Aboriginal Citizenship and Federalism: Exploring Non-Territorial Models

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Executive Summary

This paper has been motivated by a concern about the ways in which thinking about any topic can become hostage to habit. Even (maybe particularly) for experts on a topic, assumptions and frameworks can be taken for granted, and fresh approaches may not be evaluated because they are not even considered. Thus, I have endeavoured to question presuppositions and to offer a framework of analysis that steps outside our customary views of Canada and of possible vehicles for Aboriginal self-government. The purpose of such reconsiderations ultimately aims at a richer conception of Aboriginal citizenship and, with any luck, a more meaningful Canadian citizenship as well. The following recommendations, therefore, remind the reader of challenges to existing concepts or preconceptions; they may be less useful as hard-and-fast policy prescriptions.

1. Before anything else, one must recognize that public opinion and government policies have already changed in important ways that open up new possibilities that were politically unfeasible even a few years ago.
2. Federalism still provides a useful framework, and more so than consociationalism or corporatism, because of the peculiarly Canadian historical evolution of provincial powers; both orders of government (federal and provincial) are sovereign within their heads of jurisdiction.
3. Although a third order of government should be the goal for Aboriginal people in Canada, much can be learned from a provincial model, since we understand provinces through long historical experience. This is especially true when we recall that provinces have significant domains of sovereignty and have evolved a great deal since Confederation and even in recent years.
4. In assessing a provincial model for a third order of government, one must grapple with the undeniable fact that this political unit will be non-territorial in several senses. Much of the paper therefore dwells on how one can administer programs and deliver services non-territorially and extra-territorially.
5. Assumptions about the importance of exclusive, contiguous, and continuous territory have come under question after about three centuries of unquestioned hegemony. This profound challenge to the system of territorial nation-states will probably allow greater scope for traditional Aboriginal concepts of land use, governance, and culture. Not all

traditional customs have survived or can be reconstructed, but wherever possible, they should be taken into account.

6. Aboriginal people should decide for themselves what form of self-government is best without presuming that Canadian (or `European') assumptions will provide the framework; for example, a different balance between individual and collective rights should be possible.
7. Aboriginal people should decide for themselves who is or will be an Aboriginal person, just as Canadians have been able to decide who is or will be a Canadian.
8. An Aboriginal Charter of Rights and Freedoms should be drafted and approved by Aboriginal people; until agreement on the new Charter, the Canadian Charter of Rights and Freedoms (as limited by its own section 25) should continue to apply, as should section 33.
9. The portability of treaty rights should be encouraged, facilitated, and respected.
10. In negotiating a set of powers or jurisdictions for the third order, one should endeavour to reconsider the way Canadians have traditionally done this. In particular, the Royal Commission should question the value of efforts to delineate exclusive powers for each order of government and consider the usefulness of increasing the number of concurrent powers, even if some units (such as the less affluent existing provinces) may choose not to exercise many of the newly available powers.
11. Finally, and perhaps the central premise of this paper, one should question whether rights entrenched in the Constitution provide a substantial basis for Aboriginal citizenship; instead Aboriginal citizenship should be an integral part of one or more governments (with substantial and appropriate powers) whose legitimacy rests on an Aboriginal majority. Aboriginal in this instance, as well as in recommendations 6 and 7 above, should be understood as a complex mix of features, as the Royal Commission has already asserted, and not as a purely or primarily racial or genetic category.

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Citizenship is an inherently exclusionary concept. Its content, meaning, and significance depend on the nature of the political entity in which it is embodied. It excludes those who are not part of that political entity, and its meaning must evolve as that political entity changes. A citizen of Periclean Athens did not bear the same status as a citizen of Canada today, and it seems likely that Canadian citizenship a century from now will be different from ours today just as ours has distinct features compared to a century ago. By the same logic, Aboriginal citizenship can be comprehended only within the ambit of the several political entities (Canada, province or territory, Aboriginal nation, etc.) in which it finds expression. It may thereby be less exclusionary than citizenships defined in only one political unit, but there must still be non-citizens, even if non-Aboriginal people in Canada may also share a broad Canadian citizenship with Aboriginal people.

This report argues therefore that Aboriginal citizenship will not be identical to Canadian citizenship even if a third order of government for Aboriginal people comes to exist within the Canadian purview. To use a phrase from an earlier context, Aboriginal citizenship will represent a form of "citizens plus".[i] By grappling with what Aboriginal citizenship might look like in the near future, we may also learn something about new dimensions of Canadian citizenship in the twenty-first century.[ii] After all, Canada has for over a century experienced competing visions of how nationality may be reconciled with citizenship, and in particular whether provincial rights may be reconciled with individual equality. Heretofore these debates (or solitudes) have concerned mainly English and French, that is, the European founders of Canada. Now as a new rhythm gains voice and resonance, the debate becomes more complicated even if the dilemmas sound familiar.

How much personal or group autonomy must one give up in order to be accepted as a member of any particular political community? The answer can be found, among other ways, by examining the values embodied in the community's concept of citizenship. These values may be

written down — as in the Canadian Charter of Rights and Freedoms and elsewhere — or they may be inferred from practice and from the unwritten assumptions in the political culture. An example should help to clarify the point.

In the feudal world in Europe, fealty and protection encapsulated certain implicit values and assumptions. Individuals not in the same family were connected vertically by certain kinds of ties to a common lord of the manor. These lords were linked by vassalage to higher lords and they in turn to a prince or king. Some people might characterize these values by saying that individuals were subjects rather than citizens, but that would imply a degree of common status and uniformity of membership that the facts belied. The vertical linkages took so many specific forms and depended so much on local circumstances that one hesitates to lump together peasants, artisans, lords, clerics, city-based merchants, and princes into any single category. Rather than horizontal links among individuals, which we now take for granted as part of citizenship, there were social and religious barriers between groups and statuses, and dependence of lower on higher statuses.

With the hegemony of the territorial state after the mid-seventeenth century, one could speak meaningfully of `subjects'.[iii] Absolute monarchs and their courts were the state, and a long period ensued in which people subject to a monarch struggled to gain uniform rights or privileges, even if these were different in other monarchies. The American and French revolutions marked the point at which `citizens' replaced `subjects', even though women were not full citizens with the right to vote and even though two centuries later a majority of humans worldwide are probably still closer to being subjects than citizens.[iv] But legally or officially in most nation-states today, citizenship now involves uniformity and equality, and it implies horizontal linkages among people.[v] These horizontal ties derive from common status as voters, taxpayers, bearers of rights, and the like.

The world stands at the cusp of a new development in the understanding of citizenship. Citizenship will, it appears, broaden in a global sense while becoming more focused in our identities. The implicit equation of citizenship with status as members of a territorial nation-state will increasingly give way to growing obligations implicit in our belief in human rights regardless of national citizenship.[vi] The Charter may define Canadian rights and freedoms, but our greater awareness of the suppression of rights of global neighbours reminds us that the horizontal linkages of human rights need not and should not end at national borders. In this way,

citizenship takes on a wider meaning. Just as there is no sharp line between dialects of a language and separate languages, and no definitive line between cultures and sub-cultures, so in my view there need not be a dichotomy between citizenship (in a nation-state) and membership in other salient groups.

Some people feel empathy with all humans, but few of us have that capacity. Instead our awareness of abuses elsewhere most often involves people who share common features with us. Some features are visible and others are not. Thus, one may point to a host of personal or group characteristics that now serve as transnational bonds: gender, race, class, ideology, sexual orientation, disabilities or `challenges', and, of course, aboriginality. As our purview broadens to a global scale, our focus often narrows to a single feature or set of features of our identity. If citizenship has come to define those who recognize each other as worthy of concern, that concern may now be more narrowly focused but transnational or global. Lest the reader conclude that my analysis devalues citizenship by stretching it to cover a wider range of solidarities, recall that the term will be applied to associations that are in process of becoming more numerous, important, salient, and visible.

Community versus Communities

Citizenship entails community. One person alone cannot create or sustain citizenship. Traditionally we reserve the word `citizenship' for all-inclusive territorial communities.[vii] For other types of associations we use other words like member, user, stakeholder, partner, or beneficiary. So long as we all understand the conventions, these usages will do. But many non-territorial communities deserve the concept of citizenship because they are increasingly important to us; and as the historical conditions sustaining territorial nation-states have evolved and weakened, their exclusive claim to citizenship is less compelling.[viii]

Whatever else we may learn by relaxing our assumptions about territoriality and exploring new concepts of community, it should be obvious that these entail broadening our understanding of citizenship. Where can I live and still be a citizen of here? Of what community can I be a citizen without giving up too much of here? What do I have to give up in order to be accorded the status of citizen? If readers feel uncomfortable with stretching the concept of citizenship as I do here, they may substitute other terms. But I believe we should change our words to reflect the changes we experience and those that we hope to bring about. Whether or

not we use any particular terminology, the establishment of a non-territorial province or third order of government will result in the evolution of our understanding of citizenship for Aboriginal people and probably for all Canadians.

Citizenship is the right word, I argue, because of the moral force it conveys. In its national meaning, it has connotations appropriate to the new non-territorial communities gaining in significance, whether Aboriginal, economic, or interest-based. Citizenship goes beyond membership because it involves a sense of commitment, of being engaged by the actions related to that community. It is a concept that takes us beyond individualism, self-interest, and self-centredness, and thus it is inherently related to concepts of community.[ix]

Unlike citizenship in a world of exclusive territorial nation-states, the new concept of citizenship does not limit itself to a single overarching community but may be shared and may rest on multiple loyalties and identities.[x] The communities that engage us and provide our citizenship remind us that there are other people who share our concerns, other people to whom we are linked by mutual obligations, other people who have a right to call us to account ─ only citizens have these rights and duties. This has not always been the case. In earlier ages people were called to account by the pope or his bishops and later by kings who embodied the state; in such cases people were at best subjects rather than citizens.

Citizenship has come to signify rights and privileges, duties and responsibilities in a political community. It encompasses how one may gain or lose the status of citizen, what opportunities or liabilities follow from the status, and whether other loyalties or identities can co-exist as equals or will be subsumed by it. A good part of our concept of citizenship derives from the same set of historical circumstances that engendered the modern nation-state and the concept of individualism. As territorial units bundled together the varied and competing political forms into an all-purpose, sovereign entity, they blurred the distinctions of estates, cities, statuses, roles, and fealty.[xi] Rights and duties, and thus citizenship, were divorced from offices or roles and attached to the personality of the incumbent. As bearers of rights, individuals gained in significance and became equal in crucial respects. Hence, they became invested with citizenship rather than being simply subjects or vassals or lords.

In Roman times and throughout most of the medieval period in Europe, laws were `personal' rather than territorial. That meant that a political group's laws did not apply to members of other groups, even if they lived among the group.[xii] The criminal law became local

and territorial fairly early, as it was felt that individual personal law should not interfere with public law, of which the criminal law was a supreme example. Eventually almost all laws became local and territorial in this sense. This process was cause and consequence of the creation of territorial states and accompanied national integration. In relaxing the assumptions about territoriality and developing various non-territorial forms of political organization and citizenship, we are indirectly recreating conditions of the first millennium of the Christian era and perhaps also of `tribal' law in other parts of the world.[xiii] Of course, conditions are quite different today because of travel, commerce, and communication on a global scale; but it is salutary to recall that non-territorial political and legal systems have existed and functioned for hundreds if not thousands of years. Our territorial model and its related concept of citizenship are the latecomers and probably a passing phase, however dominant they may seem.

Citizenship in our modern sense of national rootedness and civic rights and duties has never been unchallenged. There have always been some people who felt that duties as `citizens of the world' could compete with, be balanced by, or override duties as citizens of a nation. Obversely, the growth over the past two centuries of the concept of individual human rights has limited citizen subservience to the nation and its state. More recently still, as Canadians are learning, sharing rights can serve as a potent basis for a sense of common citizenship.[xiv]

Yet the growth of supra-national loyalties and the legitimation of individual or human rights have obscured a once powerful strand of community and citizenship. Formerly, corporate or collective rights of several types co-existed. Cities had rights and autonomy, and their citizens partook of those rights and autonomy not as individuals but by the act of residing for a period in the city. Likewise, for centuries, the Church, convents, monasteries, and holy orders were communities that did not answer to an overarching non-religious political authority, as they came to do when the state gained its pre-eminence. In short, there existed many types of citizenship based on several types of community. Perhaps we find ourselves coming full circle to multiple citizenships, albeit integral to quite different kinds of communities.

However different city-states, religious orders, or medieval guilds may seem to our modern sensibility, they constituted self-chosen, self-governing, and self-enhancing communities. They did not grow out of an aggrandizement of other forms of authority, nor did they endeavour‑as modern nation-states have done‑to be all-purpose, sovereign, and unchallenged. Thus, in startling ways, new or resurgent non-territorial communities offer

parallels to earlier communities that also guarded as best they could their rights as autonomous entities. Pre-modern communities, modern nations, and the future non-territorial communities share the goal of harbouring, protecting, and fostering ways of life. However individualistic modern people have become, we still seek and welcome communities to sustain us, as did our ancestors. But just as nation-states supplanted or submerged those earlier communities, so our unbundled communities represent a stage beyond nations. And so our concept of citizenship will evolve too.

By forgetting earlier forms of community that sustained particular concepts of citizenship, we have also lost the sense that neither community nor citizenship need be zero-sum. Indeed we are so thoroughly imbued with territoriality and national citizenship, we have overlooked the historical nature of the idea of nation-state. We have forgotten that it is not the only true embodiment of citizenship. Thus, to posit as I will a non-territorial province or third order as the basis of Aboriginal citizenship does not automatically subordinate it to Canadian citizenship. The idea of the nation-state was invented and grew to dominance as our assumptions about territoriality became hegemonic on a world scale through imperialism and settlement. Conditions have changed, and nation-states now share the stage with political units larger and smaller than themselves. They will increasingly share the stage with non-territorial political frameworks as well.

Within the borders of Canada co-exist Canadian nationalism, Quebec nationalism, and an incipient Aboriginal nationalism. Their symbiotic existence underlines the arbitrary nature of our notions of exclusive communities and all-encompassing citizenship. Former prime minister Pierre Trudeau used to taunt advocates of provincial autonomy by asking if they were British Columbians first or Canadians first, Quebecers first or Canadians first. This question posed then, as it does now, a false dilemma. One does not have to choose one identity and discard the other, and one is not required to embrace one community to the exclusion of another more encompassing community.

Fifteenth-century Europeans would have been puzzled and fearful if told that each individual must choose only one community-sovereign above all others-to which loyalty would be owed and that would define their citizenship. And yet by the end of the seventeenth century, that was taken for granted by most people. Perhaps it is just as hard for us today to give up that singularity. It is challenging to our habits of mind and heart to learn to think of citizenship as

residing in several independent communities. Our puzzlement is the mirror-image of those Europeans before contact with the New World. Our fear of multiple citizenships as threatening to national order and stability is the obverse of their fear of a sovereign territorial state as unbalanced and as threatening to the order and stability so familiar to them.

With individualism and an ever-widening concept of rights have come new and muscular identities. Some are ancient but have been eclipsed or put in the shadows; others have been `constructed' in our time as nations were constructed in an earlier time. Examples of enhanced identities that draw their new or renewed strength from the language of rights include Aboriginal people, women, gays and lesbians, people with disabilities, and ethnicity.[xv] The question posed by Trudeau about whether provincial or national identity came first can no longer seem so simple, if it ever was, when one factors in these emergent identities and the communities they represent. For many people, and probably almost all Aboriginal people, the political (social) groupings called Aboriginal nations seem `natural' compared to the historically contrived provinces or Canada itself. This perception reflects the lack of historical knowledge of how Aboriginal groups were formed and evolved over several millennia. Particularly in light of post-contact developments, we should not endow `native' political units with eternal significance. (I use `native' here to emphasize that `Aboriginal' is a post-contact term.) Instead we should endeavour to create flexible political units that Aboriginal people may use as they see fit to construct their own meaningful communities and identities.

The psychological space of citizens in many-although not all-countries has become conditional as it has expanded and contracted. It has expanded by witnessing the legitimation of many identities that were once very private-family, sexual identity or orientation, and physical disability. These are now `public' identities fostered by the rhetoric of rights and freedoms. The psychological space has, however, contracted to the degree that many people view these once private identities as more central to their well-being; they are unwilling to stay in the closet. The privatization of identities parallels their more public display. As identities and loyalties become more varied and distinct, the concept of citizenship unbundles. A person's identity is conditioned more and more by what aspect of identity is activated or threatened by public events-and not just events `at home' in one's country or locale.

Territorial states can defend and act on behalf of some interests and identities. They cannot be champions of these new or resurgent identities, which have no territoriality. Different

communities are even now gaining strength and security relative to the waning hegemony of territorial nations.[xvi] One type of these vibrant and diverse communities consists of Aboriginal people living in Canada. Perhaps someday all such non-territorial communities can co-exist without the constraints of overarching territorial nation-states. Until that distant day, however, Aboriginal people need a government that can share power with-and resist-the territorial governments that have so far served non-Aboriginal interests. My proposal for Aboriginal Peoples Province has been made in that spirit. There are many ways to achieve dignity and self-government, but I believe that a third order of government modelled in part on provincial status (or several provinces confederated as a third order) affords the most practical, defensible, and attainable alternatives in the present context.

Although later sections spell out my proposal in detail, let me outline a few key features to guide the reader through a very abbreviated analysis of complex topics. Majoritarian governments do not protect minorities with distinctive ways of life, although the Charter has gone a small way in overcoming this defect. Hence, one may postulate that Aboriginal people in Canada cannot protect their cultures and languages unless they control one or more governments where they constitute the majority. To advance beyond this vague generality, I suggest that the Royal Commission urge the establishment of a third order of government for Aboriginal peoples, with extensive sovereign powers. To help see how this can be done `within Canada', I use the device of a province (or several provinces) for Aboriginal people. These will need to be non-territorial in a specific sense explained below. This feature and some general problems already evident in federal-provincial relations will lead to modifications in the concept of `province'; some readers will feel at the end that what I propose is not really a provincial model. That conclusion is plausible, and I will return to the issue near the end of this paper.

