INDIGENOUS SELF-DETERMINATION

INDIGENOUS SELF-DETERMINATION

IN

CANADA AND AUSTRALIA

By

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ABSTRACT

The purpose of this thesis is to explore the concept of indigenous self-determination as it is being developed and put into practice by the indigenous peoples and governments of Canada and Australia. Based on a critical comparative analysis of the four most recent and innovative indigenous self-determination initiatives of Canada and Australia – the dismantling of the Department of Indian Affairs and Northern Development (DIAND) initiative and the creation of the Territory and Government of Nunavut in Canada, and the Aboriginal and Torres Strait Islander Commission (ATSIC) initiative and the development of responsible territorial government for Torres Strait in Australia – the central argument of this thesis is that Canada and Australia's unique socio-political contexts (defined by indigenous and non-indigenous histories, institutions and cultures) determine how indigenous self-determination is defined, pursued and given a meaning in practice by indigenous peoples and government in the two countries.

This thesis concludes that the socio-political context of Canada has permitted a more broadly based and notably more extensive definition, pursuit and meaning in practice of indigenous self-determination than permitted by the socio-political context of Australia. In Canada, self-determination is directed toward the attainment of self-government with indigenous peoples largely directing the process and non-indigenous peoples generally supportive of this pursuit. In Australia, the pursuit of self-determination is directed towards the attainment of self-management with

Commonwealth and State governments largely directing the process and non-indigenous Australians generally opposed to this pursuit.

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It is good to have an end
to journey towards
but it is the journey that
matters in the end.

Ursula Le Guin

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INTRODUCTION

Introduced in international law following World War II to facilitate the decolonization of distinct peoples living under imperial rule, the concept of self-determination has been appropriated by indigenous peoples of Australia since at least the 1970s and applied to their 'internal decolonization' pursuits. Internal decolonization is the term given to indigenous peoples' pursuit of some degree of political, economic and/or social autonomy from the descendents of European settlers who now constitute the dominant societies in their homelands. Internal decolonization is necessarily a very distinct process of decolonization because the basic pattern of previous decolonization – withdrawal of the dominating society – in the case of colonized indigenous peoples is not possible. Instead, "the changes resulting from this process of decolonization must make it possible for the decolonized and former colonizers not only to share the same territory but to share membership in a common political community."[1] Internal decolonization is therefore a unique process with no comparable historical precedent. Although indigenous peoples have appropriated the concept of self-determination and applied it to their pursuit of internal decolonization for at least three decades, there exists no universally accepted definition of indigenous self-determination, no coherent process for its attainment, and no precise meaning in practice for its realization. The purpose of this thesis is to explore the

[1] Peter Russell, "Aboriginal Nationalism – Prospects for Decolonization", Hugo Wolfsohn Memorial Lecture, Melbourne University, 31 October, 1996, p. 1.

concept of indigenous self-determination as it is being developed and put into practice by the indigenous peoples and governments of Canada and Australia.

According to international law, self-determination is recognized as an inherent collective right of distinct peoples. Article 1 of the International Covenant on Civil and Political Rights (ICCPR), states:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developments."[2]

A fundamental question, however, is, 'do indigenous peoples have the requisite status to make the claim to the right to self-determination as it is understood in international law?' That is, 'do they constitute distinct peoples for the purposes of international law and Article 1 of the ICCPR?' In Canada, indigenous peoples are recognized as distinct peoples in the *Royal Proclamation Act, 1763*[3], and the *Constitution Act, 1982* (sections 25 and 35). Using this domestic recognition of their status as peoples, the indigenous peoples of Canada have been able to justify their claim to self-determination, as it is understood in international law. The result is:

- the definition of indigenous self-determination as an inherent right of indigenous peoples to control those political, economic, social and cultural issues of interest to them and to choose their own destiny without external compulsion is increasingly accepted domestically;
- the pursuit of indigenous self-determination via self-government by both indigenous peoples and governments is accepted; and,
- a meaning in practice for indigenous self-determination that conceptually extends as far as indigenous governments constituting as a distinct order of government in Canada.

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[2] Australia, Aboriginal and Torres Strait Islander Commission, First Report 1993 (Canberra: Australian Government Publishing Service, 1993), p. 41.

[3] And arguably in the treaties which arose out of the *Royal Proclamation*.

In Australia, by contrast, there is no historic or current recognition of indigenous peoples as distinct peoples for the purposes of international law. Accordingly, indigenous self-determination is not considered a matter of right in Australia.[4] Without domestic recognition of their status as peoples, the indigenous peoples of Australia have not been able to justify their claim to self-determination, as it is understood in international law. This result is:

- the domestically contested definition of indigenous self-determination as an essentially limited privilege of decision-making, defined and extended to indigenous peoples by governments;
- the pursuit of indigenous self-determination via self-management by indigenous peoples and governments; and,
- a meaning in practice for indigenous self-determination that extends only as far as the devolution of administrative responsibilities to indigenous peoples over programs and policies created outside of the indigenous community.

Because indigenous self-determination is applied to the unique pursuit of internal decolonization, a second fundamental question is, 'how can indigenous self-determination be achieved?' As the indigenous peoples and governments have been struggling to find an answer to this question, indigenous self-determination has become an important political issue in both countries. Although the concept of indigenous self-determination is not new in either country, over at least the past three decades it has advanced from the abstract world of academic contemplation and inquiry into the real world of mainstream political debate and policy making. As indigenous peoples in both countries have become more organized and more politically active, and as the international community has become more interested and involved in indigenous affairs,

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[4] First Report 1993, p. 42.

the governments of Canada and Australia have felt increasing pressure to respond to indigenous peoples' growing demands for self-determination. The result has been a myriad of self-determination initiatives in Canada and Australia over the past three decades.

Indigenous self-determination initiatives are important for several reasons. First, they have all been a result of government policy. Whether government directed or directed by indigenous peoples, the government has had the final say in how, where and to what extent they have been developed and/or implemented. They can therefore be understood as either politically 'safe' policies that the respective government has thought feasible within its own mandate/agenda, or possibly as the minimum form of action acceptable to (or thought to be possible by) the indigenous peoples pressuring the government for positive action and change. Second, whether these initiatives have the purpose of negating the need for more broadly based indigenous self-determination, or of setting the foundation for some future system is an important inquiry that must be made. Third, the success or failure of these initiatives as evaluated by indigenous peoples, non-indigenous people and governments may have important consequences for the future of indigenous self-determination in a given country and the form(s) it can or cannot be reasonably expected to take.

Based on a critical comparative analysis of the four most recent and innovative indigenous self-determination initiatives of Canada and Australia – the dismantling of the Department of Indian Affairs and Northern Development (DIAND) initiative and the creation of the Territory and Government of Nunavut in Canada, and the Aboriginal and

Torres Strait Islander Commission (ATSIC) initiative and the development of responsible territorial government for Torres Strait in Australia - the central argument of my thesis is that Canada and Australia's unique socio-political contexts determine how indigenous self-determination is defined, pursued and given a meaning in practice by indigenous peoples and governments in the two countries. My conclusion is that the socio-political context (defined by indigenous and non-indigenous histories, institutions and cultures) of Canada has permitted a more broadly based and notably more extensive definition, pursuit and meaning in practice of indigenous self-determination than permitted by the socio-political context of Australia. As the dismantling of DIAND initiative and the creation of the Territory and Government of Nunavut illustrate, indigenous self-determination in Canada is currently directed towards the attainment of *indigenous self-government*, with indigenous peoples largely directing the process via government-to-government negotiation and non-indigenous Canadians generally supportive of the pursuit. In Australia, by contrast, indigenous self-determination is currently directed towards the attainment of *indigenous self-management*, with Commonwealth and State governments largely directing its pursuit through the selective devolution of administrative responsibilities, and non-indigenous Australians generally opposed to the pursuit.

The goal of my thesis is to provide a comparative analysis of indigenous self-determination in Canada and Australia through a discussion of the terms of debate in each country and the four most recent and most innovative indigenous self-determination initiatives that have arisen out of them. This comparative analysis will highlight not only

the diverse pursuits of indigenous self-determination evident in Canada and Australia, but also the inherent tensions between indigenous and non-indigenous norms, values, perceptions, world views and cultures that permeate this policy area. My thesis is not prescriptive. Indigenous self-determination cannot be given one 'best' definition or encompassed in one 'best' practice. It is rather an umbrella concept through which indigenous peoples themselves can develop their own 'best' definitions and pursuits specific to the interests of their communities and according to their unique socio-political circumstances. Instead of offering a prescription, I aim to add to the growing literature on indigenous self-determination that serves to facilitate the dialogue between indigenous peoples and nation-states in their struggle to develop new relationships for mutual future benefits.

My thesis is informed by research gathered from diverse secondary sources written by indigenous and non-indigenous political scientists, anthropologists, and historians on the topics of indigenous self-determination, native title, indigenous-state relations and indigenous/non-indigenous histories, institutions and cultures in the pre- and post-colonial eras of Canada and Australia. Nine weeks of intensive field research in Sydney, Canberra, Melbourne, Alice Springs and Darwin, Australia (May to July 1997), and two weeks of field research in Winnipeg, Canada (November 1997) also inform this thesis. My field work in Canada and Australia permitted me to gain a deeper and more current understanding of the past and present circumstances of the indigenous peoples of Canada and Australia. It also permitted me to expand my knowledge of Canada's and Australia's past and present treatment of indigenous peoples, their conceptualization of

indigenous issues, and their current self-determination initiatives. These two field excursions also enabled me to expand my secondary source research (particularly on the topics of: my four case studies, the indigenous peoples of Canada and Australia, indigenous cultures, and non-indigenous perception of indigenous peoples) and to include sources not previously known to myself and/or not readily accessible. My thesis is also informed by numerous interviews with Canadian and Australian academics, government agents and indigenous leaders. These interviews added to my secondary source research for this thesis and have permitted me to present a more comprehensive understanding and current analysis of indigenous self-determination generally, and my four chosen case studies specifically, than would have been possible through reliance on secondary sources alone.

Indigenous self-determination, although mediated by governments, is essentially a pursuit(s) of indigenous peoples. For this reason my thesis commences with a general introduction to the indigenous peoples of Canada and Australia. Chapter 1 begins with indigenous and non-indigenous portraits of the indigenous peoples of Canada and Australia from time immemorial to the point of contact with European newcomers. It proceeds with an account of the impact that European contact had on the indigenous peoples of Canada and Australia and their communities. It then concludes with a brief portrait of the indigenous peoples of Canada and Australia today. Its purpose is to introduce the reader to the indigenous peoples of Canada and Australia, to demonstrate the magnitude of change that European arrival and occupation precipitated for the indigenous peoples, and to present the almost unanimous indigenous position that

indigenous self-determination can play a role in restoring the political, economic, social, and spiritual health of indigenous peoples and their communities.

