of Aboriginal individuals into the larger society" (Canada 1996, vol. 2, 89). RCAP accordingly proposed a comprehensive process to encourage consolidation. "The Commission," it asserted, "considers the right of self-determination to be vested in Aboriginal nations rather than small local communities" (ibid., 166).

The viability of a response to First Nations nationalism will be increased if policymakers keep in mind various realities which, cumulatively, suggest that First Nations should be located in the category of "micro-nations."[32] By way of illustration, only 5.6 percent of Indian bands, 35 out of 627, have on-reserve populations of more than 2,000; nearly two-thirds of Indian bands have on-reserve populations of less than 500. One hundred and four bands have on-reserve populations of less than one hundred (Canada. DIAND 2002, xv).[33] These figures were deeply troubling to RCAP. Many of the over 600 Indian bands had "nation" in their official titles — a descriptive label most frequently added in the last two decades. The umbrella political organization that acts and speaks on their behalf is the Assembly of First Nations. The Royal Commission rejected "nation" as an appropriate label for very small communities on the premise that small populations lacked the capacity to assume the governing responsibilities it proposed, and also could not effectively play the nation role in the "nation-to-nation" relationship that RCAP asserted was to be the primary relationship between Aboriginal peoples and the Canadian state. RCAP then proposed a consolidation of the existing 600 plus bands, supplemented by Inuit and Métis communities, into 60–80 nations by way of aggregation and various forms of merger.[34]

There is a fundamental ambiguity at the heart of the RCAP report, a report of over 3,500 pages based on the most extensive round of hearings and the most massive research program on Aboriginal policy undertaken in Canadian history. On the one hand, nation is to be the basic political unit for Aboriginal peoples, and nation-to-nation is to be the fundamental relationship with Canada. These are the crucial structuring concepts for the report. On the

other hand, its numerical criteria for nationhood (an average population of 5–7,000), in order to enhance governing capacity and community viability, excludes the bulk of Indian peoples as presently constituted from nation status and hence from its ideal nation-to-nation relationship. Following the RCAP analysis, in the vast majority of cases, nations will have to be created (or perhaps re-created on the basis of historic nations) by reducing the number of distinct, separate Indian communities/bands by about 90 percent.

In general, therefore, nation is a project for the future. In a sense, the Royal Commission gambled. It has more to say about the nations it hopes will emerge given appropriate incentives than it does about the reality that now exists of hundreds of bands too small to meet the commission's criteria for nationhood. If those small bands remain the reality on the ground, the commission goal of a multinational Canada and nation-to-nation relations is unattainable, for very few First Nation members will live in nations. The aggregation of existing bands into nations is an extraordinarily ambitious goal, the achievement of which would require a herculean process of nation-building. The federal government is lukewarm to such a proposal, in part because it has to deal with existing Indian bands embedded in the *Indian Act*. Further, any consolidation proposal challenges the existing leadership in over 600 First Nation communities. Not surprisingly, the Assembly of First Nations offers little support for a proposal that undercuts the base of its political constituency. Further, in some cases, the cost of consolidation may be political instability before the new arrangement jells. Finally, even a successful consolidation still leaves policymakers and the governments of these emergent entities with populations that are relatively small (5–7,000 on average, as already noted).

If the existing population size of legally defined Indian bands remains largely unaltered, except by birth, death, mobility, and intermarriage; if the land mass of most reserves remains of "minuscule size" (Morse 2002*b*

activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres." Such a culture has to be

parameters of the exercise are necessarily obscure to both sides" (Cameron and Wherrett 1995, 91). Kerry Wilkins, a passionate supporter of self-government, nevertheless agrees that numerous problems, which receive scant attention in the literature, need to be addressed. He is both surprised and perturbed by the passionate advocacy in favour of judicial recognition of a constitutionally entrenched right of self-government at a time when we lack "a shared and trustworthy understanding, even in outline, of how self-government rights would work within mainstream legal arrangements or of the impact they may have on them" (Wilkins 2000, 247, 244-45 and 249). He goes on to raise, always in a supportive voice, the concern that some communities lack the varied leadership skills, and technical training appropriate to the needs of their members. He expresses concern about vulnerable individuals, especially women, in communities where accountability is weakened by the fact that most government revenues come from outside the community (ibid., 254 and 258). His apprehension is shared by many members of Aboriginal communities who have lost "trust and confidence in community leadership and governance arrangements" (ibid., 268). He concludes by noting concerns about the capacity of the Canadian state to incorporate 600 plus small governments into Canadian institutions, including the intergovernmental structure of federalism (ibid., 200, 259 n. 58 and 260).

Wilkins' basic point is that in spite of the extensive academic attention to, political discussion of, and judicial observations concerning self-government some of the practicalities and normative concerns have been insufficiently addressed. Although he does not provide explanations for this failure of attention, clues are dropped here and there. Nationalism reacting to a colonized past discourages attention to impediments to self-determination. Advocates of the inherent right of self-government are almost inevitably hostile to the intrusion of practical concerns that outsiders might employ to weaken the exercise of the right. In addition, the leading role of the academic legal community and the level of abstraction of legal analysis discourage attention to practical concerns. Moreover, there is a certain reluctance among supporters of First Nations to identify difficulties and impediments to the successful exercise of the right of self-government. This reluctance is reinforced by suggestions in the vein of American Indian activist, Vine Deloria Jr., that the time has come when *We Talk, You Listen* (Deloria 1970). Although Wilkins does not refrain from speaking, he is clearly somewhat hesitant about his role, obviously concerned that his admonition to slow down and sort out certain problems in advance may be misunderstood as putting him in the wrong camp.[41] He would no doubt agree with Noel Dyck, who some years ago wrote an article on the difficulties of "Telling it like it is," when to do so might get in the way of the self-government which he, and most other anthropologists, supported (Dyck 1995).

It is truly remarkable how the small size of First Nation communities and other practical concerns receive such limited attention. The BC Treaty Commission, in "A Review of the Treaty Process," included with the *Annual*

out from the general population, and an idiosyncratic place in the federal system — were in fact impediments.[43] The White Paper proposed dismantling the battery of differential policies and administration and transforming Indians into standard Canadians. Had the White Paper achieved its objectives, individual Indians would have had the same relation to the major institutions of the constitutional order as other Canadians. There would have been no problem of "fit," which was simply assumed. The existing constitutional framework would have welcomed Indians as individuals and members of communities in a supportive manner similar to how the international system of independent states welcomed the newly independent Third World nations casting off the shackles of empire.

From the perspective of governments and the non-Aboriginal population, assimilation had many advantages. It was psychologically gratifying with its reassuring message that admission to membership in the majority culture was an obvious good, the availability of which reflected the generosity and openness of the majority. It would end the anomalous status of a people whose lives were governed by special arrangements which distanced them from the normal constitutional order. By so doing, it left the latter unchanged. The constitutional order did not have to bend to accommodate Indianness. Rather, Indians were to travel along the assimilation path until they were ready for full membership in an unchanged constitutional order. The "gift" offered by the larger society was not respect for Indian difference, but rather undifferentiated inclusion.

Now: Survival as Nations

The contemporary discourse of Aboriginal rights is dramatically opposed to the assimilatory assumptions behind the White Paper and the historic policy of incorporating Indians into an unaltered set of constitutional and institutional arrangements — parliament, federalism, the inherited first-past-the-post electoral system, etc. Not only have "nations" displaced individuals as the entities that have to be accommodated, but that accommodation presupposes a significantly modified constitutional order, and indeed a new definition of Canada. Accordingly, the fit between the goal of Indian policy and the inherited constitutional/institutional order, which was assumed by the non-Aboriginal policymakers up to the defeat of the White Paper, no longer exists.[44] Although the data is fragmentary and somewhat fugitive, there appears to be widespread alienation, particularly of Indian peoples, from the constitutional order.

of the first century after Confederation (1867) their treatment is appropriately described as "constitutional stigmatization" (Cairns 1999*b*). "From birth to death," argued Noel Dyck, "most Indians have been caught in a situation where they have had to listen to one unvarying and unceasing message — that they are unacceptable as they are and that to become worthwhile as individuals they must change in the particular manner advocated by their current tutelage agents" (Dyck 1991, 27).[45] Indian policy was an education in not belonging. Taylor reminds us that this imperial practice and supporting belief system is a form of abusive misrecognition that can inflict "a grievous wound" on its recipients (Taylor 1992, 26). The Middle-East scholar, Albert Hourani, put it even more strongly: "To be in someone else's power is a conscious experience which induces doubts about the ordering of the universe" (Irwin 2001, 30). To be colonized is experienced as a disruption, as a change of cultural direction imposed rather than chosen. It naturally translates into an ambivalence about

Canadian political institutions" (Canada 1996, vol.1, 249).[48] Georges Erasmus, before becoming co-chair of RCAP, spoke scathingly of the incapacity of Par-

personal knowledge of the candidate is higher than in southern Canada. In addition, both the indigenous percentage of the electorate and the number of indigenous candidates are very high, especially in Nunavut and the Northwest Territories, compared to southern Canada.[57] Further, the significance of government in the economy, when the private sector is weak, provides additional incentives to vote.