`Within Canada' needs some justification beyond the practical point that the overwhelming majority of Canadians would probably insist on it. My reasoning runs like this. Several United Nations declarations assert the rights of "peoples" to self-determination. This looks promising because Aboriginal peoples-or traditional groupings within that new category-seem to satisfy the criteria for status as peoples. This right of peoples, however, seems to be trumped in these documents by the stipulation to respect the territorial integrity of existing member nations (or states, actually). Hence, I start from the assumption that some form of non-territorial sovereignty `within Canada' will accomplish more than self-determination did for

colonies after World War II, even if it may not accomplish everything that Aboriginal people seek.

Elements of a New Political Culture

The postulates and assumptions that Canadians have taken for granted seem to have shifted recently, and new elements of the political culture are taking root. Some of these appear to be part of a global change in tectonic assumptions about political authority generally. In particular, the territorial nation-state ─ after two or three centuries as the hegemonic framework for politics ─ has been challenged in several ways. There are more and more supra-national organizations, such as the European Community, the North American Free Trade Area, GATT, the World Bank, and many others. Sub-national forces also compete with nations for the loyalties and energies of citizens, whether they involve separatist movements, ethnic cleansing, regional grievances, or urban-rural conflict. I will return to these global changes below, because they raise questions about territory and sovereignty that are especially pertinent for the analysis of Aboriginal self-government.

More specific to Canada and to Aboriginal people in Canada are a series of assumptions, now fairly widely shared, that were once unthinkable. Of course, not everyone shares these assumptions, in the sense of consciously affirming them; but many people do, and some of them have been entrenched in the Constitution or embodied in government policies. I will not at this point do more than list these assumptions, as they are largely self-explanatory, especially for readers of a report about Aboriginal citizenship.

1. Assimilation of Indians was the goal of federal Indian policy for about a century, but that goal has now been completely abandoned. Special status has replaced it. Some readers will feel more comfortable with saying that assimilation has been replaced with a policy of pluralism. That may be one interpretation, but I prefer to follow Doug Sanders (see below) and be provocative. As I note near the end of this paper, phrases like `special status' could be rehabilitated in Canada in a way that may be impossible in the United States.
2. Inuit were included in the category `Indian' by judicial decision, and Métis may have been added to federal responsibilities as a result of the definition of Aboriginal in section 35(2) of the Constitution Act, 1982, although this is contested. Thus, there is a new legal

term (Aboriginal) that, for at least some purposes, supplements or even supersedes the categories Indian, Inuit, and Métis.

3. Section 35 also affirms the existence of special rights for Aboriginal people, although without spelling them out. These may include an inherent right to self-government. Even if that were disputed, the Charlottetown Accord in 1992 revealed that all major governments in Canada had accepted the concept, and public opinion has since then been predominantly favourable to that inherent right.
4. At least since the constitutional negotiations in 1981, resulting in modifications of the Constitution Act, 1982, one has had to assume that constitutional change needs input from Aboriginal people and groups. Meech Lake's defeat proves that by the failure of its obverse.
5. More specifically, constitutional negotiations in the Charlottetown round saw four Aboriginal organizations treated as equals with the eleven senior governments, the territories, and their first ministers. Future meetings may or may not consist of the same four organizations, but it seems extremely unlikely that such gatherings could regress back to earlier situations where Aboriginal people were not participants, at least on issues affecting them directly or indirectly.

Caveats

In order to clarify what I hope to accomplish, it is necessary to indicate what cannot be considered. I will now mention several topics that deserve lengthy attention, but to treat them here would pre-empt the focus on the meaning of Aboriginal citizenship when decoupled from assumptions about territory and territorial nation-states.

First, I will examine Aboriginal citizenship within Canada. I will not investigate what forms of citizenship may have existed before 1492 or what forms could be developed if Aboriginal groups in the future were `sealed off' from Canada. The positive responses from many people ─ Aboriginal or not ─ to the proposal for a third order of government in the Charlottetown Accord suggest that `within Canada' is a widely shared reality, although several treaty nations reject it as not sufficient. Of course, the precise meaning of `within Canada' remains unclear, and the resolution of that ambiguity will affect the applicability of my proposals in this report. One must start somewhere, and one cannot avoid some assumptions in order to

have any focus at all.

Second, I will assume that some version of a charter of rights and freedoms will apply to this third order (or whatever it is called). It seems doubtful that all Aboriginal groups will accept the Canadian Charter in its entirety, nor need they do so, since section 25 already implies that some parts of the Charter must be interpreted so as not to derogate from Aboriginal rights.[xvii] Whether these revisions will involve different scope for the notwithstanding clause (section 33) or some ways to take fuller account of communitarian forms of decision making, or even more imaginative possibilities, the concept of `within Canada' requires some framework for rights-bearing citizenship. Non-Aboriginal Canadians will expect the Charter in some form to apply to Aboriginal governments,[xviii] and it is well-known that many Aboriginal women (among others) insist on basic Charter rights.[xix]

Third, the Charter contains many examples of what may be called collective rights, as distinct from individual rights.[xx] Perhaps Aboriginal communities need more or different collective rights. Be that as it may, readers should not be distracted by this debate as it applies to citizenship in this report. Frequently Aboriginal and non-Aboriginal people argue about the Charter's appropriateness for Aboriginal people on the assumption that it contains or protects only individual rights. Since that assumption is clearly wrong, let us note that the issue can be better framed as the appropriate balance between individual and collective (or community) rights.[xxi] Honourable people may support quite different mixtures or balances, and I take for granted here that whatever balance is struck, the issues of citizenship in this report are independent topics.

Fourth, in arguing in this report for creation of a non-territorial unit of government, I do not mean that Aboriginal peoples will not have a collective land base. This should become clear below. But let me avoid any possible misreading by asserting emphatically and unequivocally that my proposal should not be used as an excuse to abandon land claims, to weaken the already inadequate land base, to absolve the federal government of its fiduciary responsibilities to the various Aboriginal communities, or to get the federal or provincial governments off the hook in any other manner. Land is even more crucial for Aboriginal people because the reserves are not fully exclusive, continuous, or contiguous, as outlined below.

Finally, concepts of citizenship cannot solve all problems. They cannot substitute for reasonable policies fairly administered. In putting forward innovations in understanding

Aboriginal citizenship, I will try to temper them by particular reference to two broad types of problems for Aboriginal people, especially those in off-reserve situations (in towns and cities). Other problems are worthy of sustained attention, but there must be limits to one's focus, or solutions may not be relevant to any particular problem.

The two types of problems are quite distinct but interrelated. The first is practical ─ the delivery of services to Aboriginal people, especially when living away from the reserves. The second is moral, ethical, and political ─ the basis for diverse types of service delivery without opening the door to discrimination in the negative sense of inferior services so common up to the present. To explain the nature of these problems at this point would be like putting the cart before the horse ─ possible but unwieldy. Thus, I turn now to a series of issues that frame and contextualize the specific solutions to these problems. These include the concept of territoriality and its presumed importance to sovereignty; the sharing of sovereignty in a federal system; specific problems of territoriality faced by Aboriginal peoples; non-territorial pluralism as a general approach in federal and democratic political systems; and a specific suggestion for an Aboriginal province (or several provinces) as the expression and embodiment of Aboriginal citizenship and self-government `within Canada'. Only after this extensive background can I present possible solutions to the problems of service delivery and discrimination.

Territoriality and Sovereignty

The grand categories of political analysis in the `modern' world consist of persuasive systems, market systems, and authority or command systems.[xxii] All have been assumed, rightly or wrongly, to require or rest on a territorial basis.[xxiii] Nations protect `their' industries; governments exercise coercive force over `their' territory and enforce the authoritative allocation of values; and media of communication (especially radio and television) are deemed to be instruments of indoctrination and control to such an extent that planners of a coup d'état move simultaneously against the seat of government and the headquarters of the national broadcasting system.

These assumptions about the territorial basis of political authority have not been universally accepted, nor are they very old compared to recorded history. For only about 300 years, three specific assumptions have formed a deep and unconscious part of the political culture of the European world and, in more recent times, of its colonies and other countries touched by its influence. In particular, western political thought has come to accept as natural,

logical, and necessary that sovereign political entities must exclusively occupy contiguous territory that is also continuous in composition. When I use the term `territoriality', it refers to these three assumptions. `Non-territorial' means that one or more of these assumptions does not apply. That is to say, a nation or province or state should not share territory with another; for example, Labrador must be part of Newfoundland or Quebec but not both. Likewise territory should be contiguous, so one cannot allow Labrador to be part of British Columbia. Continuous territory requires that there be no `islands' of another sovereign political entity embedded in or completely surrounded by a nation or province. For example, towns in New England states are not counted as part of Quebec even if a majority of their inhabitants are Quebecers or descendants of Quebecers.

All three assumptions have been violated in one place or another. For example, the United States does not seem greatly concerned that its 48 mainland states are not contiguous with Alaska. The location of Hawaii is not viewed as separated in the same way, just as Labrador's location across a body of water from the rest of Newfoundland does not raise concerns about their contiguity. Behind the assumption of contiguity is an implicit belief that water (rivers, bays, straits, etc.) cannot have deleterious effects on contiguity; only land occupied exclusively by another province or nation can do so. Embedded units or `islands' are quite rare, unless one counts things like the `homelands' in South Africa. Of course, countries like Paraguay and Switzerland are landlocked, but they are surrounded by several countries rather than by a single country. Thus, they do not interrupt the continuity of other countries.

The assumption of exclusive use of territory is violated in most federal systems, since two `sovereign' orders of government share the same territory. This was, of course, one reason why federalism was a novel idea; and it is easy to overlook what we now take for granted. The British colonial office in the 1860s was hesitant to endorse Canadian federal schemes because of this feature; they thought it odd or illogical to divide the sovereignty of the Crown or of Parliament. Nevertheless, it worked well enough that we now forget how tentatively the idea was put forward because of the concern about exclusive use of territory. Other possible examples of non-exclusive use of territory might be joint trusteeship of colonial possessions, as in some South Pacific islands. By and large, as with the other two assumptions, `violations', when they occur, are not always noticed because these assumptions are part of the perceptual lens through which we view the institutions of modern government.

These assumptions are worth questioning, I believe, because they are very recent additions to our political culture. For the first millennium or so of the Christian era, politics was carried out with no belief that a territorial base was essential to the state, even though many rulers coveted the wealth territory provided. Peoples migrated and conquered other peoples.[xxiv] Warriors ruled and were challenged by other warriors. Exclusive use of territory was rarely achieved for long, and continuous and contiguous territories were almost unknown except for some cities or towns. Vestiges of that era still remain, especially the idea of the Vatican as a non-territorial authority.

These three assumptions about territoriality lead logically to a fourth condition ─ congruent territories. That is, administrative units within a nation or province have the same boundaries even though they deal with different matters. Of course, we do not make these assumptions about local, regional, and municipal governments. School districts, parks boards, rapid transit systems, and flood control authorities ─ to name only a few ─ rarely coincide, and yet this striking contrast to what is thought natural or necessary at the national or provincial level attracts little comment.

The reason given for this discrepancy between municipal and `higher' levels of government concerns sovereignty. Exclusivity, contiguity, continuity and congruence are necessary ─ or so our traditional theories tell us ─ because they underpin sovereignty. To be sovereign over only a single function such as parks or schools, the reasoning goes, is not to be sovereign at all.[xxv] Thus, sovereigns claim the right to control or regulate all public activities, to be all-purpose or at least multi-purpose political organizations. It has been assumed for three centuries that such a conception of sovereignty requires a territorial base, even though it has been known for much of that same period that federalism involves shared or joint sovereignty.[xxvi] But even so, the national and provincial governments in Canada constitute multi-purpose organizations and thereby stand apart from narrowly focused local governments and authorities.

Technology and ideas and theories evolve, and new situations arise. Not only have market systems penetrated all countries ─ and not just the industrialized ─ but international globalization of economic relations has placed many economic and commercial functions beyond the control of nations, even rich and powerful ones like the United States and Japan. Likewise, political organizations at the local or regional level and at the supra-national level compete with nation-states for the allegiance of citizens. And the mass media have changed in

important ways: more television channels and hence more specialized and less `mass' targeting, formats, or content; fewer newspapers and more cross-media competition; decoupling of broadcasting from territory because of cable and satellite transmissions; and greater audience control because of multiplication of options. There no longer exists, in most countries, a `headquarters' for national media that can be taken over in a coup d'état, as the anti-Gorbachev plotters discovered to their dismay in August 1991.

In short, the territoriality of political, economic, and cultural life has been shattered in recent decades, just as it was becoming fashionable on a global scale. The many ways in which our lives have been bundled or packaged in containers called nation-states have been increasingly challenged and subtly eroded. The weakening of assumptions about territoriality does not portend the disappearance of nation-states, even though particular ones (like the Soviet Union and Yugoslavia) will do so. Nations will continue for the indefinite future, but they will perform fewer sovereign functions as those functions come to be performed piecemeal by specially created political entities that focus on one or a few jurisdictions defined by function rather than by territory. One of these ─ whether a province, a third order of government or a multiplicity of community self-governments ─ will constitute a non-territorial government for Aboriginal people within the wider territorial framework of Canada. It has important implications for Aboriginal citizenship.

Dwelling at this length on the ways in which ideas or assumptions that are uniquely European in origin have been taken for granted in Canada and elsewhere should not be seen as condoning their continued hegemony. Nor do I wish to divert attention away from the particularities of Aboriginal people in Canada.[xxvii] The purposes of this historical excursion are instead twofold. For one, I have endeavoured to show that our ideas have historical roots, and I have pointed to some evidence that historical conditions are changing. Hence, it may be easier now than in previous periods to question the territoriality and sovereignty of existing political frameworks. Second, by recognizing the inherently European origins of our conceptions of nation-state, sovereignty, and citizenship, I believe they can be put in perspective and seen as limited and particular rather than natural or universal.[xxviii]

Territory and Aboriginal Peoples

From the perspective of Aboriginal peoples, it is beneficial that territoriality has come under

serious scrutiny as the basis of political frameworks. Centuries of contact, conquest, treaties, settlement, and assimilation of many individual Aboriginal people have left Aboriginal populations with a scant territorial base. This is most clear in regard to reserves south of 60º. In the Yukon and Northwest Territories, the land base is not so fragmented or constricted. Particularly in the new territory of Nunavut ─ which I assume will become a province eventually ─ one finds an Aboriginal majority with control of mostly contiguous and continuous territory.

South of 60º one encounters vastly different conditions. There are currently more than 2,000 reserves among more than 600 bands grouped historically into 40 or 50 nations. Thus, fragmentation and isolation characterize the territorial base more than continuity or contiguity. Furthermore, these lands on a per capita basis could not be considered generous or sufficient. Beyond that issue, many groups lack any valuable land; and the Métis (outside of Alberta) have no collective land base at all. When one notes that many Aboriginal people have no reserves, and that among those who do, a large minority or at times even a majority live off-reserve,[xxix] mainly in large towns and cities,[xxx] the disjuncture between the territoriality of Aboriginal people and the assumptions about territorial nation-states seems absolutely unbridgeable.

Before contact the territorial situation was obviously different than it is today, but it did not correspond precisely to the European assumptions outlined above. This is not the place to explore the differences in detail, since the European assumptions themselves are evolving and loosening their grip on our thinking. But brief mention of some features may help to show how non-territorial political entities and their attendant concept of citizenship may be less contrary to traditional Aboriginal ways than the framework imposed up to now.

The first divergence concerns the assumption of exclusivity. No doubt many Aboriginal groups had a concept of their land or territory. But it allowed, in most cases, for flexible use and control to a degree that appears widely at variance with European notions of exclusive territory. This feature may be noticed most clearly in the treaty process, which revealed a remarkable willingness to share the bounty of a given territory.[xxxi] The fact that the settlers did not share the land, but claimed ownership, merely highlights the different assumptions at work.

Other examples strengthen the point. There seems to have been a general sense throughout pre-contact North America that one did not own the land but used it on sufferance.[xxxii] Land usage in many cases could be justified only if one were certain that the use would have no net negative ecological impact to the seventh generation of descendants. Likewise, cyclical and

seasonal usage reduced stress on ecological balance, and movement across large areas intermittently allowed for the possibility of overlapping territories of different groups. It is facile to say that all Aboriginal groups lived in harmony with their environment and had no lasting impact. Nevertheless, compared to the settlers in the post-contact era, territoriality was more spiritual and less exploitative.

Superficially at least, current conditions parallel some aspects of pre-contact life, albeit in more constricted and stressful circumstances. These might include such non-territorial features as sharing land, seasonal migration, and spiritual concern for the land. For example, several land claims settlements have delineated zones of exclusive control and use (whether called reserves or not) and large tracts nearby where non-exclusive usage for specific purposes (trapping, fishing, gathering flora and fauna for ritual purposes) derives from historical patterns.[xxxiii] Migration is still common in some areas,[xxxiv] and regular movement on and off the reserves for seasonal employment can be found almost everywhere. The revival of customs, language, and spiritual traditions has occurred unevenly, but these are very strong in some nations.

However tentative and brief, these remarks should draw attention to several key points that new conceptions of Aboriginal citizenship must address. They should wherever possible build on traditional strengths and customs while taking account of the fact that those traditions have evolved in the contact period; and these traditions might have changed substantially even if settler society had not impinged so massively. The arrival of the horse would by itself have changed plains life profoundly without settlement and restriction to reserves. New forms of citizenship should also be adapted to the social situation as it has developed. This requires sensitivity to strong family, language, and national ties, even where the group has been divided into widely separated settlements and where large numbers live and work for long periods off-reserve. Hence, we must accept the `portability' of treaty rights.[xxxv] Finally, `within Canada' also implies that we must devise schemes for Aboriginal citizenship (Indian, Inuit, Métis)[xxxvi] and not just for local bands or traditional nations.[xxxvii] Achieving an appropriate balance among multiple groupings and identities will be essential, and this cannot be accomplished if we consider the purely territorial models with which our thinking has been imbued for too long.[xxxviii]

Non-Territorial Forms of Pluralism

The best known versions of pluralism have been thought to rest on individualism and thus to be

somewhat antithetical to Aboriginal concerns about social cohesion, community, and consensus. There can be no doubt that many of the foremost exponents of pluralism as a model for democratic societies have assumed that the basic unit of analysis should be the individual. One thinks of Robert Dahl, David Truman, and Harold Lasswell, among others. There has always been another strand of thought‑more common in Europe and sub-dominant but increasingly influential in North America‑that has emphasized collective, communitarian, and non-individualistic aspects in pluralism. The most visible versions have been consociationalism and corporatism. Interestingly, both of these models are also non-territorial in orientation, whereas individualism was a concept that arose out of the same historical circumstances as territorial nation-states.