Chapter 2 follows with a general introduction to the indigenous and non-indigenous histories, institutions and cultures of Canada and Australia as they relate to and have an impact on indigenous self-determination. It begins with an account of Canada and Australia's history of relations between indigenous peoples and European newcomers, including indigenous peoples concerted efforts to assert their sovereignty from the time of first contact to the present day. It continues with an overview of the institutions and cultures of Canada and Australia's indigenous peoples that embodied (and still embody today) the mores and values of indigenous peoples and structure(d) their societies. These institutions and cultures are then contrasted with those of the new European arrivals and their descendents which have been used to gain control over the lives of indigenous peoples and ensure the perpetuation of European based mores and values. Its purpose is to demonstrate that the different indigenous and non-indigenous histories, institutions and cultures of Canada and Australia have served to promote distinct perceptions and treatments of indigenous peoples by non-indigenous Canadians/Australians and their governments. It is this chapter that defines the socio-political contexts of Canada and Australia within which the four indigenous self-determination initiatives discussed in Chapters 3 and 4 are situated and through which self-determination in each case is defined, pursued and given a meaning in practice.

Chapter 3 develops the argument that the unique socio-political contexts of Canada and Australia give a different definition, pursuit and meaning in practice to

indigenous self-determination in the two countries. More specifically, it argues that the distinct pursuits of indigenous self-determination via self-government in Canada and via self-management in Australia emerge from each country's unique historical patterns of institutional relationships between indigenous peoples and government. A comparison of the dismantling of DIAND initiative and the creation of ATSIC is presented to illustrate the different approaches to indigenous self-determination in Canada and Australia and how these approaches are influenced by their foundation in unique socio-political contexts.

Chapter 4 focuses on the unique indigenous self-determination pursuits of the indigenous peoples of Canada and Australia's hinterland regions – the Inuit of Nunavut and the Torres Strait Islanders of Torres Strait. This chapter argues that the similar pursuit of indigenous self-determination via responsible territorial government by Inuit and Torres Strait Islanders emerges from shared geo-political circumstances. It also argues that the unique socio-political contexts of Canada and Australia (specifically their different legal histories) have resulted in distinct processes for achieving responsible territorial government in the two regions and different plausible outcomes for those processes.

CHAPTER ONE

THE INDIGENOUS PEOPLES OF CANADA AND AUSTRALIA: AN OVERVIEW

Long before the first Europeans discovered the land masses now known as Canada and Australia for themselves, claiming them in the names of their earthly and heavenly rulers, these lands had been discovered, explored and inhabited by other peoples - the indigenous peoples of Canada and Australia. The indigenous peoples of Canada and Australia (also known collectively as "aboriginal peoples", "native peoples", "first peoples", and "original peoples") believe they were given claim to these, their territories, by their Creator's(①). For hundreds of generations they fulfilled their responsibilities and duties towards the land and all of its resources, (plant, animal, humanoid, physical, meteorological, astronomical, and spiritual), thus governing themselves according to their Creator(s)' design and reaping the benefits of their dedication and toil. Through climatic, geological, and environment changes, these indigenous peoples survived, adapting to and evolving with their changing surroundings and circumstances. When European peoples arrived in their midst, the indigenous peoples of Canada and Australia did not cease their history of adaptation, evolution and change but instead continued it becoming the diverse peoples known today.

Although there are many commonalties among the indigenous peoples of Canada and of Australia, the diversity that exists within these collectivities must never be

forgotten or overlooked. This point cannot be overemphasized. The indigenous peoples of Canada and Australia, and their communities, differ linguistically, culturally, physically, socially, politically and/or economically from one another. Although the indigenous peoples of Canada and Australia, at various times and to varying degrees, have engaged in collective articulations of "aboriginality", indigenous peoples in both countries hold their strongest and deepest affiliations to the local and familial. In most cases, collective identification, articulation and affiliation have probably occurred more at the demand and for the benefit of non-indigenous people than by the inspiration and for the benefit of indigenous peoples themselves.

This chapter will serve as a basic (and admittedly generalized) introduction to the indigenous peoples of Canada and Australia, prior to and following the arrival of Europeans to their lands, to demonstrate the magnitude of change that European arrival and occupation precipitated for the indigenous peoples of Canada and Australia. The culmination of European attitudes and policies towards the indigenous peoples of Canada and Australia from the point of first contact to today have resulted in an exponential deterioration of the economic, social, physical, emotional and spiritual health of indigenous peoples and their communities. This trend, however, is reversible. In the words of former Australian Prime Minister P. John Keating,

> ... the starting point might be to recognise that the problem starts with us non- Aboriginal Australians.
> It begins, I think, with the act of recognition.
> Recognition that it was we who did the dispossessing.
> We took the traditional lands and smashed the traditional way of life.
> We brought the diseases. The alcohol.
> We committed the murders.

> We took the children from their mothers.
> We practised discrimination and exclusion.
> It was our ignorance and our prejudice.
> And our failure to imagine these things being done to us.
> With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds.
> We failed to ask – how would I feel if this were done to me?
> As a consequence, we failed to see that what we were doing degraded all of us. ...
> The message should be that there is nothing to fear or to loose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians.
> There is everything to gain.[1]

Although referring to Australia, Mr. Keating's words apply equally to Canada. The act of recognition has begun in both Canada and Australia and has lead to some interesting and innovative self-determination experiments, four of which will be discussed in Chapters 3 and 4 of this thesis.

FROM TIME IMMEMORIAL TO EUROPEAN CONTACT

THE INDIGENOUS PEOPLES OF CANADA

The indigenous peoples of Canada have inhabited their land since time immemorial (meaning since time beyond memory or since the beginning of time). They believe that the Creator (also known by the names "Great Spirit", "Kitchi-Manitou" and others) "created the universe, the world and the beings upon, above and below, both

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[1] (Former) Prime Minister Paul Keating, "Australian launch of the International Year for the World's Indigenous Peoples", Redfern Park, 10 December 1992, in *Aboriginal and Torres Strait Islander Social Justice Commissioner: First Report, 1994*, pp. 136-138.

corporeal and incorporeal, from a vision or dream".[2] Men and women were created as the last and most dependent of all beings by the Creator in an act of generosity and sharing. As their Elders tell them, the first of their peoples were placed on Turtle Island (their expression for the land now known as North America) by the Creator "with a responsibility to care for and live in harmony with all her Creation".[3] Since that act of Creation, generations of descendants have fulfilled their responsibilities, believing in an essential harmony in the universe (among relatives, among animals and among all creatures), the essential goodness of intent of human beings, and the equality of all men and women[4], thus governing themselves and living in a certain manner according to their Creator's design.

Anthropologists believe in the Asiatic origin of North America's indigenous peoples. They argue that between 11 500 and 100 000 years ago[5], wandering bands of hunters from Siberia traveled across the land bridge that spanned the Bering Strait at various times towards the end of the last Ice Age.[6] This migration probably continued over thousands of years with the last of these nomadic hunters to cross from Asia likely being the ancestors of the Inuit, arriving in North America perhaps 7 000 to 10 000 years

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[2] Rupert Ross, Dancing With a Ghost: Exploring Indian Reality, (Markham: Octopus Publishing Group, 1992), p. x.
[3] Ovide Mercredi and Mary Ellen Turpel, In the Rapids: Navigating the Future of First Nations, (Toronto: Viking Press, 1993), p. 31.
[4] Ross, p. xi.
[5] The initial time of arrival into the Americas of Original Peoples is still a matter of controversy. [Alan D. McMillan, Native People and Cultures of Canada: An Anthropological Overview, (2nd ed.; Vancouver: Douglas and McIntyre, 1995), p. 21].
[6] Jesse Embree, "Charter Members of the Canadian Community", in Jesse Embree (ed.) Let Us Live: The Native Peoples of Canada, (Canada: JM Dent & Sons, 1977), p. 6.

ago. The roving bands moved farther and farther eastward, southward and northward over thousands of years in the pursuit of game. As the retreat of massive ice sheets and the recession of glacial lakes made new areas of land suitable for human habitation, they spread over most of North and South America. In response to a variety of environments, many different cultures developed among the geographically dispersed indigenous peoples of North America.[7]

At the time of the arrival of Europeans, there are estimated to have been approximately 17 million indigenous people in North America.[8] Estimates of 250 000[9] and 500 000[10] have been given for Canada's indigenous population (from the Atlantic to the Pacific and from the Great Lakes to the Arctic) at the time of contact. Given the artificiality of the Canada-United States border to indigenous people and their groupings, and the limits of anthropology, however, such estimates must be accepted with caution.

The indigenous peoples of Canada are generally classified by anthropologists in seven culture areas[11], corresponding more or less to the geographic regions which they inhabit(ed), for example: Arctic, Subarctic (Western), Subarctic (Eastern), Northwest Coast, Plateau, Plains, and Eastern Woodlands (as distinguished by Alan McMillan).

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[7] It is important to note that some indigenous people are offended by this anthropological belief in their Asiatic origins on the grounds that it conflicts with their religious beliefs and their perceptions of the past, as well as demeans their unique status as "*indigenous* people".

[8] Mercredi and Turpel, p.18.

[9] Embree, p. 6.

[10] James Tully, "Foundations of Aboriginal Governance", lecture given at the *Conference on the Report of the Royal Commission of Aboriginal Peoples*, McGill University: Montreal, Quebec, (Jan. 31-Feb. 2 1997).

[11] "Culture areas are broad geographic units within which cultures tend to be similar. Such similarity stems primarily from the fact that all occupants of the area based their economies on the same essential resources ... Such concepts, however, mask considerable internal variability and ignore broad ties of trade and religious thought that linked aboriginal peoples across the continent ... Cultural areas have to be understood as somewhat artificial divisions, imposed for descriptive and analytical convenience. They do not necessarily corresponds to native identity" [McMillan, p. 3].

(Please refer to 1:1 - Map of Canada's Culture Areas) The Métis are also a distinct group/culture of indigenous people in Canada, however, their unique origin and history set them distinctly apart from the indigenous peoples of Canada's seven culture areas, as will be explained later in this chapter.

Although most images of "Indians" tend to conjure up stereotypical images of historic indigenous peoples of the Plains - mounted warriors and bison hunters bedecked in feathers and buckskin - the physical, cultural, social, and political differences between the cultures were, and are, marked and profound. From the *Beothuk* or "Red Indians" (Atlantic Provinces), to the Algonkian First Nation, embracing the *Odawa* or Ottawa, the *Anishinabe* or Ojibwa and the *Potawatoni* (Eastern Woodlands and Subarctic), to the Central, Caribou, and Copper Inuit, commonly known by the collective misnomer "Eskimo" (Arctic), only the most general of comparisons can be drawn, with differences between groups far outweighing similarities. As well as differences between cultural groups, within each culture there were usually a number of smaller groups ("societies"), all with the same basic way of life, but with pronounced individual differences from group to group.[12]

The smaller group or society, whether "family", "tribe" or "clan", was the focal point for indigenous people. Bonded together by familial and spiritual ties, group members held their primary allegiance to their co-members and the collectivity with whose members they interacted on a daily and on-going basis. Sharing responsibilities and duties for the well being of this group, indigenous people developed rules and ethics

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[12] Embree, p.6.

unique to their group's situation to facilitate the cohesion and sustainment of this all-important collectivity. On infrequent occasions, (for example to engage in large scale hunts, perform religious ceremonies, mourn deaths, celebrate important events, organize military maneuvers, or create friendship treaties), related groups would come together for short periods of time to engage in joint action or decision making. Different rules and ethics were developed among groups for these infrequent meetings to reap the benefits of collective action while at the same time ensuring and respecting the autonomy of each individual group and the paramountcy of primary group affiliation. It is these smaller collectivities, or particular collective organizations thereof, that are today referred to as the "First Nations", "Original Nations", or "Aboriginal Nations" of Canada. While it is not known how many of these nations existed at the time of European arrival, it most certainly was a number larger than the 50 to 60 First Nations recognized in Canada today.

