May 1996

EXERCISING ABORIGINAL SELF-GOVERNMENT
THE INTERGOVERNMENTAL TRANSITION

by

Douglas M. Brown
Executive Director
Institute of Intergovernmental Relations
Queen's University

and

Jonathan Rose
Department of Political Studies
Queen's University

Paper prepared for the
Royal Commission on Aboriginal Peoples

EXERCISING ABORIGINAL SELF-GOVERNMENT: INTERGOVERNMENTAL TRANSITION

CONTENTS

EXERCISING ABORIGINAL SELF-GOVERNMENT:
THE INTERGOVERNMENTAL TRANSITION

Executive Summary

Aboriginal governments require both effective room to govern, and workable relationships with other governments. The act of asserting the inherent right of self-government and subsequently establishing and exercising governing functions will involve routine interactions among the existing levels of government in the Canadian federation. This paper examines the practice and principles behind intergovernmental relations in Canada and the experience of Aboriginal Peoples in these relations. It then proceeds to propose specific principles to guide the intergovernmental transition to Aboriginal self-government and specific recommendations on policies, institutions and mechanisms in order to apply these principles.

The reason for considering intergovernmental relations is both symbolic and practical. Recognizing Aboriginal governments as a juridically independent and equal order of government is essential to establishing a new relationship. The ideal of intergovernmental relations will be those which are among governments which share certain key characteristics: a constitutionally protected sphere of authority; direct political accountability to citizens; and a degree of financial autonomy.

In practical terms, all governments are interdependent, and in fiscal matters the Aboriginal governments are especially dependent. The study does not suggest a total integration of Aboriginal government relations with mainstream Canadian intergovernmental relations (often called "executive federalism"). Rather what is proposed is a selective adaptation to the needs and circumstances of Aboriginal Peoples and their governments.

The study concludes that in order to work from the current situation to the ideal, four problems must be addressed, i.e.:

(1)a weak commitment to the concept of Aboriginal self-government by other Canadian governments;

(2) the need for a clear policy and process to achieve the recognition of Aboriginal Peoples for the purposes of self-government negotiations (who represents whom);

(3) continuing problems related to the funding and other resources applied to negotiations and;

(4) the need for specific intergovernmental mechanisms for longer term relations.

From their analysis of these problems, the authors derive the following principles and recommendations.

1. Commitment:

Aboriginal Peoples and the federal, provincial and local governments should make a formal and practical commitment to negotiating and implementing Aboriginal self-government. The commitment should be made in legally-binding declarations, recognizing the inherent right of self-government. Four potential forms are joint Aboriginal-Crown declarations; a new Canada-wide Treaty; framework federal legislation; and resolutions in legislatures to entrench new treaties under Section 35 of the Constitution Act, 1982.

Bureaucratic commitment is also important to consider. As such, consideration is given to a new federal agency.

2. Recognition:

The negotiation of self-government must proceed from a policy to determine with whom within the Aboriginal community the negotiations are to be conducted and who the community represents. The policy should provide for a fair process of mutual recognition of autonomy, self-identification of Aboriginal community membership and a means of resolving disputes -- both between Aboriginal communities and other governments and between individuals and Aboriginal communities. We recommend a federal *Recognition Act* which may be also adopted by provincial and local governments.

3. Financial and Other Resources:

The parties to self-government or treaty negotiations need assured and adequate funding and other resources. Loans against future cash settlements in treaty or land claims as well as multi-year grants leading to revenue sharing are two options explored.

The study also recommends a common, independent negotiations secretariat for logistical support, a new federal agency to undertake the federal responsibility in negotiations, and an independent review commission to resolve disputes.

4. Longer-term Intergovernmental Relations:

New, permanent institutions and processed are needed at each level, appropriate to the scale of relations involved. The study recommends protocol agreements with local government and sees the potential for commissions and boards for joint management of regional functions. There should be established province-wide fora of all Aboriginal Peoples, to meet regularly with provincial governments and federations of municipalities as well as to facilitate the resolution of intra-Aboriginal issues. At the Canada-wide level, the leaders of the national Aboriginal organizations should participate in part in meetings of First Ministers. And consideration should be given to an annual conference of First Peoples including all communities.

EXERCISING ABORIGINAL SELF-GOVERNMENT:
THE INTERGOVERNMENTAL TRANSITION

INTRODUCTION[i]

For aboriginal self-government to succeed in meeting the goals of Aboriginal Peoples, room must be made for the effective exercise of governing. The very act of asserting the inherent right of self-government, and the subsequent actions to establish and exercise governing functions by Aboriginal Peoples, will involve routine interaction among existing levels of government of the Canadian federation. This paper examines the practice as well as the theoretical assumptions of intergovernmental relations in Canada. From this study, one can better understand the likely nature of relations between aboriginal people and the Canadian state.

Intergovernmental relations is the grease between the moving parts of any federal system of government. For most of this century, the idea that governments could govern without coming into daily friction with other governments and their jurisdictions was and is completely impractical. The myriad of social programmes and increasingly blurred jurisdictions mean that intergovernmental relations are playing an ever increasing role. Many of the things that governments do affect not only their own citizens but also many outside the boundaries of their jurisdiction. Interdependence therefore, is a constraining factor for policy makers as well as interests seeking claims. The reality is that governments must cooperate with other governments to achieve mutual goals. Part one of this paper sketches both the practice of executive federalism in Canada as well as the role of Aboriginal Peoples within that milieu. We argue that the same kinds of hazards that have plagued

other governments could plague aboriginal governments. It is therefore, necessary for aboriginal governments to avoid these jurisdictional, constitutional and historical roadblocks in their quest for self government.

Part two draws upon the discussion of these principles and practices to explore whether aboriginal self government is compatible with existing patterns of intergovernmental interaction, and whether they should or should not be compatible. Intergovernmental relations under aboriginal self government must steer between the constitutional and political imperatives of federal and provincial governments and the diverse needs of aboriginal communities. We do not try to develop a model of self-government, as no doubt there will be a variety of models. Rather, we do try to outline a set of necessary preconditions, such as ensuring that there is adequate legal, fiscal and administrative resources for the exercise of self-government, that must be met prior to any transition to self government. After discussing the assumptions and principles that underlie the transition to self government, we discuss in greater detail how these principles may be applied before during and after the transition to self government.

To put these points in context, we will need to know how many aboriginal governments will there be; what kinds of powers will they have; who will be the interlocutor with federal, provincial and municipal governments; and what is the best way to balance the competing notions of flexibility in self government with an equitable and adequate level of services. All of these questions will have to be resolved prior to any exercise of power.

In this paper we cannot begin to answer all of these questions, nor should we. Nonetheless, the real nature of intergovernmental relations between the existing constituent governments of the federation and aboriginal governments cannot be known without these answers. Some answers have already become clear in practice, while others will be evident in research and position papers produced for the Royal Commission. From the tentative answers available we will make certain assumptions necessary to draw out the most elementary framework for both transitional and permanent intergovernmental relations. This paper does not advocate what aboriginal governments should look like. That is the task of the Aboriginal Peoples themselves, elected officials and the Commissioners. What we set out to do is discuss the principles and criteria which may guide the transition to self government.

I. INTERGOVERNMENTAL RELATIONS AND ABORIGINAL PEOPLES

A. Principles and Practice of Canadian Intergovernmental Relations

Intergovernmental relations exist in a federal system because of the inability of governments to be entirely independent and sovereign within their own legislative spheres. According to the classic definition by K.C. Wheare, "the federal principle [is] the method of dividing (governmental) powers so that the general and regional governments are within a sphere co-ordinate and independent."[ii] Nowhere in any federal state, however, is there such a clear division of powers. Intergovernmental relations must therefore address questions of concurrency of powers, tax harmonization, resource allocation, jurisdictional spillovers and other issues that necessarily exist in any state with at least two constitutionally empowered levels of government. In short, intergovernmental relations are an important component of alleviating the inherent tensions that exist between levels of government in any federation.

By necessity then, federal countries have extensive intergovernmental relations. Some have specific institutions to legitimate the claims of the sub-national units in the national legislatures, such as the Bundesrat in Germany and the Senate in the United States. In Canada, more informal mechanisms have developed to articulate provincial concerns largely because of the historic inability of the Senate to represent provincial or regional interests. The principal mechanism has been direct intergovernmental relations between premiers and prime ministers and among senior officials of both levels of government. The fusion of legislative and executive power in our parliamentary system further enhances the strength and legitimacy of the cabinet to represent the interests of one level of government to the other. This form of intergovernmental relations has been called "executive federalism", and is discussed more extensively below.

In parliamentary systems such as Canada, the legislature can constrain the actions of both levels of government. The actions of federal and provincial governments in the Meech Lake and Charlottetown rounds of constitutional negotiations remind us that legislatures do matter. At certain points in the policy-making process, legislative committees can make important contributions. However, intergovernmental negotiation as such occurs at the ministerial level where the participation of parliament is

reduced. Therefore the executive wields significant powers.[iii] This is an important consideration when discussing the workings of intergovernmental relations in Canada because any transition to aboriginal self-government, short of establishing a new constitutional regime changing the nature of parliamentary federalism, will have to work within these structural confines.

In addition to the existence of a separate legitimate power base at the provincial level in the form of legislatures, intergovernmental relations are shaped by other, more ephemeral, factors which are far less tangible but nonetheless significant. These include the relative balance of power among the governments engaged, the beliefs, professional norms and personalities of the persons involved, and the nature of private interests affected.[iv]

In Canada, the practice of executive federalism imposes some constraints and will require explicit effort -- and, as outlined in Part II of this paper, new institutional forms as well -- to facilitate interaction with aboriginal governments. Patterns of interaction can be incremental in nature without involving fundamental changes in the relationship between the levels of government. Diversity is a strength as it is evidence of flexibility in institutional forms. In fact a more diverse and varied pattern of intergovernmental interaction may be more easily adapted to a new order of government. In some respects however, new patterns and institutions must be created to match the unique needs and political culture of Aboriginal Peoples.

One of the most important tasks of intergovernmental relations in any federation is to provide the means for adjusting the inevitable fiscal inequities between levels of government and among sub-national units. Intergovernmental relations are needed to address these problems of "vertical and horizontal imbalance". Vertical imbalance exists where the expenditure requirements of provincial governments outstrip their revenue raising capacity. In the Canadian federation, the provincial governments are given the ability to tax directly under S. 92(2) of the *Constitution Act, 1867*. But the burden of expenditure outstrips those tax sources, thus creating a gap between the constitutional responsibilities of the federal and provincial governments. Shared-cost programs such as the Canada Assistance Program (CAP), unconditional transfers of cash and tax room such

as the Established Programs Financing (EPF) program and other programs have been designed to close this gap.

Horizontal imbalance exists when, because of population and differing economic bases, citizens in various provinces have unequal access to the same quality and quantity of government services. Smaller and less industrialized provinces rely on the federal government for revenue to provide basic services such as health and education. Indeed, one of the fundamental principles of most modern, federal countries is that government entitlements should not be entirely dependent upon place of residence within the federation. So important is this idea in Canada that it is enshrined as a constitutional principle in section 36 of the *Constitution Act, 1982*.[v] Through the federal government's equalization formulae, itself the product of intergovernmental negotiations, the principles in section 36 have been put into practice, ensuring that a comparable level of government services can be provided to all Canadians at comparable levels of taxation. Resolving vertical and horizontal fiscal imbalances will be important keystones in any transition to aboriginal self-government.

The same kinds of fiscal imbalances that affect the federal and provincial governments also affect potential aboriginal governments.[vi] The First Nations and other aboriginal communities of Canada are not demographically and culturally homogeneous. Their varying fiscal capacities -- determined by natural resources, size and population -- will necessitate funding based on different needs and criteria. The geographic remoteness of some communities will also impose a different set of demands than those more centrally located. And, because of their relatively small population, most aboriginal governments do not have the resources to finance the range of services needed for self-government. Before discussing at length the implications of aboriginal experience with intergovernmental relations in Canada, it is useful to examine more closely some specific characteristics of the type of intergovernmental relations in the Canadian federal system.