Consociationalism posits at least two social formations that are geographically intermingled. Because of non-exclusive use of territory, it is a non-territorial concept, and in an important sense it is also non-federal, because of its applicability in countries where the social `pillars' cannot be separated into distinct sub-national territorial units. Some observers would contend that consociational arrangements are akin to federalism. This is a matter of definition, and thus it is not worth more than a brief mention. In my usage, consociationalism and federalism differ in degree and in the balance between unity and separateness. Federalism aims to create multiple loyalties and to unite groups without submerging them. Consociationalism aims instead to keep the groups as separate as possible while still sharing territory. It leans away from unity and toward social separation more than federalism. Since other scholars use the terms differently, or draw different conclusions, it is important to spell out my stipulative definitions; I do not want to impose them on anyone, but I do want to be clear about why I use federalism rather than consociationalism as the central concept in this analysis.

As usually expounded, consociationalism is elitist in the sense that most people let inter-community relations be handled by elected, appointed, or traditional leaders, usually expressed through `communal' political parties and ancillary organizations. Political arrangements satisfactory to all major leaders of each `pillar' can be presumed to be accepted by each community as a whole, especially if elected parties constitute the leadership. Thus, there is an element of deference or authoritarianism in this model. However one feels about its features, consociationalism has, according to its proponents, procured long periods of stability and prosperity in several countries, including the Netherlands, Switzerland, and Austria. Its critics are

less charitable, but nearly everyone agrees that the model is interesting and that it is inherently non-territorial.

Corporatism--or corporate pluralism, as it has sometimes been called--involves a non-territorial structure of communities or organizations constituted in quite a different way from consociationalism. Instead of `societies' or `peoples' intermingled in the same territory, corporatism assumes an occupational or class base to public policy making. In theory and in practice, corporatism has been tripartite, bringing together `peak' organizations of business and labour with the national government to conclude political deals involving complex trade-offs among wages policy, fiscal policy, monetary policy, and sometimes trade policy and industrial reorganization or restructuring. It has been practised in countries like Australia, Germany, Sweden and Norway and, in looser versions, in a number of other European countries.

Power sharing takes non-territorial forms, since government, business, and labour permeate all areas and domains of each society. These three units of organization cannot be located in different territories; they all share all areas of each country. Even if, as is logically possible, one expanded beyond a tripartite structure, corporatism would still be inherently non-territorial. Other `corporate' voices might include consumer groups, environmental groups, and gender groups. In all cases, corporatism presumes that each of the peak organizations has an equal voice and veto; only if consensus prevails and all groups, of whatever size, agree can one justify this model. If two `corporate' partners gang up on the third, there is no incentive whatsoever for the odd one out to go along with any policy decisions. Thus, its consensual decision-making process, coupled with non-territorial representation, might make it an attractive way of handling Aboriginal participation in Canadian politics.

Attractive though they are in some respects, I will not explore either consociationalism or corporatism as models for Aboriginal citizenship. Both are nearly always informal arrangements, and both rest on trust and mutual respect. These qualities are in short supply everywhere but most particularly between Aboriginal and settler societies in Canada. The need for consensus in broad coalitions also seems to make both models less applicable than they first appear. One must therefore postulate a model sharing some features with these but that can be `constitutionalized' adequately so that rules, procedures, and powers are spelled out more carefully, and that relies as little as possible on trust in one's opponents or allies.

Non-Territorial Federalism

Although federalism has commonly been realized in territorial forms, it need not be so restricted. In many instances, sub-national units premised on the assumptions of exclusive control of continuous and contiguous territory may be sensible, but not in all cases. For example, in opting for federalism of a territorial sort, the Fathers of Confederation believed that they were solving a serious social problem by geographically separating the antagonists. The United Provinces of Canada had been created in 1841 as a result of Lord Durham's report; his recommendation presumed that the Catholic (that is, French) populations would be overwhelmed by the rapidly growing Protestant (that is, English) populations.[xxxix] By the 1860s this prediction had proven false. Hence, Confederation was an effort, among other things, to protect the French Catholic society in what is now Quebec by creating a province in which that `people' could control a government with substantial powers.[xl] The other provinces would have English Protestant majorities.

Even in the early decades, this territorial solution was not fully satisfactory. Large islands of French Catholic communities remained outside Quebec, and over time the non-French populations in Quebec ─ especially in Montreal ─ grew steadily. Eventually, Quebec took a strong `extra-territorial' interest in this `diaspora', including even former Quebecers living in the New England mill towns near its borders.[xli] By the time the Parti Québécois came to power in 1976, most Quebec nationalists had concluded that the best strategy was to withdraw within fortress Quebec and let the French enclaves elsewhere fend as best they could. Since the Acadians in New Brunswick have seen their security enhanced by entrenched bilingual policies, the two oldest and geographically most compact communities came to believe that a territorial solution was feasible. Some members of both francophone communities were thus led to become advocates of territorial nationalism.

This digression about French Catholic communities points up the strengths and weaknesses of the territorial form of federalism. The greatest strength, of course, lies in having a government accountable to the majority rather than being a minority in a wider society, as franco-Ontarians and francophones in the West have learned.[xlii] The weakness is equally obvious: scattered populations of permanent French minorities in any territorial model will have only as much clout as the dominant society is willing to grant.

Just as `a wider union' based on federalism of the territorial sort proved to be a creative

innovation that solved, for a period of time anyway, the religious (and later linguistic) deadlock of the 1840s and 1850s, so a non-territorial version of federalism may serve a creative purpose in our time. By this I mean that the existence of ten (and eventually more) territorial provinces may be supplemented by the creation of non-territorial provinces for specific groups. I favour two types of non-territorial provinces, one for francophones outside Quebec and at least one for Aboriginal people south of 60o.[xliii] In the context of this paper, however, I will explore only the latter hypothetical province.[xliv] Some preliminary clarifications should be put on the table before describing the new province and its implications for Aboriginal citizenship.

Many if not all Aboriginal people will wonder why one would speculate about a province when tentative agreement was reached in 1992 on the creation of a third order of government. The latter sounds so much more grand and imposing that a mere province may seem a come-down. My defence takes three forms. For one, nomenclature is not at issue. I favour a third order of government for Aboriginal people, and not `just another province'. However, that third order will very likely be federal or confederal in nature, and thus the discussion of provincial status may do double duty. In this paper, whenever I refer to an Aboriginal province, readers should understand that this may constitute a third order or that several such provinces (including Nunavut) will jointly constitute the new third order. It may also happen that agreement will be reached between Canada and Aboriginal groups on a particular configuration and then that arrangement will evolve or be transformed as a result of its own sovereignty. Thus, the object of this paper is to understand Aboriginal citizenship within a third order; and even if the exact form of the third order is necessarily indeterminate, one can still explore the nature of citizenship within a very broad range of possible institutional frameworks for the third order. But we already know what a province is, and so we have a head start in thinking about some consequences of granting that status. We even take it off the rack and try it on. For example, all provincial premiers attend first ministers' meetings, and provincial legislatures must vote on all constitutional amendments. These are automatically accorded to new provinces, whereas one would have to negotiate the status of a third order. Second, provinces are very powerful and (within the powers of section 92) sovereign political organizations. Indeed many Canadians fear they have become too powerful. Later sections will return to this issue. Finally, part of the argument below concerns the types of powers of this new province, since it will need, in my opinion, a few jurisdictions beyond those of existing provinces.

The Hawthorn report, as noted above, recommended that Indians be accorded the status of "citizens plus". (That report was not allowed to make recommendations regarding Inuit or Métis, although the authors imply that they would have done so had their terms of reference been different.) By analogy, I am recommending a political entity that might be described as `province(s) plus'. `Plus' would have several complementary meanings, including more powers than existing provinces (such as some but not complete international personality), recognition that it was partly a rectification (or affirmative action) for historical treatment, especially abuse of nation-to-nation treaties, and explicit status as a third order (or third pillar in consociational language) of Canadian government (along with existing federal and provincial orders).

What might it mean, therefore, if Aboriginal peoples gained the status of a province (or several) on the basis of an inherent right to self-government? The remainder of this paper constitutes my answer to that question. A few points now will clear the underbrush; the next two sections outline how the province or third order would be set up, and the remaining sections explore the problems of service delivery and discrimination mentioned above and also explore the expanded conceptions of citizenship implied by this province.

In considering the creation of a non-territorial Aboriginal province, I leave aside the Yukon and Northwest Territories and the Aboriginal people who live north of 60º. I assume that at least part of this area will eventually gain provincial status and will have a majority Aboriginal population.[xlv] If so, then there will someday be at least two and perhaps more Aboriginal provinces, one or more in the North and one or more non-territorial. Besides that practical consideration, it is probably fair to assume that language, culture, economic base, and distance also argue for keeping Inuit as a category or province in their own right. Indeed, diversity south of 60º may dictate that there be several provinces within a third order. To use a provincial model does not limit the number of such provinces or require that they all be non-territorial. The challenge, however, is showing that non-territorial provinces are feasible.

Second, one may ask how to identify the people eligible to reside in the Aboriginal province or provinces I am proposing. There are several ways to do so, including racial or `blood' ties to status Indians, but I suggest instead a self-selection. Section 35(2) of the Constitution Act, 1982 defines the Aboriginal peoples of Canada as "including" the Inuit, Métis, and Indian peoples of Canada. I take this to mean that those groups must be included but that other groups or individuals may be included. This is what I propose by self-selection of official residence. It is

fully in line with the position of the Royal Commission on Aboriginal Peoples, which has stated that "the phrase `aboriginal peoples' in section 35 does not refer to groups characterized by their racial make-up. Rather, it designates historically defined political units, which often have mixed compositions and include individuals of varied racial origins."[xlvi] After we identify the land base of this province ─ let us call it Aboriginal Peoples Province ─ we will know who lives there at that moment. If they prefer to move to another province, they may do so, just as they can in the current situation. If non-Aboriginal people choose to move to Aboriginal Peoples Province from the existing ten provinces, that is acceptable. Of course, any province is entitled to place some restrictions on mobility, as specified in sections 6(3) and (4) and 15(2) of the Charter; and Aboriginal Peoples Province might do so. Note, however, that restrictions would not have to be based (although they could be) on racial or ethnic characteristics. One would not need to be an Indian or Métis, nor would one need to assume one of those identities, in order to live in Aboriginal Peoples Province. Self-selection here refers to location, not to identity as an Aboriginal. This self-selection will be crucial to a later stage of my argument.

Readers of an earlier version of this paper identified a problem with phrases like "who lives there", "to live in this province", or "self-selection here refers to location". They read into such phrases territorial significance that was not intended. Let me try to clarify my usage since it has important implications for my proposal. The primary content of the phrases to which I refer concerns legal residence or conceptual space. For example, a resident of British Columbia may currently visit or even live for extended periods in other provinces without becoming a resident of those provinces, except by conscious choice. Whatever the dominant social identities of the province of residence (such as French in Quebec or English in British Columbia), residents do not automatically assume those identities when they arrive, nor need they ever do so. To the extent identities are involved, they might be better expressed that newcomers `identify with' the goals or aspirations of the political unit. In different provinces, one finds different priorities, such as linguistic security in Quebec, economic development in British Columbia, and Aboriginal integrity in Aboriginal Peoples Province. To opt for official residence in Aboriginal Peoples Province‑which could occur without physical movement‑would in most cases constitute an affirmation of such priorities.

Residence has another meaning because of the existing system of reserves. Some people are entitled to live on a reserve, although not all those eligible choose to do so or they move on

and off at intervals. Many people have no reserve, or they are legally attached to some reserve but not others. Since I have posited that reserve land and land gained through the claims process would in the first instance constitute the physical presence of the hypothetical province, some people who might opt to `live there' (legal residence) could not physically move there under current legislation. Thus, readers must be careful to note whether residence has the meaning of conceptual space or of physical location on a reserve.

At present, the Indian Act determines who is an Indian for the legal purposes of carrying out section 91(24) of the Constitution Act, 1867. Since I assume that the Indian Act would be rescinded, perhaps in its entirety, once Aboriginal Peoples Province had been established, the definition of an Aboriginal would be a matter for the groups concerned to work out. This is no different, in its own way, than the situation in regard to members of French, English, or other minorities who identify themselves to each other or not, as they please. It may also be analogous to pre-contact situations.

After a period of time, one would undoubtedly find that not all Aboriginal people lived in Aboriginal Peoples Province and not all who lived in Aboriginal Peoples Province were Aboriginal people by our conventional measures, but that the majority of Aboriginal people would live there and the majority there would be Aboriginal people. Substitute the word `French' for `Aboriginal people' and `Quebec' for `Aboriginal Peoples Province', and the previous sentence would be equally meaningful. The two provinces would, in short, respond to a market-like situation, and eventually an equilibrium would be reached in which a group that is a minority in Canada would have its `own' province where it could be a majority without restricting members of other groups from residing there.[xlvii]

In specifying self-selection as the basis of official residence, I wish to repeat that this criterion operates in the first instance. This is crucial in order to avoid the appearance of apartheid. After the province has been established and its government elected, however, other possibilities could be considered. Just as there are currently several different ways of determining Indian status ─ defined by the Indian Act, matrilineal descent in some traditional settings, adoption, and so on[xlviii] ─ the new province would have to clarify which procedures should predominate, or how to delegate these decisions to particular groups within its population. Where entitlement to services follows from membership, the ability to control membership becomes an integral power of this new political entity or its component units.[xlix] Where residence is physical,

as with existing provinces, section 6 of the Charter limits provincial controls on mobility in several ways. Where residence involves a legal tie without any necessary physical location, the hypothetical province may need to restrict `mobility' in ways that violate section 6 of the Charter. Otherwise, for example, if there were no sales taxes (see below) this would induce many people to opt for residence in Aboriginal Peoples Province. This province or third order will therefore need carefully crafted rules of residence, because our current assumptions about territoriality do not apply. The need for such rules is twofold: to protect the integrity of the political units and to protect individuals who might suffer deprivation of Charter rights. I do not know how to postulate a solution, because one must first agree on the nature of the unit; and my proposal is open-ended in several respects and thus stipulates that official residents will jointly decide many features rather than accept the current features of territorial provinces.

Another issue that I will leave to the new province or third order to resolve is the form or structure of government. In my own mind, I imagine that responsible government in the Westminster parliamentary tradition might not be the most suitable format for Aboriginal Peoples Province, since its emphasis on party discipline and clear lines of conflict between government and opposition would run counter to Aboriginal traditions of decision making. However, a form of government too different from that of other provinces or the federal government might make intergovernmental discussions and negotiations more difficult than they will be in any event. Furthermore, one might postulate a bicameral arrangement where one chamber fitted a model parallel to other provinces and the second chamber consisted of elders and/or other leaders who followed more closely some traditional model of consensual decision making. Whether these are sufficient reason to use or adapt responsible government should be left to the participants.

An independent question involves the legal or constitutional limits of governmental structures. The Constitution Act, 1867 provides that Canada will be "One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom." That brief principle has usually been understood to authorize a form of responsible government in the British parliamentary tradition. Whether it mandates that form or principle of government for new provinces is unclear. The Constitution Act, 1982 provides in section 45: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province." Section 41, of course, requires unanimous consent among provinces and the federal government to amend "(a) the

office of the Queen, the Governor General and the Lieutenant Governor of a province", and other matters not pertinent to this issue. If these constitutional provisions were deemed to be impediments to a form of government desired by the hypothesized province or third order, perhaps they could be amended, since to reach that stage of development would have required a remarkable degree of support for and flexibility regarding Aboriginal self-government by other Canadian authorities. Finally, one may speculate that recognition of the inherent right to self-government could carry the right to determine any form of democratic government.

Aboriginal Peoples Province[i]

The proposed Aboriginal Peoples Province would, in the first instance, consist of all the land and water now contained in the 2,000 or so reserves south of 60o. As current land claims are settled, land would presumably be added to Aboriginal Peoples Province. The province might trade some territory for that of surrounding provinces in order to consolidate currently scattered reserves or to create land bridges. Additional land would need to be set aside in recognition of the lack of land base of many Métis.

The population of Aboriginal Peoples Province would include people not otherwise entitled to live on the territory specified in the first instance. At present, large numbers of non-status Indians and Métis have no rights to residence on reserves, and that might continue to be the case depending on the decisions by the elected government of Aboriginal Peoples Province. At present there are also large numbers of status Indians who are entitled to residence on reserves but who choose to live, for varying lengths of time, off-reserve, usually in large towns or cities in order to gain education or employment. These `urban' off-reserve Indians must be kept conceptually separate from those who live on urban reserves, but they must be integral parts of the province if they choose to affirm official residence. In discussing service delivery below, I will use the shorthand expression of urban Aboriginal people to mean only the off-reserve Indians or the Métis and non-status Indians or Inuit who have no reserves. Reserves in urban areas, such as the Musqueam in Vancouver, will be conceptualized in the same way as reserves in rural areas.

These arbitrary definitions have a purpose. Aboriginal Peoples Province will be a non-territorial province or third order in two distinct ways. It will involve land, some of which is controlled exclusively, but that is non-contiguous and perhaps non-continuous as well. But

equally or more important, the province will allow for `residence' in an official sense even though the persons involved may never or rarely reside on the land that constitutes the physical presence of the province. As we will see, service delivery may be different for land-based and urban populations in the province, although not for all topics of jurisdiction or kinds of services.