Most indigenous peoples' societies valued (and continue to value) the interrelated principles of individual autonomy and freedom, so long as their exercise was consistent with the preservation of relationships and community harmony. They also tended to share a respect for other human and non-human beings, a reluctance to criticize or interfere with others, and an avoidance of confrontation. Although these basic principles and values had general acceptance among indigenous peoples' cultures and societies, mediated by unique circumstances and environments, these principles and values were diversely translated into cultural, social, political and religious norms, practices and rules that varied from culture to culture as well as from society to society. Heterogeneity

between and among cultures and societies has been an important but often overlooked feature of indigenous domain in Canada.[13]

The indigenous peoples of Canada did not all share the same pattern of daily life. Although most commonly thought of as hunter-gathers, the subsistence lifestyles of the indigenous peoples of Canada were, in fact, quite varied prior to European arrival. Geographic, environmental and climatic factors in different areas of the country, and at different periods in time, gave rise to numerous subsistence choices for the many different First Nations. Some groups were nomadic, following herds of animals according to the season, supplementing their diet with available edible plants, and living in temporary camps that were generally not revisited regularly; others were semi-nomadic, following select herds of animals for part of the year and regularly returning to seasonal camps at particular times of the year to harvest plants and berries; others were marine people, living in a succession of semi-permanent camps or permanent villages while harvesting marine resources for sustenance; and still others were agricultural, living in permanent camps throughout the year, possibly rotating camps from year to year, and relying on harvested crops for sustenance, with nearby game supplementing their diet and providing raw materials for clothing. Different social, political, cultural and religious systems were developed to facilitate the internal cohesion of these various societies and to provide for their unique needs.

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[13] Alan D. McMillan, Native People and Cultures of Canada: An Anthropological Overview, (2nd ed.; Vancouver: Douglas and McIntyre, 1995) provides excellent descriptions of the cultural groups in Canada as well as of some of the variations within them.

The indigenous peoples of Canada spoke many different languages and dialects deriving from numerous different language families before the arrival of Europeans.[14] Eleven indigenous peoples' language families exist in Canada today, with approximately 53 distinct indigenous languages surviving.[15] These statistics, however, point to a dramatic decline in indigenous languages, especially if one considers that there were once at least sixteen separate languages deriving from five different language families spoken along the British Columbia coast alone.[16] Today only three indigenous languages (Cree, Ojibwa and Inuktitut) are considered to have excellent chances for survival. All others are endangered, with several facing possible extinction.[17]

THE INDIGENOUS PEOPLES OF AUSTRALIA

The indigenous peoples of continental Australia, commonly referred to as "Aboriginal people(s)", "Aboriginals" or "Aborigines", believe they began their existence during the creative era of the Dreaming, or Dreamtime. "The Dreaming was the period in which dramatic events took place which shaped the environment, its inhabitants and their life. Aboriginal people trace their ancestry to the beings which participated in these events."[18] The Dreaming assumes that there was a pre-existent formless substance at the time of creation out of whose water and land Ancestor Beings (also referred to as Spirit Beings or Creative Beings), emerged and took upon themselves

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[14] A language family consists of a number of separate but related languages.
[15] McMillan, p. 5.
[16] Ibid, p. 187.
[17] Ibid, p. 7.

a variety of forms and identities with human, animal and plant essences. These Ancestor Beings moved across the face of the earth, at times entering again into the earth or water, or moving into the sky. "As they traveled and engaged in various activities they formed the earth, the rocks, the waterholes, [the heavenly bodies] and other phenomena of the environment so that the world was shaped by their actions."[19] These Beings are the ancestors of both the particular animal or plant associated with the Ancestor Being, and of the group of indigenous people associated with the geographic area central to the Ancestor Being's travels and activities (called a Dreaming "Story" or "Track"). Indigenous people's connection to the Dreamtime and to the Ancestor Beings is not only a distant one. As Tonkinson explains:

> When the Dreamtime creators were traveling, the life-essence they constantly shed remained on earth as a limitless fund of power from which all living things would henceforth stem. Part of this power animated hosts of spirit-children that were ultimately born as human beings. The spirit-children first assumed a particular plant, animal or mineral form, which would later be recognized as the newborn child's conception totem. Each Aborigine is thus bonded, through a unique concatenation of events and through the mediation of a physical substance, to the creative powers of the Dreamtime.[20]

The indigenous peoples of Australia, like the indigenous peoples of Canada, believe that their peoples have inhabited their lands since time immemorial.

Anthropologists and archaeologists are uncertain as to when indigenous peoples began living on the Australian continent, but most agree it was probably 50 000 to 60 000

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[18] W. H. Edwards, An Introduction to Aboriginal Societies, (Wentworth Falls: Social Science Press, 1993), p. 12.

[19] Ibid, p. 13.

years ago.[21] Some say it may be as long ago as 100 000 years. Using either estimate, the indigenous peoples of continental Australia are members of the world's oldest continuously living cultures.[22] "Although Aborigines are believed to have a single racial origin, they have naturally evolved in many different ways across Australia in adapting to environmental influences owing to dramatic climatic, geological and wildlife variations."[23] Widely assumed to be a culturally, socially, politically and physically homogenous group, the variations between groups are in fact striking and profound, as illustrated by anthropologists' classification of mainland indigenous peoples into at least 17 cultural regions. (Please refer to 1:2 - Map of Aboriginal Cultural Regions). These vast differences are only beginning to receive their due from anthropologists, although research into cultural, social and political mores is made extremely difficult by prescripts of "Aboriginal Law", (or simply "The Law") - the totality of the Ancestor Beings' legacy or design plan which governs all elements of indigenous people's lives.[24] The Law designates much cultural, social and political information (details of Dreaming Tracks) as sacred or secret-sacred and strictly delimits the breadth and scope of its transmission.

> To reveal these beliefs to anyone not entitled to know them under Aboriginal traditions (including other Aborigines and even people of the

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[20] Robert Tonkinson, "The Cultural Roots of Aboriginal Land Rights", in Ryse Jones (ed.) Northern Australia: Options and Implications, (Canberra: Research School of Pacific Studies - Australian National University, 1980), p. 114.
[21] "The First Australians", Fact Sheet on Australia prepared by the Overseas Information Department of Foreign Affairs and Trade (Australia), February 1993, p. 1.
[22] Ibid.
[23] Bradford W. Morse, Aboriginal Self-Government in Australia and Canada, (Kingston: Institute of Intergovernmental Relations – Queen's University, 1984), p. 6.
[24] Tonkinson, p. 113.

> opposite sex in the same community) is itself a kind of desecration, and it has been done reluctantly and painfully ...[25]

At the arrival of Europeans in 1788 it is estimated that Australia was inhabited by between 300 000 and 600 000 indigenous people.[26] Although generally described in European literature as nomadic hunter-gatherer peoples, in areas where there were abundant food or fish resources (for example, in high rainfall coastal fringe areas) indigenous people tended to confine their movements to a relatively small area.[27] At the time of European arrival, the indigenous peoples of continental Australia lived in some 500 clearly demarcated 'tribes' of varying customs and spoke some 500 to 600 different languages with extensive vocabularies and grammatical features.[28] "Each 'tribe', or, to be more exact, language group, was a loosely knit social unity, varying in size from about 100 to 1 500 people."[29] Members of a language group had similar customs and beliefs, occupied a fairly definite territory and regarded themselves as being related through descent from common ancestors (both corporeal and incorporeal), but came together on infrequent occasions. Groups subdivisions (called 'hordes') of not more than 50 people bonded together more frequently for hunting and food gathering. Each horde had its own

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[25] Wooten, Hall (QC), "The Alice Springs Dam and Sacred Sites", in Murray Goot and Time Rowse (eds.) Make a Better Offer: The Politics of Mabo, (Leichhardt: Pluto Press, 1994), p. 14.
[26] Jean François Tremblay and Pierre-Gerlier Forest, "Australia", in Groupe de recherche sur les interventions gouvernementales – Université Laval, Aboriginal Peoples and Self-Determination: A Few Aspects of Government Policy in Four Selected Countries, (Québec: Secrétariat aux affaires autochtones, 1993), p. 31.
[27] "The First Australians", p. 1.
[28] Tremblay and Forest, p. 31.
[29] Lorna Lippman, Generations of Resistance: The Aboriginal Struggle for Justice, (Melbourne: Longman Cheshire, 1981), p. 3.

territory and comprised several generations of related men, women and children. The nucleus of this subdivision and the fundamental unit around which Aboriginal society was organized was the smaller descent group or "clan" - "an extended family whose members had religious ties with a series of sacred sites in their territory."[30]

Aboriginal society, culture and law were and are extremely rich and complex with "one of the most complex kinship systems in the world."[31]

> The intricate web of classificatory kinship that enmeshes large numbers of Aborigines dictates the behavioral bounds of their interactions and involves them in ties of mutual obligation and responsibility. These ties may involve clearly defined roles and procedures, e.g. as 'host' or 'visitor' [or as "aunt", "father", "cousin" etceteras] and an elaborate etiquette defining the proper behavioral content of these roles.[32]

Within the various social units, each person had a defined relationship to everyone else and kinship implied certain behaviour pattern and responsibilities, thus providing a total framework for social interaction. "So complex was the system of beliefs and management that basic facts may be still matters for dispute. Much of the cultural-legal corpus remains secret among the initiated, and most has been lost with the languages ...".[33]

The Aboriginal peoples of continental Australia were and are not the only indigenous peoples of Australia. Frequently grouped together with Australian

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[30] Ibid, p. 7.
[31] Ibid, p. 8.
[32] Tonkinson, p. 116.
[33] Tim Rowse, After Mabo: Interpreting Indigenous Traditions, (Carlton: Melbourne University Press, 1993), p.86.

Aborigines, Torres Strait Islanders have their own distinctive history, cultures, and traditions.

Torres Strait Islanders inhabited (and continue to inhabit) the islands between north-eastern Australia and southern Papua New Guinea, a region that is today known as Torres Strait. "The Torres Strait is a passage, 150 kilometres wide, incorporating the northernmost part of the Great Barrier Reef, other extensive reef areas, islands, islets, cays and mangroves, as well as some of the most extensive sea-grass areas in the world."[34] (Please refer to 1:3 - Map of Torres Strait Region). It is not known how long Torres Strait Islanders have been living in Torres Strait, but it is known that they were there when the Spanish navigator Luis Vaez de Torres passed through the region in 1606.[35]

Torres Strait Islanders are a Melanesian people, related physically, linguistically and culturally to the people of southern Papua New Guinea, with some Aboriginal influences. They have a strong seafaring and trading tradition and were widely feared as raiders and headhunters prior to European arrival.[36] Although Torres Strait Islanders drew heavily on marine resources for sustenance they were also agriculturists, which

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[34] Monica E. Mulrennan and Peter Jull, "Indigenous Peoples and Sustainability: The Politics of Regional Development in Australia's Torres Strait and Canada's Nunavut", paper prepared for the 1992 Conference of *The Association for Canadian Studies in Australia and New Zealand*, University of Wellington, Victoria, (December 14-16, 1992), p. 2.

[35] "The First Australians", p. 2.