Executive federalism is a term brought into currency by a leading student of federalism, Donald Smiley.[vii] It has been used since by a host of academics and has even permeated popular discussion of federalism by politicians.[viii] With the debates over the

Meech Lake and Charlottetown constitutional amendment packages put together by the processes of executive federalism, it has gained even more popular usage among politicians and academics alike.[ix]

Smiley defined executive federalism as:

> the relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in interprovincial interactions.[x]

At the core of the definition is the idea that there is a significant interdependence of governments at both the elected and bureaucratic level. This interdependence takes many forms and thrives at many levels. There are countless daily informal interactions through telephone and other communications, meetings of all kinds and constant correspondence on a wide variety of matters. The "summitry" of the first ministers is the most visible sign of executive federalism, but like an iceberg, it only represents the tip of the mass beneath the surface.

Several general points are worth considering when reviewing the development of intergovernmental relations in Canada.[xi] First, there has been rapid grown in federal-provincial and interprovincial conferences, committees and agencies since the Second World War. In some recent years there have been over 700 meetings each year as a result. Second, the overall pattern has changed over time, from one of relatively cooperative and essentially technical relations to a more expressly political and conflictual set of relations. Third, intergovernmental summitry has become much more important. In the late 1970s and again after 1984, first ministers have met several times a year to discuss economic concerns, general and aboriginal constitutional issues, and the negotiation of the free trade agreement with the United States. Fourth, both the federal and provincial governments have created specialized central agencies to coordinate the conduct of intergovernmental relations. These include the federal government's Federal-Provincial Relations Office (now part of the Privy Council Office), and various ministries and offices of intergovernmental affairs in several provinces. Fifth, executive federalism has come to fulfil a broad range of functions. At one end of the spectrum, executive federalism exists primarily for information exchange and mutual persuasion.

Ultimate decisions on policies or legislation are then made by the respective cabinets and legislatures in their own jurisdictions. Most federal-provincial and interprovincial meetings fall in this category. Farther along the spectrum lies the achievement of consensus on broad policy goals, which, with varying results, shape and contain the final decisions taken by federal and provincial governments. Executive federalism works best when dealing with mutual accommodation of views, or the making of general commitments to be met and implemented by the partners. Canadian intergovernmental relations rarely operate according to decision-making rules other than consensus or unaminity -- votes are not taken. In these situations, the decisions of the first ministers or other ministers or officials must often be enforced by the legislatures, and remain binding by convention and practice, not by law.

Finally, and partly as a result of the variety of functions just described, both federal and provincial governments use the fluidity and informality of executive federalism to strategic advantage. At differing times and situations, a government (especially the federal government) may choose to pursue a unilateral, bilateral, or multilateral initiative. Whether governments choose to enter into complex cooperative relations with other governments or not, depends in part on the general tenor towards cooperation or conflict at the time.

Even if the intensity of relations has varied, the institutions and process of intergovernmental relations can count a number of specific achievements. Canadian governments have reached significant consensus or agreement in a number of areas, including medical and hospital insurance; the unemployment insurance amendments to the constitution in 1940; agreement on pensions in the 1960s; the extensive cooperation in the area of manpower training and vocational education; and the creation of an extensive program of regional development. Arguably the most significant achievement of executive federalism has been the constitutional agreements reached in 1981, and again in 1987, although the latter achievement did not of course, reach the final stage of legislative ratification. Nevertheless, these examples demonstrate that, under the right circumstances, executive federalism can produce substantial consensus. And to these high profile outcomes, one must also add the ongoing accomplishments of intergovernmental mechanisms to reduce conflict, achieve policy coordination and

harmonization across many minor policy fields.

Against the achievements of intergovernmental relations must be weighed its shortcomings as a policy-making process. First are those criticisms that arise on democratic grounds. The executives involved are not as representative of the population as are the members of the legislatures, and the legislatures in turn are much less diverse than the Canadian population as a whole. Thus executive federalism is seen as exacerbating the perceived lack of representativeness of government institutions -- a criticism captured by the phrase "eleven white men in suits" used to describe first ministers meetings in the 1980s. This criticism has been amplified by the tendency -- and frequently the need -- for executive meetings to be held *in camera*.

A second shortcoming is the lack of formal institutional status of intergovernmental relations. The meetings are not recognized in the constitution, and there are no formal rules for establishing the agenda or for voting or determining consensus. This means that the more powerful federal government can often set the agenda unilaterally. The lack of decision rules in particular, means that executive federalism most often produces only very general results which everyone can live with. If a decision with more detail is required, the implicit need for unanimity provides the hold-out participant with undue influence.

Despite these shortcomings, the pattern of intergovernmental relations which we call "executive federalism" is an established and important part of the Canadian federal system. It has been the means by which the inevitable problems of interdependence have been addressed. Executive federalism has provided badly needed flexibility to enable the system to adapt to new challenges -- where the more rigid and formal structures of the constitution could not. In this respect, the authors feel that executive federalism, despite some recent failures at the summit level, is alive and well. There has been an increasing tendency towards a greater role for the broader public and for legislatures -- through committees, hearings, special commissions, the use of referenda and polling. And in some high-profile cases, notably constitutional reform, the politics of these forms of interaction have undone the "dealmaking" of executive federalism. Nonetheless, in their quiet way, governments continue to meet in dozens of fora many times a year -- year in

and year out.[xii]

The revival of the need for aboriginal self-government represents another fresh challenge for the Canadian federal system. In devising the role for executive federalism to play in the transition to self-government, one must bear in mind the shortcomings of the process just discussed. The interplay of the decision-making processes of Aboriginal Peoples with the continuing characteristics of executive federalism may produce a new Canadian hybrid. It will be important to identify precisely what sorts of alterations to the intergovernmental process will be required to facilitate what many see as a third order of government. As outlined below, much of the action in terms of implementing Aboriginal self-government will be as much a "bottom-up" as a "top-down" process, requiring greater attention to institutions and processes of a regional and local scale. Before turning to these issues, one must examine, however, the other side of the issue -- recent aboriginal experience with executive federalism.

B. Summary of Aboriginal Experience

The intergovernmental experiences of Canada's Aboriginal Peoples range across a wide variety of fora and purposes.[xiii] These include participation in the high profile First Ministers Conferences which attempted to reform the constitution; the increasing involvement of aboriginal leadership in multilateral meetings on the aboriginal policies and programs of the federal, provincial and territorial governments; the representation of specific First Nations, Treaty Councils and other groups of Aboriginal Peoples in treaty, land claims and other similar negotiations on a regional basis -- some of which have been ongoing for years; and finally, the day to day intergovernmental relationship between the band governments and the Department of Indian Affairs. These latter relations, for reasons obvious to the participants and which will be discussed below, are not properly *intergovernmental*, but have more of the character of patron-client or government-interest group relations. There is also an important fiduciary aspect of this latter relationship. It should be emphasized here, and will be made clear further in this paper, that when we describe current and historic relations as "patron/client" or of an interest group nature, we do not imply this in a normative sense but rather as descriptive. In examining each of these major types of relationships, one can draw out the chief lessons learned in order to establish a more appropriate basis for intergovernmental relations in the future.

The most visible and symbolic intergovernmental experience of Aboriginal Peoples over the past twenty years has been the changing nature of their involvement in constitutional reform discussions. While at times such debate may have seemed far removed from the daily needs of Aboriginal Peoples -- or other Canadians for that matter -- these high-profile relations set the tone for other aspects of the relations of Aboriginal Peoples to the Canadian state.

Aboriginal Peoples became major players in the constitutional politics of Canada after they forced the federal government to back away from its 1969 White Paper which recommended abolishing the *Indian Act*. The political renaissance that followed among First Nations and other aboriginal groups led to a concerted campaign to restore aboriginal rights to the Canadian political agenda, including their recognition in the constitution. The struggle has nonetheless been long and arduous. Aboriginal Peoples continued to be excluded from formal constitutional negotiations throughout most of the 1970s, forcing aboriginal leadership to rely on more informal processes through the media, as well as pursuing their rights through the courts.[xiv]

Beginning in 1978, aboriginal leaders were invited to some meetings of the Continuing Committee of Ministers on the Constitution (CCMC), and to be observers at the public sessions of the First Minsters Conference on the Constitution later the same year. The precedent was followed again in 1979, and there was also the formal inclusion of the topic of "native peoples" on the agenda. By 1980 the political climate had changed. Following the defeat of the referendum on sovereignty-association in Quebec, the federal strategy for "renewed federalism" narrowed, and aboriginal issues were dropped from the 1980 "short-list" agenda.

Lobbying and public pressure from aboriginal leaders and their allies succeeded in getting aboriginal rights back onto the federal agenda, in particular through the parliamentary hearings held on the federal bill for constitutional reform in late 1980 and early 1981. Proposed constitutional provisions -- ultimately to become sections 25, 35 and 37 of the *Constitution Act, 1982* -- were once again, however, nearly eliminated in the intergovernmental bargaining (without the Aboriginal Peoples' representatives being

present) in November 1981. But again, after intensive pressure they were restored with some alteration, in the final constitutional resolution.[xv] To summarize, throughout this round of constitutional negotiations ending in 1982, the Aboriginal Peoples had not succeeded in gaining a full role in the intergovernmental process but had organized themselves effectively to be a major party to constitutional politics, and to achieve some significant substantive gains.

One of these substantive constitutional outcomes was section 37 of the *Constitution Act, 1982* which set the stage for the next round of aboriginal involvement in executive federalism. Section 37 called for a First Minsters Conference to be held with aboriginal representatives within a year after the proclamation of the new *Constitution Act*, on the subject of constitutional matters directly affecting Aboriginal Peoples. This multilateral process, involving all Canadian federal and provincial governments (although Quebec did not participate fully) and the leaders of four national aboriginal organizations (see below), wound its way through four First Ministers Conferences and numerous ministerial and official level conferences and meetings from 1983 to 1987. Despite a few important but relatively minor amendments to the *Constitution Act* in 1983, the process ended in failure. In his analysis based on extensive interviews with the participants, David Hawkes found that the multilateral process sensitized both sides to the issues, values and tactics of aboriginal and non-aboriginal interests. However, the process itself was hampered by its high profile, rigid timing, dominant bureaucratic values, large numbers of persons involved and an unclear agenda. On the key issues of defining the right of self-government, the participants talked past one another and could not reach agreement.[xvi]

The section 37 process might have confirmed that constitutional negotiations involving the rights of Aboriginal Peoples could not proceed without the latter's full participation in a multilateral process, if not for the apparent success of the Meech Lake Accord, to which aboriginal leaders were not a party, and which they saw as ignoring and possibly limiting aboriginal rights. The achievement of the Accord and the acceptance of Quebec's demands came as a bitter blow to aboriginal leadership who could not get agreement from the federal and provincial governments on their constitutional goals, signalling a lack of political will, if not deceit, on the federation's part.[xvii]

During the "Canada Round" of constitutional discussions, culminating in the defeat of the Charlottetown Agreement in the referendum of 1992, Aboriginal Peoples were included as never before.[xviii] In this round the Aboriginal Peoples had the strong support of a number of governments, Ontario in particular, and a large segment of the Canadian public opinion, which sympathized with the Aboriginal Peoples' exclusion from the substance and process of Meech Lake, and with their general plight after the "Oka" episode of 1990. The national aboriginal organizations played an integral role in negotiating an extensive package of constitutional amendments and related political undertakings. The organizations also brought to the multilateral negotiations the benefit of extensive public consultations in their communities throughout 1991 and 1992 (to some extent parallel to the extensive public consultations underway across Canada in the non-aboriginal community -- e.g. the Bélanger-Campeau Commission, the Spicer forum, the federal parliamentary committees, the constitutional renewal conferences, etc.).