Those Aboriginal people who have no current right to live on a particular reserve would still have the right (but not the obligation) to take up official residence in Aboriginal Peoples Province. Eventually there may be a land base developed for Métis and non-status Indians, or they may be incorporated into existing reserves and the added land resulting from land claims settlements. For urban Aboriginal people, however, there may never be a land base in the sense of a particular place where they may reside physically. This is perhaps analogous to Canadians living abroad who own no property in Canada; they have the right to return to Canada but no guarantee of the right to live on any particular piece of land unless they purchase or inherit it.

If these arrangements sound tentative and complex, those features are intended to leave open the decisions about such issues. As a province or third order with some sovereign powers, Aboriginal Peoples Province should be able to decide its own residence requirements, at least within certain very broad parameters. A fundamental component of this assumption concerns the right to vote. If everyone who chooses Aboriginal Peoples Province as their official residence has the right to vote in electing its new government, then that government has a powerful incentive to take account of the urban Aboriginal people as well as those entitled to reside on the reserves. Since these two groups are roughly equal in size,[li] it would be virtually impossible to form a majority government without support from both groups, and thus without sensitivity to the situations of both groups.

To this end, political parties, pressure groups, and voluntary organizations will undoubtedly come to exist, and many already do. They may not duplicate the names or structures in the rest of Canada, but functional equivalents seem likely to arise and play similar roles of interest articulation, interest aggregation, and political accountability. It should be emphasized that political parties and private groups are inherently non-territorial since they bring together people of a certain type or who share certain views regardless of where they live. Thus, they are well suited to a non-territorial province even though their historical origins and current use have been confined to territorial political entities.

A final point needs explicit formulation. If these organizations are adaptable to

non-territorial politics, one might argue that they could be sufficient for self-government. Do we need to set up something as elaborate and costly as a province? The answer is unequivocally `yes'. There are already many equivalents of political parties and `interest groups' (such as the Assembly of First Nations, the Native Women's Association of Canada, and others) and of private or service organizations (such as the Urban Representative Body of Aboriginal Nations in Vancouver, the Métis Child and Family Services in Edmonton, and the Canadian Council for Native Business in Toronto). However, "they lack the tax base and legislative authority to compensate for the lack of policy and programs emanating from all levels of government."[lii] They must currently incorporate under the various societies or corporations acts and cannot therefore have independent standing or be accountable to inclusive governmental authorities. A province for Aboriginal people could validate such groups, and its government would need to be responsive to them and the voters and taxpayers they involve.[liii]

Several of the organizations just mentioned have visibility among both Aboriginal and non-Aboriginal people. In part this reflects their ongoing service functions, but part of their standing derives from participation in the Charlottetown process as more or less official representatives of Aboriginal people. As I envision the third order, these groups will not automatically have such clear status, although if they become, in effect, political parties, they could form the government. If not, there may be tensions during a transition period in which some residents of Aboriginal Peoples Province-even political leaders elsewhere-view these organizations as legitimate representatives alongside `official' representatives such as members of parliament or members of the legislative assembly (or whatever the third order's legislative body is called).

The most important aspects of Aboriginal Peoples Province would be its status and the powers that confers.[liv] As a province, it would have the same powers as existing provinces: jurisdiction over education, health, welfare, administration of criminal justice, natural resources, and the like; representation at all first ministers' conferences; participation in the constitutional amending procedure; and shares in equalization payments and other federal transfers, among the main advantages. As a province, Aboriginal Peoples Province could also invoke the notwithstanding clause where necessary. There might be some obligations not now imposed on Indian reserves, such as paying taxes,[lv] but to my thinking these would be clearly outweighed by the powers, status, and prestige of provincial status. The creation of this province would be

coincident with revocation of the Indian Act, would result in abolishing the Department of Indian Affairs and Northern Development, and should see the end of federal paternalistic responsibility for "Indians, and Lands reserved for the Indians". While less paternalistic, the new arrangements probably need to recognize that there might still be continuing fiduciary responsibilities of the federal government to Aboriginal peoples.

Most of these powers figure prominently in Aboriginal negotiations for community self-government[lvi] and in their concern at being excluded from the process of constitutional change in the Meech Lake Accord. Instead of letting the federal government negotiate piecemeal deals with several hundred local bands, the creation of Aboriginal Peoples Province would satisfy most of these demands and relieve the federal government of a set of thorny issues. Indeed, it would be incumbent upon the leaders and residents of Aboriginal Peoples Province to solve internal distributional and service issues.

Pros and Cons

Response to this proposal usually engenders a caution that Aboriginal people might not be ready for these responsibilities or that this province would further weaken a federal government already under siege from provincial demands for more autonomy. The first reaction can be dismissed for what it is ─ paternalism. Every colonial power in history has claimed that colonists were not yet ready for self-government. Perhaps some were not, but the experience of Canada, Australia, New Zealand, India, and several other former colonies suggests a reservoir of expertise sufficient to the task. If this reaction is not paternalism, then it is centralism, which is the second type of response.

Prime Minister Trudeau often argued in the 1970s that the provinces aimed for a power grab from the federal government. By that he seemed to mean that the provinces wished to have sufficient taxing powers to pay for all of their constitutional responsibilities without interference from the federal government. This, many have argued, would weaken the federal government so much that it could not play its proper roles of maintaining national unity and protecting Canadians from American influence. No one, it should be clear, can protect us fully from American influence, judging by the inability of countries distant from the United States (Australia, for example) to resist. So the real issue is: Will national unity be helped or hindered by the federal government carrying out its own responsibilities and letting the provinces carry

out theirs? Why would one expect that sovereign governments ─ as the provinces are, at least in certain areas of jurisdiction ─ would be induced to support calls for national unity while witnessing federal intrusions in those jurisdictions central to their autonomy such as health and education in Quebec or natural resource rents in Alberta? To the extent that an Aboriginal Peoples Province is viewed as weakening the federal government, the issue cannot be divorced from the broader conceptions of federal-provincial relations that have been contending in this country for generations.

Let us leave aside, then, issues of paternalism and centralism as irrelevant or unresolvable in the short run. What are some other implications of the creation of Aboriginal Peoples Province?

Canada has always been proud of its image as a haven of freedom and dignity for immigrants and refugees. But it has sometimes appeared hypocritical about its treatment of Aboriginal people. Creation of an Aboriginal Peoples Province would almost certainly put Canada back into a leadership role in regard to Aboriginal peoples, oppressed peoples, and human rights generally. This may be especially urgent at a time when Canada claims to be linking its foreign aid to human rights improvements in target countries.

How would the new province affect existing provinces? Three areas should be mentioned: loss of land and other resources, fiscal arrangements, and dynamics of future constitutional changes.

The 2,000 or so existing reserves in the ten provinces do not belong to the provinces. The constitution gives the federal government exclusive jurisdiction over Indians and lands reserved for their use. Thus, to cobble them together and call them a province or third order would not automatically subtract any land or natural resources from existing provinces.[lvii] Of course, currently ongoing land claims will almost certainly result in land or resources being transferred to Aboriginal Peoples Province, but that would happen whether it was organized as a third order, as a province, or as band reserves. The concentration of land and resources in an Aboriginal Peoples Province might lead to greater success in ongoing or future land claims negotiations because of its greater visibility and powers.

The Crown, federal and provincial, holds title to vast areas. Some of these lands could be used to enhance the land base of Aboriginal Peoples Province, especially where bands have been forced onto extremely small or unproductive reserves. Since there are questions about whether

all of these Crown lands were actually ceded or sold to the Crown by Aboriginal nations, one might argue that a gesture of returning some areas to Aboriginal people could serve several useful purposes.[lviii] This would presumably be much more acceptable to non-Aboriginal people if residents of Aboriginal Peoples Province agreed to pay taxes to their province and to Canada as a whole, but legal and political obstacles may make that less likely, as I argue below.

Such a transfer of ownership would also have symbolic value. At present, the land is held by `the Crown in right of the federal government' or by `the Crown in right of the province'. To transfer ownership to `the Crown in right of Aboriginal Peoples Province' would be an equivalent status, and it would constitute a government-to-government relationship, which has been an objective of Aboriginal leaders for some time.

All provinces participate in fiscal arrangements such as equalization grants, either by being net donors or net recipients. Who falls into which category has varied over time, and thus it is hazardous to predict that Aboriginal Peoples Province would be a have-not province requiring major infusions of tax dollars skimmed off from wealthier provinces.[lix] At first, there would likely be such a net transfer because of the current lack of infrastructure (such as hospitals and airports) on many reserves. Given the compensation ─ in land, rents, or cash ─ that has characterized some land claim settlements (such as the James Bay Cree), one might anticipate that Aboriginal Peoples Province has a chance of being self-sustaining. More exactly, some parts of it would be relatively affluent, and therefore internal redistribution might be as extensive as any equalization grant. Even if grants are needed, one wonders whether they would greatly exceed the amounts regularly spent by the Department of Indian Affairs and Northern Development and other departments on Aboriginal people and their administration (currently in excess of $5 billion, or at least $5,000 for each potential resident of Aboriginal Peoples Province).

The dynamics of constitutional change, at least under current procedures, would almost certainly be changed by adding Aboriginal Peoples Province. An extra premier (or several) could bring new perspectives or new objections. Where unanimous agreement is mandated, change will generally be more difficult where more groups have a veto. But one must recall that Elijah Harper exercised what was, in effect, a veto regarding Meech Lake; and Aboriginal people were quite effective in 1981-82 in lobbying for changes in the Constitution Act, 1982. Hence, it might happen that their official representation could smooth the process rather than inhibit it, since

some of their grievances would have been met earlier in the negotiating process. The dynamics of the Oka crisis might have been quite different if the premier of an Aboriginal Peoples Province could have met with other first ministers.

Where unanimity is not necessary, the presence of Aboriginal Peoples Province should have only a small impact. Two-thirds of the provinces with, together, more than 50 per cent of the total Canadian population is the amending formula for most constitutional matters. Two-thirds of 11 is 7.33 or eight, which is slightly larger than two-thirds of ten, namely, seven provinces (actually 6.7). Since Aboriginal Peoples Province would be a medium-size province ─ with roughly 4 or 5 per cent of the population ─ it would not be decisive in the way Ontario or Quebec is, since at least one of the latter must support any amendment in order to achieve the 50 per cent rule. One could alternatively envision a third order as co-equal with the federal government and all the provinces, which would be a version of the veto situation above.

Each of the existing provinces would presumably become less diverse, socially and demographically, by the `removal' of Aboriginal people to their own province. The fact that a certain proportion of Aboriginal people would choose to live in provinces other than Aboriginal Peoples Province would not change the generality of this point. Hence, it might be easier for any given province to reach consensus on its own political or constitutional position under this proposed arrangement.

Under section 42(f) of the Constitution Act, 1982, the creation of new provinces must occur under the amending procedure specifying concurrence of seven provinces with at least 50 per cent of the population, plus the federal Parliament. Hence, this proposal would not require unanimity, as had been proposed in the Meech Lake Accord. This does not guarantee that approval would be easy, but at least the conditions are less stringent than they would have been if the Meech Lake Accord had been entrenched in the Constitution. Section 43 of the Constitution Act, 1982 outlines the procedure of constitutional amendment where "one or more, but not all, provinces" are affected. It stipulates that the federal Parliament and the legislature "of each province to which the amendment applies" must give consent. Since 43(a) refers to "any alteration to boundaries between provinces", does this mean that existing provinces have a veto over creation of Aboriginal Peoples Province? Without a Supreme Court interpretation of "boundaries" or other features of this section, one cannot be certain. Part of my emphasis on the non-territorial nature of the third order derives from a desire to avoid negotiating physical

borders of the new unit; but "boundaries" may be social, legal, or conceptual and not just physical. If this proved to be a serious obstacle, one might turn to another procedure that I will mention but not develop.

If one retreats from the strict concept of a province, then implementation of a third order might be achieved by other means. In particular, section 35 of the Constitution Act, 1982 offers the possibility of a treaty-based constitutional amendment. This might have the additional benefit that all Aboriginal groups would then have access to treaty status and its implicit nation-to-nation standing. Currently the distinction between treaty and non-treaty status causes some hard feelings and may prove important in certain types of court cases.[lx]

Violating Assumptions About Territoriality

At the beginning of this paper I outlined the major assumptions about territoriality. The reader will recall that these three assumptions involve exclusive control of territory, contiguous territory, and continuous territory. They have been, for good historical reasons, accepted so thoroughly that we are usually unaware that we take them for granted. But historical explanations may be set aside in order to focus on the fact that First Nations would not conform to these assumptions. If based on 2,000 or more reserves scattered among all ten provinces, the assumption of contiguity would clearly be violated. The patchwork quality of the reserves defies any simple description.

Exclusivity might also be violated if Aboriginal Peoples Province were created. Current reserves and some other land claims settlements include, besides the reserves proper, the right to use nearby land for certain purposes such as trapping, hunting, fishing, and gathering flora and fauna for ritual purposes. If those rights continued under this proposal ─ as one would expect, since they were strenuously sought and defended by Aboriginal people ─ then it would be correct to say that the residents of two or more provinces share certain territory, and not just in the vicarious sense in which all Canadians `share' the Rockies or Niagara Falls.

Perhaps the Parti Québécois intended to question the value of exclusive territory when it revised its policy on Aboriginal people in January 1991. After extensive debate about the interdependence of Aboriginal peoples' and Quebec's aspirations, the policy conference adopted as a goal the creation of "autonomous native nations within an independent Quebec".[lxi]

Rather than pursue the ways in which some of our customary assumptions would be

violated, let us ask whether those violations matter. Are there positive or negative consequences of this territorial peculiarity of Aboriginal Peoples Province? Let us consider first the possible negative implications. These can, for shorthand reference, be grouped under the label of inconveniences and diversity. By inconveniences, I mean that the distances among the parts of Aboriginal Peoples Province would be great, much greater than in any other province, and that one would have to cross at least one or several provinces to get to other parts of one's own province. So what? It takes two days to drive across Ontario; why should three days or four or five days matter in any critical sense? There are large parts of British Columbia and other provinces that cannot be reached at all by road. Surely distances are less important in the age of telecommunications and jet air travel than in earlier periods. (This is one of the historical explanations of the declining importance of territoriality to which I alluded above.) To me, a five-hour drive from Vancouver to Kelowna and a five-hour flight to Montreal are the same; both are equally distant physically.

If a third order were to encompass several provinces or equivalent units, the issue of distance within each unit might be thought to be less critical. This would, I believe, be misleading. For one thing, a Cree nation or nations (as one example of a type of sub-unit within the third order) would be widely spread across half the width of Canada. Second, and more important, all arrangements envisioned in a non-territorial framework will come up against off-reserve Aboriginal people, often in distant towns or cities. Thus, distance and extra-territoriality are inevitable features of any imaginable third order or province, with the implications for new conceptions of citizenship outlined in this paper.

Another inconvenience may seem more serious. Would there be any cities in Aboriginal Peoples Province? Although there are urban reserves (one of which owns much of the Vancouver harbour waterfront), there are no reserves that are themselves major urban centres. If one wants to retain a traditional lifestyle, this may be an advantage. Or perhaps cities will grow up in some of the larger reserves. Or perhaps we are incorrect in believing that cities are essential to all forms of civilized life. Or perhaps we have an overly narrow notion of civilized life.

Diversity is a potential negative. Aboriginal Peoples Province would consist of groups speaking several very different languages (although most Aboriginal people also know French or English) and enjoying distinct cultures with different social organizations. That, plus the distances from one part of the territory to others, might make political organization, election

campaigning, and administration cumbersome and expensive. Of course, administering the many bands and reserves through the Department of Indian Affairs and Northern Development is also cumbersome and expensive, and it has the decisive disadvantage of lacking self-government.

One way to accommodate such diversity would be to organize Aboriginal Peoples Province as a federation or confederation.[lxii] The 600 or so bands historically constituted about 40 or 50 nations. Perhaps each of these nations could be a partially self-governing unit within the province, electing members of the legislature and administering certain local services. Many existing provinces have regional as well as municipal units for administrative purposes, so perhaps diversity within Aboriginal Peoples Province could be respected with adjustments to existing sub-provincial models.[lxiii]

Without meaning to imply that the social, economic, linguistic, and other diversities would be easy to overcome, let me outline a few ways in which a non-territorial province could address some of these difficult issues. I can only mention education, health, and social services briefly at this point. A later section will examine health care in depth as an example of service delivery.

Education would be, as for all provinces, an exclusive jurisdiction for Aboriginal Peoples Province. Because of the great variety of languages, much decentralization of the delivery of educational services would be necessary. This is one reason I suggested that this province or third order have a federal structure. Of course, many materials could be distributed or broadcast from central locations, and some might involve facilities shared with contiguous provinces (for example, French language materials for some Aboriginal groups in Quebec).

Health care and social services might be handled in novel ways. Indeed, other provinces might be able to learn from experiments in Aboriginal Peoples Province. Take health care facilities first. Primary care would presumably be local and very similar to private and community health care centres in existing provinces. Where Aboriginal communities were small or isolated, they might share specialized facilities with the existing province in which they constituted a small island, such as in parts of B.C. or Alberta. The two provinces ─ let's say Aboriginal Peoples Province and B.C. ─ could share costs and benefits proportionally, keeping a record of usage by their official residents. Currently a resident of one province may use facilities in another province (whether a doctor, hospital, surgery, or whatever) and the cost will be billed back to the home province. It would, therefore, not be an insuperable obstacle to work out more

extensive arrangements for shared facilities.

Social services could, in principle, follow the model just outlined for health and hospitals. Some modifications might be necessary to reflect the fact that Aboriginal groups often want somewhat different types of services or styles of delivery. Of course, provinces already differ quite a bit in these ways, but Aboriginal Peoples Province (or units within it) might want or need radically different services or combinations of services.[lxiv] Besides the fact that this is clearly feasible ─ although requiring imaginative thinking ─ I would argue that we might find that existing provinces come to imitate some innovations pioneered in Aboriginal Peoples Province. One of the values of federal systems is tolerance for local experiments that may later (as with health care in Saskatchewan) be copied by other governments.

Let me reiterate that I do not have solutions to all problems, and many problems will prove vexing. What I wish to emphasize, on the other hand, is that current problems for Aboriginal people are already extremely vexing, and current solutions are not working. This proposed province or third order may not solve all the problems, but it offers some hope of dealing favourably with some of them. And it allows Aboriginal people to take charge of dealing with their own problems at last.