Confusion of Voice

The limited legitimacy of Parliament is implicit in the role of the Assembly of First Nations (AFN) as a recognized spokesperson for First Nation concerns. This was indicated by its participation, along with other major Aboriginal organizations, in the four special constitutional conferences (1983 to 1987) to clarify the Aboriginal and treaty rights identified in section 35 of the *Constitution Act, 1982,* and again in the discussions that produced the Charlottetown Accord. These recognitions not only suggest that the AFN is not a simple interest group, but that it has an informally recognized, albeit shaky, constitutional status. The logical corollary is that even though members of First Nations possess the federal franchise, Parliament has a diminished capacity to speak on behalf of First Nations and their members. The inevitable result is a profound tension between the AFN and the federal government (particularly INAC), a tension that cannot always be kept under control. It surfa(lotk1Tw[(3(vitabl7q]

based on section 91(24) of the original *BNA Act, 1867*, dealing with "Indians and Lands Reserved for the Indians." The AFN and other national Aboriginal organizations identify with the recently constitutionalized section 35 (1) and (2) of the *Constitution Act, 1982* which recognizes and affirms "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada," defined as including the "Indian, Inuit and Métis peoples of Canada." Section 91(24) reflects a colonial past now held in disrepute when Indians were wards, and Indian policy was made as a matter of course by non-indigenous legislators representing non-indigenous voters. Sections 35 (1) and (2) are constitutionalized expressions of anti-colonialism. Section 35 is a positive affirmation of Aboriginal difference supported by and embedded in Aboriginal and treaty rights.[59] Section 35 is the focal point for contemporary Aboriginal jurispru-

as a Canadian citizen. In addition, the report's recommendations included numerous ongoing important roles for the major Aboriginal organizations (Canada 1996, vol. 5). These were steps toward the commission's goal of a multinational Canada in which the actors were nations and wherein citizens were to be defined in relation to the nations to which they belonged.

Disaffection from Federal and Provincial Governments

Disenchantment with the federal government does not translate into affection for the provinces. Historically, First Nation members had an anomalous relationship to the federal system. Prior to the post-World War II extension of the federal and provincial franchise to Indians, they experienced a virtual unitary state relationship with the federal government. They were not thought of and did not think of themselves as belonging to provincial communities, or as having the standard citizen relationship with provincial governments. The combination of a special statute, the *Indian Act*, a federal Indian Affairs Branch to administer it, and isolation on federally established and federally administered reserves inevitably meant that both practically and psychologically Indians existed outside the federal system. In 1966, the Hawthorn report noted that: "Historically the Canadian Indian has had an especially strong link with the federal government and a weak and tenuous relationship with provincial governments.... The Indians ... developed a special emotional bond with the federal government and suspicious and hostile attitudes to the provincial governments" (Hawthorn 1966/67, part I, 199). More recent research studies of individual provinces undertaken for RCAP, supplemented by other research, confirm the survival of negative attitudes to the provinces — ranging from hostile to wary and suspicious.[62] The "strong link with the federal government" noted by Hawthorn is prized as an indicator of the unique status of Indians, not because of a positive identification with Ottawa as such.

Uncertain Citizens

Given their anomalous position in the federal system, their historical experience as "outsiders" reflected in the denial of the federal franchise until 1960, and the fact that the traditional enfranchisement process required the relinquishment of Indian legal status in order to obtain the federal right to vote and to have the same relation to the federal government as other Canadians, it is not surprising that the label "uncertain citizens," in John Borrows' phrase, appropriately describes the widespread ambivalent contemporary relationship of Indian peoples to Canadian citizenship (Borrows 2001).[63] Borrows' assessment is supported with nuanced differences of tone by other scholars: Darlene Johnston, another First Nations author, refers to the "ambivalence and

Other assessments are less favourable. In 1989–90, in a frequently cited article, Mary Ellen Turpel, then a law professor and now a judge in Saskatchewan, authored a devastating root and branch critique of the Charter as wholly incompatible with Aboriginal values and beliefs (Turpel 1989/90). The "Charter's severest critics," according to Boldt and Long, "have been native Indians" (Boldt and Long 1985, 165). To be a Charter supporter was to be labelled a "dupe of the colonizing society" (Green 1993, 118). Although the Native Women's Association of Canada has been a strong supporter of its application to First Nation governments (Native Women's Association of Canada, n.d.), the Assembly of First Nations described it as a "foreign" document and passionately opposed its applicability and suitability for First Nation communities (First Nations Circle on the Constitution 1992, 64).[67]

There is well-argued support in main stream legal scholarship that as a matter of constitutional requirements the Charter does not apply to Aboriginal "communities exercising inherent self-government rights or powers" (Wilkins 1999, 62). If, however, the Charter does apply, the "acceptance of the [its] legitimacy would threaten the integrity of, and undermine internal respect for, the customs, traditions and orientations that constitute many indigenous forms of government" (ibid., 117).[68]

Boldt and Long agree with Turpel and the AFN on the cultural dissonance between the Charter and tribal traditions and beliefs. They go on, however, to note that in their contrast between the "western-liberal tradition and native American tribal philosophies," including "traditional customs relating to group rights," they are not arguing "that Indians are currently uniformly and consistently practising these traditions." In fact, these traditions have been "embraced as their charter myth" (Boldt and Long 1985, 169). In part, the appeal to tradition as a charter myth is a rhetorical weapon in the never-ending struggle to justify differentiated treatment. It is also a way to preserve identity integrity in the face of the ubiquitous pressures of the majority society.

In somewhat different language, opposition to the Charter comes from an appreciation of and antipathy to its (Canadian) nation-building goals. The Charter's nation-building purpose of linking Aboriginal peoples (and, of course, other Canadians as well) to the pan-Canadian state by the vehicle of rights confronts the rival nationalism of First Nations intent on preserving social and cultural difference from the pan-Canadian majority.

In addition, and quite apart from arguments about cultural differences and unhappiness with the fact that the nation-building purpose of the Charter is directed to the Canadian nation, the AFN opposition is based on the oppo-

of governments. For the provincial governments, opposition was expressed in the historic rhetoric of parliamentary supremacy. For First Nation elites, opposition was typically expressed in terms of the link between cultural difference and nationalism. The Charter was not their charter. Significantly, and supportive of the idea that Charter opposition is designed to protect First Nation governments from the constraint of rights, there does not appear to be any opposition to the Charter's availability for First Nation individuals living off-reserve in the midst of non-Aboriginal society.

In a sense, the Charter debate is now history. In Quebec, opposition to what René Lévesque called that "bloody Charter" (Cairns 1992*a*, 121) is now over, and Charter support in Quebec differs little from that among other Canadians (Bauch 2002; Fraser 2002). For Aboriginal peoples, the evidence of the debate being over may be more tentative. However, in a massive, exhaustive, and balanced recent survey of the status of Aboriginal peoples under the Charter, law professor Brad Morse noted that "the individual rights and liberties emphasized by the Charter are becoming more accepted and internalized by Aboriginal people," leading to challenges to laws and policies by any government, including Aboriginal governments. He also noted that Charter challenges to Aboriginal governments were leading to renewed discussion of the need to develop a rival Aboriginal charter (Morse, n.d., 62-63).