The multilateral process involving the aboriginal organizations was not solely confined to the aboriginal agenda. At the ministerial and officials level, the negotiations proceeded in four working groups on substantive issues: on the Canada clause and the amending formula; on Senate and institutional reform; on the division of powers; and on aboriginal issues. Aboriginal representatives participated in all four groups.

Thus, for the first time in Canadian history, aboriginal representatives participated, in a constitutional negotiation process with the other constituent members of the federation. It is important to note that they had no formal status in the ratification process. The ultimate result of a comprehensive set of constitutional amendment proposals showed clearly, however, the determination of the leadership to succeed where previous efforts had failed. The complex provisions dealing with "First Peoples" presented numerous difficulties: the right of self-government was circumscribed in ways unacceptable to some; aboriginal government powers were placed squarely within the federal context; and many aspects of the agreement were unfinished, to be worked out in political accords. Nonetheless, the compromises reached on such issues as the context and circumscription of the right of self-government, whether or not it was to be inherent, the timing of judicial review, and the application of the *Charter of Rights and Freedoms* were

all key matters which had eluded the participants in the section 37 negotiations. The achievement at Charlottetown is thus underscored by the number of such difficult issues that were resolved.

The agreement on the "First Peoples" section was a victory for moderates on both sides -- but fell victim to the overall dissatisfaction in the Canadian public to other parts of the Agreement. Its legacy is to demonstrate what can be achieved by aboriginal organizations in a process of executive federalism, but also to show that aboriginal leadership -- as with the federal and provincial leadership -- must also on occasion, be directly accountable to the public.

The multilateral constitutional reform negotiations involved Aboriginal Peoples mainly through the aegis of four national organizations. These organizations, some of which have changed names and membership over the past twenty-five years, have been created to bring aggregate representation to what is otherwise an extremely diverse set of constituencies. Of the four national organizations, the Assembly of First Nations represents the Chiefs and Band Councils of status Indians on reserve, and -- more or less -- those First Nations with treaty rights with the Crown. The 1Inuit Tapirisat of Canada represents the different Inuit populations across northern Canada. The Congress of Aboriginal Peoples (until 1994, the Native Council of Canada) represents the Indian population that has lost its "*Indian Act*" status, including by some definitions, some of the Métis population. And the Métis National Council represents the Métis nation with roots in the Red River Valley, and generally resident from Ontario to Alberta. In 1992 the Native Women's Association of Canada litigated unsuccessfully to be included as a fifth representative body of Aboriginal Peoples.[xix] It is important to note that Aboriginal participation in the constitutional FMCs and ministerial and officials meetings were not truly *intergovernmental* as the national organizations do not represent directly an order of government.

Apart from the executive federalism of constitutional reform negotiations, the broader experience of Aboriginal Peoples with intergovernmental relations is more difficult to summarize. This experience has involved both a much broader group of aboriginal participants and a more diverse set of issues.

The broader set of intergovernmental relations involving Aboriginal Peoples have, on occasion, also involved these four national organizations. Probably as a result of the Meech Lake and Charlottetown experiences, the federal and provincial (and territorial) ministers responsible for native affairs now do not meet, at least as a group, except with the representatives of the four national organizations present. Since 1993 there have been occasional meetings for exchanging views on issues related to self-government and other key aboriginal concerns.

The remainder of aboriginal relations with Canadian governments are not multilateral and therefore do not involve the four main national organizations. Nonetheless, these relations, in their diversity, mirror many aspects of executive federalism, although at one end of the spectrum they depart from intergovernmental relations as such and are closer to client-patron relations or government-interest group relations (as unsatisfactory as this may be for Aboriginal Peoples). It is important to briefly review these relations in order to determine the requirements for sustaining future relations in a more equitable intergovernmental mode.

At one end of the spectrum are First Nations, Tribal Councils or Treaty signatories or Inuit organizations such as the Tungavut Federation of Nunavut, who have entered into negotiations with the Crown in order to define more precisely their treaty and/or aboriginal rights. The Aboriginal Peoples represented may not constitute a government as such, but they are clearly a legal entity with constitutional status (via section 35 of the *Constitution Act, 1982*). This sort of intergovernmental relationship has been provided with enhanced power since the Supreme Court judgement in the Calder case of 1973 redefined aboriginal title in Canadian law, and since the federal government responded with a new comprehensive claims policy. This led to the 1975 James Bay and Northern Quebec Agreement with the James Bay Cree and the Inuit of Northern Quebec. More recently such negotiations have come to include not only comprehensive claims settlements but also detailed provisions for government, whether they are commitments to proceed with a territorial government (e.g. Nunavut) or a series of self-government agreements within an overall framework (e.g. Council of Yukon Indians). There are many problems with the relationship which these processes entail, not least of which is that

there is no current forum to negotiate the modernization of existing treaties reached one or two centuries ago. There are also a number of missing elements in the process required to establish an equitable intergovernmental relationship, which are discussed at the beginning of part II below.

At the other end of the current spectrum of relations are those between the urban and/or provincial organizations of off-reserve, non-status Indians, Métis and other Aboriginal Peoples which have been attempting to represent the interests of their constituencies. These organizations exist without specifically recognized claims or access to lands and rights, and often at the financial sufferance of federal and provincial governments. Despite the fact that they represent large constituencies of Aboriginal Peoples, they are often treated no differently from other social interest groups. Where it is recognized that such aboriginal organizations have a special claim to public resources or to authority over the delivery of certain services, they still lack an independent base of financing and jurisdictional authority.

Between these two extremes lies the daily relationships forged by Band Councils and Treaty Councils with the Department of Indian Affairs. The relationship here is confined to the *Indian Act* -- although there is at least one exception in the powers of the Sechelt Band provided by separate parliamentary legislation. Nonetheless, there exists a wide range of practical autonomy among Indian bands, determined by the relative differences in community support, cohesion and initiative, as well in some cases of community wealth, and in the relative success in negotiating arrangements within the confines of DIAND's various programs to devolve administrative and financial control of reserve governance. Yet the constraints of accountability and the related legal limitations of band government under the *Indian Act*, would make it difficult to classify these relations, as important as they are, in the same category as "intergovernmental" relations among the federal and provincial governments of Canada.

In summary, Aboriginal Peoples in Canada have indeed experienced a mixed bag of relations in recent years with Canadian federal and provincial governments and executive federalism in general. First, at the level of the "high politics" of constitutional reform, the Aboriginal Peoples through their four major national organizations, have

achieved a significant degree of partnership with the federal and provincial governments. It would now be difficult to contemplate a constitutional reform process without the aboriginal representatives as integral players, even if that has complicated the chances of reform. Second, the involvement and participation of Aboriginal Peoples within the broader agenda of executive federalism is much less complete. The key negotiations and policy-making processes of concern to Aboriginal Peoples are often bilateral (e.g., treaty relations, claims negotiations, Band-DIAND relations) and do not fit into a neat characterization as either "interest group" politics or intergovernmental relations. The four national organizations cannot play a direct role in these relations as they do not directly represent individual Aboriginal Peoples or groups. This second type of relations neither fits the typical pattern of executive federalism in Canada nor, in most cases, should it. As we move next to examine the specific assumptions and principles required to implement aboriginal self-government, it will be important to underscore how and in what circumstances relationships between aboriginal communities and other Canadian governments can be put on a more equitable footing. In so doing we explore under what circumstances it is possible and appropriate to integrate these relations to overall executive federalism.

II. THE TRANSITION TO SELF-GOVERNMENT

A. Assumptions and Principles

Establishing a new relationship with Aboriginal Peoples requires effective intergovernmental relations, both in the transition phase as aboriginal communities negotiate and then begin to exercise self-governing powers, and in the longer term as aboriginal governments take their place as a third order of government within the federation. To think about the requirements for such relations, however, in turn requires that one make at least a minimal set of assumptions about what aboriginal self-government will look like, as well as to establish the principles that should guide the relations needed to make self-government happen. But first, it is important to draw upon the previous section of this paper to point out, in a structural way, the differences between the actual pattern of relations and the ideal relations in a federal system.

The ideal of intergovernmental relations is that it exists to deal with the interdependencies of otherwise sovereign spheres of government. Each order of government has its own jurisdiction, its own direct political legitimacy with its citizens, its own base of public accountability and public administration. Each also has -- at least to some degree -- its own source of revenues.[xx] Within different federal systems there are obvious degrees of jurisdictional sovereignty of the constituent units as compared to the central government (compare Mexican states and Canadian provinces), or of the relative fiscal dependency among units to the centre (compare Newfoundland and British Columbia). But they all have the following in common: a constitutionally protected sphere of authority; direct political accountability to their citizens; and at least a degree of financial autonomy. Even with these attributes, governments must still enter into intergovernmental relations in order to deal effectively with overlapping issues, to pool resources, to harmonize policies or to share resources. However, when these governments do enter into these relations, they do so on the basis of juridical equality and constitutional integrity. And they have similar access to political, administrative and financial resources sufficient to allow them the minimal capacity to hold out from time to time and to have default options if negotiations fail.

Almost no aboriginal organization in Canada today meets these ideal criteria. In terms of spheres of jurisdiction, Aboriginal Peoples may be said to be exercising their inherent right of self-government to varying degrees, but without formal recognition by other governments or constitutional entrenchment of specific terms or jurisdictional scope. Many aboriginal governments and related institutions enjoy strong community support and electoral legitimacy. Nonetheless, the system of political representation imposed on these communities is sometimes alien to them. Their traditional forms of governance are often unrecognized, and key aspects of political sovereignty such as being able to determine one's own citizenship base, are compromised (for example by the terms of the *Indian Act*). For these reasons the accountability of these governments to their peoples is weakened. In other cases, aboriginal organizations play important roles in dealing with the federal and provincial governments but are not on the same playing field because they are advocacy organizations only, with no direct accountability to Aboriginal Peoples and no direct ability to act on behalf of Aboriginal Peoples. Finally, most aboriginal communities and organizations have little or no financial and administrative

base independent of federal DIAND policy or the interest group funding policy of other federal agencies. These conditions are changing at the margins as aboriginal communities become more entrepreneurial, but the fiscal needs of most aboriginal communities remain massive in relation to their accessible revenue base.

We do not cite this gap between the ideal and the actual in order to be determining or pessimistic, but rather to underscore the need to establish a new relationship in which aboriginal governments have the legal, political and other means to participate as full intergovernmental partners in the Canadian federation. This is not to imply that this relationship must mirror that of other governments in the federation, but rather that it takes seriously the Aboriginal Peoples' inherent right of self-government. The next part of this paper addresses this issue from the perspective of the transition to a new relationship and its long-term maintenance. We thus turn to our basic assumptions about self-government.

As we noted in the introduction, the ultimate answers about self-government must be provided by Aboriginal Peoples themselves, and this may take place over many years. One must also deal with the existing governments of Aboriginal Peoples, even if they do not conform to the ideal of self-government espoused by aboriginal leadership. These include those at the community level in the 600 or so band governments, the governing authorities established under the James Bay Agreement, some specific agencies at the level of Tribal Councils and the Sechelt special municipal government. Other forms of government in various stages of development include the Nunavut Territory (which will be a public government, not exclusively aboriginal), and the dozens of self-governing agencies and societies in urban centres or among Métis and off-reserve populations.

In the submissions to the Royal Commission, research studies prepared for the Commission and other recent work, a general picture of self-government in the future is emerging. Three models of aboriginal government which have been generally discussed are: the nation-based model; the public government model; and the community of interest model.[xxi] Figure 1 provides an overview of the characteristics of these models. What follows is a brief description of these models with an emphasis on the significance of the type of intergovernmental relations required to implement and sustain them.