On the other side of the equation, diversity may have some advantages. Underlying the great diversity is an important unity: Aboriginal people would at last have a clear institutional voice instead of working through several organizations to try to influence ten provinces and the federal government. If an analogy is possible, one might contrast the relative security and self-confidence of the French in Quebec or New Brunswick compared to the small and isolated communities in many other parts of Canada.[lxv] Furthermore, one must concede that Aboriginal people have demonstrated considerable political skills in their fragmented situation up until now. Perhaps organizing and running a province would prove no more daunting a task.[lxvi]

The central questions regarding diversity are three. They should be noted, even though they cannot be answered here. First, would there be enough coherence within the new province or third order to support and sustain extensive redistribution of resources? After all, some bands or nations enjoy impressive resources while others live in the most abject poverty. Second, would some bands feel just as oppressed by the new province as they do now by Ottawa? Third, will Aboriginal women eventually be comfortable within Aboriginal Peoples Province? Spokeswomen have repeatedly expressed concern about their status if the Canadian Charter of

Rights and Freedoms does not apply fully.

One obstacle might involve the absence in traditional Aboriginal social organization of a concept of province-hood or even of a large, impersonal bureaucracy. That may be correct, but such concepts will inevitably take hold, whether Aboriginal people are organized as a province, as a nation, or other forms of self-government. Even the growth of national organizations such as the Assembly of First Nations or the Native Council of Canada involve developments beyond traditional political forms. Although not `command structures', they involve types of organizations not present, as far as we know, in the pre-contact period in northern parts of North America.

The violation of these territorial assumptions, I argue, could be beneficial for Canada. The creation of Aboriginal Peoples Province might have many positive consequences, as I mentioned above, but here I refer to the benefits of questioning territoriality as the fundamental basis of political organization. This questioning is an inevitable part of what is usually called the globalization of the world economy. Nations ─ even large and powerful ones like the United States ─ have less sovereignty, autonomy, or independence as markets become interdependent. Environmental issues, we are coming to understand, do not fit neatly within provincial, national, or even continental boundaries. In short, territoriality has less meaning as nations become less useful for some important human purposes. Thus, an Aboriginal province consisting of noncontiguous `islands' and non-exclusive use of territory could turn out to be the cutting edge of the twenty-first century's geopolitical and economic structures.

The forces constraining nations come from below or inside as well as from global and international challenges. As cities grow larger and provincial governments seem more remote, many people seek empowerment in local and regional affairs.[lxvii]

Furthermore, many of our most cherished loyalties and identities cannot easily be defined in territorial terms. Gender equity, professional and occupational ethics, constitutional rights and freedoms, and religious, leisure, and recreational activities are just a few of the growing number of aspects of people's lives that cannot be confined to a group in a single location. The affinity among Aboriginal groups across Canada (and indeed among Aboriginal peoples in Canada, the United States, Australia and elsewhere), which leads me to propose a province for them, cannot be satisfied by a traditional territorial identity.

Richard Falk has also presented a complementary case for non-territorial organizations.

He has urged the creation of "...cooperative ventures and voluntary associations linking indigenous peoples as a kind of transnational pressure group that is not a creature of governmental or intergovernmental activities. The focus on the rights of peoples as a new normative foundation for rights follows directly from this realization of the oppressiveness of a state system based on deference to territorial supremacy."[lxviii] He goes even further in stating that "...there needs to be an acceptance of some international personality for indigenous peoples...so that the resolution of conflicts between indigenous peoples and modern society is not totally subject to the institutions and criteria of modern society." (p. 608)

There are already concessions to the international personality of Canadian provinces, including trade missions, collaboration with the federal government on selecting and targeting immigrants, and Quebec's and New Brunswick's participation in La Francophonie (the French equivalent of the Commonwealth). Thus, I argue that Aboriginal Peoples Province should, as a province, have some responsibilities for external relations that go beyond those available to existing provinces.[lxix] This form of asymmetric federalism could be justified on the grounds of an inherent right to self-government, and it would apply also to other Aboriginal provinces such as Nunavut. One might usefully note that passports issued by Aboriginal nations are accepted as valid travel documents by some countries, especially in Europe. There is hence a good case for sanctioning Aboriginal Peoples Province to issue passports, although they might also indicate that they were valid as Canadian passports. Other provinces would, of course, expect the same jurisdiction, and that could be considered. Since Aboriginal Peoples Province would be the only province explicitly based on the inherent right to self-government, one could argue that other provinces have a lesser claim to their own passports.

It may seem ironic to many people that Aboriginal struggles for a land base, for land claims, and for a place to pursue their own customary lifestyles might result in a province or third order that challenges the importance of exclusive and contiguous territory. This attitude tells us something important about our own preconceptions and reminds us of an essential characteristic of most Aboriginal societies around the world. In their worldview, one does not own the land, one nurtures and uses the products of the land. By careful migration, by seasonal variations in use, by overlapping boundaries, most Aboriginal groups were tied to the land but not to one particular place that they alone used exclusively. Understanding the dangers of territoriality may help non-Aboriginal people live together more productively and less

antagonistically, and if so we will owe some thanks to Aboriginal peoples for making us face and question some assumptions no longer necessary.

But will it not be terribly confusing if boundaries overlap and many types of groups share a place? Think for a moment about how one's own town or city is organized. Some agencies and institutions co-exist in the same territory; for example, a school board and a parks board may coincide with the boundaries of a municipality. But there is no commonality of territory for others: telephone toll-free areas, hospital boards, water districts, hydroelectric power utility districts, air traffic control regions, and rapid transit systems. Each functional institution is designed to deal with a specific problem or issue, and thus each adopts a size of territory that seems appropriate to that issue. Why should one expect all problems to fit neatly within the same territorial boundaries?

Some people respond to this question by answering that these agencies do not relate to the same territory because, of course, they do not all answer to the same sovereign government. That begs the question. Why should we assume that sovereign governments must be all-purpose entities, dealing with all issues in regard to the same territorial base? It is arguable that the federal and provincial governments might perform better if they undertook fewer activities and instead allowed political units larger and smaller than them to handle some other problems. Perhaps the motto for the twenty-first century should be to do less but do it better.

Jurisdictions and Administration

One may distinguish between jurisdictions and administration. The former refers to topics, heads of power, content, or kinds of services delivered or rules imposed. The latter refers to how the delivery occurs, how policies or rules or incentives are managed. When one keeps separate the issues of what is delivered and how it is delivered, there is more scope for a refined analysis of both dimensions. It should be clear that `jurisdiction' in my usage refers to heads of power and not to a form of government.

Currently, most public administration texts (although not all) assume that nations, provinces, and most political units should be based on territoriality, as defined to include exclusive, continuous, and contiguous territory. When one examines what governments do, it is immediately clear that only a few topics of jurisdiction are inherently territorial. As technology has evolved, fewer jurisdictions have remained inherently territorial; and it may be that

eventually very few will be. Before placing too much faith in a non-territorial entity like Aboriginal Peoples Province, one must demonstrate that it can administer enough non-territorial jurisdictions to be a viable province or third order.

If territoriality involves exclusive control or use of territory that is continuous and contiguous, there are relatively few jurisdictions that are inherently and unequivocally territorial. Even if we relax these conditions slightly, to mean that proximity is the ultimate criterion, that is, a combination of contiguity and continuity, there are still a great many non-territorial jurisdictions. An incomplete list of inherently territorial jurisdictions includes primary health care (such as emergency wards and general or family physicians), mass transit, and daycare centres for children. One should note that defence and military matters may be set aside in this discussion as examples of federal jurisdiction of a territorial nature.

One thing each of these jurisdictions shares is that distance has negative consequences. If one is too far from primary health care, accidents or illnesses are more likely to be fatal. Mass transit works most effectively where everyone in an area shares the system, rather than having separate systems for different groups, as was the case for decades in South Africa with bus and train systems restricted to white or non-white. Daycare centres would serve little useful purpose for parents who had to drive hours to drop off and pick up their children.

Another example of a territorial jurisdiction will serve to make another kind of point. The provision of postal services could be set up in a non-territorial manner, but that would be enormously more expensive. For example, one could have separate systems for men and women, or one for businesses and another for residences. But both systems would have to cover the same territory and would thus duplicate basic overhead costs. Hence, it seems reasonable to state that postal services should be territorial. If we redefine postal service to mean messenger service, then it will not be inherently territorial, because electronic messages can be non-territorial. For example, academics have a different electronic mail system from doctors and hospitals, and most people in an area do not participate in such systems yet. With the penetration of telephones, fax, e-mail, and the like, postal services in the traditional sense (carrying hard copy) have had less and less to do with messages. The important conclusion is simple: technology can and does affect what counts as inherently territorial. As postal systems come to have less and less to do with messages, their remaining functions are almost totally territorial.

Some taxes seem to be territorial and others non-territorial, even though at present all

taxes are administered by territorial governments. Retail sales taxes and VAT (or GST) are currently territorial, although there are exceptions, which may grow in extent as technology changes. Income taxes, on the other hand, need not be territorial, or at least not to the same degree as retail taxes.

Retail sales taxes appear to be inherently territorial; that is, everyone in a particular area will be charged the same tax. Fairness as well as practicality may require that each customer in a store be charged the same tax, rather than a tax rate determined by their country or province of residence. But perhaps not, since in some jurisdictions today certain types of people are exempted; for example, clothing for children under a certain age or equipment for people with disabilities may be exempt from sales tax. Even now, when purchases are made by mail, certain kinds of taxes are not collected for residents of some places, either foreign or some provinces. Thus, as electronic shopping (for example, by use of TV catalogues) becomes more common, it may happen that VAT, GST, and retail sales taxes will be assessed according to place of residence rather than place of purchase. Such taxes would then be non-territorial in application even though territorial governments would still set the rates.

Income taxes have not been territorial for a long time, even though they too are administered by territorial governments. Although the basic rates apply to everyone who is resident in a territory, there are a great many non-territorial features. For one thing, official residence in a province or country does not entail physical presence; one may live away from home for extended periods and still maintain that home as official residence. Second, tax codes everywhere make distinctions of a non-territorial sort about tax rates, tax deductions, tax credits, exemptions, and surtaxes. For example, capital gains may be taxed at a different rate from salaries, wages, or dividends. Likewise, individuals incorporated as a business may be treated differently from salaried individuals. In some areas, income below a certain level attracts negative income tax. Almost everywhere, family structure affects tax rates by determining who counts as a spouse or a child eligible for deductions for dependents. In short, people pay income taxes only in small part because of territorial residence; they are treated as types of individuals at least as much as a territorial group.

Besides the jurisdictions mentioned as territorial, most of the remaining provincial jurisdictions are non-territorial either wholly or in large measure. Take education, for example, where neighbourhood schools are a clear example of territoriality based on proximity. There are

several non-territorial aspects, such as shared territory between public and private systems, between English and French systems in some provinces, and between private, secular, and Catholic schools in many areas. At more advanced levels ─ colleges and universities ─ students do not restrict their choices to the nearest school. Without modern telecommunications, distance education has still occurred; and with them, education by combination of post, television, fax, telephone, and electronic mail should be easier, cheaper, and more common.

Although primary health care needs to be localized, specialized care, hospitals, and high-tech equipment seem to be non-territorial. They serve needs beyond a locale, and they will be used only by certain types of individuals. Likewise, many social benefits are targeted to individuals with particular characteristics rather than to all people living in an area. For example, unemployment insurance, welfare assistance, low-income housing, and the former family allowance involved the identification of needs and services based on personal characteristics. Although they are all administered by regional offices of territorial governments, they are targeted to types of people rather than particular places.

We may conclude therefore that a non-territorial province or third order is not an oxymoron. There will be plenty of jurisdictions for Aboriginal Peoples Province to administer, just as there are for existing territorial provinces. Some very localized matters will also fit in easily, since the nature of Aboriginal Peoples Province consists of small communities, mainly on reserves but also in many towns and cities. There may be problems, such as schools conducted in Aboriginal languages, but those problems exist under present arrangements as well. By leaving such issues aside for now, I do not imply that they do not pose formidable challenges. Instead I assert that those challenges would exist under any system, and Aboriginal Peoples Province can handle many challenges at least as well as territorial provinces. One must also bear in mind that Aboriginal people themselves should be given the opportunity to address these issues, and Aboriginal Peoples Province seems to me to be a good framework for that goal.

Delivery of Services in Aboriginal Peoples Province

Some jurisdictions may have inherently territorial features that the hypothesized province must handle. By itself Aboriginal Peoples Province would do so inefficiently, but by sharing some services with territorial provinces, delivery should be at least as efficient as it is now in existing provinces. I will discuss collection of retail sales taxes and delivery of health care services as

representative examples of beneficial co-operation between provinces.

Taxation is even more vexatious in the context of Aboriginal people than for other Canadians. Some treaties exempted Indians from taxation, and the Indian Act exempted residents of reserves from taxation. Furthermore, the fiduciary responsibilities of the Crown in right of the federal government may preclude any tax revenue from Aboriginal people in an Aboriginal province or the third order. The issue of tax collection needs to be addressed, however, because it can take several forms that are completely independent of each other. For one, Aboriginal people may pay no taxes to Ottawa after a third order is established, because of the historical origins of the fiduciary relationship. Second, they may wish to pay taxes to themselves in an Aboriginal province or third order, as a symbol of citizenship or common sharing. Finally, Aboriginal people would presumably want to collect taxes from non-Aboriginal people shopping in the province or from non-residents who reside temporarily in the province. Since the second and third possibilities, at least, have some plausibility, it is necessary to say something about retail sales taxes.

One cannot easily discriminate at the cash register between people who live in different provinces, although I suggest one procedure below. Would this pose a problem in financing Aboriginal Peoples Province? In particular, would it be deprived of the revenues from such taxes? If so, this could be crippling, given the degree of dependence of nine of the existing provinces on sales tax‑all except Alberta. There are at least three major alternatives for dealing with this issue.

The first involves self-identification by customers in the retail outlet. One would charge a particular tax and remit it to Aboriginal Peoples Province for the customers who identify themselves as residents there, and all other tax from customers would go to the territorial province within which the retail outlet was located or, if on a reserve, the province `surrounding' the reserve. This procedure would be feasible but expensive for retailers to administer and almost prohibitive to police. It might also be time-consuming at the point of check-out. So let us consider two other procedures.

Second, one might designate each retail outlet as Aboriginal or not, depending on the official place of residence of the owner (if a local business) or manager (if a branch of a regional or national company). Aboriginal stores would remit tax to Aboriginal Peoples Province, while all others would do so to the territorial province `surrounding' the store. This method has the

merit of simplicity and low cost of administration. If it were felt, however, that one or the other of the provinces got an unfair share, then one could consider alternative number three.

Third, one could monitor the use of retail outlets by Aboriginal and non-Aboriginal people and then allocate tax revenues proportionally. In other words, one need not record every transaction (as in the first procedure above) but simply have spot-checks. These would be analogous to labour force surveys on unemployment, which are now done once a month on samples of people rather than on everyone. A combination of the second and third methods might be most reasonable: one would divide the tax revenues according to the residence of the owner (or manager) unless a survey indicated deviation from the norm beyond a certain margin.

The purpose of this extended example is twofold. I want to show, for one thing, that a non-territorial province could be funded by a reasonable mix of tax sources. These would obviously be supplemented as necessary by transfer payments collected and disbursed by the federal government, as occurs now among all provinces. But those transfers would be distorted if Aboriginal Peoples Province (or any other province) made no effort to collect its own taxes. Taxes are, after all, public goods; they require an enforcement mechanism to deter free-riders, whether individuals or provinces.

My second purpose in dwelling on sales tax ─ and another example in a later section ─ concerns the need for interprovincial co-operation. Instead of each province collecting and keeping its own sales tax revenues, these would be handled in a co-operative manner to ensure that neither territorial nor non-territorial provinces suffered. One might also perceive the issue from the residents' vantage point, since they would like to be assured that their taxes were destined for their province's treasury. There is already considerable co-operation of this type currently, and one should encourage rather than discourage it. For example, residents of a province travelling or residing temporarily in other provinces continue to pay income taxes and health insurance premiums to their province of residence, but all provinces reimburse each other for certain costs such as hospitalization, automobile accidents, and the like.

The Value of Shared Jurisdictions

A great deal of effort has been expended ─ by theorists as well as judges and politicians ─ in trying to clarify the division of powers in federal systems. After all, the reasoning goes, federalism was created to keep distinct national issues and matters of local concern. Therefore,

each order of government should have jurisdictions that are clearly delimited and defined. I propose to challenge this doctrine at least as regards joint delivery of some services by provinces.

It is easy to lose sight of the relatively novel division of jurisdictions in Canada. For good historical reasons, Canadian federalism has relied on lists of exclusive jurisdictions for federal and provincial governments, especially in sections 91 and 92 of the Constitution Act, 1867. That federalism may also be used as a vehicle to share powers follows from examining other federal systems. The United States and Australia, for example, allow relatively few exclusive jurisdictions and rely instead on mostly concurrent powers. I will explore in the next section a sweeping change in that direction for Canada. In that section, my focus will be on the merits of asymmetric federalism; in this section, I propose to focus on the value of co-operation for service delivery.

The first specific example analyzed in this section is the delivery of health and hospital services in the non-territorial Aboriginal Peoples Province. I have already stated that emergency wards and other primary health care seem to be inherently territorial in the sense that proximity must prevail or else more fatalities and greater suffering will occur because of the link between distance and time lapse.[lxx] For all other types of health and hospital care, contiguity may be convenient, but it is not essential. Non-routine check-ups, elective surgery, expensive diagnostic procedures, rarely used treatment facilities, and experimental programs should not be located in or near every neighbourhood or community, since the expense of doing so would take resources away from other governmental programs or from private disposable income. For ease of reference, I will refer to these latter types of services as secondary or specialized, to distinguish them from primary or all-purpose emergency services.