[36] Ross Babbage, "The Strategic Significance of Torres Strait", report prepared for the Department of Defense by the Strategic and Defense Studies Unit - Australian National University (Canberra: Strategic and Defense Studies Centre and Research School of Pacific Studies - Australian National University: Canberra, 1990), p. 6.

permitted them to live in sedentary settlements with substantial houses.[37] Prior to the arrival of Europeans, there were probably 4 000 to 5 000 Torres Strait Islanders living in Torres Strait in some 20 island communities.[38]

THE IMPACT OF EUROPEAN CONTACT

The "discovery", invasion and settlement of Canada and Australia by Europeans had a profound, devastating and lasting impact on the indigenous peoples of these lands. In both countries indigenous peoples suffered population declines brought on by the rapid transmission of infectious diseases to which they had no immunity, by violent skirmishes between indigenous people and settlers, and through starvation resulting from the destruction of traditional food sources, the confiscation and destruction of traditional hunting/agricultural lands, and the learned reliance on European food sources. They also suffered emotionally from the loss of, or separation from, their traditional lands, from the clash of their cultures and religions with new cultures and religions, and from the resultant changes including the forced restructuring of their social, economic and political systems. It is impossible to underestimate the immediate impact the arrival of Europeans had on indigenous peoples, their cultures and societies, the magnitude and profundity of the changes their arrival precipitated, or the lasting effects their arrival and subsequent actions have had on all aspects of indigenous people's lives.

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[37] J. Beckett, "The Murray Island Land Case and Problem of Cultural Continuity", in W. Sanders (ed.) Mabo and Native Title: Origins and Institutional Implications, CAEPR Research Monograph No. 7 (Canberra: Centre for Aboriginal Economic Policy Research - Australian National University, 1994), p. 8.
[38] Will Sanders, "Reshaping Governance in Torres Strait: The Torres Strait Regional Authority and Beyond", *Australian Journal of Political Science*, Vol. 30 (1995), p.502.

The indigenous peoples of both Canada and Australia have survived government policies of extermination, 'protection', assimilation and integration. They have survived the forced removal of their children and their placement in residential schools, or adoption into white families. They have survived dislocation from their traditional lands and relocation on small, isolated "reserves", generally with few resources. They have suffered and survived racism, ostracism and discrimination. Their survival is a testament to the inner strength, cultural pride and unfaltering sprit of indigenous people and their staunch determination to live in harmony with the earth and all her creatures.

THE INDIGENOUS PEOPLES OF CANADA TODAY

From a population of 500 000 to barely 100 000, approximately 90 percent of indigenous people in Canada were killed by disease, starvation or extermination between 1500 and 1900 as a result of the arrival and settlement of Europeans on their lands. Indigenous populations are now on the rise. According to the 1991 Census, indigenous peoples comprise approximately 3.6 percent of Canada's population, with 1 002 675 people reporting "aboriginal" ancestry. [39] This figure represents a dramatic 41 percent increase from the 1986 population figure of 711 720. While some of this increase can be attributed to population growth (indigenous peoples, particularly on-reserve status Indians and Inuit, have the highest population growth rates in the country), it is most likely that reinstatement and increased pride in and awareness of "aboriginal" origins are

[39] Many indigenous peoples and others estimate the actual population to be as high as 2 million. [Mercredi and Turpell, p. 14].

the most important factors in this increase.[40] Across the country this figure breaks down as follows:

Indigenous Peoples' Population and Distribution (1991)

PROVINCE	NUMBER[41]	% of CANADA'S TOTAL INDIGENOUS POPULATION	% of PROVINCES' TOTAL INDIGENOUS POPULATIONS
Newfoundland	13 110	1.3	2.3
Prince Edward Island	1 880	0.2	1.4
Nova Scotia	21 885	2.2	2.4
New Brunswick	12 815	1.3	1.7
Quebec	137 615	13.7	1.9
Ontario	243 550	24.3	2.3
Manitoba	116 200	11.6	10.4
Saskatchewan	96 580	9.6	9.6
Alberta	148 220	14.8	5.7
British Columbia	169 035	16.9	5.0
Yukon	6 390	0.6	21.9
Northwest Territories	35 390	3.5	57.7
CANADA	1 002 675	3.6	100.0

The dispersion of indigenous people across Canada is anything but even. "Approximately 69 percent of the population who identified with an Aboriginal group [in 1991] lived west of Ontario, compared to 29 percent of Canada's total population."[42] The difference was most apparent in the Prairie provinces. "Manitoba, Saskatchewan and Alberta were home to almost half (46 percent) of all people who identified with an Aboriginal group in 1991, but home to only 17 percent of Canada's total population."[43] In the Eastern Arctic region of Nunavut, Inuit people comprise 85 percent of the total population. Although Ontario and British Columbia record the highest number of

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[40] McMillan, p. xi.

[41] Canada, Statistics Canada, 1991 Census, in "Towards a Métis Database", Manitoba Native Council/Statistics Canada Workshop", Convention Inn: Edmonton, Alberta, (May 11-12 1993), p. 2.

[42] Ibid, p. 7.

indigenous people in their provinces, these figures represent only a fraction of these provinces' overall populations.

There are three recognized categories of indigenous peoples in Canada today: Indians, Inuit and Métis. Indians are the most heterogeneous group, with a wide range of separate languages and cultures across Canada. Legal distinctions divide this group into those recognized as "Indians" by the federal *Indian Act* and registered as Indians (the so-called "status Indians"); and those who are of Indian ancestry and cultural affiliation but are denied this recognition under the *Indian Act* (so-called "non-status Indians"). Some indigenous people consider the term "Indian" offensive, (the word is actually a misnomer that comes from Christopher Columbus' mistaken belief he had reached India when he arrived on Canadian shores) others prefer it as self-designation. "Aboriginal Peoples", "Indigenous Peoples", "First Nations" (primarily in reference to status Indians) or original designations in aboriginal languages are the most accepted terms of reference for this group of indigenous peoples.

The Inuit of the Canadian Arctic have a separate origin and history from Indians, representing a later movement of people into Canada, and are closely related to indigenous peoples of Alaska and Greenland. This is a relatively homogeneous group with a common origin and a single language (Inuktitut), with a number of known dialects, across the entire Canadian Arctic.[44] Formerly known as "Eskimo" (a term

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[43] Ibid.
[44] McMillan, p. 2.

believed to have derived from an Algonquian word meaning "eaters of raw flesh"[45]) this designation has been replaced with the singular "Inuk" (person) and plural "Inuit" (people), the designations these indigenous occupants of the Arctic use in reference to themselves.[46]

The Métis (from a French word meaning "mixed") emerged in historic times, during the fur trade period. They are a product of the unions between male fur traders, most commonly Catholic and of French-Canadian or Scottish origin, and indigenous women, particularly Cree, on the Plains of western Canada in the nineteenth century[47]. Although "métis" (small "m") can be used to refer to any persons of mixed Indian and European ancestry who, for whatever reason, are not regarded as either Indian or white, "Métis" (capital "M") is almost always reserved for the descendants of the *Red River* and *Dominion Land Acts* who formed a common identity on the Canadian Plains during the nineteenth century and came to see themselves as a "New Nation".[48]

The indigenous population of Canada can be broken down according to these categories as follows:

Status-Indian Population	553 316
Non-Status Indian Population	unknown (estimates vary from 75 000 to 750 000)
Inuit Population	40 000
Métis	100 000 [49]

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[45] Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution, (Toronto: Methuen, 1984), p. 4.
[46] McMillan, p. 1.
[47] Ibid, p. 293.
[48] David Chartrand, (President of the *Manitoba Métis Federation*), interview with the author (Manitoba Métis Federation Office, Winnipeg, Manitoba, November 28, 1997).
[49] Fleras and Elliot, p. 194.

"No matter what economic index is cited - income, employment, education - [indigenous people], in a statistical sense, tend to occupy the bottom-most rung of the socio-economic ladder."[50] They lag behind in socio-economic status and attainment, they experience high levels of unemployment, under education, violent death, imprisonment and ill-health. Fewer than 50 percent of indigenous people's homes have sewer or water connections; unemployment rates are three times higher than for the non-indigenous population of Canada; on certain reserves 95 percent of the population subsists on welfare or unemployment benefits; only 20 percent of indigenous people finish secondary school (with up to 90 percent of students dropping out of high school, a rate 3 times the national average)[51]; violent deaths occur at a rate up to 4 times the national average; infant mortality rates are approximately 60 percent higher than the national average; suicide rates are up to 6 times the national average for certain age specific groups (the suicide rate for indigenous people under the age of 25 is the highest of any racial group in the world[52]).[53] In Ontario, 7 of every 10 indigenous women are the victims of physical or sexual abuse; in Alberta, the homicide rate among indigenous people is 8 times the average for non-indigenous people, and the rate of accidental death is 5 times higher; in Saskatchewan, half of federal prison inmates are indigenous people and 68 percent of inmates in provincial jails are indigenous people.[54]

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[50] Ibid, p. 4.
[51] Ebree, p. 44.
[52] Ibid, p.43.
[53] Fleras and Elliot, pp. 197-198.

THE INDIGENOUS PEOPLE OF AUSTRALIA TODAY

From a pre-contact population of between 300 000 to 600 000, the indigenous population of Australia fell to 60 000 by the end of the nineteenth century.[55] Today Australia's population of 17 million includes approximately 257 000 indigenous people, or 1.5 per cent of the general population. Although indigenous peoples' populations have been on the rise since the 1950s (the growth rate from 1986 to 1991 was 2.5 percent), they have continued to represent only 1 to 2 percent of the general population. It should be noted, however, that there may be 100 000 Australians who do not identify themselves as being of indigenous descent "because they or their forebears were not only forcibly prevented from associating with their Aboriginal parents but were brought up to feel superior to other Aboriginal people."[56]

Torres Strait Islanders represent roughly 10 per cent of the indigenous population of Australia.[57] The 1991 Census recorded 26 880 Torres Strait Islanders, with 21 200 Torres Strait Islanders living outside the Torres Strait region and 5 680 living inside the region (47 percent in the sub-region of the Inner Islands; 42 percent in the Outer Islands, and 11 percent in Cape Islander communities[58]).[59] At the time of European arrival, there

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[54] Canada, Royal Commission on Aboriginal Peoples, "First Phase of Public Hearings: 2Volume Report", October 1992, in Dan Smith, The Seventh Fire: The Struggle for Aboriginal Government, (Toronto: Key Porter Books, 1993), pp.43-44.
[55] Tremblay and Forest, p. 31.
[56] Rowse, p. 44.
[57] W. Sanders and W.S. Arthur, "A Torres Strait Islanders Commission? Possibilities and Issues", CAEPR Discussion Paper No. 132, (Canberra: Centre for Aboriginal Economic Policy Research – Australian National University, [April] 1997), p. 13.
[58] Sanders, p. 50.

were probably 4 000 to 5 000 Torres Strait Islanders living in Torres Strait. "National census data and other evidence suggest that the Islander population remained at about this level until the 1960s."[60] Since then, the population has increased rapidly. Recent population growth has been accompanied by, and is probably related to, significant population dispersion. The number of Torres Strait Islanders living in Torres Strait has remained fairly constant at around 5 000.[61]

Indigenous people's dispersion across States shows some interesting trends:

Indigenous People's Population and Distribution (1991) [62]