FIGURE 1: MODELS OF ABORIGINAL GOVERNMENT

GOVERNMENT MODELS	APPLICATION OF THE MODEL TO ABORIGINAL PEOPLES		
	INDIANS	INUIT	MÉTIS
Nation-Based Model •citizenship by tradition & culture •could encompass treaty areas •potential extra-territorial scope	•one or more of approx. 60 aboriginal nations •identifiable land base of reserves, treaty areas, claim settlements, etc. •could include urban holdings/reserves	•not the preferred model •could be used as basis for governing land and resources as result of treaty or claim settlement.	•governance of Métis nation on and/or off-land base
Public Government Model •citizenship based on residency •defined territorial scope	•not preferred model	•northern settings where Inuit the majority •both regional and community government	•possible model for community government
Community of Interest Model •membership based on identification •urban and other off-reserve settings	•urban and off-reserve Indians who are members	•urban Inuit who are members	•urban and other Métis who are members

It is widely recognized that self-government must be self-determined if it is to be effective. The subject of self-determination most often described by Aboriginal Peoples is the "nation". In this sense, many Aboriginal Peoples foresee a relationship with the Canadian federation that is on a nation-to-nation basis. The traditional governance of aboriginal communities in Canada was by nations that occupied a specific traditional territory -- even if that territory and the national divisions among peoples changed over time. By one count[xxii], at the time of the first arrival of Europeans there were seven tribal groups of Inuit and approximately 80 tribal groups of "Indians" in or near the present territory of Canada. Some aboriginal leaders and elders speak of the need to resurrect the

traditional governing structures of these tribal nations as the basis of self-government agreements. Such a resurrection would not be possible in all circumstances. Some nations no longer exist or have been absorbed by others. Some groups have largely merged through intermarriage with Europeans. Others no longer live in their traditional territory. Nonetheless, recent research indicates that there are, by aboriginal Peoples' own definition, at least sixty nations continuing within the territorial bounds of Canada,[xxiii] and who occupy -- with a certain degree of overlap -- distinct territorial scope.

Despite practical and historical limitations, there are compelling reasons for focussing on the aboriginal nation as the self-governing unit. These nations have a social and cultural basis, which can be reasonably differentiated by language or territory or both. Aboriginal nations in the sociological meaning of a "people" have been recognized under emerging international law as holding indigenous and aboriginal rights. It has been historically the nation, or at least defined groups of nations, which have entered into treaties and which have been recognized by the Crown in the negotiation of new treaties or comprehensive settlements.

While still small in relation to any provincial community in Canada, most individual aboriginal nations have a scale that is appropriate to the exercise of many of the governing powers which Aboriginal Peoples wish to assume. Self-government in its fullest sense is unlikely to work in communities that are too small or where the government is too far from the people. This is not to argue that larger representative institutions do not have a role to play, but they should not be considered as the primary locus of government authority. And therefore, it is this intermediate level consisting of approximately 60 Aboriginal nations that is likely to be the most appropriate long-term focus of intergovernmental relations as well.

The question of scale is also related to questions of practical implementation, community involvement, traditional values and power balances. While many individual Indian bands are, by the above definition, separate nations, it would be very difficult for a nation of 400 persons to exercise on its own the full range of powers contemplated for aboriginal self-government. The nation would lack human resources, financial resources and political power. If several bands of the same or allied nations pooled their resources

and authority for specific functional purposes, such limitations might be overcome. On the other hand, aboriginal government which did not give a large measure of local control over daily life to individual communities would be self-defeating. Aboriginal communities must therefore consider size and scale factors when deciding upon the basic unit of governance. In many cases, however, it seems that the nation is the most appropriate unit.

The model of nation-based government does not address the needs of all Aboriginal Peoples. The Inuit in particular have expressed the preference for a public model of government. The territorial isolation of most Inuit communities, where they constitute the majority of the population by a considerable margin, enables them to propose self-governing autonomy that conforms to a public as compared to an ethnic model. Such a model still meets the needs of aboriginal self-determination because the governing structures and principles of these governments will differ in important ways from "southern-based" Canadian governments where the majority is not aboriginal. For example, the Tungavut Federation of Nunavut has been in the forefront of advocating a public government within the general context of the northern territorial government of Canada -- although this reform required the consent of all of the citizens of the current Northwest Territories to divide their territory and to create a new eastern territory where the Inuit would be the majority. Even if the transition to this territory is already well advanced, the principles which should guide intergovernmental relations discussed below also apply to this government, as well as to the other Inuit communities seeking similar status.

The third model of a community of interest is, for most potential applications, at the opposite end of the spectrum from the public government model in that it is designed for situations where Aboriginal Peoples constitute a minority within a larger geographic community. As more than half of all persons of aboriginal ancestry in Canada live in cities, this model will be important for many of them to have access to self-governing institutions affecting their daily lives. The most important aspect of the model is that it is not land-based, and that it exists on a foundation of the mutual identification of persons in the broader community as being aboriginal persons and their acceptance as such by the aboriginal community.[xxiv] Such communities must exist to meet the needs of people

who, regardless of their legal status or relationship to their "home" nation, have a general aboriginal right to self-government. This model implies a special series of issues to determine where the interests and claims of the land-based nation model ends and the community of interest model begins (or where they overlap). These issues will also have to be addressed in the transition.

Regardless of the model adopted in the future, each aboriginal government must face the prospect of negotiating the legal, administrative and fiscal space for its existence. Based on our reading of the experience of Aboriginal Peoples in their relationships with the federal and provincial governments to date[xxv], a number of problems have prevented the progress of self-government. These include the problems of a weak commitment to the concept of self-government by other Canadian governments; the issue of which aboriginal communities are recognized for the purpose of self-government negotiations; continuing problems of funding and other negotiation resources; and the problem of inadequate intergovernmental structures and processes for implementing agreements. When the issues presented are re-formulated in positive terms, they can be adopted as guiding principles for how a transaction process to self-government *should* occur.

The first problem has been the widespread phenomenon of a weak commitment to self-government, usually but not always on the part of the federal and provincial governments. This weak commitment has been exhibited in the lack of legislative or cabinet direction, lack of bureaucratic and financial resources, lack of carefully considered policy positions, and lack of interdepartmental consistency and coordination. In short, the parties have exhibited a lack of political will to do what is necessary to reach agreement that both sides can live with and stand by. Among the provinces the level of commitment has varied considerably, and can change abruptly with a change of government. Even on the aboriginal side, negotiations have proceeded in some cases for years only to be defeated or stalled indefinitely by a lack of grass roots support. Intergovernmental relations for self-government obviously require sustained and supportable political will -- more especially where substantive results depend on the process of negotiation alone.

In his review of what it would take to successfully negotiate self-government

agreements, Ian Cowie notes the importance of the initial recognition of aboriginal authorities as having the right of self-government and, flowing from that right, the power over certain jurisdictions.[xxvi] The history of the past twenty years or so of attempts to negotiate self-government is a testament to the importance of the initial status accorded to the aboriginal side. If it is not clear from the outset that the Aboriginal Peoples are party to the negotiations *as a government*, then the results will not be intergovernmental and will resemble patron-client relations. A similar result has been experienced when federal negotiators have looked upon Treaty negotiations and consultations not as nation-to-nation negotiations but as the pleadings of a special interest group faced with a large and, from the federal perspective, a more legitimate government bureaucracy. Thus mutual recognition of the other party or parties as a governmental entity with its own source of political and constitutional legitimacy would be an important start to a new relationship.

A more specific issue of recognition is the question of with whom should federal and provincial governments negotiate. In many cases this has been straightforward, but there have also been cases where conflict over who represents whom has emerged. This has included competing territorial claims, competing jurisdictional claims (such as over members of a nation off the land base) and membership disputes as such. The federal and provincial governments must not usurp the role of determining who represents Aboriginal Peoples, or of determining who Aboriginal People are (as has been the practice under the *Indian Act*).[xxvii] However these governments and Aboriginal Peoples will have to agree to a policy of recognition to determine the primary parties to negotiation of self-government, their readiness to enter into negotiations, and the appropriate scale of the Aboriginal negotiating party.

Funding has also been a continual difficulty in attempting to establish effective relations. As long as the potential governments of Aboriginal Peoples have been completely dependent upon other governments, and in particular DIAND operating under the strictures of the *Indian Act*, they have not been able to maintain their independence in intergovernmental relations. There have been, of course, matters of degree, with some aboriginal institutions and organizations having greater or lesser access to financial resources. In federal-provincial and provincial-municipal relations there is also a wide

range of relative dependencies. There is, nonetheless, a difficult chicken and egg problem: without financial resources, governments cannot negotiate or otherwise maintain intergovernmental relationships --- but without negotiations they often cannot get access to those resources. The existing treaty and comprehensive claim processes have dealt with these issues in part by providing funds for negotiation (usually as a loan against cash settlements) or block grants to advocacy organizations. The transition to self-government must address the need and access to resources at every stage of the process.

Apart from funding, issues of agenda-setting, timetables for negotiations and recourse to arbitration and other forms of dispute settlement are also important to fair negotiations. The Coolican report on comprehensive claims put significant emphasis on the independence of the negotiation process for redressing power imbalances among the negotiating parties. Based on its review of previous efforts to make progress on comprehensive claims, that report underscored the need for independent institutions as the "keeper of the process" to monitor, intervene, arbitrate and report upon claims negotiations, and to ensure that both sides are adhering to an equitable and effective negotiating process.[xxviii] Such means of maintaining balance would seem essential where the parties to a relationship are the huge and resourceful federal government (and/or a provincial government) on one side, and a small and relatively powerless aboriginal nation on the other -- especially so in bilateral negotiations where only one aboriginal nation is involved.

Finally, there are the continuing problems of implemention. This is in many respects simply a longer-term extension of power imbalances, as bureaucratic inertia and vested interests often resume their dominant position once actual negotiations have been complete. The political will initially established may dissipate; negotiating parties may change; financial and policy support may have come to an end; and the parties may not have foreseen the need to revisit the terms of agreements to deal with changing circumstances. As noted, there is also a strong history of inadequate or failed attempts to establish independent processes to monitor progress and to settle disputes. These problems demonstrate the need for properly funded processes for sustaining intergovernmental relations between legitimately recognized aboriginal governments and

the other governments in the federal system. This need becomes all the more obvious when compared with the relations among non-aboriginal governments, including regional and local government. By examining the underpinnings of what seem to make for effective intergovernmental relations, we can indicate the necessary conditions for a successful negotiation and implementation of self-government (from the perspective of intergovernmental relations) and to sustaining self-government over the long term.

In summary, and at the risk of over-simplifying, the preceding discussion points to four principles for the establishment of effective intergovernmental relations for the transition to self-government. These are:

1. The Aboriginal Peoples and the federal, provincial and, where appropriate, local governments should make a formal and practical commitment to negotiating and implementing aboriginal self-government.

2. Negotiation and implementation should proceed on the basis of a clear and fair policy of recognition of with whom within the aboriginal community self-government negotiations are to be conducted, and who the aboriginal community represents, what territory is covered, and the required mechanisms of community consent and accountability.

3. There should be assured and adequate financial and other resources provided to the parties for the negotiation and implementation of self-government agreements, appropriate to the pace and scale of negotiations, and a process for the independent resolution of disputes concerning the provision of negotiation and implementation resources.

4. There should be consideration of new permanent intergovernmental forums and related mechanisms, to handle relations between Aboriginal governments and the local, provincial and federal governments. These institutions and processes should be specific to the level and scale of relations involved (i.e., local, regional or provincial, and Canada-wide).

What follows is a further elaboration on these principles.

B. Applying the Principles

(1) Commitment:

To achieve a new start on the negotiation and implementation of self-government will require both the symbolic and practical commitment of both sides. Ideally the symbolic overture would be a constitutional framework such as that provided in the Charlottetown Agreement. In the absence of such a declaration, governments and the Aboriginal Peoples must fall back upon existing constitutional provisions such as section 35 of the *Constitution Act, 1982* and build from there. A concerted effort at demonstrating practical commitment could substitute for the lack of detail and vagueness in the section 35 route.