Constitutional Alienation and the Frustrations of Nationalism

Overall, the preceding catalogue of either opposition or half-hearted allegiance to the major institutions of the constitutional order adds up to a First Nations political culture of alienation/distrust/suspicion. From a First Nations perspective, the Canadian institutional environment is uncongenial; there is a misfit, difficult to measure, between First Nations aspirations and Canadian governing arrangements. In marked contrast, therefore, to newly independent Third World nations who were accommodated by and comfortably fitted into an expanding international state system, First Nations in Canada do not encounter a ready-made system of institutions appropriate to their ambitions and waiting to receive them.

Members of First Nations are uncertain citizens; the standard practice of representation in legislatures is considered inappropriate by many; Parliament's legitimacy is challenged; federalism is valued primarily for the opportunity a third order of government offers to escape the imposition of majority rule insensitive to the needs of indigenous nations; provincial governments tend to be viewed through suspicious eyes, and the Charter encounters significant opposition, even if it receives support from the Native Women's Association of Canada (Native Women's Association of Canada, n.d.).

It would be unwise to assume that the previous catalogue of antipathy to, simple lack of interest in, or lukewarm support for the major political institutions of the Canadian state is universally subscribed to by all or possibly

even by a majority of individual members of First Nations.[69] It would be astonishing if there was not significant variation across the country or between on-reserve and off-reserve individuals.[70] However, when all the qualifications are listed and the probable diversity of views is underlined, the indisputable fact remains that there is a repudiation of, or distancing from, the core institutions of the Canadian state by a significant proportion of the First Nations population.

The frequently repeated assertion that indigenous peoples view self-determination as occurring within existing states (Barsh 1994, *passim*) undoubtedly applies to the Canadian situation. However, the amount of attention paid by the First Nation political elite and scholarly supporters of their position to the search for a viable political and constitutional arrangement with the non-Aboriginal majority is minimal compared to the effort and advocacy devoted to self-determination, self-government, and a third order of government. The limited emotional connection between First Nations and the institutions and practices of the constitutional order starkly underlines the magnitude of the task of developing/devising institutional meeting places where at least a limited acceptance of common membership in an overlapping civic community can emerge and grow. A rapprochement between First Nations and the Canadian state is a task of immense difficulty that will have to be pursued for decades, a pursuit in which a positive outcome is not guaranteed.

This rejectionism and alienation are historically rooted. They will not be significantly reduced or disappear in the short-term future. Memories of cultural stigmatization — residential schools (including language prohibition) and the banning of certain customs (potlatch, sun dance) — produce a distancing from the successors of those who sanctioned these cultural assaults. More generally, a colonial analysis of the past fosters the desire to achieve a community escape. Colonialism is an education in outsiderness. Its ending is more naturally seen in terms of self-government than in the incorporation and statistical disappearance of individuals in the Canadian community of citizens. This perspective is facilitated by the communal/territorial basis of over half of the First Nations population, which inevitably leads to a portrayal of a desirable future in terms of as much separate self-governing political existence as possible. This future vision is additionally supported and strengthened by the diffusion of the term "nation" throughout First Nation communities. Nation is simultaneously a servant of "otherness," an instrument of solidarity, and at the very least a competitor to Canadian citizenship.

Alienation from imperially imposed governing arrangements in Third World overseas colonies can be expressed in the choices available to the nationalist movement as it takes power, or shortly after, in a newly independent state. Often the initial choice, especially if the transfer of power has been peaceful, will be modelled on the constitutional and institutional arrangements of the mother country, which may turn out to be a temporary accommodation. The international system imposes fewer constraints of constitutional and institutional forms on newly independent Third World peoples than are imposed on Fourth World indigenous nations in polities with large settler majorities. These constraints are reinforced

> their way of being Canadian is not accommodated by first-level diversity ... To build a country for everyone, Canada would have to allow for second-level or [what Taylor calls] "deep" diversity ... a Québécois or a Cree or a Dene might belong in a very different way, [by being] Canadian through being members of their national communities (Taylor 1993, 182-83).

The phrase "deep diversity" lends itself to misinterpretation. It does not necessarily translate into profound cultural divergence. For example, Taylor notes that in terms of values and political cultures, "English" Canada and French Canada are closer together than they have ever been. Cultural distance between immigrants who partake of first-level diversity and the society they enter is in many cases profoundly greater than the differences between English Canada and French Canada. In other words, on average, cultural diversity is much deeper in first-level diversity Canadians than for Taylor's prime deep-diversity community, Quebec or French Canada. "Deepness," to Taylor, resides in identity, in the sense of nationhood and the desire to continue as a separate people into the future. This is what singles out Quebec or French Canada — Taylor moves back and forth between the two conceptions — and Aboriginal nations. In its simplest form, for Taylor first-level diversity Canadians share a common patriotism, but not a common culture. Deep-diversity communities increasingly share a common culture but not a common patriotism. They are kept apart by competing senses of national belonging (Taylor 1993. Quote marks for "English" Canada are Taylor's.)

For Taylor I, members of deep-diversity communities will belong to Canada indirectly through their membership in a respected and recognized internal nation. They do not belong directly to Canada as citizens. Accordingly, internal deep-diversity nations will monopolize the allegiance of their members. The internal nation will be the intermediary between its individual members and the distant state of the country as a whole. The belonging to Canada of individuals in deep-diversity communities "pass[es] through their national communities" (Taylor 1993, 183; see also 199). To exaggerate only slightly, for internal deep diversity nations the overarching constitutional order will be more like a container than a focal point for citizen allegiance. Citizenship, in the sense of emotional belonging, will be located in the internal nations. The relationship with the pan-Canadian constitutional dimension is instrumental. As noted below, much of First Nations constitutional theorizing approximates Taylor I theorizing.

The Taylor I deep-diversity perspective, which is the view from below, is supplemented, if not contradicted by a very different Taylor II. In an article provocatively titled "Why Democracy Needs Patriotism (1996)," Taylor II argues that "strong identification on the part of their citizens" is a necessity in democratic societies, as is the belief "that their political society is a common venture of considerable moment." Contemporary democratic states, he asserts, need "a high degree of mobilization of their members, [which] occurs around common identities." Finally, "a high degree of mutual commitment" is

necessary to sustain redistributive policies to reduce the alienation of minorities and the disadvantaged (Taylor 1996, 19-20).[72]

Taylor II appears to suggest that a comprehensive institutionalization of deep diversity will lead to a dangerous weakening of the capacity of the democratic state to implement policies for the alienated and less well-off. His argument, although perhaps not put quite so bluntly, is that deep diversity and a high degree of mutual commitment are uneasy partners. While Taylor II is clearly not arguing for a uniform undifferentiated citizenship, he is asserting that internal nations whose members are "in" but not "of" the larger society, whose members relate to the state in a Taylor I fashion, who view a common citizenship as an unacceptable instrument of assimilation are weakening the overall capacity of the state to enhance their welfare.[73]

Taylor I speaks to the nations within. He understands their desires. Taylor II speaks to federal and provincial governments; he understands the practical, functional considerations behind their desire to forge at least a limited version of a common civic community among all those who live within their borders. "Democratic states," he argues, "need something like a common identity" (Taylor 1999, 265; see also 271 and 272). In the absence of a common identity, he reluctantly observes, there is an understandable, albeit dangerous, temptation for the majority to exclude those who fall outside the identity which is natural and congenial to them.[74] This, of course, was the reality for reserve-based Indian peoples prior to the 1960 extension of the federal franchise. They were clearly excluded from common civic membership in the Canadian community. As a consequence, their overall public policy treatment was unquestionably inferior to that of the or I sTp.0242 Tw sT Tw(74cleaH5,0/nadian com-)]T

of the RCAP clearly identifies "nations" as the constituent elements in the multinational Canada it advocates. That the Royal Commission paid minimal attention to Aboriginal political representation at the centre, and had a very weak conception of citizenship logically followed from the privileged position it accorded to the Aboriginal nation. Representation at the centre, which received only the cursory attention of a few pages in a five-volume report of over 3,500 pages, was to be by Aboriginal nations in a new third chamber with the task of acting as a watchdog on behalf of Aboriginal interests. There was no, or at least limited, indication that they would be participating in shared decisions that reflected a pan-Canadian dimension of their existence.