STATE	NUMBER	% of AUSTRALIA'S TOTAL INDIGENOUS POPULATION	% of STATES' TOTAL POPULATIONS
New South Wales	70 019	26.4	1.2
Victoria	16 735	6.3	0.4
Queensland	70 124	26.4	2.4
South Australia	16 232	6.1	1.2
Western Australia	41 779	15.7	2.6
Tasmania	8 885	3.3	0.2
Northern Territory	39 910	15.0	22.7
Australian Capital Territory	1 775	0.7	0.6
AUSTRALIA	265 459	100.0	1.6

As well as variations in indigenous people's distribution across States, there is also regional variation in the distribution of indigenous people within States. Roughly 28 per

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[59] J.C. Altman, WS Arthur and W. Sanders, "Towards Greater Autonomy for Torres Strait: Political and Economic Dimensions", CAEPR Discussion Paper No 112, (Canberra: Centre for Aboriginal Economic Policy Research – Australian National University, 1996), p.6.
[60] Sanders and Arthur, p. 2.
[61] Ibid, p. 2.
[62] Lorna Lippman, Generations of Resistance: Mabo and Justice, (3rd ed.; Melbourne: Longman, 1994), p. 87.

cent of indigenous people live in capital cities, just under 20 per cent live in rural and remote areas and approximately 50 per cent live in towns and rural localities.[63]

The indigenous population of Australia is a young population. Almost 40 per cent of indigenous peoples are less than 15 years old (compared to 22 per cent for the non-indigenous population), 15 per cent are less than 5 years old (compared to 7 per cent) and only 6 per cent are over the age of 55 (compared to 20 per cent). While the birth rate for indigenous people is declining, it is still 46 per cent higher than that of non-indigenous Australians.[64]

Indigenous people are the least healthy identifiable population in Australia. Infectious diseases such as respiratory diseases, hepatitis B, ear and eye diseases together with lifestyle conditions such as coronary heart disease and diabetes mellitus have had major impacts on the health status of indigenous people.[65] The abuse of alcohol and other substances has also had a profound affect on indigenous people's health. The fact that "... around 14 000 Aboriginal and Torres Strait Islander people have sub-standard water supplies ... [and] almost 12 000 have sub-standard sewerage systems"[66] only exacerbates these problems. The life expectancy for indigenous people is 15 to 20 years less than for the non-indigenous population; at any age indigenous people are more than twice as likely to die as are non-indigenous people; infant mortality is more than 3 to 5 times higher for indigenous children than for non-indigenous children; infectious diseases

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[63] Ibid.
[64] Ibid, p. 88.
[65] "The First Australians", p. 1.
[66] Bev Blaskett, Alan Smith and Loong Wong, "Guest Editors' Introduction: Indigenous Sovereignty and Justice", *Social Alternatives*, Vol. 13, No. 1 (April 1994), p.5.

are 12 times higher than the Australian average; diabetes affects 30 per cent of people in some indigenous people's communities (4 times the non-indigenous rate); and, hospital admissions for Aboriginal men are 71 per cent higher than for non-indigenous males and 57 per cent higher for Aboriginal females than for non-indigenous females.[67]

There is a wide disparity of socio-economic situations within the indigenous population, in particular between those who still live in their traditional territories and those who have been dispossessed and urbanized, with the later generally suffering much more greatly.[68] "Inadequate housing, poor health, over-representation in prisons, unemployment, low educational success, alarmingly high child welfare apprehension rates and alcoholism continue to be the reality for far too many Aboriginal and Torres Strait Islanders ...".[69] Only 33 per cent of indigenous people complete schooling (compared to a national average of 77 per cent); less than half (49 per cent) of the indigenous people aged 15 to 19 are attending school (compared to 98 per cent of non-indigenous youth); 2.2 per cent of indigenous people have tertiary degrees compared with 12.8 per cent of all Australians; the unemployment rate is 38 per cent for indigenous people compared with 8.7 per cent for the general population; the mean individual income for indigenous people is 65 per cent of that of the general population; indigenous people are 17.3 time more likely to be arrested, 14.7 times more likely to be imprisoned and 16.5 times more likely to die in custody than non-indigenous Australians; the number

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[67] "Face the Facts: Some Questions and Answers About Immigration, Refugees and Indigenous Affairs", produced by the Federal Race Discrimination Commissioner (Australia), 1997, p. 24.
[68] Richard Mulgan and Will Sanders, "Transforming Indigenous Affairs Policy: Labour's Contribution to 'Internal Decolonisation'", in Francis G. Castles, Rolf Gerrisen and Jack Vowies (eds.) The Great

of indigenous people in prison has increased by 61 percent from 1990 to 1997 (almost twice the growth rate of the non-indigenous population); and only 28 per cent of indigenous people own their own home (compared to 67 per cent of all Australian families).[70]

CONCLUSION

These statistics show the culmination of European attitudes and policies towards the indigenous people of Canada and Australia from the point of first contact to today. They are also a testimony to the failure of past policies on the part of the Australian and Canadian governments. In light of these dismal failures, the indigenous peoples of Canada and Australia have begun to actively seek a restructuring of indigenous-state relations for the purpose of regaining control over their lives and destinies. With this renewed self-assertiveness has come a focus on self-determination and related concepts. Self-determination, self-management, and self-government can all play a role in improving the economic, social, physical, emotional and spiritual health of indigenous peoples and their communities.

Experiment: Labour Parties and Public Policy Transformation in Australia and New Zealand), (St. Leonards: Allen & Unwin, 1996), p.146.

[69] Morse, p. 10.

[70] "Face the Facts", pp. 24-25.

CHAPTER 2

INDIGENOUS AND NON-INDIGENOUS HISTORIES, INSTITUTIONS AND CULTURES IN CANADA AND AUSTRALIA: THE SOCIO-POLITICAL CONTEXTS OF INDIGENOUS SELF-DETERMINATION

This chapter will serve as a general introduction to the indigenous and non-indigenous histories, institutions and cultures of Canada and Australia as they relate to and have an impact on the struggle for self-determination. Self-determination, as a term, principle, policy or solution, necessarily derives its meaning in practice from the specific context in which it has been, and is being, articulated. In this chapter I argue that the differences between Canadian and Australian histories, institutions and cultures of indigenous peoples and European newcomers (and their descendants) can help to explain the current differences in perceptions, treatments and legal/constitutional statuses of indigenous peoples in the two countries. The histories, institutions and cultures of Canada have served to leave room for:

- initially friendly and mutually beneficial relations between indigenous peoples and European newcomers;
- the centralization of government administrative authority;
- the development of a concept of collective rights;
- a shared sense of aboriginality joined with strong associations by indigenous peoples with their 'aboriginal nations'; and
- a relatively open sharing of cultural information.

In contrast, the histories, institutions and cultures of Australia have served to generate:

- initially hostile and dismissive relations between indigenous peoples and European newcomers;

- the decentralization of government administrative authority;
- little development of a concept of collective rights;
- a weak sense of 'aboriginality' joined to primary association with kin groups; and
- very guarded sharing of cultural information.

Each of these distinct and circumstantial facts has served to promote distinct courses of action for self-determination on the part of the indigenous peoples and governments of Canada and Australia. It has resulted in different definitions, demands for, and strategies related to self-determination, and variations in recognizing and accepting rights to self-determination. The resulting distinctive obstacles to achieving self-determination have resulted in more progress towards self-determination in Canada than in Australia.

HISTORIES

At the time of first contact with Europeans, the indigenous peoples of Canada and Australia existed as self-governing nations or tribes, exercised effective control over geographic areas, and traded and occasionally made war with other nations. When Europeans arrived in their lands, they did not surrender their lands, sovereignty or rights to self-determination and self-government, nor were these rights terminated by conquest in either country. The indigenous peoples of both Canada and Australia asserted (and continue to assert) their 'possession' of the land, their sovereignty and their rights to self-determination and self-government in numerous ways. How the indigenous peoples made these assertions, and to what degree these assertions were or have been recognized by the colonial invaders has resulted in different perceptions, treatments and legal/constitutional statuses of indigenous peoples in the two countries.

CANADA

Initial contact between the indigenous peoples of Canada and the new European arrivals was cautious. European explorers and the indigenous people they encountered greeted each other with mutual curiosity and suspicion, but generally not with overt hostility. In a foreign and often harsh environment, the new European arrivals sought the friendship, assistance, skills and knowledge of indigenous peoples as they explored what is now Canada and began to exploit its resources. The two dominant new groups of arrivals, the British and the French, also sought the friendship of indigenous peoples to ensure their allegiance in trade and warfare to promote their respective nation's dominance in the new land. On their part, indigenous peoples sought friendship and allegiance with the new arrivals to obtain European tools, materials, foods and medicines, to ensure loyalty in trade, and to secure military strength in the face of competing European arrivals and their indigenous allies. European historical accounts of the development of Canada have, to some degree, included the roles played by indigenous peoples in the exploration of Canada, the development of the fur trade and the competition for dominance of the British and French. Although this history has been replete with European biases and assumptions, it has, at a minimum, recognized that the indigenous peoples of Canada have influenced Canada's development. This history is taught in schools, is known to many Canadians and is very rarely disputed. As such, it provides a minimal understanding upon on which indigenous peoples have been able to build their case for their right to self-determination and self-government, and to achieve

some support for their case from non-indigenous Canadians and governments. This foundation is reinforced by other forms of recognition.

The institutionalization of potentially mutually beneficial relations between the new European arrivals and indigenous peoples was made possible under British rule through the *Royal Proclamation, 1763.* The *Royal Proclamation* explicitly recognized the Aboriginal tribes of the Americas as "nations-within" (nations living under the protection of the Crown), with a claim to treatment as a distinct people with self-determining and self-governing rights. The *Royal Proclamation* also acknowledged the existence of native title to all of the lands not ceded to or purchased by the Crown and set out a process for extinguishing native title through the signing of agreements or treaties.[1] The conclusion of treaties was not new to the indigenous peoples of Canada, making the treaty process a more or less mutually understood and respected process for concluding agreements of cooperation and accommodation between groups. Many indigenous nations used treaties before the arrival of Europeans to conclude agreements for trade relations, the use of hunting areas, allegiance in warfare and other issues involving cooperation and accommodation between groups. Perhaps the indigenous understanding of this process is best set out by the Hadenausaunee (Iroquois) Confederacy's *Gus-wen-tah* or Two-Row Wampum which symbolized the relationship:

> The two-row wampum committed us to a relationship of peaceful coexistence where the First Nations and Europeans would travel in parallel paths down the same symbolic river in their own vessels. The two-row wampum, which signifies "One River, Two Vessels", committed the newcomers to travel in their vessel and not attempt to interfere with

[1] King George III, *The Royal Proclamation, October 7, 1763* in Home and Native Land: Aboriginal Rights and the Canadian Constitution, Michael Asch, (Toronto: Methuen, 1984), Appendix B, pp. 112-114.