In the existing territorial provinces, allocation of secondary facilities and services among communities has been accepted from the beginning of the Canadian universal care system in the 1960s. Where a community cannot fully utilize a specialized facility, ambulance or air ambulance transportation becomes an extra service so that artificial or arbitrary barriers to use are minimized. In some cases, provincial health plans even pay for the procedure to be performed in other provinces, the United States, or elsewhere and for related travel costs. Since there is a central clearinghouse for payments, use anywhere in the system has the same effect; and thus where use should occur can be determined on the basis of efficiency, cost, and fairness rather than proximity.

As hypothesized, Aboriginal Peoples Province would consist of about 2,000 pockets of reserve land, varying in population from a handful to several thousand. In addition, most Aboriginal people live off-reserve, permanently or temporarily, and their numbers and demographic composition change frequently. Thus, one cannot realistically expect to set up the full range of secondary services in all locations, whether on-reserve or off-reserve. Some reserves will be too small, even if several are located near each other, and urban or other off-reserve sites would often duplicate existing specialized facilities run by territorial provinces.

As a result of these considerations, I propose that Aboriginal Peoples Province share its jurisdiction over health with the other territorial provinces, at least where reserves or groups of reserves may not allow sufficient population base for elaborate facilities. Sharing will mean several related aspects: sharing the use of facilities, sharing the cost of operating them, sharing capital costs, and sharing responsibility for quality and accountability. Some of these aspects are already shared among existing provinces, since federal co-ordination ensures that members of any provincial health plan can use facilities in the other provinces and have that use paid for by the home province. Capital and other costs are shared between federal and provincial governments, which follows logically from equalization grants and other transfer payments between have and have-not provinces. These would presumably continue but not be limited to transfers among territorial units alone.

The sharing would, on a practical level, be quite simple. Imagine a community in Aboriginal Peoples Province that is too small to justify a full-service hospital but is relatively near a town or city with an existing facility. The members of the band or reserve will have identity cards that entitle them to service, just as Canadians have now. When they make use of a service in a territorial province next to their homes, billing will occur ─ electronically if possible, by mail if not ─ so that the relevant province or order of government pays for the service. At regular intervals, the two provinces can determine proportions of use by residents of the two provinces ─ such as during a yearly audit ─ and therefore apportion the operating and capital costs for the next fiscal year accordingly. If all billing were handled electronically, as it surely will be in the future, such cost sharing could be done weekly, monthly, quarterly, or whatever. By the same token, accountability and responsibility would be transparent, and ministers of health in each province would be able to answer questions about usage, cost, efficiencies, and planning in the time frame defined by the audits or monitoring.

Note that the same exact sharing and accounting would also be feasible for off-reserve citizens of Aboriginal Peoples Province.[lxxi] Instead of a short trip from reserve to town, these people would travel from one part of a city to a nearby hospital of their choice (or their doctor's choice). Billing to Aboriginal Peoples Province would be automatic. Since income tax is, as we have seen, non-territorial, those citizens of Aboriginal Peoples Province who reside for extended periods off-reserve would (or at least could) declare their wish to be official residents of Aboriginal Peoples Province, in which case their income taxes (if there are any) would revert to that province. The territorial province would then reclaim a portion of revenue from the non-territorial province or the federal government to pay for the shared operating and capital costs. These procedures would require some legislative changes to take account of long-term physical residence without a change of official residence. There is, presumably, no reason why such changes could not apply among territorial provinces as well if that seemed to be preferred. Part of the value, I believe, in exploring these alternatives to territoriality concerns the potential benefits even where territorial provinces are retained. This could result in greater choice and flexibility for all citizens.

It is only fair to note that some services for urban Aboriginal people might not be susceptible to shared jurisdictions, even if many others would work well. For example, the Royal Commission on Aboriginal Peoples has heard testimony that Aboriginal people are discriminated against when referred to social service agencies run by non-Aboriginal people. This problem might have two sorts of solutions. One might use a rule about special services `where numbers warrant'; these would be warranted in all the major cities, since Aboriginal people number in the thousands in such centres. One could also insist that existing agencies be modified ─ after negotiations between Aboriginal Peoples Province and the territorial provinces ─ to hire Aboriginal staff, to train existing staff to be more culturally sensitive, and to open branches in areas with heavy Aboriginal concentrations.

The scale of sharing in the envisioned system would greatly exceed what now occurs as a result of tourism, business travel, and temporary residence in another province. As just suggested, however, the example of joint or shared jurisdiction and administration between Aboriginal Peoples Province and territorial provinces might have a demonstration effect. Then the territorial provinces might find it advantageous ─ either for cost reasons or to satisfy citizens with unusual living arrangements such as commuting couples who live or work in different

provinces ─ to share some or all of their health systems or other services.

These suggestions may not seem very radical, since they constitute incremental changes beyond current practice.[lxxii] By themselves they may not involve fundamentally different arrangements. But they represent a new and beneficial mind-set based on a habit of co-operation rather than conflict, sharing for mutual benefit of citizens rather than the zero-sum attitudes of "what you get, I lose." This orientation will become more visible and marked, the greater the number of shared jurisdictions. Besides health, territorial provinces might share with Aboriginal Peoples Province many other jurisdictions, including highways construction and maintenance, firefighting, secondary and post-secondary education, tax collection and auditing staffs, environmental regulation, licensing of private businesses, and many others. Some jurisdictions might never be shared, since most Aboriginal communities seem to place great emphasis on their own police and administration of justice.[lxxiii] Leaving aside such jurisdictions, one might ask whether some of the territorial provinces might benefit from joint jurisdiction in some of these areas. This already occurs in the Maritime region to a limited extent, but more of it might be helpful.

Differences and Equality

At the beginning, I identified two types of problems ─ service delivery as a practical challenge and whether `positive' discrimination in service delivery might lead to `negative' discrimination. The previous sections have outlined feasible solutions to service delivery in a non-territorial province and `extra-territorially'. The procedures would ensure delivery to meet the needs of Aboriginal peoples by giving them a government that has financial resources to pay for dedicated or shared services. Some procedures involve doing what is now done but in a slightly different way, while others may be innovative and even of interest to territorial governments. Now it is time to turn our attention to issues of discrimination.

To discriminate usually means to treat a group badly compared to fellow citizens, but it can also mean affirmative action or (neutrally) separate categories that receive different but equal treatment. A century of discrimination against Afro-Americans in the South was justified under the slogan, "Separate but equal." Hence, most residents of North America shy away from that and equally loaded phrases such as `distinct society', `special status' and `asymmetric federalism'.[lxxiv] While recognizing that abuses can and do occur, I want to argue that we should

not reject the labels out of hand. I shall endeavour to show that Canadians have discriminated but maintained equal treatment for decades and in some respects since Confederation. One way to think of how to reconcile pertinent differences with equality involves fitting the solution to the particularities of a problem rather than to the average of several problems.[lxxv] Another way, of course, is to entrench in the Charter ─ after a broad consensus develops ─ those categories or cleavages deemed acceptable for positive discrimination or for rectification of former negative discrimination. Section 15 of the Charter lists most of the features where consensus has existed up to now and permits the judiciary to define others by rules of analogy.

In this section, therefore, I want to demonstrate that particularistic treatment of provinces and their jurisdictions has paralleled equality in important respects. In the next section, I will turn to some specific concerns of a non-territorial province or third order for Aboriginal people.

The faith in exclusive jurisdictions for federal and provincial governments has proved groundless.[lxxvi] Except for a few cases, such as currency and military defence, none of the jurisdictions have remained exclusive in practice. In some cases, deceptive terminology disguises overlap; for example, exclusive provincial jurisdiction over education but federal jurisdiction over training. In other cases, courts have delineated `aspects' of the same jurisdictions; for example, different aspects of banking or insurance or trade. In three cases, concurrent jurisdictions have been entrenched in the Constitution Acts ─ immigration and agriculture with federal paramountcy and old age pensions with provincial paramountcy.

It is time, I believe, to recognize that all orders of government in Canada have legitimate interests in many, if not most, jurisdictions now considered exclusive to one or the other. In proposing that most jurisdictions become concurrent among all three orders of government, I want to emphasize that my motives go beyond facilitating a third order for Aboriginal people. I believe that the benefits of concurrency would accrue to all of the governments in Canada and would enhance the operation of particular jurisdictions. If Canadians prove reluctant to create concurrent jurisdictions across the board, there would still be value in increasing their number, and especially where the third order's jurisdictions are concerned. These jurisdictions should become concurrent with paramountcy by one or the other order of government. Usually paramountcy can be decided in the first instance on the basis of which domain currently has exclusive jurisdiction in the relevant sections of the Constitution Acts. By this I mean that where section 91 entrenches federal jurisdiction, it would have paramountcy, and where section 92

entrenches provincial jurisdiction, the provinces and the third order would have paramountcy. Deviations from that rule would be negotiated. As a result, one would deal with several issues now causing difficulties. One could reduce the amount of litigation over which order of government has jurisdiction, thereby saving money on court costs and, even more important, reducing delays in implementing programs. One might also foster an attitude of co-operation and responsibility, as argued in the previous section. This would be a welcome change, from the perspective of citizens at least, in avoiding the now common efforts to protect one's turf and avoid responsibility for contentious issues.

The largest single benefit of shared jurisdictions, in my estimation, would be the entrenchment of a flexible form of asymmetric federalism. This type of federalism has usually been resisted for three reasons, none of which I accept as reasonable. The first has been an assumption that it runs counter to the equality of the provinces. The concept of equality has several meanings ─ equal legal standing, fair treatment, uniformity, homogeneity, reciprocity, and equal opportunity, among others. One should note that the provinces have equal standing in most respects ─ in constitutional revisions, in the right to attend first minister's conferences, in reference cases, and a host of other matters. They also vary enormously in treatment: number of senators (some are parts of regions, other constitute a whole region), equalization grants, transfer payments, deviations from proportional representation in the House of Commons (small provinces are overrepresented, large ones are underrepresented), provisions regarding terms of entry into Confederation, provisions regarding the status of Catholic or dissentient schools and of the two official languages, and many others. There is no homogeneity or uniformity, and thus legal equality rather than these types of equality should be our focus. If all were to share jurisdictions legally, equality would be preserved.

The second objection revolves around the role of members of Parliament. If a province has jurisdiction over some matters that other provinces have left to the federal government, then MPs from the former province, it is alleged, should not vote on those matters since that federal legislation would not affect their province.[lxxvii] Concurrent jurisdictions clearly do not raise this issue, or otherwise one would have heard concerns about the three concurrent jurisdictions now shared or about problems in other federations where concurrent jurisdictions predominate. They also fail to raise the issue because exercise of a head of power is totally voluntary and can be taken up or put aside as need be, whether under the present examples of concurrent jurisdiction

or any further instances. Thus, no MPs would have to abstain on any issues before Parliament, and one would not need elaborate procedures for determining who was allowed to vote on which bills or amendments. Differential treatment of provinces in a particular piece of legislation has never up to now disqualified some MPs from voting on any bill, such as unemployment insurance, fisheries, regional economic stimulus, the Quebec pension plan, or transfer payments ─ all of which differ enormously in intent and in impact on different provinces or regions within provinces. Urban MPs vote on farm subsidies and rural MPs on urban facilities such as airports, ports, and convention centres.

The final objection concerns `special status', and especially its entrenchment in the Constitution. When entrenched, it cannot change in response to unforeseen circumstances. The most common example hypothesizes that Quebec might someday be notably less French, and thus not deserve special powers to protect its `Frenchness'. Leaving aside the fact that no projection of current trends has envisioned French becoming a minority language in Quebec in a century or more, one should note that, once concurrent jurisdictions were established, the current proposal would require no constitutional change to reflect changing circumstances. If Quebec decided that French could not or need not be protected, it could simply cease to exercise the powers available to it, or would exercise them less vigorously. Likewise with federal policies and legislation on bilingualism.

Let us put aside these objections and focus on how concurrent jurisdictions would work in practice. Then we can assess their value in asymmetric federalism. The simplest description of what would occur in the immediate future might be that Quebec and British Columbia would occupy most heads of jurisdiction, Alberta and Ontario almost as many, and the less affluent provinces fewer of them. Furthermore, what each province chose to do in any given concurrent jurisdiction would be, to a greater or lesser degree, different from activities in that jurisdiction undertaken by the other provinces. In other words, provincial experimentation would occur, and sometimes other provinces or the federal government would emulate the program. Sometimes, unique local needs would engender programs in one or more provinces that were of no interest to the rest of the provinces. Federal programs in areas of concurrent jurisdiction might also be quite different in each province or region, as they often are now in areas of exclusive jurisdiction. All of this variety should be judged by its value in reaching the stated objectives; it should not be sought for its own sake or condemned simply because it occurs. Variety does not in itself weaken

Canada, despite what some advocates of federal power claim.

Consider one further likely consequence of concurrent jurisdictions. At present most governments feel obliged to occupy their jurisdictions in order to head off potential encroachments by the other order of government. "Use it or lose it" seems to cover many situations. If the Constitution made plain that each order could move in or out of a domain without risking a battle, retaliation, or loss of standing, concerns might be lessened and tempers might subside. If these speculations proved correct, then each order of government could rationally consider as a course of action the option of doing less but doing it better. One might see, thereby, a variety of mixes of public and private administration in different places or orders of government.[lxxviii] Some mixtures might prove less costly or more effective or more popular, and thus other governments might learn from them.

But some critics will assert that this recommendation is purely academic. No political leader would wish to share jurisdictions. Of course, one may point to other federal systems where shared jurisdictions are much more common, such as Australia and the United States. Even in Canada, there has from time to time been considerable enthusiasm for concurrent jurisdictions, and that is why I have proposed it here. The fact that the most recent advocacy of these ideas came from Quebec ─ and in particular the Allaire report in 1991[lxxix] ─ has meant that most observers reacted negatively, fearing that otherwise they would be labelled separatists or seen as weakening the federal government or appear to be giving in to Quebec. Regardless of the source and regardless of the motives of the Allaire Committee, these innovative ideas deserve evaluation in their own right.

There have always been many ways in which the provinces have been different or unique. Size, affluence, mix of economic activities, ethnic origins of population, proportion of Aboriginal people, types of natural resources, and climate constitute only a few of these dimensions. If one were to allow each province to choose the jurisdictions it deemed most important to its well-being ─ even if some chose to let the federal government exercise them on its behalf as currently happens in many cases ─ the asymmetry would be one more way in which federalism tried to balance local and national interests. If one went one step further, one could imagine a different pattern of public and private means of service delivery in each province. If the third order were itself a confederation, that would be a further source of asymmetry. Finally, the ultimate asymmetry would involve creating one or more non-territorial provinces where those

could more adequately answer the needs of groups long neglected in the politics of territorial provinces.

Exit, Voice, and Loyalty

If one accepts the argument of the previous section, differences recognized as significant to one or more groups in the country may be reconciled with formal equality. Many Canadians have apparently not agreed with this conclusion, judging by the strenuous opposition to Quebec's demand for designation as a distinct society. Some opponents of a third order of government and of the inherent right to self-government for Aboriginal people probably share the same concerns, although Aboriginal opposition may have a different basis. Proponents of a Triple-E Senate, on the other hand, unwittingly support my conclusion to the degree that they try to justify equal representation of provinces by reference to the inability of small provinces (i.e., all but Quebec and Ontario) to secure the policies they need against the nearly two-thirds majority of the two large provinces.

Accepting that difference and equality are compatible, let us examine some potential consequences of asymmetric federalism and special status for Aboriginal Peoples Province or other non-territorial provinces. The first approach will examine responses to the existence of differences between regions, especially between territorial provinces; and the second will broaden that inquiry to differences between neighbours (individuals or families) who live near each other but in different provinces, one territorial and the other non-territorial.

The first approach has often focused on the notwithstanding clause (section 33) of the Charter. In 1981, opposition to it centred on the notion of checkerboard rights: some people would have more rights than others depending on the province in which they lived.[lxxx] The concern about this result was lessened by placing a five-year time limit on each use of section 33. Hence, voters in the relevant jurisdiction would have a chance to vote out the party that made use of the clause, or to affirm its acceptability by re-electing them. Although the section has not been used often (only twice really, leaving aside pro forma uses by the Parti Québécois in the early 1980s), the concern with uneven rights across the country has, if anything, grown stronger, judging by the opinions voiced by many groups and some first ministers during the Charlottetown process in 1992.

The logic of this concern about checkerboards, if pushed to its limit, leads to the

conclusion that provinces or other sub-national governments should not exist or should be nothing more than the administrative arms of the central government. That conclusion is clearly nonsense. There are two reasons for a federal system: to achieve a degree of unity instead of many independent political systems, and to avoid too much unity. Some might agree as far as policies or programs but argue that `rights' must be absolute and universal. This response fails to solve the dilemma because there is no definitive boundary between programs and rights. For example, is abortion a right or an aspect of health policy? It probably involves both. Is the presence in one's hometown of a heart transplant team a right, or can one have a policy that forces some people but not all to travel some distance to receive the service? If absolutely no variations are acceptable in anything people cherish, then there can be less justification for federalism, for provinces, for responsiveness to local concerns, for minority ways of life that are sheltered from majority rule.

Hence, we have accepted for over a century that the package, bundle, or basket of policies and services in each province will be somewhat different than in the others. Of course, one reason that situation is acceptable concerns the limited range of variation we believe will in fact occur and the existence of boundaries set by equalization payments, federal jurisdictions, and the Charter, among other checks on local experiments.[lxxxi] If people around you in this province share your situation, you will be less likely to feel aggrieved that other people far away have a different basket of services. If those distant comparisons bother you enough, you have a constitutional right to migrate to the other province. This option of `exit' is the ultimate right in regard to some aspects of one's life chances.[lxxxii]

The second approach to issues of difference and equality concerns neighbours. With the creation of Aboriginal Peoples Province as a third order of government, its nature as non-territorial entails that at least some people will live next door or just down the street or road from each other and yet will live in different provinces.[lxxxiii] Hence, `discrimination' in the sense of a different bundle of services or opportunities or even rights will be that much more visible. How can we justify this kind of discrimination in pursuit of dignity and self-government for Aboriginals? More poignantly, how do we justify it without also encouraging or warranting less benign forms of discrimination?

Let us admit up front that one can never eliminate all attempts at discrimination. If we could, we would have less need of politics, constitutions, or charters of rights and freedoms.