The RCAP report, therefore, can be described as a deep diversity document that paid negligible attention to the concerns of Taylor II. In slightly different language, the report looked at the Canadian future through the lens of Aboriginal, especially First Nation, desires, with minimal attention to what the

distinct treaty order of federalism outside the federal-provincial order. James Tully, one of the leading exponents of this position, describes the view that Aboriginal peoples are part of the "federal-provincial confederation" as "a travesty of history." He proposes a reconceptualization of Canada as comprising two separate confederations: the federal-provincial one familiar to all students and a treaty confederation of "First Nations with the Crown and later with the federal and, to some extent provincial governments." Canada then becomes "a political association of two confederations" (Tully 1999, 424-25). The relationship is variously described as "nation-to-nation," as "side-by-side," and as a "partnership" (ibid., 419, 423 and 424).[76]

Treaty federalism, in which treaties rather than citizenship are the bonding mechanism, in effect proposes to internationalize the domestic system, and has only a weak answer to the question of what is to be the source of cohesion.[77] The frequently referred to "two-row-wampum" vision of two societies travelling in separate ships down the river of life, with an agreed mutual respect for each other's autonomy, suggests at best a tolerant coexistence, but negligible interest in the idea of a common society.[78] This pattern of thinking is profoundly rooted in the historical experience of First Nations. Its origins are similar to the origins of Third World independence-seeking nationalism — regrettably constrained in the Fourth World by the reality that a similar independence outcome is not possible. The overall impression is of Indian nations/peoples being in, but not of, the surrounding society. If federalism is about self-rule and shared rule, the colonized, especially if they combine territory and governing authority as First Nations do, will focus their attention on self-rule, in the Canadian case on a third order of government. Shared rule, which is normally buttressed by a common citizenship in standard federal systems, will get limited attention.[79]

Surely, if the entire First Nations population were positioned in another Nunavut with an adequate resource base, independence would be pursued, if not already achieved. It is a "regrettable necessity," as Joseph Carens observes, (Carens 2000, 173) that precludes independence. Would Ovide Mercredi have said, "we know we cannot displace the alien government completely ... the objective is to live together," (Mercredi and Turpel 1993, 198) if three-quarters of a million First Nations people were an overwhelming majority in a bounded and resource-rich territory? However, Mercredi and Carens are not responding to the wishes of a concentrated reasonably large and economically prosperous population, but on the whole, to scattered enclaves of poor and small populations. Fleras and Maaka's observation clearly applies to Canada: "In structural terms, most indigenous peoples occupy an encapsulated status as disempowered and dispersed subjects of a larger political entity" (Fleras and Maaka 2000, 114).

That larger political entity is driven by its own internal logic, which Taylor also understands. In marked contrast to his deep-diversity thesis, with its sympathetic focus on internal nations seeking outlets to express and sustain their historically-based differences of culture and identity, Taylor II argues for the

need for democratic states to be able to call on the loyalty and identity of their citizenry for major public policies. In a sense he has simply changed his vantage point. Taylor I focused on the desire of internal nations to maximize their escape from the smothering embrace of the larger society, including a rejection of individual citizen membership in the pan-Canadian community. Taylor II's focus is on the overall government of the larger society and the requirements for its effective functioning.

In general, historic states with indigenous nations within their borders will opt for a version of Taylor II. They will seek to limit departures from their view of normality in the constitutional order. The 1969 White Paper was a classic example of a strong version of Taylor II, as was historic Indian policy with its goal of enfranchisement.

Federal and provincial governments seek an accommodation that is compatible with (a modified version of) the inherited constitutional order, which means generally compatible with institutions rejected or distrusted by many First Nations.[80] They do not see themselves either as imperialists or as the successors of imperialists. Hence, their policies do not envision a form of coexistence in which parallel societies exist side-by-side in separate compartments. They insist that the Charter must apply. They display no interest in the kind of Aboriginal watchdog third House proposed by RCAP. Federal and provincial government positions are no less natural to them than the constitutional thought of First Nations is to successive National Chiefs of the AFN. The premise behind federal policy is that the members of Aboriginal peoples/nations may not be citizens like the others, but they are Canadian citizens. The federal position is that "citizenship is the institutional arrangement that makes empathy a natural fellow-feeling for all within its compass" (Cairns 1999*a*

On the other hand, Taylor I is also problematic. First Nations on average are too small, and the jurisdictions they can wield are too limited for the quasi-separate existence visualized by deep-diversity relations.[81] I have already argued that the "immensely ambitious and arduous project" of maintaining what Kymlicka describes as "a separate societal culture in a modern state" (Kymlicka 1998, 31) is beyond the capacity of First Nations. The federal and provincial governments are too important for the future of small First Nations for their members to be involved only as nations and not as citizens in the political process at federal and provincial levels. In any event, there is negligible likelihood that the federal and provincial governments would agree to deep-diversity relations with anywhere from 60 to 80, to over 600 distinct First Nation communities which would geographically be within Canada, but whose individual members would not have a significant degree of direct citizen relations with federal and provincial Canada. While Taylor I is not available as a realistic choice, any pure version of Taylor II has been repudiated by First Nations nationalism and by the political developments of the last 40 years.

Let us consider some observations by four sets of authors, including Taylor, that will help to give us a sense of direction in this debate.

The task, according to Taylor, is to share "identity space," creatively working out new "political identities … between peoples who have to or want to live together under the same political roof (and this coexistence is always grounded in some mixture of necessity and choice)" (Taylor 1999, 281).[82]

The massive nature of the enterprise of generating a togetherness that is not smothering and a separateness that is not isolating includes what Cameron and Wherrett call a "shift in the paradigm of social and political reality in which we all live ... [which will require] a redefinition of the origin and nature of the majority society as well as ... address[ing] the circumstances of Aboriginal nations and communities." This quest ultimately leads the majority society to "a reconsideration of [its] history ... of assumptions about sovereignty and conventional government structures, and the very vocabulary [employed] ... to describe significant dimensions of [its] social and political world" (Cameron and Wherrett 1995, 92).[83]

Taylor and Cameron and Wherrett are saying the same thing, which is that we need to rethink "who we are" in the new circumstances of First Nations nationalism. Taylor put it nicely: the majority has to move to a "looser 'us' to accommodate 'them'"

John Borrows, a First Nations Chippewa scholar, recently and passionately argued for full and committed Aboriginal participation in Canadian affairs on the grounds that self-government in small communities was a limited goal. He cited high rates of intermarriage, significant breakthroughs in postsecondary education and large indigenous populations without a land base, many in urban settings, as evidence of a high degree of interdependence. Aboriginal participation in the major Canadian public and private institutions was essential if that interdependence was to be more than a one-way street. "Aboriginal control of Aboriginal affairs" by self-government for small communities was not enough (Borrows 1999, 74-80).

The composite set of instructions that emerges from the preceding is that the majority must move toward a more generous and inclusive interpretation of *we*, and that rejection by First Nations of a tolerant vy

by a profound constitutional alienation. It encounters the Canadian state, well into its second century, perhaps battered by globalization, but showing no

the degree of solidarity that sustains our reciprocal responsibility for each other. I disagree, by expressing the caution that there are functional limits to the institutionalization of diversity for small and poor self-governing peoples/nations that are set by the requirement of an embracing commonality which sustains reciprocal empathy for each other. Charles Taylor puts it well in asserting that we must not let our pursuit of one good "lead us to undervalue, or even lose from sight, important virtues of society, goals like social harmony, a sense of solidarity, mutual understanding and a sense of civility, which we neglect at our peril" (Taylor 2001, 4).[88]

The goal, therefore, is reasonably clear — to work toward a solution sympathetic to the anti-colonialism that motivates First Nations and the desire for a distinctive place and constitutional recognition to which it leads on the one hand, and the requirement of the Canadian state for an allegiance to the constitutional order not entirely mediated by First Nation membership.[89] The goal might be phrased as institutionalizing a compromise between Taylor I and Taylor II. While this compromise will not be easily achieved, it has its virtues. It is more achievable than the extremes it straddles — the view that pushes toward the White Paper and a relatively undifferentiated citizenship, and the counter view, which sees Canada as an aggregation of treaty-linked quasi-solitudes. The first is unacceptable for good reasons to First Nations. The second is unacceptable for good reasons to the federal and provincial governments and to the non-Aboriginal population. In contrast to the alternatives, this necessary compromise has some prospect of long-run viability.