> our voyage. The two vessels would travel down the river of life in parallel course and would never interfere with each other. It was a co-living arrangement. The two-row wampum captures the original values that governed our relationship - equality respect, dignity and a sharing of the river we travel on.[2]

This treaty is similar in nature and scope to the earliest treaties signed during the late seventeenth and early eighteenth centuries between the British government and indigenous peoples, the so-called "peace and friendship" treaties. The British sought these agreements to forge trade and political alliances with indigenous peoples and to gain their assistance in wars against the French. The indigenous peoples sought or agreed to these treaties to ensure trade relations and amiable interactions with the new arrivals to their territories. These early treaties did not include the purchase or surrender of land, nor the promise of reserves or annuities, but instead solidified cooperative allegiances.[3]

After the defeat of the French and with increased European settlement, the focus shifted from "peace and friendship" treaties to land surrender. The result was the so-called lettered treaties. The first of these were concluded between the Mississauga, Chippewa and Mohawk nations and the Colonial Government. These pre-Confederation treaties varied greatly but usually involved the surrender of relatively small areas of land for an initial gift or small one-time cash payment and would occasionally include reserve grants or guaranteed hunting and fishing rights. Beginning in 1850, the Robinson-

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[2] Ovide Mercredi and Mary Ellen Turpell, In the Rapids: Navigating the Future of First Nations, (Toronto: Viking Press, 1993), p. 35.
[3] Alan D. McMillan, Native Peoples and Cultures of Canada: An Anthropological Overview, (2nd ed.; Vancouver: Douglas and McIntyre, 1995), p. 318.

Superior and Robinson-Huron treaties set the precedent for the surrender of large areas of land in exchange for reserves, lump-sum cash payments, annual payments to each member of the band and promises of hunting and fishing rights over unoccupied Crown lands.[4] When the Dominion government formally assumed political authority in 1867, it continued the land surrender treaty practice with its so-called numbered treaties. In the early years of Confederation, the priority was western expansion, so the focus of treaties number 1 to 8 was to extinguish native title to indigenous peoples' lands on the prairies for the purpose of expanded settlement. Treaties 9 to 11 continued colonial expansion westward and northward. The final historic treaties, the Williams treaties, brought treaty-making in Canada to a close in 1923 with the surrender of most of the remaining land in southern Ontario.[5] Most treaties cover areas south of 60° latitude with the principal areas not covered by treaties being most of British Columbia, the Yukon, the Northwest Territories, Labrador and northern Quebec.[6] (Please refer to 2:1 - Map of Treaty Areas).

The historic treaties signed between the Colonial and then Dominion governments and the indigenous peoples of Canada continue to be of great legal and symbolic significance, although perceptions of their nature and importance varies significantly.

> Native people whose ancestors signed treaties tend to view these documents as recognition of their sovereign status and affirmation of their aboriginal rights. The treaties provide for a continuing relationship between Canada and First Nations. Government and non-aboriginals, however, tend to see the treaties as historic agreements which

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[4] Ibid.
[5] Ibid, p. 319.
[6] Frank Cassidy and Robert L. Bish, Indian Government: Its Meaning in Practice, (Lantzville, Halifax: Oolichan Books, The Institute for Research on Public Policy, 1989), p. 13.

> extinguished aboriginal rights to the land and established federal control over the lives of native people.[7]

Indigenous people today want the treaties to be interpreted in the broadest possible way, reflecting the spirit in which they were signed, arguing that there were great differences between what they were told they were signing and the actual written words of the treaties. "Gifts such as flags and medals enhanced the illusion that these were pacts of friendship and mutual assistance between nations, while the written provisions more closely resemble deeds of sale."[8] Governments have generally advocated a more literal interpretation of the treaties as extinguishing title to land as well as aboriginal rights. Although disagreement about the nature and scope of treaties continues, what is crucial is that their existence has provided indigenous peoples with a basis to assert their claim to sovereign nationhood, to press the government to uphold its responsibilities (as defined in the treaties) to the ancestors of the treaties' signatories, and to demand compensation from governments for the wrongful dispossession of land and extinguishment of aboriginal rights.

Despite this key legal framework, the indigenous peoples of Canada have had to assert their sovereignty relentlessly and vigorously since the arrival of European newcomers to their territories. Violent outbreaks and warfare between groups of indigenous people and Europeans in the seventeenth and early eighteenth centuries attached a 'fierce and ruthless warrior' reputation to indigenous peoples. After Confederation the confrontations continued as the Dominion Government struggled to

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[7] McMillan, p. 316.
[8] Ibid, p. 319.

secure the territory of the new nation. Two of the more dramatic of these struggles are the Red River Rebellion of 1869/70, and the Haudenausaunee (or Iroquois) struggle for international recognition in the 1920s, and today.

In 1869, at the Red River Settlement in present day Winnipeg, Manitoba, the local Métis inhabitants under the command of Métis leader Louis Riel established a provisional government and took up arms against the Dominion of Canada in defense of their rights to their lands and to self-government.[9] Angered over the transfer of Rupert's Land from the Hudson's Bay Company to the Dominion of Canada without their knowledge or consent Riel and his supporters engaged in an unprecedented rebellion against the new Dominion Government and its treatment of indigenous peoples and their lands. This insurrection resulted in the creation of the province of Manitoba, the inclusion of most of the provisional government's eighteen point "List of Rights" in Canada's constitution, as well as the enduring inclusion of the Métis people in Canada's history.

Armed resistance, however, has not been the only method chosen by the indigenous peoples of Canada to assert their sovereignty. In the 1920, Deskaheh (also known by his Christian name, Levi General), a traditional chief from the Iroquois Longhouse, used the unique position of his people as allies of the British during the French and American wars, to push his case for international recognition of the Iroquois

nations. In 1921 he traveled to London on his Iroquois passport to lobby the Colonial Office for recognition of the Iroquois claim to independence. In 1923 he traveled to Geneva (again on this Iroquois passport) to put his case to the League of Nations.[10] Although both attempts were unsuccessful, they brought domestic and international attention to the Iroquois cause. The Iroquois continue to assert their sovereignty and independence, both domestically and internationally, today.

The Mohawk, one of the six nations that make up the Haudenosaunee (or Iroquois) Confederacy, have continued to assert their sovereignty in a 'radical' way. They maintain that they are an independent nation and that international law and conventions govern their relations with Canada.[11] Through their actions, the Mohawk have been successful in bringing public attention to their cause and also to the wider debate concerning self-determination, self-government, and land rights for all of Canada's indigenous peoples.

AUSTRALIA

Australia's history of relations between indigenous peoples and European newcomers stands in stark contrast to that of Canada. It is a history of non-recognition and of violence. In the words of Father Frank Brennan, "Our history is marked by the

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[9] Jacqueline Peterson and Jennifer S. H. Brown, "Introduction" in The New Peoples: Being and Becoming Métis in North America, Jacqueline Peterson and Jennifer S. H. Brown (eds.), (Winnipeg: University of Manitoba Press, 1985), p. 4.

[10] McMillan, p. 83.

[11] Cassidy and Bish, pp. 34-35.

lack of any initial agreement between Aborigines and colonizers and the settlers' disregard for instructions from imperial authorities urging the accommodation of Aboriginal interests."[12] It is also a history marked by policies of 'extermination' and 'dispossession' (from contact to 1897).[13] These policies permitted, and at times advocated, the slaughter of indigenous peoples with impunity and the expropriation of their lands without compensation.

In 1770, Captain Cook took the first serious look at the east coast of Australia. He and his crew spent three month off the coast of present-day Queensland repairing *The Endeavour*, all the while maintaining friendly relations with the Aborigines they encountered.[14] As in Canada, mutual curiosity, caution and suspicion, but not overt hostility, initially mediated the interactions between indigenous peoples and European newcomers. These friendly, if cautions, relations, however, were very short lived. In January 1788, the first fleet took possession of Australia in the name of King George III. The instructions given to Captain Arthur Philip, (the Governor Designate of the penal colony in New South Wales), by the Imperial authorities clearly advocated respect for the indigenous people of the land and accommodation of their interests:

> You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoying all our subjects to live in harmony and kindness with them.[15]

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[12] Frank Brennan, Sharing the Country: The Case for an Agreement Between Black and White Australians, (Ringwood: Penguin Books, 1991),p. 8.
[13] Stephanie Gilbert, "A Postcolonial Experience of Aboriginal Identity", *Cultural Studies*, 9:1, (January 1995), p. 146.
[14] Lorna Lippman, Generations of Resistance: The Aboriginal Struggle for Justice, (1st ed.; Longman Cheshire: Melbourne, 1981), p. 13.
[15] Ibid, p. 15.

Unfortunately, these words were soon very soon forgotten (if they were ever given credence) and bitter struggles ensued.

The indigenous peoples of Australia possessed many disadvantages in the face of the new European arrivals: they were split into small, decentralized communities dispersed over a vast area; seldom in contact with each other; within the communities there were no clear lines of command (i.e. Chiefs) nor were settlements permanent. They possessed simple technology and were largely non-militaristic.[16] The European arrivals recognized these disadvantages and viewed indigenous people as posing little concerted threat to settlement. European newcomers viewed the indigenous peoples of 'their' new land as 'primitive' and sub-human, possessing nothing recognizable to them as governments, cultures, land ownership, economies or law. "Therefore there was no willingness to negotiate treaties, to develop friendship, to promote trade, to purchase land or to engage in government-to-government relations."[17] Although the British policy of recognizing native title and negotiating nation-to-nation treaties was well known at the time, the Colonial Governments in Australia viewed this approach as primarily applicable to North America where the indigenous population was regarded as 'civilized'.[18] The absence of competitors to the British also removed some of the need that existed in North America to conclude treaties and develop military allegiances with indigenous peoples.

The indigenous people of Australia were seen as a 'dying race' by the new European arrivals. They were considered to be weak and inferior, living in a state closer

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[16] Ibid, p.17.
[17] Bradford W. Morse, Aboriginal Self-Government in Australia and Canada, (Kingston: Institute of Intergovernmental Relations – Queen's University, 1984), p. 7.

to nature than to humanity and lacking adequate skills and intelligence to survive in the 'modern' world. The Colonial Governments therefore treated indigenous peoples with an almost absolute disregard, leading to the entrenchment of the legal doctrine of *terra nullius* - land belonging to no one. This view guided policy in Australia until the landmark Mabo decision in 1992 (this decision will be discussed in more detail later in this chapter).

The opinions of the early European arrivals have been propagated from one generation of non-indigenous Australians to the next through history books, public education, and the media. They have culminated in a securely entrenched acceptance of indigenous people as weak and inferior to 'white' Australians. They have also proliferated the myth that the 'settlement' of Australia was swift and without resistance. In reality, resistance and assertions of sovereignty by indigenous peoples were and are an important, if widely unknown, feature of Australian history. Armed resistance against the encroachments of the new European arrivals continued until as late as the 1920s[19], non-violent resistance has continued to the present day, and assertions of sovereignty and accompanying rights to self-determination and self-government have been ceaseless since first contact.

In 1822, the great Aboriginal warrior, Windradyne, led his warriors on a campaign for survival and justice, seeking retribution from the colonial power that was in the process of armed dispossession of his people. At the site of a massacre near Bathurst,

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[18] Ibid.
[19] Lippman, p. 24.

where some 300 Aboriginal men, women and children had been forced to choose between facing the sword or jumping off a cliff, Windradyne and others of the Wiradjuri nation attempted to resist the illegal encroachment upon their lands and territories for many months. They were finally forced to abandon their fight when introduced diseases weakened their strength.[20]

More than a century later, in 1966, the Gurintji asserted their rights for equality and native title by peacefully walking off Lord Vesty's Wave Hill cattle station.[21] Their eight year protest and strike for decent wages and the return of their traditional lands is commonly understood as the start of the modern land rights movement in Australia. The walk-off received wide public attention across Australia and eventually resulted in the return of some of the Gurintji's traditional lands.