Nonetheless, what is required -- in advance of negotiations -- is a solemn and legally-binding declaration that recognizes the inherent right of self-government as falling within section 35 and the commitment of both orders of government to support the exercise of that right. Such a declaration should be made by the federal parliament and by the provincial legislatures (preferably all of them, but at least most of them to begin with). It would also be helpful if such a declaration were made by federations of municipalities or by individual municipalities. This declaration would ideally be made at the same time or simultaneously (even if it has already been done) by the national aboriginal organizations and by individual aboriginal nations, communities and organizations.

The specific legal form of this symbolic commitment to recognizing the inherent right of self-government could differ, respectful of the differing bases of aboriginal rights. Examples of different forms are:

- joint Aboriginal Peoples-Crown declarations reaffirming the rights under specific Treaties;
- a Canada-First Peoples Treaty as a country-wide declaration;
- framework legislation to recognize the rights of all Aboriginal Peoples to exercise self-governing powers (i.e. specifically empowering community of interest

models);

- resolutions in parliament and the provincial legislatures to entrench new treaties under section 35;

On the more practical side, governments and Aboriginal Peoples need to signal their readiness to enter into what could be a long journey. It may seem obvious to state that government should not enter into what will be several negotiations which could take many years without having a consistent and well considered policy position. But this has often been the case in the past, resulting in endless delays and eroded good faith. To this end, the federal government, each province, and many municipalities should all consider the adequacy of existing internal structures and policies for the self-government transition. In the federal government the bureaucratic responsibility for negotiations should be reassigned from DIAND, to a new minister reporting to a reformed committee of cabinet. Parliament should also appoint a special committee to oversee the new department's role. The provinces should also designate a special minister as responsible, with appropriate cabinet and legislative committees. The larger municipalities that have not already assigned responsibilities to plan for relations with aboriginal governments should do so as well. And all levels of government should consider independent advisory boards for dealing with third party interests (see below for other institutional considerations regarding dispute resolution and intergovernmental relations *per se*).

On the aboriginal side, it might be said that the leadership has been ready to commit to self-government negotiations for years. But indeed the lack of practical readiness is apparent: there is a big difference between advocacy and implementation, and the two require different players and resources. Much of this burden will naturally fall on those groups of Aboriginal Peoples which are recognized as the legitimate focus of self-government negotiation (see below). Without going into great detail, commitment to the process will require participation and consent at the community level and the internal integrity and accountability of the community leadership.

Finally, commitment to self-government should state a set of mutual objectives. These might include the facilitation of the exercise of Aboriginal jurisdiction, with emphasis on land, culture and language; the framework for the recognition of Aboriginal

laws by federal and provincial governments; and the access to financial and other resources commensurate with the scope and nature of self-government agreements.[xxix]

First and foremost among the strategies for achieving results from negotiations will be community ownership of the process and the objectives of self-government. The submissions to the Royal Commission from aboriginal communities and national Aboriginal organizations make it clear that self-government will not work unless it is driven by the people, and tied to the community's struggle for cultural and social healing and revival. This may be a difficult concept for the federal and provincial governments to accept, in part because it will delay agreement in some cases as legitimacy and accountability matters are resolved at the community level. It also casts self-government in broader and perhaps more philosophical terms than those with which government negotiators are familiar. Yet the first challenge of any negotiations is to learn and acknowledge, if not entirely accept, the worldview of the other party.[xxx]

In considering the commitment issue, one must address squarely the inability, of the national Aboriginal organizations to actually deliver the commitment of their constituencies to the implementation of self-government. In this respect, it must be recognized that there appears to be waning appetite in Canada (particularly since the failure to ratify the Charlottetown Accord in 1992) for a multilateral process -- i.e., one in which the national Aboriginal organizations attempt to represent Aboriginal Peoples. For this reason, and for reasons of legitimacy, the main actors in negotiations for self-government are likely to be at the regional and local level.

These points having been made, there may also be an important continuing role for the national aboriginal organizations. They will of course play a key role in negotiating the content of any of the framework declarations referred to above. They could also provide a role in research and training -- providing draft framework agreements and a clearing house for legal, policy and administrative advice to the negotiating parties. Providing such services requires sustained funding. This should be secured in multi-year agreements with the federal government. One alternative method of providing such federal funding would be to establish a national foundation with an independent board to oversee funding to national organizations. There are related issues

of the sustainability and legitimacy of the national level of Aboriginal representation, to which we return below.

(2) Policy of Recognition:

The question of recognition is an important philosophical as well as practical issue. It is important as a philosophical issue because governments have legitimacy only if they are recognized by other key actors. Moreover, recognition usually confers *legal status* upon the group being recognized which is one of the reasons why the federal government's refusal to recognize any new bands since 1984 is such a contentious issue.[xxxi] In the specific terms of this paper, recognition is important as it establishes the parties with whom negotiations will resume and to whom disputes will be resolved. There are competing conceptions of recognition theory, and debate about the principles that should guide recognition policy.

In his study for the Commission, John Giokas writes that there are two kinds of recognition theory. Borrowing from international law, declaratory theory states that recognition is a product of statehood and exists "from the moment a body has the attributes of a state".[xxxii] In this model, recognition of one government's capacity to act is implicit in its statehood. Recognition does not have to be exercised or negotiated, it merely exists as a result of its statehood. This was the way in which a number of government reports (such as the Penner report and the "Partners in Confederation") viewed recognition.[xxxiii] It has the advantage of being intuitive but may be more applicable in the international arena than to internal relations within a federal state. Another model, the constitutive theory, "emphasizes the need for explicit acts from other states ... before a state can be recognized.[xxxiv] This model sees the principle of recognition as something which is negotiated by governments. The decisions to be made as a result of such negotiations are about the criteria used to establish recognition. Because of the variety of ways in which recognition can be conferred, such as ancestry, race, historical identity, and geographic location, to name a few, it is important that both sides establish criteria in which to make claims about recognition.

Of the two approaches, the constitutive model seems best suited to the needs of

both Aboriginal Peoples and existing orders of government as it recognizes the different needs of both parties and is able to respond flexibly to those needs.

If the constitutive model is best suited to aboriginal self government in Canada, what criteria should govern a policy of recognition? This paper does not attempt a detailed discussion of those criteria. We will, however, attempt to outline what principles should guide negotiations. These can be broadly defined as the recognition of mutual autonomy, acknowledgment that membership be a prerogative of aboriginal organizations and a dispute resolution mechanism.

Recognition of mutual autonomy is an important way in which the federal government can give its assurances to Aboriginal Peoples that it takes the process seriously. This can be accomplished by the creation of a separate minister of aboriginal self government discussed in the previous section. Following consultations with the national aboriginal organizations, the federal Parliament would pass a "Recognition Act" which would outline the criteria that an Aboriginal People would have to meet in order to be recognized by the federal government.[xxxv] Decisions about recognition would be made by the new department guided by the Act. This separate department would also serve as the negotiating arm of the federal government as well as providing an administrative service to both parties.[xxxvi] Provinces and municipalities could adopt recognition policies which mirrored the federal legislation.

A second principle associated with recognition can be called the principle of self-identification, namely, that decisions about membership and identity are left to Aboriginal Peoples and their organizations. This, quite properly, allows for decisions about citizenship, entitlements and other benefits to be left to the incipient governments themselves. What this means is that aboriginal governments would decide on questions of identity and memberships and as well as the form of government. Aboriginal Peoples have long complained about the seemingly arbitrary nature of their relationship with the federal government. Through both court decisions as well as DIAND policy, aboriginal persons have had different rights conferred upon them over time.[xxxvii] Since the 1969 White Paper on Indian Policy, aboriginal organizations have had a justified skepticism about the federal government's intentions *vis-à-vis* citizenship. The White

Paper had argued that the historical "special relationship" with aboriginal organizations was the source of their "problems", and that special citizenship rights had to be terminated.[xxxviii] In order to go some way to repair this breakdown of good will, the federal government needs to allow questions about membership determination to be left in the hands of aboriginal organizations.

The third principle that should guide recognition discussions is a clearly articulated and mutually agreed upon dispute resolution mechanism. The details of the ways in which a dispute resolution mechanism could work are sketched out in the next section. Suffice it to say that the underlying principle is rooted in the historical relationship between Aboriginal Peoples and the federal government. To establish dispute resolution is to recognize that differences will arise between the parties, and that these differences do not derogate from the federal government's commitment to the process.

There are two kinds of appeals which might be brought before a dispute resolution mechanism. The first encompasses individual disputes about the determination of membership; it may be characterized as `micro' in scope. The second kind of appeals are those pertaining to which aboriginal organization will be recognized as the self government interlocutor; it is more `macro' in scope. An example would be potential disputes about who represents urban-dwelling Métis, Treaty Indians, and so on. A dispute resolution mechanism would adjudicate both sorts of competing claims of representation by various aboriginal organizations.

Below is a simple model of how the way in which the recognition process might work:

FIGURE 2

RECOGNITION PROCESS

I. Consultation About Criteria	**II. Application of Criteria 1*+ 2***	**III. Appeals Procedure**

Multilateral Process — National aboriginal organizations and federal government — enshrined in *Recognition Act*	Federal government and Aboriginal governments	Two Track: 1. Micro: Aboriginal Tribunal at community levels; 2. Macro: Aboriginal governments and federal government;
1* Determination of individual membership (Micro) •appeal for individuals on issues of membership •decisions made by community **2* Recognition Application (Macro)** •decisions about which aboriginal organization represents whom •decided by *Recognition Act* and representatives of federal government and aboriginal governments		

While this figure indicates that the primary actors in the recognition process will be the federal government and Aboriginal Peoples we believe that the provincial and even municipal governments could also participate. Indeed, the first stage could very well be multilateral with national aboriginal organizations and the federal *and* provincial orders of government deciding what criteria would be needed for recognition. The first stage would ideally result in consensus on a policy but with the federal parliament making the final act. The provincial governments, and even local governments, could undergo a similar if not identical process. However, given the primacy of the federal role in the fiduciary aspects of the aboriginal-state relationship, the provinces and other governments would have more incentive in following the federal lead. In this respect, recognition at the federal level could have a cascading effect, triggering recognition by other governments. Thus the second and third stages of this process -- application of criteria, and appeals procedures or dispute resolution -- could also involve provincial as well as local government where their recognition policy is being applied.

Finally, the participation of Aboriginal Peoples is obviously key to the entire process. At the first stage, the national aboriginal organizations would be

consulted -- and indeed would negotiate with the other governments -- about the recognition criteria. At the second stage, individual aboriginal communities, governments and self-governing institutions would be recognized, or would seek recognition, from the other governments. In so doing they would indicate which Aboriginal People, and individual persons, are represented, thus determining their own membership, while the federal and provincial governments decide whether, as a whole, the aboriginal collectivity meets the recognition criteria. The third phase comes into play when individuals challenge the decision of Aboriginal authorities about membership, or when Aboriginal Peoples challenge the decision of other governments to recognize or not. The tribunals or independent panels established to hear such grievances (see the next subsection) would also include individual aboriginal persons, although obviously not persons who are party to the dispute.

(3) Resources for Negotiation and Implementation

Equity is an important principle in negotiations. To establish a "level playing field" for negotiations in every respect is of course impossible. And the advantage is not always and on every issue going to be with the more powerful federal or provincial party. Nonetheless, the realities of power must be recognized and counter balanced. An aboriginal negotiating team which has the support of its community can partially offset the power imbalance with a carefully considered and singular strategic focus. It can also appeal to public opinion and allied social interests to overcome bureaucratic inertia and vested private interests.

None of the above can substitute, however, for a process that clearly establishes the aboriginal parties on an equitable and independent footing with the other governments. There are several aspects of this equal footing, including access to financial resources, adequate human resources, processes for bilateral agenda setting and jointly determined negotiating schedules, and independent institutions especially established for the purpose of maintaining an equitable process.