Having a province with impressive jurisdictions has not kept French speakers in Quebec from believing that the English majority, outside of Quebec, has, in subtle ways, undermined their way of life. Nor has it forestalled Alberta's concerns about the security of its oil and gas reserves as a provincial rather than a national resource. Some degree of tension, conflict, and misunderstanding will remain even if we all have the best of intentions.

The issue may be framed, therefore, not as how to eliminate discrimination but how to ensure that when it occurs someone has the power to bring it to the attention of the public. Recourse to the courts to clarify or enforce Charter rights is an important way of dealing with alleged discriminations. Having a provincial government that answers to a majority who share a way of life is another important safeguard. That is why I have urged that Aboriginal Peoples Province be established as a province or several provinces with all the powers and prerogatives of a province (even if it ends up being called a third order). This would be a formidable province since there are approximately a million Aboriginal people in Canada; Aboriginal Peoples Province might thus be larger than Saskatchewan, Manitoba, or any of the four Atlantic provinces.

Provincial governments with significant minorities of Aboriginals resident among their citizens have not so far proven reliable as guardians of Aboriginal interests. Some, like Ontario in recent years, have been relatively open to Aboriginal needs, but most have behaved more like opponents than allies.[lxxxiv] Thus, an Aboriginal province ─ even if open to migration in and out ─ will have a government composed wholly or mostly of Aboriginal people[lxxxv] and concerned to gain election or re-election by attending to the specific needs of Aboriginal individuals and communities wherever they may be.[lxxxvi]

One must be on guard against a double bind for the third order. Only if this political unit has mostly Aboriginal citizens will it have the legitimacy to speak on their behalf. If it is mainly Aboriginal in composition, however, some observers will discount its legitimacy on the grounds of racism or single-interest politics. Thus, its demographic profile could be used to strengthen or weaken its ability to speak on behalf of Aboriginal peoples. By a similar logic, Quebec's majority French population makes it one of the natural vehicles to defend the French fact while also making it possible for some non-Quebecers to dismiss Quebec's stance as self-serving.

The issue of neighbours being jealous of the mix of policies and rights that they see Aboriginal people enjoying should cause no more problems than federal policies do now. After

all, the Aboriginal people in urban centres and those living on the reserves next door to non-Aboriginal settlements are there right now. Creation of Aboriginal Peoples Province may increase the visibility of some policies because its government will enact legislation reported in the news media. Likewise, if residents of territorial provinces pressure their governments to give them some services they notice are available to their Aboriginal neighbours, that is how democracy works. If these non-Aboriginal citizens or provinces seek to penalize Aboriginal people rather than to benefit themselves, the provincial government of Aboriginal Peoples Province may take up the matter with other provincial governments on a government-to-government basis. That has so far been effective in many areas for most Canadians except Aboriginal people, so one may realistically hope that it would prove effective for Aboriginal people as well.

Feeling that someone in authority will take your concerns seriously should encourage a feeling of empowerment. This has often been referred to as `voice', as in expressions like `having your say' and `voicing your demands', If voice does not work, exit is an option whether from territorial or non-territorial provinces. Knowing that one can leave if one is not listened to often leads to better listening. The combination of exit and voice options should lead to a sense of `loyalty' or security, of being able to work the system to one's advantage.[lxxxvii] That at least has been an essential component of theories of democracy: consent freely given to a government responsive to one's needs and way of life may be withdrawn, and if enough people withdraw their consent, the government's mandate ends. Thus, we see again why it is so important that Aboriginal citizenship rest not just on entrenched rights but on the existence of one or more governments whose legitimacy depends on an Aboriginal majority.

The issue of discrimination may arise in a totally different context, one for which I can offer no easy solution. There is a strong possibility that some Aboriginal people will want to discriminate against other Aboriginal people. For example, testimony at hearings of the Commission included the following comment and others like it: "...does `we' mean Aboriginal urban people collectively or does it mean urban status people, urban treaty Indians, urban Métis, urban non-status Indians or urban Inuit peoples separately?"[lxxxviii] I have also alluded above to the need for some Aboriginal groups to help other groups because of the current ─ and perhaps long-term ─ disparities in resources.

One response to these issues involves the responsibility of the government of Aboriginal

Peoples Province for decisions about how services should be targeted in urban centres. Another would involve a debate before setting up the province so that potential residents would know whether they might get what they want. A third option would require an Aboriginal Charter to spell out the ways in which the government should aim to balance preservation of the language and culture of each nation and equal sharing of facilities and services. Finally, one might want to consider whether urban Aboriginal people (off-reserve) should have their own self-government rather than the extra-territoriality I recommend. This has implications for the nature of the third order, since it would entail sub-units (confederation) or several provinces for Aboriginal people. All of these possibilities have their strengths, and none is a perfect solution. It is not my place to dictate the procedures to be used. That is a challenge for the citizens of Aboriginal Peoples Province. The choice they make on this issue will have ramifications for what citizenship means in the new province. However, even in the absence of answers to these uncertainties, one may spell out some implications for citizenship in a non-territorial province or third order. After that, I turn to a list of recommendations that also may help to summarize some of the key arguments of this paper.

Avoiding All-or-Nothing Thinking

Why choose among possibilities if you do not have to do so? Why not combine elements of several institutions, procedures, experiences, or possibilities? Why think only of this or that when one might have some of this and some of that? Politics is, of all endeavours, the one most committed to resolving tensions among alternatives without rejecting any of them completely. That sets it off in important ways from military, bureaucratic, or certain economic approaches.

In the present context, these political dilemmas involve citizenship and the institutional forms that express it and undergird it. Should we allow Aboriginal citizenship, or should everyone be a Canadian? Should Aboriginal citizenship `within Canada' reflect the form of a province or take the form of a third order `equal' to the federal government and the ten existing provinces? I hope that by this point readers are not surprised to find that I reject these all-or-nothing choices, these forms of dichotomous thinking. In certain contexts, such as a meeting in Ottawa, I feel myself to be primarily a British Columbian, whereas when abroad I more often identify myself as Canadian. Both are relevant, and neither eclipses the other. Of course, I am equally a professor (and other things) depending on the situation.

I hinted near the beginning of this paper that Aboriginal Peoples Province might not really turn out to be a province, but that one can learn a great deal about setting up a governmental order for Aboriginal people by working through a provincial model. The name or label we agree on has some value, because it has contextual meanings for us as Canadians of whatever specific type. We should, however, be cautious about letting the name or label convey too much information. The reader will recall that use of the concept `province' has led to several insights in this paper that are not commonly understood or accepted by many Canadians. For example, it reminds us that these are sovereign bodies, at least within areas listed in section 92 of the Constitution Act, 1867. Also, that they need not be territorial just because they have been so up to now. Further, provinces do not all equally share the same features, although they are all equal in some ways. Thus, equality and asymmetry are not completely contrary concepts, even though many Canadians perceive them to be antithetical.

Some (perhaps most) readers will detect a tension between a political unit sometimes called a province but sometimes called a third order. If it is a province, it must be inferior to a third order since the latter would be co-equal to the entire provincial order (of ten territorial units). If it is a third order, it cannot be a province. This is a perspective that has its own logic, and I do not deny that. However, my perspective has a logic of its own too, and mine cannot be ruled out of consideration just because many commentators have taken for granted a contrary view. I do not feel the tension between a province and a third order. Or more precisely, I believe this is a political tension rather than a theoretical problem. I have argued that there are many forms or aspects of asymmetrical federalism, and I think Canada could be stronger if there were more of them. Once one grants that `federal order', `provincial order', and `third order' have some features in common and that they lie at various points on a continuum, one need not base one's conclusions on dichotomous or all-or-nothing thinking. If people feel a tension between an Aboriginal third order and the provincial model from which it has been derived here, that poses a political challenge to make that tension acceptable or less relevant rather than to remove it completely.

A similar point needs emphasis in regard to citizenship. Most citizens and most informed observers apparently assume that there is only one kind of citizenship, that which is grounded in a territorial nation-state. They thereby effectively rely on dichotomous thinking: if granted by anything else, it is not citizenship but merely membership in an association or category. I have

argued, to the contrary, that the weakening of national sovereignty or autonomy and associated degrees of loyalty and identity has been paralleled by increasingly powerful bases of identity with and loyalty to sub-national and transnational groups or entities. As a consequence, the line between citizenship and these other memberships has been blurred; many forms of citizenship may co-exist, and they may be conceptualized along a continuum rather than as discrete points or contrary elements.

My perspective is grounded in the belief that humans construct most of their environment through long-term social processes, most of which are not controlled in a conscious way. Although there may be things that are `natural', they are few in number compared to the concepts, norms, institutions, and groups that we construct. What we mean by `family', `law', `nation', `state', and `sovereignty' differs greatly from what our ancestors meant, and by the same token `citizenship' is a concept and legal status constructed over time, evolved and evolving, and almost certain to change in the future.[lxxxix] When we reflect on the types of political entities and associated citizenships we wish to create or construct, we are of course acutely conscious that these creations are not `natural'. Too many people have concluded, therefore, that they have a lesser status than the `natural' patterns we live in as a society, because these people have never known how or when our environment was created or slowly constructed.

Although `constructedness' and `deconstruction' are concepts more familiar to academics than to the general public, their relevance has very wide applicability. Let me close this section and the paper with a couple of illustrations of these points about constructedness. First, ask yourself to whom I might refer when I used concepts like `self-government' or `self-selection' in regard to Aboriginal Peoples Province and its residents. For some Canadians-probably the vast majority-`self' means `an autonomous individual' with certain moral or legal rights. And thus self-government and self-selection imply that a bunch of legally autonomous individuals, acting as individuals, choose to do something. This is the `modern' conception of the individual, or the `liberal individualist'. As a concept and as a lived reality, it stands in marked contrast to earlier notions-which are still lived realities for many people today, even in Canada-where rights derive from membership in a community. In medieval Europe, the relevant communities included cities, religious orders, and local feudalities. Where some of these medieval institutional outgrowths survived as political forms-especially in the British Parliament-we now think of them as modern

undergirdings of democratic government.

Second, there are quite different ways to ground or secure individual identities. In the liberal individualist tradition (`modernity'), most people find it natural to assert and maintain their individuality against the groups or communities thought to be pressing for uniformity or assimilation. Hence the extraordinary emphasis on individual rights as `trumps' to override group, national, or governmental demands. Before the construction of liberal individualism-and co-existing with it even today-is an alternative grounding that sees individual identity as the product of a community or context of many such communities. Even if a particular individual may feel confined by a community context, this perspective asserts that the sense of confinement is one side of a coin whose other side consists of the community support for its members or citizens.[xc] Of course, one must acknowledge that `confinement' or `support' involves a continuum, not all points on which are equally positive or beneficial in all cases; but one can also acknowledge that liberal individualists often feel alienated, anomic, isolated, and at the mercy of broad societal forces beyond their understanding or control. The issue here is not who is right, but what can we learn from these different perspectives?

To return to citizenship, let me note that this paper has focused on territoriality as a conceptual and practical hindrance to the analysis of citizenship in Canada, especially but not exclusively for Aboriginal people. European traditions of territoriality are very recent in origin-roughly three to five centuries ago-and they are almost wholly unique to Europe, although European conquest, conversion, and settlement have made some of these features commonplace in other societies. As I emphasized at the beginning of this paper, I dwell on the historical origins and constructed nature of nation-states, territoriality, and citizenship to demonstrate their grounding in very specific circumstances. I believe those circumstances are evolving, and the concepts are thereby less relevant, even in the core areas where they first arose; but even if they were not already changing, to recognize their contextual limits should help Canadians to see that choices exist, that societies may construct, deconstruct, and reconstruct their institutions and identities-not with absolute freedom, and not on a whim, but deliberately upon reflection. Failing to do so deliberately will result in evolution in ways less conscious and less under our control.

Finally, I must remind readers that these comments and proposals are not intended for the sole benefit of Aboriginal people in Canada, although they deserve as much as any carefully considered and imaginatively constructed political units within Canada. Recall that my advocacy

of greatly increased numbers of concurrent jurisdictions was occasioned by the need to assure the right mix of powers for Aboriginal Peoples Province, but that I asserted its relevance for existing provinces-most notably Quebec. By the same token, I believe that if Canadians broaden the concept of citizenship to accommodate Aboriginal people as "citizens plus", they will learn something about Canadian citizenship, will loosen the constraints around it, and may thereby hasten the evolution to more encompassing and satisfying citizenships for all Canadians. If in the end we discover that different Canadians seem to have different types of citizenships-or different combinations of citizenships-one hopes that will reflect an outcome in which each group gets the combination most suited to its wishes or needs.

Recommendations

This paper has been motivated by a concern about the ways in which thinking about any topic can become hostage to habit. Even (maybe particularly) for experts on a topic, assumptions and frameworks can be taken for granted, and fresh approaches may not be evaluated because they are not even considered. Thus, I have endeavoured to question presuppositions and to offer a framework of analysis that steps outside our customary views of Canada and of possible vehicles for Aboriginal self-government. The purpose of such reconsiderations ultimately aims at a richer conception of Aboriginal citizenship and, with any luck, a more meaningful Canadian citizenship as well. The following recommendations, therefore, remind the reader of challenges to existing concepts or preconceptions, and they may be less useful as hard-and-fast policy prescriptions.

1. Before anything else, one must recognize that public opinion and government policies have already changed in important ways that open up new possibilities that were politically unfeasible even a few years ago.
2. Federalism still provides a useful framework, and more so than consociationalism or corporatism, because of the peculiarly Canadian historical evolution of provincial powers; both orders of government (federal and provincial) are sovereign within their heads of jurisdiction.
3. Although a third order of government should be the goal for Aboriginal people in Canada, much can be learned from a provincial model, since we understand provinces through long historical experience. This is especially true when we recall that provinces have significant domains of sovereignty and have evolved a great deal since

Confederation and even in recent years.

4. In assessing a provincial model for a third order of government, one must grapple with the undeniable fact that this political unit will be non-territorial in several senses. Much of the paper has therefore dwelt on how one can administer programs and deliver services non-territorially and extra-territorially.
5. Assumptions about the importance of exclusive, contiguous, and continuous territory have come under question after about three centuries of unquestioned hegemony. This profound challenge to the system of territorial nation-states will probably allow greater scope for traditional Aboriginal concepts of land use, governance, and culture. Not all traditional customs have survived or can be reconstructed, but wherever possible, they should be taken into account.
6. Aboriginal people should decide for themselves what form of self-government is best without presuming that Canadian (or `European') assumptions will provide the framework; for example, a different balance between individual and collective rights should be possible.
7. Aboriginal people should decide for themselves who is or will be an Aboriginal person, just as Canadians have been able to decide who is or will be a Canadian.
8. An Aboriginal Charter of Rights and Freedoms should be drafted and approved by Aboriginal people; until agreement on the new Charter, the Canadian Charter of Rights and Freedoms (as limited by its own section 25) should continue to apply, as should section 33.
9. The portability of treaty rights should be encouraged, facilitated, and respected.
10. In negotiating a set of powers or jurisdictions for the third order, one should endeavour to reconsider the way Canadians have traditionally done this. In particular, the Commission should question the value of efforts to delineate exclusive powers for each order of government and consider the usefulness of increasing the number of concurrent powers, even if some units (such as the less affluent existing provinces) may not choose to exercise many of the newly available powers.
11. Finally, and perhaps the central premise of this paper, one should question whether rights entrenched in the Constitution provide a substantial basis for Aboriginal citizenship; instead Aboriginal citizenship should be an integral part of one or more governments

(with substantial and appropriate powers) whose legitimacy rests on an Aboriginal majority. Aboriginal in this instance, as well as in recommendations 6 and 7 above, should be understood as a complex mix of features, as the Royal Commission has already asserted, and not as a purely or primarily racial or genetic category.

Notes

i Alan Cairns, S.H. Jamieson, and K. Lysyk, A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies, ed. H.B. Hawthorn (Ottawa: Queen's Printer, 1966). Part 1, p. 13 seems to be the first use of this phrase.

This is one of the themes I explore in my book, Beyond Sovereignty: Territory and Political Economy in the Twenty-First Century (Toronto: University of Toronto Press, forthcoming, 1995).

iii Perry Anderson, Lineages of the Absolutist State (London: Verso, 1979).

iv Simon Schama, Citizens: A Chronicle of the French Revolution (New York: Alfred A. Knopf, 1989).

v Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad, or the Law of International Claims (N.Y.: Bank Law Publishing, 1916).

vi David J. Elkins, "Canada in the Twenty-First Century", Australian-Canadian Studies 8/2 (1991), 3-15.

Borchard, The Diplomatic Protection of Citizens Abroad, and George Armstrong Kelly, "Who Needs a Theory of Citizenship?" Daedalus 108 (Fall 1979), 21-36.

viii Albert Weale, "Citizenship Beyond Borders", and Geraint Perry, "Conclusion: Paths to Citizenship", in The Frontiers of Citizenship, ed. Ursula Vogel and Michael Moran (London: Macmillan, 1991).

ix Michael Ignatieff, "The Myth of Citizenship", Queen's Quarterly 94 (Winter 1987), 966-985.

x See David J. Elkins and Richard Simeon, Small Worlds: Provinces and Parties in Canadian Political Life (Toronto: Methuen, 1980), especially chapter 1; and Richard Vernon, "The Federal Citizen", in Perspectives on Canadian Federalism, ed. R.D. Olling and M.W. Westmacott (Scarborough: Prentice-Hall Canada, 1988), 3-15.

xi Engin Isin, Cities Without Citizens: The Modernity of the City as a Corporation (Montreal: Black Rose Books, 1992).

xii Borchard, The Diplomatic Protection of Citizens Abroad.

xiii Sparrow v. R. (1990), 70 D.L.R. 385 (S.C.C.) and A.G. Quebec v. Sioui (1990) 1 S.C.R. 1025, seem to address the issue of `portability' of treaty rights, a serious concern to urban Aboriginal people as well as those like Sparrow and Sioui. As Groves has argued ("Territoriality and Aboriginal Self-Determination: Options for Legal Pluralism in Canada", in Proceedings of the VIth International Symposium of the Commission on Folk Law and Legal Pluralism, ed. Harold Finkler [Ottawa, August 14-18, 1990 and February 1991]), these cases may point the way to a definition of citizenship in Aboriginal Peoples Province according to treaty rights and Aboriginal rights rather than by residence or by band membership. (p. 239)

xiv Alan Cairns, Charter versus Federalism: The Dilemmas of Constitutional Reform (Montreal and Kingston: McGill-Queen's University Press, 1992).