Assertion of sovereignty in the form of political action began in earnest in the 1970s. On January 26 (Australia Day) 1972 a tented Aboriginal Embassy was set up on the lawns of Parliament House in Canberra by Aboriginal activists and their supporters to symbolize the separateness of indigenous people from the dominant society.

> The term Embassy was the first widely publicized expression of the claim to be a separate 'people' or 'nation' and this in turn helped to mobilize Aboriginal support and demonstrated to the world, through Canberra's diplomats and press agencies, the essentially anti-colonial passion developing among the new Aboriginal elites.[22]

Six years later, in 1978, Paul Coe (an Aboriginal barrister from Sydney) instituted legal proceedings in the High Court of Australia against the Commonwealth and the

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[20] Paul Coe, "The Struggle for Aboriginal Sovereignty", *Social Alternatives*, 13:1, (April 1994), p. 10.
[21] Ross Howie, "Northern Territory" in Aboriginal Land Rights: A Handbook, Nicholas Peterson (ed.), (Canberra: Australian Institute of Aboriginal Studies, 1981), p. 28.

United Kingdom seeking recognition of Aboriginal sovereignty over Australia.[23] The action failed on the basis that the Crown's sovereignty could not be questioned in an Australian court. On January 26 1988 an Invasion Day march was organized by Aboriginal leaders and held in Sydney to commemorate the invasion of Australia by Europeans and the dispossession and disruption that followed. In that same year the Barunga Statement of national Aboriginal political issues (written on bark in an Aboriginal language) was presented to Prime Minister Hawke as a starting point for reconciliation between indigenous and non-indigenous Australians.[24]

All of these events and many others like them demonstrate indigenous peoples concerted and ongoing efforts to assert their sovereignty and rights. Successive governments of Australia and Australia's non-indigenous population have largely chosen to ignore or dismiss these assertions and cling to long-established false truths about indigenous peoples and Australian history. Consequently, the indigenous peoples of Australia have had to engage in an almost wholesale rewriting of Australian history to provide a foundation for their case for the right to self-determination. Not only have they had to fight for the acceptance and inclusion of their understanding of the history of Australia, they have also had to fight for the simple recognition of their presence in Australian history. These obstacles have made the struggle for self-determination even more fraught with difficulty and opposition than the still onerous struggle in Canada.

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[22] C. D. Rowley, Recovery: The Politics of Aboriginal Reform, (Ringwood: Penguin Books, 1986), p. 25.
[23] "A Chronology of Events Affecting the Aboriginal Land Rights Struggle", *Social Alternatives*, 13:1, (April 1994), p.9.
[24] "A Chronology of Events 1901-1996: The Indigenous Struggle for Rights and Recognition", *Constitutional Reform Conference*, Adelaide, (February 1996), p. 3.

INSTITUTIONS AND CULTURES

Political institutions are very important to the discussion of self-determination. They embody the assumptions and values of their creators, they define priorities, they develop policies and they structure relations between and among groups. Successive governments in both Canada and Australia have developed and used institutions of European origin to govern their societies, to gain control over the lives of indigenous people, and to suppress indigenous peoples' institutions. The indigenous peoples of both Canada and Australia, however, have distinct institutions of their own that they have used, and continue to use, to govern their societies and to assert their right to self-determination.

The political institutions of indigenous peoples were developed within specific cultural contexts. These contexts defined the objectives, principles, structures and rules of these institutions in the same way that European culture defined the frameworks of Canada and Australia's political institutions. The cultures of Canada's and Australia's indigenous peoples are also important because they continue to define the political and institutional aspirations of indigenous peoples.

CANADA - INDIGENOUS PEOPLES' INSTITUTIONS AND CULTURES

At the time of contact with Europeans, the indigenous peoples of Canada had developed finely tuned political institutions that were remarkably successful at keeping

order, respecting individual autonomy and promoting social harmony. Confederacies, both formally and loosely organized, are an important feature of the political organization of some indigenous nations in Canada and pre-date European arrival. These loosely and formally organized regimes facilitated relations between indigenous peoples and between indigenous peoples and European arrivals, and have also served as the foundations on which groups have built more modern political organizations to assert their sovereignty and press their demands for self-determination. Some well-known examples are the following.

Established shortly before European contact (during the late fifteenth or early sixteenth century), the famed League of the Iroquois united five separate nations (from west to east, the Seneca, Cayuga, Onondaga, Oneida and Mohawk) into a single confederacy. In 1722 the Tuscarora were formally adopted into the League, after which it was commonly referred to as Six Nations or the Haudenosaunee Confederation. Legends credit Deganawidah, a supernaturally powerful individual from Huron country to the north, and his Onondaga convert Hiawatha with founding this alliance to promote peace among the five quarreling groups.[25] Deganawidah established the *Kaianesakow* or Great Law of Peace, (which still governs the Confederation today and is possibly the world oldest constitution[26]), to govern the actions of the League and the interactions of its members, and to provide constitutional authority for their governments. The League was governed by a council of fifty chiefs (called *sachems*) which sought unanimous decisions

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[25] McMillan, p. 82.

before action was taken. Although the League served as a political and military alliance, considerable autonomy was maintained by its members, who often acted independently.

In the Eastern Woodlands and Subarctic, the Ottawa, the Ojibwa and the Potawatomi shared a tradition of a common origin and remained allied throughout the historic period in a loose confederacy known as the Council of the Three Fires.[27] The Council was made up of numerous politically independent bands, each with its own chief and hunting territory. Leadership positions were informal, with chiefs holding power by virtue of their prowess in hunting, welfare or shamanism. The Council sought unanimous decisions for mutually beneficial collective action, and no single leader could speak for more than his small band.[28]

In the Plains, the term Blackfoot Confederacy usually includes the Blackfoot Nation (the Siksika, the Blood, and the Peigan or Pikuni) as well as their close allies the Sarcee, and the Gros Ventre or Atsina. Although the three tribes of the Blackfoot Nation shared the same language and customs and frequently intermarried, they remained three separate tribes and did not recognize any true sense of intrinsic unity. They were closely allied in warfare with the Sarcee and Atsina, against the Cree and Assiniboine during the fur trade era, despite occasional internal feuds[29], and it is this military alliance that is embodied in the term Blackfoot Confederacy.

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[26] Tom Porter, "Traditions of the Constitution of the Six Nations" in Pathways to Self-Determination: Canadian Indians and the Canadian State, Leroy Little Bear, Menno Boldt and J. Anthony Long (eds.), (Toronto: University of Toronto Press, 1984), p. 15.
[27] McMillan, p. 104.
[28] Ibid.
[29] Ibid, pp. 150-151.

In the Plateau region, the Interior Salish people were scattered for most of the year in their fishing, hunting, root-digging or berry-picking camps. During the coldest months of the year, however, they lived in sedentary winter villages. Each village, or small cluster of nearby settlements, was politically autonomous. "Each village might have had several headmen or "chiefs", respected for their wealth, oratory or abilities."[30] In addition to the chief(s), some individuals could rise to prominence through skills in hunting or fishing or military prowess, and would take leadership for those activities. There were, however, no leadership positions above the level of winter village, or village cluster, and no mechanism existed to link the various communities.

These examples of indigenous peoples' political institutions are important for two reasons in the discussion of self-determination. First, they all represent forms of political (or military) organization recognizable as such by early European arrivals. While they differed greatly from European institutions, they were more or less formally organized with recognizable chiefs or headmen (although Europeans often gave these people more power and authority than did the members of their communities). Second, they have in many cases provided the foundation for indigenous peoples' assertions of sovereignty, and self-determination/self-government rights on the domestic and international levels.

Prior to European arrival, the indigenous peoples of Canada had strong associations to their localized tribe or clan, but, as has been illustrated in the preceding, many also developed strong affiliations on more encompassing levels. Following the arrival of Europeans, pressure to develop broadly based affiliations increased as the

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[30] Ibid, p. 172.

indigenous peoples of Canada began entering into treaties with Colonial and Dominion Governments, sharing reserve lands with unrelated groups, and becoming the subject to specific government policies that applied uniformly to all groups. All of these occurrences, as well as recognition of the benefits of broadly based group action, have encourage identification by indigenous peoples with their more encompassing Nations and a strong collective sense of aboriginality. Although this identification has not replaced identification with the smaller tribe, clan, community or kin groups, it has moved political discussions, especially those related to self-determination and self-government, to the more broadly based level of the (First) Nation.

AUSTRALIA - INDIGENOUS PEOPLES' INSTITUTIONS AND CULTURES

Prior to the arrival of Europeans, Aboriginal peoples governed themselves informally according to the dictates of The Law. Aboriginal society and law were extremely rich and complex with a highly developed kinship system that governed all interactions between individuals and groups, negating the need for highly formalized social and political institutions. Instead, Aboriginal societies created "informal governing structures based upon the decisions of separate councils of male and female elders who knew the sacred laws."[31] Controls were based on and achieved through the desire for successful group action and the belief in supernatural punishment and reward. The clan, or descent group (an extended family whose members had religious ties with a series of sacred sites in their territory), was the fundamental unit around which traditional

Aboriginal society was organized, and around which Aboriginal societies, to a large degree, remain organized today.[32] A defining characteristic of this domain is its localism (defined socially, geographically or both) in which political, economic, and social imperatives lie in more restricted forms and institutions rather than in broader and more encompassing ones.[33] The Law, as it was variously understood across groups, was, and is, a total institution for each group of related individuals, governing all aspects of their lives. Because interaction with other groups was rare and occurred primarily among clans and descent groups with similar connections to Ancestor Beings, sacred sites and Dreaming Tracks, the necessity for confederacies of other forms of formal and encompassing institutions and agreements was absent.

When Europeans arrived in Australia, they saw nothing they could recognize as institutions and therefore assumed that Aboriginal peoples had no government, no lines of authority, no laws and no property. The institutions of Australia's Aboriginal peoples remain widely unknown or misunderstood today making it extremely difficult for Aboriginal peoples to assert their past self-determining and self-governing status as well as to advocate its reinstatement. The localism that characterizes Aboriginal peoples' institutions and political organization has also made it difficult for Aboriginal peoples to organize broadly based political movements in the present day.

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[31] Morse, p. 6.
[32] Lippman, p. 8.
[33] D. F. Martin and J. D. Finlayson, "Linking Accountability and Self-Determination in Aboriginal Organizations", CAEPR Discussion Paper, No. 16 (October), (Canberra: Centre for Aboriginal and Economic Policy Research - Australian National University), p. 5.

The existence of permanent and semi-permanent camps (necessitated by agriculturalism) in Torres Strait facilitated some recognition of Torres Strait Islanders' institutions by the new European arrivals. This recognition was also facilitated by Torres Strait Islanders' strong seafaring, trading and warrior tradition which demonstrated to European arrivals their ability to organize concerted group action directed towards common goals. The social and political life of most Torres Strait Islanders was structured by religious 'cults'. These cults defined leadership and decision-making roles, the assumption of these roles by individuals (usually through hereditary lines), acceptable mores and practices, and sanctions for individuals/families who acted inappropriately or unacceptably. The early recognition among Europeans of Torres Strait Islanders' institutions and cultures has facilitated their assertion of rights to self-determination.