The negotiations must be adequately funded, but in keeping with the size of the nation or community involved and the resources of the parties as a whole. The Task Force to Review Comprehensive Claims Policy (the Coolican Report) discussed the

financing of the negotiation of comprehensive claims and reached sensible conclusions.[xxxix] These included the recommendation that access to resources for all parties to the negotiation be automatic at a prescribed stage in the process (i.e in the context of the report, once a claim has been accepted for negotiation), and that funds for negotiation could be borrowed interest free from the ultimate cash settlement. Applying this idea to self-government negotiations is somewhat more difficult in that cash settlements will not always be envisaged as part of the ultimate agreement -- although surely fiscal arrangements (i.e., transfers, revenue sharing, etc.) will be. The aboriginal parties to the negotiations, as well as the federal and provincial agencies involved, may have to rely on somewhat less secure but minimally guaranteed access to funds for their negotiations. This could take the form of a multi-year agreement committing the federal (and/or provincial) government to paying a grant to the aboriginal party to cover negotiation costs. Such an agreement could stipulate that at the end of the agreement period -- if negotiations are not yet completed -- there would be an interim settlement on revenue sharing, earmarked to the general government expenditures of the aboriginal government (which would in turn be defined to include the costs of sustaining further negotiations). Such a system would provide to the parties an incentive to reach the interim settlement within the initial time-frame established (e.g two years), but would also mean that to continue the negotiations indefinitely would be to keep funds from being applied to actually implementing self-government.

The human resources employed in negotiations are also of vital importance. Successful negotiations are helped by non-partisan, professional negotiators with sufficient independence to be free from the daily interference of bureaucracy, but with sufficient seniority to have access to leading decision-makers in government. Observers of the existing negotiation processes complain that federal negotiators, for example, are not independent of the Department of Indian Affairs, do not have sufficient dedicated resources and do not have an adequate process to get decisions and directions out of government parties to the negotiations.[xl] (In the previous section, we addressed the need for the parties to self-government to be structurally organized and prepared for the negotiations in the previous section.) The aboriginal community as a whole should consider the training needs of a relatively large contingent of negotiation specialists. As noted above, there could be a role for the national aboriginal organizations in providing

training and a recruiting clearing house for negotiators for individual self-government agreements.

Apart from human and financial resources, in a fair and equitable negotiating process the agenda for negotiation and the schedules and time-frame for reaching agreement must be acceptable to both sides. This point may seem obvious -- and to an extent, it matches ongoing emphasis in many negotiations on the importance of an initial framework agreement setting out agreement on such matters. Nonetheless, every effort should be made to avoid the prospect of many sets of negotiations dragging on for years if not decades, as has been occurring in Canada. This is not to counsel for quick results which break down soon afterwards. But it does call for a more frank appreciation by all parties of the kinds of internal consensus, prior research and long-term financial commitment necessary to make a negotiation successful. Organizational and community soul-searching should be accomplished before the clock starts ticking on finite personnel and finances. Once begun, an established, transparent process with clearly indicated stages and milestones will help to ensure that the actual and difficult task of negotiation is done as efficiently as possible.

This leads to a final set of considerations about a special and specific set of institutions to handle the sheer scope and number of separate negotiations of self-government agreements. The Coolican report noted above made the key recommendation that there be an independent "keeper of the process" to ensure that resources are adequate and to hear appeals from the parties if the process breaks down over financial or other issues. These recommendations, dealing with comprehensive claims policy, have not been implemented.

Our conclusion is that for both the symbolic reason of making a clean break with the past, and for the practical reason of ensuring a strategically focused and equitable process, three related institutions are required, and are briefly sketched below:

- a common self-government negotiations secretariat: the federal and provincial governments of Canada currently facilitate their relations by having an independent secretariat -- the Canadian Intergovernmental Conference Secretariat, CICS -- to

handle all of the logistical arrangements for meetings. This ensures the availability of neutral venues and often the provision of the "good offices" of CICS personnel. A special arm of the CICS or a new agency could be created under the joint management of the federal and provincial governments and the national aboriginal organizations, to be responsible for the logistical support of self-government negotiations, separating this function from the bureaucratic resources of any one party. Such an agency would have a native staff component to ensure that negotiations and the process generally facilitates the aboriginal approach to consensus building and is sensitive to the need for bicultural accommodation.

- a new federal agency to undertake the federal side of negotiations: as noted above, there is merit in establishing a new agency, separate from DIAND's ongoing responsibilities, for the specific purpose of undertaking the federal responsibility for negotiating new agreements. The new agency might best be placed with the Privy Council Office where it could benefit from central resources and access to the cabinet decision-making process. Obviously it would deal with *all* Aboriginal communities, not just "status" Indians.

- an independent review commission: modelled on the recommendations of the Coolican Report, this agency would be at arm's length from the federal government, with half of its members appointed by the federal government (some of whom could be nominated by the provinces) and the other half appointed or nominated by Aboriginal Peoples (one would expect them to be mainly persons of aboriginal ancestry). The independent agency could have a range of roles, which might include deciding which negotiations would proceed based on such factors as readiness, scale and accountability; initial decisions or appeals regarding the recognition policy; the establishment of initial financial resources for negotiations; hearing disputes regarding financial resources and other issues; the provision of mediation services where requested by the parties; and, in carefully prescribed circumstances, arbitration on deadlocked issues.

We are not suggesting that these three specific institutions are a panacea. The main point is to suggest that independent institutions would be very helpful at this

stage in the implementation of aboriginal self-government. They are important to get beyond the historic distrust of DIAND, to provide greater equity and fairness to aboriginal parties in an intergovernmental process that would otherwise be overwhelmingly tilted towards the established governments, and to signal to the Canadian public at large the importance and independence of this key relationship.

(4) Institutions for Intergovernmental Relations

The previous three sections have been focussed on issues critical to the negotiation of self-government and the early stages of implementation. This fourth subsection addresses the need to maintain intergovernmental relationships during and after the transition to the longer-term establishment of aboriginal governments.

Such ongoing intergovernmental relations to implement and sustain aboriginal self-government will take place at three levels. By "levels" we do not mean levels of government or jurisdiction, but rather the geographic scope of relations, from the local/regional level, to the provincial or treaty-area level, to the Canada-wide level.

The intergovernmental relations at the first level are those of individual aboriginal communities and self-governing organizations with the local and regional governments which are their neighbours or are the broader community (in the case of urban self-governing institutions) within which the aboriginal community lives. Relations at this level are vitally important. Many Aboriginal communities exist in isolation from neighbouring municipalities, with relations characterized by fear and misunderstanding.[xli] However, Aboriginal communities will come into daily contact with neighbouring municipalities and will need to pursue the kind of policy coordination, service delivery and financial arrangements essential to interdependent community life. These relations will require that the non-aboriginal governments recognize the legitimacy of the aboriginal governments, possibly through protocol agreements or legislation. We would recommend here the adoption of the process discussed under the "Policy of Recognition" above. From such recognition should then come the next, more practical steps, of putting into place such initiatives as training programs for staff and political leaders, resource sharing, cross-cultural education, joint economic development and land management.

The second level of intergovernmental relations is more crucial to the actual transition to self-government. This is the level of the Aboriginal nation, Treaty area or province-wide organization. The chief functions of the aboriginal representatives at this level would be to negotiate agreements for the self-government of the nation, including the framework for agreements to be reached with individual communities; and to negotiate or renegotiate treaties or comprehensive settlements. Because the objective would be self-government and land and resources agreements, the negotiations would be conducted with the federal government and the provincial or territorial government. Recent examples of this scale of negotiations include the Council of Yukon Indians negotiations for land claims and self-government; the Tungavut Federation of Nunavut negotiation for a comprehensive settlement; and, on a more narrow basis, the resource management negotiations between Ontario and the Teme-Augama Anishnabai. The aboriginal authorities established to conduct such negotiations would require interim funding along the lines discussed above and well established representational links with their communities.

Provincial participation in these negotiations remains a problem of coordination and commitment. The small "native affairs" secretariats in most provinces cannot do this task alone: many more government departments must be involved, which includes sensitizing the staff in these departments to the importance of effective relations with Aboriginal governments. This suggests the need in most provinces for well-considered cross-departmental policies and procedures for dealing with the many issues (policing, resources, environment, economic development, etc.) which involve provincial jurisdiction.

A second problem with provincial involvement is the reluctance of many First Nations, especially "Treaty Nations" to deal with provinces. This reluctance stems from their fear of being treated as municipalities, from a legacy of mistrust in previous relations, and from a concern that provincial relations will detract from their primary relationship with the Crown through the federal government. There are no simple solutions to get beyond this reluctance. The provinces have legitimate jurisdiction; the Aboriginal Peoples have legitimate rights; both have a role to play. It may be that Treaty

Nations and other Aboriginal communities reach initial agreement on key matters including scope of jurisdiction, with the federal government prior to negotiating land, resources and revenue sharing with the province.

The third level of relations (which have not been "intergovernmental" in the strictest sense) is the one that until now has tended to be most visible to Canadians in general -- the national or Canada-wide level. Self-government will not happen if it is not rooted in individual aboriginal communities and does not draw upon the rights and traditions of the aboriginal nation. However, it is obvious that little will happen without political leverage being exercised at the federal capital. We do not foresee Aboriginal representatives in Ottawa negotiating self-government or new treaties, but they would help to create the conditions for successful negotiations by proposing and negotiating framework legislation, constitutional resolutions, and financial and other political accords. (An exception to this rule would be the negotiation of Canada-wide Aboriginal institutions which might have important governing powers, such as the proposed Métis Parliament.)

How the representational role of Aboriginal Peoples is achieved at the Canada-wide level is largely up to them, but until now this has been the function of the national aboriginal organizations such as the Assembly of First Nations. While in legal status these organizations are essentially advocacy groups, they have been granted political power by virtue of being recognized as representing Aboriginal Peoples in the consultations and negotiations of executive federalism, as noted in Part I. As the transition to self-government becomes more intense, the ability of these organizations to represent and act on behalf of their constituent communities may be challenged. Some have suggested that the representational role would be better performed by more formal representative bodies, such as a "House of First Peoples" as part of Parliament, or by restructuring the existing organizations.

In summary, all three levels of relations have a role to play. The first two levels are especially important to the negotiation and the implementation and long term maintenance of aboriginal self-government. For these reasons we think it is important to expressly consider the need to adapt the institutions of executive federalism to facilitate

the more permanent nature of these relationships. As we discussed in Part II, the current practice of executive federalism in Canada suffers from some significant defects, including problems of representativeness, lack of openness, and inadequate decision-making rules. Yet the process remains politically potent and enormously useful. For example, executive federalism provides for all the provinces the means to have an equal voice in intergovernmental relations, provides for a degree of regional representation which is otherwise a weak feature of our federal institutions, and -- despite the many meetings which are secret and closed to the public -- provides occasional opportunities for transparency and accountability before other governments and the Canadian public.

As note above, there are therefore compelling reasons for aboriginal governments to participate in intergovernmental relations. The act of participation in itself denotes legitimacy as one of three orders of government. It would provide a forum for the advocacy and negotiation essential to the role of the Canada-wide organizations of aboriginal Peoples. It would bring Aboriginal perspectives into the consideration of federal and provincial policy deliberation, much in the same way as it now does for the provinces *vis-à-vis* Ottawa.

Despite these advantages, there will be resistance to the full integration of aboriginal governments into executive federalism -- both from within and outside the aboriginal community. Among aboriginal peoples, there may be reluctance to participate extensively in the apparently elitist, closed nature of much of executive federalism. Its reliance on representative democracy runs counter to the more direct democratic culture of aboriginal communities. To the extent to which the entire philosophy and style of governance by Aboriginal Peoples differs fundamentally from that of the other governments, the professional norms and values which drive productive intergovernmental relations at the federal-provincial level may not be able to be extended to aboriginal governments without losing something on both sides. We have noted above the reluctance of Treaty Nations, among others, to enter into negotiations with provincial governments. And yet there is really no other option but for Aboriginal Peoples to be involved around the same table when significant matters affecting their role in the federal system is at stake.