Those who suggest or imply that a reconstitutionalized Canada can survive as a multinational polity with dozens, perhaps hundreds of nations ranging from a few thousand to the 30 million nation of non-Aboriginal Canada, linked by treaties but with negligible common citizenship bonds are obligated to show the viability of their proposals.[90] Those who argue that the White Paper had the correct vision for the future, in which citizenship is all, and First Nations are accorded museum status are obligated to show that their vision can roll back Aboriginal nationalism and that section 35 of the *Constitution Act, 1982* can be bypassed.

I do not believe that even the most passionate supporter of the above alternative road maps to the future can successfully defend them as attainable and viable over time. My position is that Charles Taylor got it right if we can blend Taylor I and Taylor II into a composite vision.

POSTSCRIPT: A RECIPE FOR LIVING TOGETHER

In its original version, this paper ended with the previous paragraph. However, two readers suggested that a concluding section spelling out what a hybrid of Taylor I and Taylor II would look like would strengthen the paper. In other words, what arrangements for living together could respond to the Aboriginal desire for constitutional space to accommodate self-determination within

The combination of the Charter, including the section 25 qualification to its application to Aboriginal peoples, and section 35 of the *Constitution Act, 1982* constitutes a possible bridge between Taylor I and Taylor II. The fact that the Charter, with its notwithstanding clause, was a compromise between the federal government and several provincial opponents of the Trudeau vision is a given. Less noticed is the compromise between the Charter and the rights of Aboriginal nations.

Section 25 of the *Canadian Charter of Rights and Freedoms* states that:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 25 is an "interpretive prism" to prevent a reading of the Charter that would undermine Aboriginal rights. It is, therefore, a protective instrument (Morse 1999*b*, 19).

The Charter is now generally recognized as a nation-building instrument, originally designed to strengthen Canadian identities against centrifugal provincialism and Québécois nationalism, especially of the *indépendentiste* variety. This political purpose explains both the original federal government sponsorship of the Charter, and the provincial government opposition, particularly of Quebec, Saskatchewan, and Manitoba (Cairns 1992*b*). That same Canadian nation-building purpose explains the original opposition to the Charter of the Assembly of First Nations (First Nations Circle on the Constitution 1992, 68) and of scholars sympathetic to Aboriginal nationalism. From the AFN perspective, the Charter was correctly seen as an instrument of a rival nationalism. While, as previously noted, the Charter is now taking root among First Nations, a result that may be seen positively by the heirs of the Trudeau vision, others continue to see the Charter as a threat to the integrity of First Nation societies.

The Charter, with its purpose of strengthening identification with the Canadian constitutional order by the vehicle of rights, is a classic example of Taylor II. Simultaneously, the section 25 qualification of the Charter's application so as not "to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms" reflects, at least modestly, a Taylor I perspective, which receives a more emphatic recognition of a Taylor I commitment to support for deep diversity in section 35 of the *Constitution Act, 1982*.

Section 35 states that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The original section 35 is supplemented by a 1983 amendment, which states that "for greater certainty ... 'treaty rights' includes rights that now exist by way of

land claims agreements or may be so acquired." These section 35 clauses constitutionalize a version of the Taylor I position. On its face, section 35 is an instrument of decolonization and constitutional affirmation, both, of course, within Canada. The combination of the Charter, the section 25 exception to its application, and the rights affirmations of section 35, clearly express a hybrid or blending of Taylor I and II. This compromise is now part of our constitutional philosophy. Canadians are constitutionally committed by these instruments to coexisting nation-building projects — for the country as a whole via the Charter, and to Aboriginal nation-building as the decolonization consequences of section 35 are fleshed out by, *inter alia*, judicial decisions, and new treaties/agreements.

This package of constitutional changes, now in its third decade, is a major achievement. It encompasses a fundamental criterion of contemporary Canadian statehood, the Charter, and a central goal of indigenous nationalism — a constitutionally protected recognition of Aboriginal and treaty rights, albeit the comprehensive translation of the latter into specific enforceable rights is a project still underway. It remains, however, a flawed achievement, with one legal scholar asserting "compelling legal arguments for concluding that, apart from the gender equality provision in section 28, the Charter does not apply to ... Aboriginal governments" (McNeil 2001*a*, 247-48). Cultural arguments are also employed to delegitimize the Charter. Dan Russell contrasted Aboriginal values and Charter rights, and argued that the Charter has the capacity to undermine Aboriginal customs and culture. In *A People's Dream*, he canvassed various options, including the suggestion that the Charter would apply to Aboriginal communities until they adopt their own charters. If this has not occurred "after five years, ... then the Canadian Charter would become the permanent community charter" (Russell 2000, 123 and 144). While this is a plausible proposal, its implementation would reopen the debates about the Charter's applicability and appropriateness that were deeply divisive and wounding in native communities (Borrows 1994, 21 and 31). As Schouls points out, based on a reading of transcripts of the RCAP hearings, there are passionate supporters of the Charter, especially among Native women and youth (Schouls 2003, 93; see also 100-05 and 167-71).[92] Further, if Russell's proposal was taken up on a widespread basis, it would remove the opting-out of First Nations from the orbit of a constitutional instrument that has come to define "Canadianness." The likelihood of the federal government supporting such a development is infinitesimal. It could lead to a Charter checkerboard which almost certainly would be deemed deeply offensive to the Charter Canadians who contributed to the demise of the Meech Lake Accord, which they believed threatened "their Charter."[93]

Given the complexity and volatility of the issue, the more modest proposals of the Charlottetown Accord deserve consideration. Aboriginal peoples should be consulted by provincial and territorial governments when candidates are proposed to fill Supreme Court vacancies, and Aboriginal groups should have the right to make their own representations for membership on

the Supreme Court. Finally, and intriguingly, the Accord recommended consultation between the federal government and Aboriginal groups on the "proposal that an Aboriginal Council of Elders be entitled to make submissions to the Supreme Court when the court considers Aboriginal issues" (Cited in Russell 2000, 181).[94]

These Charlottetown proposals, which were only a small part of the overall Accord, have the virtue of preserving the Charter's role in strengthening Canadians' identification with the constitution, while simultaneously sensitizing the Charter's interpretation to Aboriginal values and concerns. Accordingly, these proposed indirect modifications of the process of Charter interpretation are examples of a nuanced Taylor II, the necessity for the state to strengthen its positive and direct rapport with a society composed of more than one people.

Supreme Court adjudication of the Charter needs to be sensitive to Aboriginal concerns. The Charter, qualified by section 25, and interpreted by a Supreme Court whose role and membership are influenced by the

federal system and of the major Aboriginal organizations. The Accord not only significantly extended Aboriginal exemptions from the Charter, but provided Aboriginal input into "virtually every major institution of the Canadian state" (Cairns 2000*a*, 83) and generously described Aboriginal governments' jurisdiction. The *Consensus Report* described the rationale for Aboriginal governments' authority as being "(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and, (b) to develop, maintain and strengthen their relationship with their lands, waters and environment so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies" (cited in Cairns 2000*a*, 83; see 81-84 for a summary of the Accord; see also McNeil 2001*a*).

The accordion-like quality of changing descriptions over time of Aboriginal governments' possible jurisdiction indicates that this is contested territory, that in the right circumstances Taylor I is capable of expansion. The potential jurisdiction of self-government is indeterminate. There is immense variation in the jurisdictional proposals from the Penner Report (1983), to Charlottetown, to the 1995 federal government position paper, to RCAP. This area, therefore, is unsettled territory, with the existing federal position more restrictive than some of the previous proposals. In the right circumstances, therefore, the jurisdictional response to Aboriginal nationalism (Taylor I) may exceed the existing federal proposals.