"Drawing on the rhetoric of human rights, citizen groups have sought to employ...a popularized language of citizen rights which demands active government intervention and state-directed social engineering as the means of securing the promises of human rights." Alan Cairns and Cynthia Williams, "Constitutionalism, Citizenship and Society in Canada: An Overview", in Constitutionalism, Citizenship and Society in Canada, ed. Alan Cairns and Cynthia Williams, vol. 33 of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), p. 32.

xvi This is the central argument of my book, Beyond Sovereignty. The book examines a host of forces, trends, institutions, and identities contributing to the greater salience of sub-national and transnational communities. Thus, the present discussion is a particular version of a global phenomenon.

xvii Section 25 reads in part, "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada...".

xviii Alan Cairns has argued that the Charter has become more and more central to the political identities of most Canadians, and thus they will be reluctant to exempt Aboriginal people from its application. See, for example, "Citizenship and the New Constitutional Order", Canadian Parliamentary Review (Autumn 1992), 2-6.

xix The Supreme Court may eventually have to enunciate how the plain language of section 25 (quoted above) can be reconciled with the apparently absolute exemption of women's equality rights from all Charter restrictions. Section 28 reads, "Notwithstanding

anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." The former appears to shield Aboriginal people from some Charter provisions, whereas the latter seems to state unequivocally that it overrides any exemption explicit in section 25. Of course, the issue for the courts to resolve is even more complex in light of section 35(4): "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons", a provision added to the Charter in 1983.

[xx] David J. Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness", Canadian Journal of Political Science 22 (December 1989), 699-716.

[xxi] See the interesting analysis in Luke McNamara, "Aboriginal Self-Government and Justice Reform in Canada: The Impact of the Charter of Rights and Freedoms," Australian-Canadian Studies 11 (1993), 43-75.

[xxii] Charles Lindblom, Politics and Markets: The World's Political-Economic Systems (N.Y.: Basic Books, 1977).

[xxiii] Elkins, Beyond Sovereignty.

[xxiv] Pierre Elliott Trudeau, Federalism and the French Canadians (Toronto: Macmillan of Canada, 1968), p. 183: "It was not the population who decided by what states they would be governed; it was the states which, by wars (but not `people's wars'), by alliances, by dynastic arrangements, by marriages, by inheritance, and by chance, determined the area of territory over which they would govern. And for that reason they could be called territorial states...".

[xxv] For contrary arguments, some implicit and some explicit, concerning Aboriginal sovereignty, see Richard H. Bartlett, "Inherent Aboriginal Sovereignty in Canada and Australia", Australian-Canadian Studies 11 (1993), 1-16; and David H. Getches, "Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations' Self-Government", Review of Constitutional Studies I (1993), 120-170.

[xxvi] The Judicial Committee of the Privy Council in London ruled repeatedly that the Canadian provinces are as sovereign within their heads of jurisdiction as the federal government is within its heads of jurisdiction. Many critics of this conclusion have alleged that the Committee erred in its reasoning. Whatever one's view of the acumen of their Lordships, the decisions stand as definitive statements of Canadian jurisprudence. The classic review of this debate is Alan Cairns, "The Judicial Committee and Its Critics", Canadian Journal of Political Science 4 (September 1971), 301-45. See also W.R. Lederman, Continuing Canadian Constitutional Dilemmas (Toronto: Butterworths, 1981), chapter 15.

[xxvii] Several popular books document the radically different ways in which Aboriginal groups conceptualize territory. Consult especially Hugh Brody, Maps and Dreams (Vancouver: Douglas & McIntyre, 1981) and Bruce Chatwin, The Songlines (N.Y.: Elisabeth Sifton Books—Viking, 1987). Both books are especially revealing because they show how dreams and songs can be used to navigate over known or unknown or changing terrain.

[xxviii] Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism, revised edition (London: Verso, 1991).

[xxix] Royal Commission on Aboriginal Peoples, Aboriginal Peoples in Urban Centres (Ottawa: Supply and Services Canada, 1993).

[xxx] Although there are some reserves in urban areas, `urban Aboriginal people' generally refers not to those groups but to Aboriginal people who are living off-reserve or who have no reserve.

[xxxi] Bruce Clark, Native Liberty, Crown Sovereignty: The Existing Aboriginal Right to Self-Government in Canada (Montreal and Kingston: McGill-Queen's University Press, 1990).

[xxxii] Jerry Mander, In the Absence of the Sacred: The Failure of Technology and the Survival of the Indian Nations (San Francisco: Sierra Club Books, 1991).

[xxxiii] For example, the James Bay Cree in northern Quebec have use of land well beyond the lands under their direct control. Likewise, the new territory of Nunavut makes a similar distinction. Some recent Supreme Court decisions have validated the Aboriginal right to fish in waters that are not part of the reserves.

[xxxiv] Brody, Maps and Dreams.

[xxxv] Aboriginal Peoples in Urban Centres, pp. 5, 31, 59.

[xxxvi] Section 35(2) of the Constitution Act, 1982 defines Aboriginal as including the Indian, Inuit, and Métis peoples of Canada.

xxxvii Douglas Sanders ("The Renewal of Indian Special Status", in Equality Rights and the Canadian Charter of Rights and Freedoms, ed. A. Bayefsky and Mary Eberts [Toronto: Carswell, 1985]) could be read as arguing that `Indians' might be a distinct category from Métis or Inuit; but he does not argue that each nation is distinct or entitled to `special status'.

xxxviii Some of the testimony cited in Aboriginal Peoples in Urban Centres (e.g., p. 57) states or implies that Aboriginal is too broad and largely empty of meaning. Nevertheless, no one seems to argue explicitly for territorial models. See also Robert Groves, "Territoriality and Aboriginal Self-Determination", who demonstrates the tensions between territorial (band council) and non-territorial (kinship and traditional political organization) criteria for membership or citizenship.

xxxix John George Lambton, Earl of Durham, Lord Durham's Report: An Abridgement of the Report on the Affairs of British North America, ed. Gerald M. Craig (Toronto: McClelland and Stewart, 1963); and Garth Stevenson, Unfulfilled Vision: Canadian Federalism and National Unity (Toronto: Macmillan of Canada, 1979), chapter 2.

xl The clearest statement of this logic may be found in the Tremblay Report: "Only one thing could quiet their fears but could not, however, fully reassure them, and that was the prospect of a provincial state whose government it would control by its votes and to which could be entrusted the guardianship of its ethnic, religious and cultural interests." The Tremblay Report: Report of the Royal Commission of Inquiry on Constitutional Problems, ed. David Kwavnick (Toronto: McClelland and Stewart, 1973), p. 110.

xli A.I. Silver, The French-Canadian Idea of Confederation, 1864-1900 (Toronto: University of Toronto Press, 1982).

xlii David J. Elkins, "Where Should the Majority Rule? Reflections on Non-Territorial Provinces and Other Constitutional Proposals", Points of View No. 1 (Edmonton: Centre for Constitutional Studies, 1992).

xliii For more on the francophone province, see Elkins, "Where Should the Majority Rule?".

xliv See also David J. Elkins, "Aboriginals and the Future of Canada," in Aboriginal Governments and Power Sharing in Canada, ed. Douglas Brown (Kingston: Institute of Intergovernmental Relations, 1992).

xlv The Northwest Territories will be divided into two areas, one of which (Nunavut) will have an overwhelming Inuit majority. If it achieves provincehood, it would be, in effect, the second Aboriginal province. Of course, even if the Yukon or the other part of N.W.T. were to become a province, it would certainly be heavily influenced, as now, by Aboriginal concerns.

xlvi Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution (Ottawa: Canada Communication Group-Publishing, 1993), p.30.

xlvii For further discussion, see Elkins, "Where Should the Majority Rule?".

xlviii Groves, "Territoriality and Aboriginal Self-Determination".

xlix An appropriate analogy or set of precedents might be the control of French schools in Ontario or of English schools in Quebec. In the former case, the minority seeks protection through exclusive control of schools and school boards; and in the latter case, the majority (French) wishes to restrict access to English schools in order to preserve and promote its distinct society.

l Under other circumstances, I would prefer names like First Nations or First Peoples, since these emphasize the priority and status of the groups. These names have been partially appropriated by status or treaty Indians, and thus they may convey an impression that some Aboriginal people would be excluded or second-class citizens. Aboriginal Peoples Province should be general enough to encompass all Aboriginal people. However, the issue for me revolves around the power, authority, and autonomy of this political unit; the name is important only if it distracts the reader from the central concern. In the end, Aboriginal people within the unit will determine their own name.

li Aboriginal Peoples in Urban Centres, and Groves, "Territoriality and Aboriginal Self-Determination", p. 226.

lii This is emphasized in Aboriginal Peoples in Urban Centres, especially p. 6, as quoted.

liii Aboriginal Peoples in Urban Centres, p. 56, notes that many Aboriginal people pay municipal taxes without receiving any services designed for their needs or concerns.

liv This would also result, presumably, in changes to the current situation where provincial laws of general application apply on the reserves. As a province, Aboriginal Peoples Province would have its own laws. For a description of the current applicability of some provincial laws, see Douglas Sanders, "The Application of Provincial Laws", in Aboriginal Peoples and the Law, ed. Brad Morse (Ottawa: Carleton University Press, 1989).

lv Until the relevant sections of the Indian Act are repealed or amended, Indians on reserves are exempt from many forms of taxation. See Richard H. Bartlett, "Taxation" (pp. 591ff) in Morse, ed., Aboriginal Peoples and the Law. Since I have assumed that the Indian

Act would be revoked if Aboriginal Peoples Province were created, it would follow that its residents might become subject to taxation. I return to this issue below.

[lvi] Notice the use of the concept of `community self-government' by Aboriginal groups. Although this is equivalent to local government in some people's understanding, it can be quite different. One way it may differ from local government is in its power and jurisdictions, and another is that communities need not be local or territorial.

[lvii] Noel Lyon, "Constitutional Issues in Native Law", in Morse, ed., Aboriginal Peoples and the Law, pp. 448-450, argued that some lands (but not all) ceded by Indians to the Crown generate revenue (e.g., from timber) for a province rather than for the federal government. If so, the statement in the text would need qualification, although Lyon seems to say that most such ceded lands do not generate provincial revenues.

[lviii] Clark, Native Liberty, Crown Sovereignty.

[lix] See the extensive discussion of fiscal and equalization issues involved in a province for Aboriginal peoples in Thomas J. Courchene and Lisa M. Powell, A First Nations Province (Kingston: Institute of Intergovernmental Relations, 1992).

[lx] Menno Boldt has indeed argued that a treaty process should be the primary focus for Aboriginal people seeking the maximum autonomy and self-government. He provides some very interesting arguments against the use of Canadian courts and constitutional amendments. See Surviving as Indians: The Challenge of Self-Government (Toronto: University of Toronto Press, 1993).

[lxi] This policy appears to move in the direction that has been standard in the United States since the 1820s and 1830s. At that time, a series of Supreme Court decisions written by Marshall established the Indian tribes as "domestic, dependent nations". See Bruce H. Wildsmith, "Pre-Confederation Treaties", in Morse, ed., Aboriginal Peoples and the Law (esp. pp. 131-43).

[lxii] Some experts on federalism draw a sharp distinction between federal and confederal arrangements, while others do not believe the distinction is tenable in practice even if precise in theory. Since I fall into the latter group, I generally use `federal' and do not use `confederal'. In the present discussion, however, I should emphasize that I would expect a loose or decentralized federal structure within an Aboriginal third order, and thus something that might be labelled confederal by some.

[lxiii] Indeed, local and regional governments are highly varied even within any given province. British Columbia, for example, has cities, municipalities, resort municipalities, and unincorporated areas, as well as special purpose bodies such as regional districts, fire districts, and water districts.

[lxiv] Aboriginal Peoples in Urban Centres, pp. 16, 43.

[lxv] The analogy is developed further in Elkins, "Where Should the Majority Rule?".

[lxvi] One way of dealing with the diversity inherent in Aboriginal Peoples Province would be through political parties. We usually think of parties in electoral terms, but they are also ways of organizing ideologies, of expressing regional grievances, and of integrating minority and majority groups. As with my other suggestions, I repeat that no single solution will handle all problems, but there are many vehicles to consider and many institutional forms compatible with provincial status.

[lxvii] See the extensive discussion in Jane Jacobs, Cities and the Wealth of Nations: Principles of Economic Life (N.Y.: Random House, 1984).

[lxviii] Richard Falk, "The Rights of Peoples (in Particular Indigenous Peoples)", in The Rights of Peoples, ed. James Crawford (Oxford: Clarendon Press, 1988), p. 589.

[lxix] Sanders, "The Renewal of Indian Special Status", may be read to support this conclusion, since special status derives in this case from treaty rights and other government-to-government transactions in the past.

[lxx] By focusing on these types of health care facilities, I do not imply that traditional healing methods would not occur on the reserves or in the larger urban centres. If these methods were brought under coverage by provincial government health plans, as Aboriginal Peoples Province might choose to do, they could be paid according to the procedures in the text.

[lxxi] This would also apply to hiring elders as consultants on `wellness' or to traditional healing methods generally. In such cases, territorial provinces would probably insist that Aboriginal Peoples Province pay the marginal cost, or else it could be paid by the federal government under its fiduciary responsibilities.

[lxxii] Getches, "Negotiated Sovereignty", demonstrates that Indian tribes, state governments, and the United States government have been able to negotiate agreements about sharing services and costs, about jurisdiction of justice systems, about sharing land and water regulation, and other matters great and small. What is proposed here would begin such a process in Canada.

lxxiii Aboriginal Peoples in Urban Centres, p. 43, contains testimony suggesting that daycare for children may be a special concern at least in urban areas. McNamara, "Aboriginal Self-Government and Justice Reform in Canada", raises a number of pertinent concerns about the nature of distinct justice systems for Aboriginal communities, whether urban or rural.

lxxiv Despite that reluctance, public policy in Canada has in effect recognized that Indians have special status, as Sanders shows in "The Renewal of Indian Special Status".

lxxv For imaginative examples from various parts of the world, see Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (Cambridge: Cambridge University Press, 1990).

lxxvi Lederman, Continuing Canadian Constitutional Dilemmas.

lxxvii Former prime minister Pierre Trudeau has consistently put forward this view for decades. See his discussion in Federalism and the French Canadians, p. xxv, among other references.

lxxviii Ostrom, Governing the Commons, is one of the most thorough presentations of why different mixes best serve different situations.

lxxix Parti Libéral du Québec, Un Québec libre de ses choix: Rapport du Comité constitutionnel, presented to the 25th general convention, 28 January 1991.

lxxx Roy Romanow, John Whyte, and Howard Leeson, Canada...Notwithstanding: The Making of the Constitution 1976-1982 (Toronto: Carswell/Methuen, 1984), especially chapter 8. Compare the cautious remarks in McNamara, "Aboriginal Self-Government and Justice Reform in Canada".

lxxxi For evidence about the remarkable degree of convergence around certain practices, especially after the expansion of federal transfer payments, see Elkins and Simeon, Small Worlds.

lxxxii The original and seminal presentation is Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (Cambridge: Harvard University Press, 1970).

lxxxiii Of course, there are `neighbours' in different territorial provinces, such as Lloydminster (Alberta and Saskatchewan) and Ottawa-Hull (Ontario and Quebec).

lxxxiv Although not a province, the Yukon has also been relatively receptive to Aboriginal concerns. Of course, so has the Northwest Territories, but there one finds an Aboriginal majority. The point in the text concerns the attitudes of governments that respond to non-Aboriginal majorities.

lxxxv Dilys R. Leman, "Reclaiming Control of Citizenship: First Nations and the Development of Membership Codes" unpublished paper, Department of Geography, Carleton University, June 1991, reviews the many and conflicting bases for membership in Aboriginal nations. It will apparently always be difficult to decide who is or is not an Aboriginal person. Of course, this is also true (for somewhat different reasons) for ethnic groups in the wider Canadian society. In the end, multiple criteria may be needed.

lxxxvi This is, of course, one of the main motives for the creation of Nunavut.

lxxxvii Hirschman, Exit, Voice, and Loyalty.

lxxxviii Aboriginal Peoples in Urban Centres, p. 57.

lxxxix Anderson, Imagined Communities, demonstrates how nationalism developed in a few places, spread to many more places, and stimulated governments to create or make manifest `the nation' that that nationalism posited. School texts and the media then rendered the process of construction invisible by emphasizing the latent or actual existence of the nation's roots in a distant past or mythology. Many other examples could be given, but they are not central to this report.

xc Of many sources that expound this perspective, the most relevant is perhaps Charles Taylor, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism, ed. Guy Laforest (Montreal and Kingston: McGill-Queen's Press, 1993). One of the merits of Taylor's analysis of Quebec (and Aboriginal people) compared to the `English' parts of Canada concerns what he calls "deep diversity". Instead of a simple or surface diversity-such as variations in lifestyle among ethnic groups in English Canada-he focuses on a deeper variation. The "deep diversity" he describes is similar to the cleavage I describe in the text between different concepts of the individual, different groundings of identity, and more generally different relations between collectivity and the individual person. Although I do not agree with the sharpness of the line he draws between mediated and unmediated links of individual to the state, the point at issue here concerns the almost complete lack of awareness among the majority of Canadians that there may be differences of the sort Taylor and I describe. For those who know Taylor's work, let me just characterize in an oversimplified way the divergent emphases in our approaches to citizenship. He sees Quebecers and Aboriginal people as having Canadian citizenship

indirectly through the collectivities central to their identities (la nation québécoise and Aboriginal nations or communities). By contrast, I am trying to redefine citizenship in such a way that most Canadians would have more than one avenue or link to citizen-status; but whatever the number, many different combinations would be legitimate, valued, and overlapping. Why choose if one does not have to do so?