On the other side, the concern will be with making executive federalism unworkable. There is a great deal of difference between what can be accomplished in one day among eleven leaders and what can be accomplished among 500. Therefore to begin with, aboriginal participation in the key multilateral forums of executive federalism is unlikely to be feasible without falling back on the practice of the past twenty years of the Aboriginal Peoples essentially aggregating their interests through the four major national organizations already established. And yet the problem in relying on these organizations to represent aboriginal governments is that their authority to act on the behalf of self-governing Aboriginal Peoples is at best a delegated one, and not on a par with the ability in most circumstances of the premier or minister of the federal government or a province to deliver on a commitment made in an intergovernmental meeting. Nonetheless, the federal and provincial governments will need workable intergovernmental mechanisms if they are to fulfil their part in sustaining a new relationship with Aboriginal Peoples. In our view such intergovernmental relations should concentrate on the Aboriginal nation, or province-wide organization level, for self-government and treaty negotiations and on-going relations.

In conclusion, we propose institutional adaptations for each of the three levels of intergovernmental relations identified. At the first level of community and regional government formal Canada-wide structures are unlikely to be required. *Protocol agreements* with neighbouring governments would be helpful, however, and there will probably also be a need for *joint boards and commissions established for functional purposes.* It does not make sense for us to recommend any specific institutions, as they would have to arise from community needs.

At the second level -- and more broadly at the level of a province -- there should be established specific Aboriginal People-Province processes to deal with province-wide concerns. In 1993 the Quebec government proposed that there be a *"political forum" established in each province* to reach agreement on self-government and other aspects of aboriginal rights.[xlii] It seems unlikely that Aboriginal Peoples would enter into such a forum without federal participation. However we see in the emerging practice of some provinces the usefulness of a cross-province forum to exchange views

and information and to reach common understandings about the provincial role in implementing self-government, and in discussing broad issues related to provincial policy. Such a forum would be most effective if it provided a regular opportunity for the leaders of all the First Nations, and provincial Métis and off-reserve aboriginal organizations to meet with the premier and key ministers and senior officials (and among themselves). Another province-wide forum worth considering would be a meeting of aboriginal community leaders with municipal government mayors, councillors and officials -- possibly in conjunction with *regular meetings of provincial federations of municipalities.* Such a forum could provide an opportunity for municipalities to share perspectives and experiences in their relations with aboriginal communities, and vice-versa.

The third level of intergovernmental relations is where the key functions of executive federalism are currently performed. Here we propose three different, but not exclusive options.

- Participation in Annual First Ministers Conferences and the Annual Premiers Conferences

In 1993 and 1994 there was a practice at the annual meeting of provincial premiers to invite the leaders of the four national aboriginal organizations to attend a special session. This seems to be a sensible innovation, providing the opportunity for developing a relationship but not in a way which prevents the premiers from discussing issues among themselves as provincial leaders. We would propose that the leaders of these aboriginal organizations also participate in a similar way in annual FMCs (i.e., those including the Prime Minister of Canada).

- Federal-Provincial-Territorial Ministers of Native Affairs

This forum currently includes the leaders of the four national aboriginal organizations as well as the other governments, indicating the recent commitment of the federal and some other governments to deal with the broad concerns of Aboriginal Peoples only with the participation of their representatives. As self-government becomes more of a reality, this forum could become the key process for sorting out intergovernmental issues of a Canada-wide scope.

• Annual First Peoples Conference

Many issues must be resolved among aboriginal governments as such. Indeed one can foresee occasions where the federal and provincial governments will not be able to act without a consensus among Aboriginal Peoples and their governments being achieved. This could occur through aboriginal "caucuses" at the local, provincial and federal level in the forums described already. It may also be useful to have a fixed forum of aboriginal representatives to meet at least annually. It could provide for the direct representation of every recognized aboriginal government and self-governing community in Canada -- which the other two Canada-wide forums, above, could not. This may entail a conference of hundreds of delegates, but it would provide a high-profile forum, to which first ministers or ministers could also attend in part.[xliii]

None of these proposals offer a panacea for workable intergovernmental relations. In every federal system processes naturally form and dissolve as needed. But well-considered processes and structures for the types of relations required will smooth the way through what will inevitably be a difficult transition to self-government and the full participation of Aboriginal governments in the Canadian federation.

III. CONCLUSIONS AND RECOMMENDATIONS

Intergovernmental relations are an important element in the effective operation of any federal system of government. They are especially important in the transition to any major change in the institutions and processes of federalism. The transition to aboriginal self-government in Canada, creating in many cases a third order of government, will entail daily interaction and negotiation with the existing governments of Canada. Therefore the examination of the intergovernmental transition in its own right is important -- not just as an afterthought to other institutional and political considerations.

There are both practical and symbolic reasons for understanding the role of intergovernmental relations. The practical reasons are obvious given the interdependence of governments, especially in the initial stages, and the large potential for fiscal dependence among aboriginal governments. Symbolically, the recognition of aboriginal

governments as an independent and juridically equal order of government will require recognition as equals in the institutions of Canadian "executive federalism". The practical and symbolic considerations involve not just the insertion of aboriginal governments in these institutions and processes, but also a degree of integration with aboriginal philosophies and modes of governance.

This study has examined in part the history and structure of intergovernmental relations in Canada: demonstrating that all federal systems rely on institutionalized intergovernmental relationships, although these institutions vary considerably among different federal systems. In Canada, the practice of "executive federalism" has emerged from the marriage of federalism with parliamentary government. Unless these two fundamental features of our system of government change, executive federalism is here to stay. Yet integrating aboriginal governments in whole or in part to these institutions will require a sensitivity to the diversity among Aboriginal Peoples and their governing situations -- diversity in terms of underlying nationality, Treaty-basis, geographic size and location, and degree of integration with the surrounding economy, among other factors.

This study has also shown that it is important to recognize the legacy of intergovernmental relations in the past, and the mixed experiences and perceptions of Aboriginal Peoples (and Canadians in general) with Canadian executive federalism. We conclude that, overall, aboriginal governments and self-governing institutions would enjoy the benefits of executive federalism -- as do the provincial governments now -- such as an equal voice, an extra measure of accountability and the ability to participate in a range of worthwhile relations. And the processes of executive federalism may help to achieve the legal commitments, financial arrangements and ongoing policy coordination required to make self-government viable.

Yet our research into the experiences of Aboriginal Peoples in Canadian intergovernmental relations show that these have been far from ideal. The ideal intergovernmental relations are those which are among governments which share certain key characteristics: a constitutionally protected sphere of authority; direct political accountability to citizens; and a degree of financial autonomy. No aboriginal

organization in Canada today fully meets these criteria, but the transition to self-government should address the means for closing the gap between the ideal and the actual.

Closing the gap requires attention to the specific transition to self-government and the longer-term relations required to sustain a third order of government. Our analysis of recent negotiations and processes involving Aboriginal Peoples, leads us to conclude that four types of problems must be addressed. These are:

(1) a weak commitment to the concept of self-government by other Canadian governments;

(2) the need for a clear policy and process to achieve the recognition of Aboriginal Peoples for the purposes of self-government negotiations, i.e. to determine who Aboriginal communities represent and how or whether they should be recognized;

(3) continuing problems related to the funding and other resources applied to negotiations; and

(4) the need for specific intergovernmental mechanisms for continuing relationships between the three orders of government.

In this paper we have attempted to find solutions to these problems, first by restating the above problems as normative principles to guide the relationships needed to assist in the transition to self-government, and second by applying these principles to current circumstances, leading to specific suggestions for policy and or institutional reform. A summary of these suggestions form our recommendations listed below.

In conclusion, none of the specific recommendations which we make will be a cure all for effective intergovernmental relations, or a substitute for the difficult but essential task of rebuilding the political will for a comprehensive approach to aboriginal self-government, and a coherent and consistent intergovernmental effort to achieve it. Nonetheless we are hopeful that the final report of the Royal Commission on Aboriginal Peoples will be catalytic in rekindling political will, and that this paper and recommendations will help to show a practical way forward to meet the mutual goals of Aboriginal Peoples and Canadians as a whole.

RECOMMENDATIONS

Principle No.1:

The Aboriginal Peoples and the federal, provincial and where appropriate, local governments should make a formal and practical commitment to negotiating and implementing aboriginal self-government.

This commitment should be made by solemn and legally binding declarations, recognizing the inherent right of self-government. Four potential forms to be considered are:

1)joint Aboriginal Peoples-Crown declarations affirming rights under Treaties;
2)a Canada-First Peoples Treaty covering all of Canada;
3)framework legislation to recognize the rights of all Aboriginal Peoples to exercise their right of self-government (i.e. to specifically empower a "community of interest" self-government model);
4)resolutions in the federal parliament and provincial legislatures to entrench new treaties under section 35 of the *Constitution Act, 1982*.

Consideration should also be given to fresh bureaucratic commitments, including a new federal agency, and to the role of national aboriginal organizations in providing advice and support to Aboriginal Peoples, when they are ready for negotiations.

Principle No. 2:

Negotiation and implementation of aboriginal self-government should proceed on the basis of a clear and fair policy of with whom, within the aboriginal community, self-government negotiations are to be conducted, and who the aboriginal community represents.

There needs to be a process which provides for mutual recognition of autonomy, self-identification by aboriginal communities, and the fair resolution of disputes. We recommend that there be a federal *Recognition Act*, passed after negotiation with the national aboriginal organizations, which establishes criteria for recognition.

These criteria would be applied by federal and other government agencies, while aboriginal communities would be responsible for determining their membership for the purposes of recognition. Independent dispute resolution mechanisms should deal with disputes about membership or recognition.

Principle No. 3:

There should be assured and adequate financial and other resources provided to the parties to the negotiation and implementation of self-government agreements, and a process for the independent resolution of disputes regarding these resources.

Two methods of providing resources to the aboriginal parties should be considered:

1)a model in use in current claims negotiations where aboriginal costs are taken as a loan against the ultimate cash settlement;
2)a model where a multi-year grant is guaranteed for a specific duration, with the incentive that if agreement is reached an interim revenue sharing scheme could be adopted.

We recommend three specific institutions to assist in providing administrative, financial and other support to the negotiation process:

1)a common negotiations secretariat providing independent logistical support;
2)a new federal agency, separate from Indian Affairs, to undertake the federal side in the negotiations; and
3)an independent review commission to resolve disputes about resources, to mediate in deadlocked negotiations and, in certain circumstances, to provide an arbitrated result.

Principle No. 4:

There should be new, permanent intergovernmental institutions and processes specific to the level and scale of relations involved (i.e., local, regional or provincial, and Canada-wide).

We recommend that there be attention given to institutions at each of three levels of aboriginal relationships.

At the level of daily relations with local and regional governments for service delivery, policy coordination and revenue sharing, we propose protocol agreements with local governments to achieve recognition of mutual autonomy, and joint boards and commissions for functional regional purposes.

At the level of province-wide relations or those of treaty-area scope, we propose that there be established political forums in each province of all recognized Aboriginal Peoples, and that aboriginal communities meet regularly with provincial federations of municipalities. Such institutions are not in place in all provinces now, but will be important ongoing forums to discuss financial, jurisdictional and policy coordination matters.

At the Canada-wide level, the participation of the leaders of the national aboriginal organizations in certain sessions of the Annual Premiers Conference and First Ministers Conferences should be confirmed. The participation of these aboriginal leaders in the Ministers of Native Affairs meetings should also be confirmed. Finally, consideration should be given by Aboriginal Peoples to the creation of an annual First Peoples Conference directly representing all recognized aboriginal governments and self-governing institutions.