In terms of *realpolitick*, however, the upper limits to Aboriginal self-government are set not only by federal policy, but also by the limited governing

rights (Borrows 2003, 247; see also Walkem 2003, 216).[98] One group of authors, the optimists, thought it might still be salvaged. A second group, pessimistic about its current interpretation, sought a "fundamental transformation" of its interpretation "that will acknowledge and respect Indigenous Peoples as Nations with both territorial and law-making jurisdiction equal (or roughly so) to those of Canada." A third group sought to go beyond section 35 with the goal of nation-to-nation relationships outside the Canadian constitution (Walkem and Bruce 2003, 11-12).

Since this paper is organized around the premise that the future relationship between Aboriginal nations and the Canadian state will be dictated more by practical concerns than by the more radical nationalist aspirations, such as acknowledgement and respect for "Indigenous Peoples as Nations with both territorial and law-making jurisdiction equal (or nearly so) to those of Canada," or nation-to-nation relationships outside the Canadian constitution — the hybrid of Taylor I and II is best served by a more generous, less restrictive interpretation of section 35, which should be understood as an instrument of decolonization.

Viewed through the criteria of balance and as a hybrid of Taylor I and II the Aboriginal clauses of the *Constitution Act, 1982* and the federal government policy position on self-government represents a distinct improvement over the pre-1982 era. Nevertheless, this existing attempted reconciliation of Aboriginal nationalism and the Canadian state is flawed. As noted above, the compromise tilts too heavily on the federal side.

A major weakness of the vast literature on rights, on self-government, and on what should be done in the area of Aboriginal-state relations in Canada is the negligible attention to how Aboriginal peoples are to relate to the representative political institutions of the country in which they live. This is especially true of writings by the academic legal community, both Aboriginal and non-Aboriginal. A comprehensive discussion of how we are to live together should include a concern for how Aboriginal citizens/nations relate to the 25(v)8.9(5(v)8re to li)25(v)8.9(e)e a9ement

argument is that membership/citizenship in a First Nation is incompatible with membership in the Canadian nation (See Taiaiake Alfred, quoted in Williams 2004, 93). Kiera Ladner quotes a prominent Anishnaabe scholar: "I don't vote in elections in France. I don't vote in elections in Ethiopia. Why would I vote in Canada? They are all foreign nations" (Ladner 2003*b*, 24). If this argument enjoyed universal Aboriginal support, the result would simply be to punish small communities by isolating them from their Canadian counterparts, while simultaneously providing disincentives for the governments of Canadian federalism to be concerned about their fate (Cairns 2003*b*, 8). Occasionally, the rationale for non-participation is a version of the Trudeau argument that if Quebec acquired a vast increase in jurisdiction possessed by no other province, Members of Parliament (MPs) from Quebec would have to opt out of discussion in Parliament of law and policy that applied only to Canada outside Quebec. Kymlicka applies this argument to Aboriginal MPs elected from Aboriginal districts "voting on legislation from which Aboriginals would be exempt" (Kymlicka 1995, 143).[99] However, the applicability of the Trudeau thesis to First Nations is minimal. It makes no sense to suggest that the limited legislative powers of small communities of a few hundred or a few thousand people should require the legislators who represent them to opt out of federal (provincial or territorial) legislative discussions because of marginal infringements of federal, provincial or territorial jurisdictions. In any event, no one has explained how a representative should behave when, as will typically be the case, the First Nations in his/her Aboriginal constituency possesses different jurisdictions. Curiously, no one argues that provincial legislators elected from Montreal, Toronto or Vancouver, whose law-making powers vastly exceed any jurisdiction likely to be possessed by First Nation governments, should absent themselves from policy discussions that apply to smaller communities but not to themselves. As Ovide Mercredi, subsequently Grand Chief of the Assembly of First Nations, argued in 1990: "There is no inconsistency in Canada recognizing our collective rights of self-government and us still getting involved and maintaining our involvement in the political life of the state, which means getting involved in federal elections" (cited in Schmidt 2003, 1).

Members of Aboriginal nations are, of course, free to act on their belief that to vote is to accept an unwanted citizenship in someone else's nation. Further, it is true that for many reasons Aboriginal (First Nation) electoral participation is generally low. This is both evidenced and explained in a recent issue of *Electoral Insight* (2003) devoted to "Aboriginal Participation in Elections." In Manitoba, First Nations voting turnout on reserves in federal and provincial elections declined precipitously from 65.4 percent in 1962 to 26.7 percent in 2003 (Kinnear 2003, 47). Bedford describes very significant declines in voter turnout in Nova Scotia and New Brunswick from the 1960s to the late eighties and early nineties. In New Brunswick, participation rates declined from 70 percent in the 1962 federal election to 17.8 percent in 1988, and in Nova Scotia from 89.3 percent in 1962 to 54 percent in 1988 (Bedford 2003, 17; for provincial elections across the country, see Bedford 2003, 17-20).

Bedford interprets this decline in voter participation to a weakening sense of "civic duty," to "a significant decline in the self-identification of Aboriginal persons as Canadians" in the last 40 years, and as indicating "serious and deep-seated questions about the legitimate authority of the Canadian state and its control over their lives" (ibid., 19). This voting data supports Borrows' description of Aboriginal peoples as "'uncertain citizens,' only loosely associated with the Canadian political community" (Borrows 2003, 225). The question of what is to be done is not easily answered.

Enhancing the representational role of the Assembly of First Nations and other Aboriginal organizations to speak for Aboriginal peoples in lieu of conventional politics is a high-risk enterprise given the fragility and internal tensions that are endemic features of their existence.[100] Any representational theory postulated on the two-row-wampum image of two societies travelling

In a major advocacy report on the reform of Canada's electoral system, the Law Commission of Canada, responding to what it described as "a democratic malaise," (2004, xiii) and sensitive to the criticisms that the existing first-past-the-post electoral system contributed to the "under-representation of women, minority groups, and Aboriginal peoples," (ibid., xv) advocated a mixed-member proportional electoral system for Canada.[104] Under such a system, "two-thirds of the members of the House of Commons should be elected in constituency races using the first-past-the-post method, and the remaining one-third should be elected from provincial or territorial party lists," with the voter having two votes, one for a constituency representative and one for a party list (ibid., 175).

The decisiveness of the report foundered on the issue of Aboriginal representation. Although it advocated a battery of common measures to enhance the representation of women, minority groups, and Aboriginal peoples in the House of Commons, its policy proposals for representing Aboriginal peoples were incomplete or tentative. It recommended that "the federal government, in consultation with First Nations, Métis, and Inuit peoples, should explore the possibility of introducing Aboriginal Electoral Districts, as recommended by the Royal Commission on Electoral Reform and Party Financing, or a 'House of Aboriginal Peoples,' consistent with the recommendations of the Royal Commission on Aboriginal Peoples" (ibid., 178).

I have already argued that the Royal Commission proposal is seriously

Aboriginal Electoral Districts, with candidates from larger communities carrying the day. Gibbins underlines the tensions of AEDs containing "quite disparate Aboriginal interests" identified with Indian, Inuit, and Métis (ibid., 164). Finally, in the absence of a constitutional amendment to allow AEDs to transcend provincial boundaries, there would be no AEDs in Atlantic Canada (Royal Commission on Electoral Reform 1991, 176 and 178). Accordingly,

reform previously mentioned. It would increase Aboriginal representation in the House of Commons, and it would support integrative tendencies in the party system by facilitating collaboration between Aboriginal and non-Aboriginal representatives.

Canada, of course, has a Senate as well as a House of Commons at the

to implement any form of self-government" (Russell 2000, 210) may be an exaggeration, but it is made by a First Nations lawyer who describes Aboriginal self-government as "a People's Dream."

Fourth, section 35 is not doing the job of constitutional affirmation that appears to have been its clear intent. Judicial interpretation of its meaning should be less restrictive and more generous, interpreting it as an instrument of self-determination within Canada.

Fifth, given the limitations on governing capacity that will attend even the most favourable circumstances for small populations, mostly of village size, participation in the policy-making arenas at all levels of the federal system is a necessity if Aboriginal voices are to be heard. At the federal level the electoral system most likely to enhance Aboriginal representation in legislatures and encourage integrative tendencies in the party system is the mixed member proportional system.

Sixth, the Senate is an appropriate supplementary vehicle for strengthening Aboriginal representation in Parliament.

Seventh, yesterday's symbolic order, in Breton's phrase, stigmatized Aboriginal peoples. Its successor should recognize the special place of Aboriginal peoples in Canadian society by their visible presence in the major institutions of the Canadian constitutional order.

The preceding recommendations are driven by three imperatives:

One, Aboriginal peoples, nations, and individuals are part of the pan-Canadian civic community in one of their dimensions. As David Miller cogently observed, without a shared identity, Canadians "are being asked to extend equal respect and treatment to groups with whom they have nothing in common beyond the fact of cohabitation in the same political society" (cited in Schouls 2003, 82; see also Chambers 2004, 220).

Miller's position is implicitly supported by poll data that indicates divided opinion over land claims and treaty rights. A 2003 poll indicated 42 percent support for doing "away with Aboriginal Treaty rights and treat[ing] Aboriginal people the same as other Canadians." In the Prairies, 54 percent (62 percent in Saskatchewan) support doing away with Aboriginal treaty rights. Andrew Parkin, the former co-director of the Centre for Research and Information on Canada, interprets the polling data as indicating that "Canadians say that they value Aboriginal culture and want Aboriginal communities to prosper, but are uncomfortable with arrangements that suggest that Aboriginal people might be treated differently than other Canadians" (Centre for Research and Information on Canada 2003, 2).

Two, the inescapable limitations that attend self-government for small populations, most of whom as presently constituted have less than 500 people, necessarily mean that the politics and administration of the external governments of Canadian federalism are hugely important for Aboriginal peoples. They need, therefore, to so position themselves that they can systematically and predictably make their voices heard in the standard political arenas of Canadian federalism.

Three, Charles Taylor's arguments for deep-diversity recognition of Aboriginal nations (Taylor I) and his separate Taylor II argument of the necessity for democratic states to be able to mobilize their populations as citizens in the pursuit of public goals need to be integrated into a hybrid vision of the polity which seeks to accommodate Taylor I and II. This accommodation comes with a price tag, the relinquishing of goals that make reconciliation unattainable. The Canadian state has to recognize the limits to its tendency to push toward homogeneity in its citizen body. Deep diversity Aboriginal peoples need to accept, and respond to, the reality that they are "nations within," as well as the reality of their existence as nations.

Conclusion

reasoning [in the RCAP report] ... almost devoid of any practical insights" (Russell 2000, xii).

Borrows, Morse, and Russell are repeating for the Aboriginal policy area the lessons that activists and scholars learned after the failure to update the constitution by judicial review and formal amendment in the Depression of the 1930s. After World War II, the governments of Canadian federalism retreated to working the constitution with various instruments of flexibility (Smiley 1970). More recently, the bruising results of the attempts to accommodate Quebec nationalism by constitutional change have generated an aversion to seeing the constitution as a site for problem-solving (Cairns 1997*a*). The retreat from "big-bang" theories of constitutional change, or big-bang hopes for supportive judicial interpretations of clauses such as section 35 should not be misconstrued. Macro-thinking is essential if we are to have any sense of direction. Section 35 may at the moment be a sleeping giant, but it is a constitutional sleeping giant, and it may be awakened in the future when times are propitious.

The likelihood of a comprehensive implementation of the policy thrust of this postscript being implemented is minimal. The support of too many differently positioned actors with their own visions and their own analysis

The remaining four do not identify their disciplinary background. See White, Maxim and Beavon (2003).

3. See, however, the recent essay by Loxley and Wien (2003).
4. A view strongly expressed by Monture-Angus, who writes: "I do not believe

10. However, the worldwide indigenous population is not small. Niezen estimates 300 million (Niezen 2000, 120), while Tennant (1994, 21) cites Valerie Parker's reporting of "500 million indigenous people."
11. Up until the 1960s in Canada, assimilation was the prevailing paradigm among non-Aboriginal policymakers. In 1939, at a seminar on Indian policy co-hosted by the University of Toronto and Yale University, the general impression was the inevitability of assimilation. "In the end," according to Charles Loram of Yale University, "the civilization of the white man must prevail" (Loram and McIlwraith 1943, 7-8). Thirty years later, the federal government's 1969 White Paper repeated the assumption that, to the astonishment of its authors, was repudiated by organized Indian resistance (Canada 1969).
12. Thornton observes that "men do not allocate a secondary and subordinate place to other men without developing a contempt for them. They can justify their dominance only on the assumption that these others are not worthy to share it. The subsequent anti-colonialist campaigns have accordingly had as their principal objective the release of whole peoples from this contempt, which is the most searing of all forms of bondage" (Thornton 1965, 158).
13. "If progress is accepted as desirable, and if indigenous peoples are located at the far bottom end of the ladder of progress, then it is an act of compassion and humanity to develop and assimilate indigenous peoples into modern society. Indeed, this was the self-evident and enthusiastic project of the International Labour Organization ... in the 1940s, 1950s, and 1960s: to help indigenous peoples develop out of their miserable lives and into the modern world" (Tennant 1994, 10).
14. This explains Frances Abele's observation of "a remarkable convergence with respect to fundamental goals and even political strategy" of indigenous peoples in Canada, Australia, New Zealand, Norway, and Greenland (Abele 2001, 140).
15. Barsh asserts that "developments in the international arena have begun to have an effect on indigenous people's political movements at the national level. United Nations activities have not only added to the strength of conviction of national movements, but are beginning to open up opportunities for concrete aid" (Barsh 1994, 86). Stamatopoulou states that "A major benefit that indigenous peoples draw from their participation at the UN Working Group and, of course, at the major indigenous conferences, is the strength that accompanies the awareness of common problems, common struggles, and international solidarity. Indigenous leaders whose communities are impoverished, marginalised, and often persecuted find a supportive audience at the international level and are strengthened by common goals and strategies" (1994, 69).
16. Thus, Philpott argues that "international agreement upon sovereign statehood was the terms on which a crisis of pluralism (triggered by colonial independence movements) was settled" (Cited in Bruyneel 2002*a*, 7).
17. The capacity to displace the imperial power, take control of a sovereign state, and acquire membership in the international state system does not, of course, guarantee a successful post-independence record. The colonial power often left behind state boundaries with little meaning and a population with limited identification with the new state. See Davidson (1991 and 1992) for a discussion of tropical African kleptocracies that brutalize, rob, and exploit their own people. Davidson, in fact, blames the nation-state, an ill-suited imposition on African societies, as the cause of these failings. See also Jackson (1990) for a discussion of "quasi-states" that have attained independence and international recognition,