ENDNOTES

i..The authors would like to thank the three reviewers of this manuscript for the Royal Commission on Aboriginal Peoples for their helpful comments. The revised text is nonetheless the sole responsibility of the authors.

ii.. Wheare (1953), p. 11.

iii.. Smiley (1980), p. 91.

iv.. See Caplan (1969).

v.. Section 36(1), "Equalization and Regional Disparity", says, in part, that the federal and provincial governments: "are committed to a) promoting equal opportunities for the well-being of Canadians; b) furthering economic development to reduce disparity in opportunities; and c) providing essential public services of reasonable quality to all Canadians."

vi.. These issues are discussed in Barham and Boadway (1995).

vii.. First published as Smiley (1972). The term is also discussed in subsequent editions of the book.

viii.. Pierre Trudeau used it at a Liberal Party fundraising dinner on November 12, 1981.

ix.. While there is not one index entry under "executive federalism" in *Hansard* in the first six years of 1980s, during the Meech Lake controversy politicians seemed to have discovered this concept. See House of Commons, *Report*, pp. 9778-9 in 1987; 414, 18526-7 in 1988; 13038-9, 13052 in 1990.

x.. Smiley (1980), p 91.

xi.. These comments are drawn in part from an unpublished study by Douglas Brown "Sharing Responsibility Through Intergovernmental Institutions: Analysis of the Proposed `Council of the Federation'", prepared for the Government of Canada, February 1992. This study summarized conclusions from several academic analyses: see Richard Simeon, Gordon Robertson, Donald Stevenson, Louis Bernard and Donald Smiley in R. Simeon (ed.), *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (1979); chap. 4 in Smiley (1980); Dupré (1985); Breton (1985); Pollard (1986); McRoberts (1985); Painter (1991); Fletcher and Wallace (1985); and Leslie (1987).

xii..For example, the Canadian Intergovernmental Conference Secretariat (CICS) which provides support to the majority of intergovernmental meetings in Canada, reported 70 First Ministers, Ministers and Senior Officials meetings in 1994-95. Over a twenty-year period the average has been 85 per year, with 127 in 1992-93 -- an exceptional year. See Table 1 and Appendix c, CICS, Report to Governments 1994-1995 (October, 1995).

xiii..A review of the transcripts of the hearings of the Royal Commission provides no specific references to the form or nature of intergovernmental relations in the transition to self-government.

xiv.. Russell and Jones (1994), p. 24.

xv.. See Sanders (1983).

xvi.. Hawkes (1989).

xvii.. For a critical review of the Meech Lake Accord from a perspective sympathetic to aboriginal concerns, see Hall (1989).

xviii.. For an overview summary, see Brown (1994), pp. 60-61.

xix..See *NWAC, Gail Stacey-Moore and Sharon McIvor Vs. R.*, (File T-627-92). This decision was overturned on appeal but the Charlottetown Accord was concluded before the federal government could respond.

xx.. For a more general discussion of the prerequisites of governance, see Russell Barsh (1993). For principles drawn from Canadian federal experience see the "Pepin-Robarts" report, Canada (1979).

xxi.. This typology is taken from the RCAP, "Financial Arrangements for Aboriginal Government", internal discussion paper, September 1993. Related analysis on models of government for financial and other purposes is based on Brown, Courchene and Powell (1994).

xxii.. Dickason (1992), chapter 4.

xxiii.. Communication with research team, Royal Commission on Aboriginal Peoples.

xxiv.. For a discussion of these concepts see Chartrand (1993).

xxv.. This discussion is based on a review of the findings of Cowie (1987) and (1993), Franks (1987), Task Force (1985), and McCallum (1993). Detailed examination of the relationships of Aboriginal Peoples, including their governments, with the federal government and the provincial and territorial governments are in various stages of preparation for the Royal Commission. The authors of this paper did not have access to the completed studies in preparing this paper.

xxvi.. Cowie (1993), pp. 7-10.

xxvii.. For a discussion see Giokas (1994).

xxviii.. Task Force to Review Comprehensive Claims Policy (1985), pp. 79-82.

xxix..We are grateful to Anthony Careless for making this point to the authors.

xxx.. See Cowie (1993). For general principles of negotiation now widely accepted in North America see Fisher, Ury and Patton (1991).

31. Giokas (1994), p.5.

32. Ibid p.15.

xxxiii..For Penner Report see Canada (1984); for reference to *Partners in Confederation*, see RCAP (1993).

34. Ibid. p. 99.

xxxv.. Discussed in Giokas (1994) p. 85.

xxxvi.. This was one of the recommendations of the Penner Report. See Canada (1984), recommendation 15, p. 61.

xxxvii..This is discussed in a variety of places. See for example, Pratt (1989) pp.19-57; Boldt and Long (1985).

xxxviii.. Quoted in Satzewich and Wotherspoon (1993) p. 230.

xxxix.. Task Force (1985), especially pp. 78-79, 89-90.

xl.. Cowie, pp. 14-17; Task Force (1985), Chapter 5.

xli..We are indebted to Murray Coolican on this point.

xlii.. Hon. Christos Sirros, Minister for Native Affairs, Government of Quebec, "A New Framework for Relations Between Natives and Non-natives", Notes for a speech before the Royal Commission on Aboriginal Peoples, Dec. 2, 1993.

xliii.. There are related alternatives to such a forum. They include a "House of First Peoples" established as an integral part of Parliament, although this would not substitute for an intergovernmental forum; and an Intergovernmental Council of Aboriginal Nations, which could meet more frequently than an annual conference and with smaller numbers, chosen by rotation from the nations and self-governing institutions.

References

Assembly of First Nations (1993) *Reclaiming Our Nationhood, Strengthening Our Heritage*. Report to the Royal Commission on Aboriginal Peoples.

Barham, Vicki and Robin Boadway (1995) *Financing Aboriginal Self-Government*, Paper prepared for the Royal Commission on Aboriginal Peoples.

Barsh, Russell (1993) *Aboriginal Self-Government in the United States: A Quantitative Political Analysis* Paper prepared for the Royal Commission on Aboriginal Peoples.

Breton, Albert. (1985) "Supplementary Statement," in Canada *Report of the Royal Commission on the Economic Union and Development Prospects for Canada* (Ottawa: Supply and Services Canada).

Boldt, Menno and Anthony Long (1985) *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto).

Brown, Douglas M. (1994) *Aboriginal Peoples and Canadian Federalism: An Overview* paper prepared for the Royal Commission on Aboriginal Peoples.

Brown, Douglas M., Thomas J. Courchene and Lisa M. Powell (1994) *A Framework of Financial Options for Aboriginal Government*, Discussion paper prepared for Royal Commission on Aboriginal Peoples.

Canada (1979), The Task Force on Canadian Unity. (Jean-Luc Pépin and John Robarts, co-chairs) *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada).

Canada (1984) *Report of the Special Parliamentary Committee on Indian Self-government in Canada* (Ottawa: Minister of Supply and Services).

Caplan, Neil (1969) "Some Factors Affecting the Resolution of Federal-Provincial Conflict," *Canadian Journal of Political Science* (Spring 1969), pp. 173-87.

Chartland, Paul (1993) "Aboriginal Self-Government: The Two Sides of Legitimacy" in Susan D. Phillips (ed.) *How Ottawa Spends: A More Democratic Canada? 1993-1994* (Ottawa: Carleton University).

Cowie, Ian B. (1987) *Future Issues on Jurisdiction and Coordination Between Aboriginal*

and Non-Aboriginal Governments (Kingston: Institute of Intergovernmental Relations).

Cowie, Ian B. (1993) Unpublished presentation to the Royal Commission on Aboriginal Peoples.

Dickason, Olive P. (1992) *Canada's First Nations* (Toronto: McClelland and Stewart).

Dupré, Stefan (1985) "Reflections on the Workability of Executive Federalism" in Richard Simeon (research coordinator), *Intergovernmental Relations*, Collected Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, Vol.63. (Toronto: University of Toronto Press).

Fisher, Roger, William Ury, and Bruce Patton (1991) *Getting to Yes: Negotiating Agreement Without Giving In*, Second edition. (Boston: Houghton Mifflin).

Fletcher, Frederick J. and Donald C. Wallace (1985) "Federal-Provincial Relations and the Making of Public Policy in Canada: A Review of Case Studies," in Richard Simeon (research coordinator), *Division of Powers and Public Policy*, Collected Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, Vol.61. (Toronto: University of Toronto Press).

Franks, C.E.S. (1987) *Public Administration Questions Relating to Aboriginal Self-Government*. (Kingston: Institute of Intergovernmental Relations).

Giokas, John (1994) *Domestic Recognition in Canada and the United States*, Paper prepared for the Royal Commission on Aboriginal Peoples.

Hall, Tony (1989), "What are We? Chopped Liver? Aboriginal Affairs in the Constitutional Politics of Canada in the 1980s", in M.D. Behiels (ed.), *The Meech Lake Primer* (Ottawa: University of Ottawa Press).

Hogg, Peter and Mary Ellen Turpell (1994). *Jurisdictional Issues Involved in the Exercise of an Inherent Right of Self-Government*, Paper prepared for the Royal Commission on Aboriginal Peoples.

Leslie, Peter M. (1987) *Federal State, National Economy*. (Toronto: University of Toronto Press).

McCallum, Andrea (1993) *Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims: Power Imbalance Between Aboriginal Claimants and Governments*, Paper prepared for Royal Commission on Aboriginal Peoples.

McRoberts, Kenneth (1985) "Unilateralism, Bilateralism and Multilateralism: Approaches to Canadian Federalism" in Richard Simeon (research coordinator), *Intergovernmental Relations* Research Study of the Royal Commission on the Economic Union and Development Prospects for Canada, Vol.63. (Toronto: University of Toronto Press).

Painter, Martin (1991) "Intergovernmental Relations in Canada: An Institutional Analysis," *Canadian Journal of Political Science*, Vol. 24, no.2.

Pollard, Bruce G. (1986) *Managing the Interface: Intergovernmental Affairs Agencies in Canada*. (Kingston: Institute of Intergovernmental Relations).

Pratt, Alan (1989) "Federalism in the Era of Aboriginal Self-Government" in David Hawkes (ed.) *Aboriginal Peoples and Government Responsibility* (Ottawa: Carleton University Press).

Reid, Angus (1992) *Canadians and Aboriginal Peoples 1992: A Syndicated National Public Opinion Research Study*, Report for the Royal Commission on Aboriginal Peoples.

Royal Commission on Aboriginal Peoples (1993) *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Canada Communications Group)

Russell, Peter H. (1992) *Constitutional Odyssey – Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press).

Russell, Peter H. and Roger Jones (1994) *Aboriginal Peoples and Constitutional Reform*, Paper prepared for Royal Commission on Aboriginal Peoples.

Sanders, Douglas (1983) "The Indian Lobby" in K. Banting and R. Simeon (eds.) *And No One Cheered: Federalism Democracy and the Constitution Act* (Toronto: University of Toronto Press).

Satzewich, Vic and Terry Wotherspoon (1993) *First Nations: Race, Class and Gender Relations* (Scarborough: Nelson).

Simeon, Richard ed. (1979) *Confrontation and Collaboration: Intergovernmental Relations in Canada Today*. (Toronto: Institute of Public Administration of Canada).

Smiley, D.V. (1980) *Canada in Question: Federalism in the Eighties* Third edition. (Toronto: McGraw- Hill Ryerson Limited).

Smiley, D.V. (1972) *Canada in Question: Federalism in the Seventies* First edition. (Toronto: McGraw-Hill Ryerson Limited).

Smiley, D.V. (1987) *The Federal Condition in Canada*. (Toronto: McGraw-Hill Ryerson Limited).

Taihakurei Durie, E. and Gordon S. Orr (1990) "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" in *New Zealand Universities Law Review*, Vol.14.

Task Force to Review Comprehensive Claims Policy (1985) (M. Coolican, chair) *Living Treaties: Lasting Agreements* (Ottawa: Indian and Northern Affairs Canada).

Taylor, Charles. (1991) *Malaise of Modernity* (Toronto: Anansi Press).

Wheare, K.C. (1963) *Federal Government* Fourth edition. (London: Oxford University Press).