26. The urban route is now attracting increasing attention, particularly from the Canada West Foundation. See Hanselmann and Gibbins (2002) and the references there cited, and Hanselmann (2003). See also Newhouse and Peters (2003*a*). The urban route attracts different disciplines than the landed community self-government route. The prominence of the academic legal community in the latter is not duplicated in the former.
27. The most prominent exception is Stewart Clatworthy (Clatworthy 1993, 1994, 2001, 2003).
28. Siggner (2003*a*) provides slightly different figures for urban areas.
29. In his recent history of *Peoples and Empires*, Anthony Pagden observed that: "All Aboriginal peoples are inescapably peoples of two worlds. They are Micmac and Canadian, Maori and New Zealander. They share two cultures ... No one resists the idea that cultures are porous and subject to periodic reinvention so fiercely as the spokespersons of the Aboriginal peoples. This is hardly surprising since so much of their claim depends upon an appeal to continuing cultural difference. Yet few cultures are so polymorphous as they. Everywhere in the world, they nestle within other cultures, predominantly of European origin, where they now constitute the minority" (Pagden 2001, 164-65).
30. The governance problems of small First Nations — limited capacity, kinship ties — cropped up intermittently before the Standing Committee on Aboriginal Affairs dealing with the *First Nations Governance Act*. (See Canada. Standing Committee 2003, no. 18, January 30/03, Jim Aldridge; no. 19, February 3/03, Michael Mitchell; no. 22, February 5/03, John Graham; no. 23, February 6/03 Stephen Cornell; no. 40, February 27/03, John Whyte). A preliminary attempt to assess a "Community Capacity Index" was published as this essay was in its final stages. See Maxim and White (2003).
31. See Cairns (2000*b*) for a critical discussion of RCAP.
32. David Miller, although he refers specifically to "aboriginal groups such as native Americans and Australian aborigines," can be assumed to include First Nations in Canada as he puzzles over how they should be classified. They are clearly not ethnic groups, but "their social and political structure is not sufficiently developed for them to constitute integral nations rivalling the dominant national groups in the states to which they belong" (Miller 2001, 301 n. 4).
33. Technically, these figures refer to registry groups (627 in 2001) rather than bands (612 in 2001), both of which need to be distinguished from reserves (2,675 in 2001) (Canada. DIAND 2002, xv, viii).
34. Frances Abele suggests that there are, "depending on how the counting is done, between 40 and 60 First Nations" (2001, 141). Paul Chartrand suggests 35 to 50 "distinct nations, meaning peoples in the usually accepted international sense of a group with a common cultural and historical antecedence" (1999, 104).
35. In an important article, Robert White-Harvey documents the typically land-poor reality of Indian reserves in Canada in contrast to both Australia and the United States. In Canada, "officials recognized only small individual sub-divisions of larger tribes, and left these small bands dispersed across thousands of tiny and isolated reserves ... while dozens or even hundreds of bands may speak similar languages and share common cultural traditions, Ottawa still chooses to ignore the reality of

self-government will be a hollow victory if First Nations have little land and resources to govern. The present micro-sized and dispersed reserves show demonstrably little potential for ever providing a basis for economic renewal from within the Native communities, or for freedom from economic wardship" (ibid., 611).

36. DIAND definitions are as follows: *Rural*: First Nation between 50 and 350 kilometres from the nearest service centre having year-round road access. *Remote*: First

was repeatedly portrayed as betraying trust, being deceitful, lying, not dealing in good faith, and being insincere or hypocritical" (Ponting 1990, 93). Cree leader Billy Diamond reported that his father taught him "one thing ... never, never agree with the government — no matter what, and I never have. Never" (MacGregor 1989, 4).

47. Since 1986, many First Nation communities have refused to participate in the census for a variety of reasons (e.g., expression of their sovereignty, distrust of government). Incompletely enumerated reserves often make trends, over different census years, more difficult to interpret because it is not always the same

complicate the struggle with Quebec independentistes (Cooper 2004, 126 and 142).

59. "The *Constitution Act, 1982*, has dramatically changed the relationship between all Aboriginal groups and the rest of Canada....The effect of these provisions has had a profound impact upon the jurisprudence as well as upon the political stature and public profile of the Aboriginal peoples in Canada" (Morse 2002*a*, 73).
60. For example, Nault admits that the First Nations *Governance Act* is an example of section 91(24) thinking, which Coon Come critiques as a hierarchical paternalistic anachronism, in contrast to section 35 of the constitution which legitimates a nation-to-nation relationship (Barnsley 2002*a*, 3). Hurley notes that one basis of AFN opposition to the First Nations *Governance Act* was the fact that it was "based on subsection 91(24) of the 1867 Constitution rather than a rights-based approach under section 35 of the *Constitution Act, 1982*" (Hurley 2002, 37-38). The tension between these two visions surfaced in the evidence presented to the Standing Committee on Aboriginal Affairs (2003) to consider the First Nations *Governance Act*. (See Canada. Standing Committee 2003, no. 15, January 28/03, Matthew Coon Come; no. 20, February 4/03, Wendy Cornet; no. 39, February 26/03, Anna Hunter.)
61. See Brad Morse (2002*b*) for a devastating critique of the *Indian Act*, especially sections 1–3 and 36–38. Hurley notes that the *Indian Act's* fundamental flaws

64. Writing in 1985, Boldt and Long assert that "Indians do not see themselves as fully participating Canadian citizens and have shown little interest in such participation. They do not participate meaningfully in the legislative or bureaucratic aspects of any level of government other than their own tribal governments. The Canadian government does not derive and never has derived its power to govern Indians from the consent of Indian people" (Boldt and Long 1985, 177). See

one ... This means that refusal of diversity may not be animated solely by narrowness and ill will ... It may also come from a genuine and not entirely fanciful fear. Which is why the proposal to build a more open, equal, diverse, mutually enriching society has to meet these fears with believable proposals for a new political identity" (Taylor 2001, 4).

75. A brilliant survey of the Burnt Church conflict by Ian Stewart documented the tension and violence between non-Aboriginal fishermen and the MicMac over the *Marshall* decision. The former are unsympathetic to any "special ascriptive [MicMac] right" to fish, which MicMac view as an inherent pre-existing right

"incorporate elements more responsive to a present state of affairs," he argues. "It must reinvent itself or perish with the order it can no longer justify" (McHugh 2002, 71-72).

84. This is a goal more easily stated than reached. Brad Morse, writing in 2002, stated: "It has only been over the past three decades that as a society we have moved away from the policies of complete assimilation that was [sic] championed in the federal White Paper of 1969. This has not been an easy transformation in the thinking and attitudes of non-Aboriginal peoples, nor has this change been accepted by all. This change has, however, been made far more difficult for federal and provincial governments that have vigorously resisted the development of a new relationship based upon mutual respect and the sharing of the bounty of this land" (Morse 2002*b*, 93).

simply would not be possible without the bureaucratization of First Nations societies." The result is that First Nations peoples are "also agreeing to abide by a whole set of implicit assumptions about the world, some of which are deeply antithetical to their own." Such is the price paid to make "relations between First Nations, Canada, and the provinces/territories possible" (Nadasdy 2003, 2-7).

92. As McDonnell and Depew point out: "Aboriginal people today are just that; they are contemporaries who, quite apart from being the proud inheritors of distinct traditions ... may have developed sensibilities with regard to gender equality, individual rights, and a host of other values that may be contrary or contradictory to [past] tradition" (McDonnell and Depew 1999, 369).

98. For the Métis, according to Mark Stevenson, "the constitutional promises held out by s.35 ... have been all but illusionary" (Stevenson 2003, 65; see also 96-98).
99. Clearly, at some level of enhanced Quebec jurisdiction, the argument could emerge that the rationale for electoral participation by the Quebec population in Canadian affairs had completely disappeared.
100. The *Windspeaker* has frequent accounts of these difficulties. For a recent example, see Barnsley (2004).
101. In his plea for greater use of indigenous law in Canadian courts, Borrows asserts that: "A legal doctrine focused exclusively upon the differences between Aboriginal and non-Aboriginal people would distort the reality both of Crown-Aboriginal relations and Aboriginal peoples' lives. Aboriginal and non-Aboriginal people have developed ways of relating to one another which, over the centuries, have produced numerous similarities between the various groups. Moreover, Aboriginal and non-Aboriginal people often share interests in the same territories, ecosystems, economies, ideologies, and institutions. While imperfect, and often skewed to the disadvantage of Aboriginal people, these points of connection cannot be ignored" (Borrows 2002*a*, 9-10).

    Elsewhere, Borrows argues that the two-row-wampum, in addition to asserting the autonomy of the British and First Nations, also contains "a counterbalancing message that signifies the importance of sharing and interdependence [that makes it] ... clear that ideas of citizenship must also be rooted in notions of mutuality and interconnectedness" (Borrows 2002*d*, 149).

introduced, linked to the overselling of its virtues. The public was surprised and frustrated to find that (i) "proportionality of seats does not entail proportionality of power." (ii) "Empowerment of previously disadvantaged groups can lead to growing pains in the body politic." (iii) "Coalition government does not mean consensus government" (Nagel 1999, 158).

109. At the time of the November 2000 election, Aboriginal representation at 6.1 percent of Senate membership was nearly four times greater than the 1.6 percent Aboriginal membership in the House of Commons (Joyal 2003, Appendix 326).
110. "Aboriginal Canadians least of all Canadians desire an end to the Crown," observed David Smith, "while more than most they endow it with political substance" (Smith 1999, 231).

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