CANADIAN INSTITUTIONS

"Indian Affairs is the oldest continuously operating arm of government in Canada. It was instituted by the British Imperial Government in the mid-1700, and until 1860 it discharged the responsibilities of the Crown to the indigenous peoples."[34] When Canada became a Dominion in 1867 responsibility for "Indians, and Land reserved for the Indians" (*Constitution Act, 1867*, Sec.91(24)) passed from the Imperial Government in Britain to the Dominion (Federal) Government in Canada. The Canadian Government continued the assimilationist policies of the Imperial and Colonial Governments and

[34] David Nicholson, "Indian Government in Federal Policy: An Insider's View" in Pathways to Self-Determination, p. 59.

began to adopt policies of protection, wardship and residential segregation, which culminated in the passage of the *Indian Act*.

With the passage of the first *Indian Act* in 1876, the federal government of Canada assumed jurisdiction over Indian Affairs with the establishment of the Indian Affairs branch of the Department of the Secretary of State. Later, responsibility for Indian Affairs was transferred to the Department of Interior, then to the Department of Mines in 1936, to the Department of Health and Welfare in 1945 and to the Department of Citizenship and Immigration in 1949. It was not until 1966 that the autonomous and separate Department of Indian Affairs and Northern Development was created by an Act of Parliament, with a minister responsible for the administration of the *Indian Act* and the Indian and Inuit Affairs Program.[35] In each incarnation, the Department of Indian Affairs has maintained almost absolute, and certainly colonial and paternalistic, control over indigenous peoples and their lands in its jurisdiction.

The *Indian Act* is what sociologists call a "total institution" - a comprehensive mechanism of social control.[36] With the passage of the first *Indian Act* by the Dominion Government of Canada in 1876, the Department of Indian Affairs was given sweeping power to invade, control and regulate all aspects of the lives of its subjects, even to the point of curbing constitutional and citizenship rights. Perceptions of indigenous peoples as wards of the state in need of superior protection gave rise to the colonialist/paternalist character of the Department, which has changed little over the years. In general, the

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[35] Roger Gibbins and J. Rick Ponting, "Historical Overview and Background" in Arduous Journey: Canadian Indians and Decolonizing, J. Rick Ponting (ed.), (Toronto: McClelland and Stewart, 1986), p. 21.
[36] Ibid.

Indian Act sought to standardize and regulate ("bureaucratize") federal interactions with "status Indians" and persists today "as an essentially repressive instrument of containment that subverts aboriginal control over jurisdiction of local control."[37] Despite a major rewriting of the *Indian Act* in 1951, and later minor alterations (for example, the repeal of enfranchisement provision in 1985 and amendments allowing bands to tax businesses on reserves in 1988), much of the colonial and paternalistic spirit of the first *Indian Act* survives today.

The *Indian Act* applies to so-called "status-Indians" (or "registered Indians"), a legal category defined by the federal government with only partial correspondence to biological realities. "Membership is defined by (a) admittance to a general registry [maintained by the Department of Indian Affairs], (b) affiliation with one of 596 bands (although membership is not automatic) and (c) jurisdiction under the Indian Act."[38] The *Indian Act* also permitted non-Indian males to gain status through marriage, while requiring Indian women to abandon status if married to non-Indian males (until 1985). Although the *Indian Act* treats all status Indians collectively for administrative purposes, they remain culturally and politically diverse and continue to identify themselves as not one but many nations. According to the *Indian Act*, status Indians are legally permitted to reside on one of the 2 272 reserves and are entitled to certain benefits such as subsidized housing on reserves; the provision of certain services on reserves (health,

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[37] Augie Fleras, "The Politics of Jurisdiction: Indigenizing Aboriginal-State Relations" in Visions of the Heart: Canadian Aboriginal Issues, David Alan long and Olive Patricia Dickason (eds.), (Toronto: Harcourt Brace and Company, Canada, 1996), p. 156.

justice, education and welfare) as well as funding for cultural programs, band government and economic development by the federal government. They also receive an exemption from federal and provincial taxes on income earned on reserves.[39]

The *Indian Act* ignores the institutions, alliances, and affiliations of indigenous peoples and creates "non-Indian styled" bands as the basic institution of Indian government. The *Indian Act* "defines the basis of membership in and requirements for election to those governments, lays out their powers, outlines the relationship of provincial government to Indians peoples and lands, and establishes a regime for the management of resource lands and the economic activities of those who belong to the bands."[40] Indian governments under the *Indian Act* are agents of the federal government, and it has been the federal government that has decided which kinds of governing and political activities are permissible and which are not. Indian governments are subordinate governments and dependent on the federal government for their existence.

The *Indian Act* has served to repress Indian cultures, and to keep Indians locked in a state of dependence, with little control over their affairs. The original *Indian Act* established a "model of oppression so successful that the white South African government studied it before Pretoria set-up the so-called independent black homelands as part of the system of apartheid."[41] While condemnation of the *Indian Act* as antiquated and paternalist is widespread, aboriginal leaders are reluctant to advocate or

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[38] Augie Fleras and Jean Leonard Elliott, The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand, (Toronto: Oxford University Press, 1992), p. 14.
[39] Fleras and Elliott, The Nations Within, p. 14.
[40] Cassidy and Bish, p. 40.

support its repeal for fear of undermining the government's legal obligations to status-Indians.

CANADA - INSTITUTIONAL FOUNDATIONS FOR SELF-GOVERNMENT

In 1969, the federal government published a White Paper that promised a modernized approach to assimilation. Its main goals were to:

1. terminate the special relationship between First Nations and the federal government;
2. devolve federal responsibilities to First Nations to the provinces;
3. repeal the Indian Act and dismantle the Department of Indian Affairs;
4. abolish treaty privileges and special status, thereby "normalizing" the entry of First Nations people into Canadian society; and,
5. entrench the formal legal equality of First Nations people as individual citizens of Canada.[42]

Opposition to this document and its agenda for change was widespread and aggressive and has culminated in contemporary demands for self-government. It quickly and effectively galvanized diverse indigenous peoples into national protest resulting in the abandonment of the White Paper and its agenda. It also resulted in formal, if somewhat grudging, acknowledgment by the federal government of the legitimacy of aboriginal and treaty rights.[43] The White Paper also sparked what has been termed the 'Indian Quiet Revolution'.[44] This social, political, cultural and to a lesser extent economic revolution ushered the indigenous peoples of Canada onto the national stage and into the political

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[41] Dan Smith, The Seventh Fire: The Struggle for Aboriginal Government, (Toronto: Key Porter Books, 1993), p. 39.
[42] Augie Fleras and Jean Leonard Elliott, Unequal Relations: An Introduction to Race, Ethnic and Aboriginal Dynamics, (2nd ed.; Scarborough: Prentice Hall Canada Inc., 1996), p. 204.
[43] Ibid.
[44] J. Rick Ponting, "Preface" in Arduous Journey, p. 13.

and media spotlight, and greatly stimulated the growth and development of the 'modern' indigenous political movement.

Many indigenous leaders in Canada saw the repatriation of Canada's constitution and the negotiations leading up to it as a vehicle to achieve their aspirations for a new role within Canada. After a long and frustrating battle, the protests and lobbying efforts of indigenous peoples, accompanied by sympathetic media coverage and wide public support, resulted in the inclusion of three important sections in Canada's constitution:

Section 25	The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
Section 35 (1)	The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2)	In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3)	For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
Section 37 (1)	A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
(2)	The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the right of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions of that item.[45]

[45] *Constitution Act, 1982* in Federalism and the Charter: Leading Constitutional Decisions, Peter H. Russell, Rainer Knopff and Ted Morton (Ottawa: Carlton University Press, 1990), Appendix 2, pp. 784, 786, and 787.

The required First Ministers' conference was held in March of 1983, marking the first time that aboriginal leaders fully participated in constitutional debate in Canada. From 1982 to today, "Canada remains the only country in the world in which constitutionally entrenched aboriginal and treaty rights serve as the basis for framing aboriginal-state relations."[46]

Since the entrenchment of aboriginal rights, the Supreme Court of Canada has gradually argued that these rights include a right to self-government. The proposition that "[I]n pre-European times, the indigenous people of Canada were sovereign and independent nations controlling their own territories and ruling themselves under their own laws" was recognized in *Calder v. Attorney-General of British Columbia (1973)* and in *R. v. Sioui (1990)*; the proposition that "[i]n various stages these nations passed under the sovereignty of the Crown, and their members are now Canadian subjects" was asserted in *Calder v. Attorney-General of British Columbia (1973), Guerin v. The Queen (1984) and R. v. Sparrow (1990)*; the proposition that "First Nations continue to possess "aboriginal rights" which although not the creation of the Canadian state, are recognized under the common law of Canada" was asserted in *Calder v. Attorney-General of British Columbia (1973), Guerin v. The Queen (1984), Roberts v. Canada (1989) and R. v. Sparrow (1990)*; and the proposition that many First Nations also hold "treaty rights" flowing from agreements with the Crown or between the Crown and other states was

[46] Fleras and Elliott, The Nations Within, p. 8.

recognized in *Simon v. The Queen (1985)* and *R. v. Sioui (1990)*.[47] These decisions have all aided Canada's indigenous peoples in their fight to obtain recognition of their inherent right of self-government by giving legal recognition to their previously dismissed propositions that serve as the foundation for the right of inherent self-government. In this respect, their demands for self-government have a much stronger institutional foundation than in Australia.

The Charlottetown Constitutional Accord, which was defeated in a national referendum in 1992, included some important provisions relating to indigenous peoples and self-determination. It provided for the constitutional entrenchment of aboriginal self-government - inherent in nature, sovereign in sphere and circumscribed in extent (meaning including no external sovereignty) - as a third tier of government, subject to the Charter of Rights and Freedoms and to the Constitution. It did not define the exact powers and jurisdiction of aboriginal self-government but it did extend this right to all 'aboriginal peoples' (status and non-status Indians, Inuit and Métis). It also guaranteed that as counterparts of provincial governments, aboriginal governments would receive federal transfer payments and would also secure power to override those sections of the Charter at odds with aboriginal interests (use of a "notwithstanding clause" similar to that of the provinces).[48] While not all indigenous peoples agreed with the provisions of the Charlottetown Accord, the Accord did serve the purpose of securing aboriginal self-

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[47] Brian Slattery, "First Nations and The Constitution: A Question of Trust", *The Canadian Bar Review*, Vol. 71, (1992), p. 262.
[48] Fleras and Elliott, Unequal Relations, p. 206.

'Aboriginals' from the census) and deleting the restriction within s. 51(xxvi) (precluding the Commonwealth government from making laws for those of 'the Aboriginal race').[50] Prime Minister Harold Holt introduced the *Constitution Alteration (Aboriginals) Bill* on March 1, 1967 to pursue these changes. The Bill was ultimately passed by both Houses of Parliament and approved on May 27, 1967 by a public referendum with 5 183 133 voting in favour of the amendments and 427 007 voting against. Not only did the referendum receive an unprecedented 89.34 per cent approval across Australia, it also received majority approval in all States. The deletion of the restriction in s. 51(xxvi) created concurrent Commonwealth-State jurisdiction over Aboriginal and Torres Strait Islander people, ushering in an era of cooperative federalism in Australia with respect to Aboriginal and Torres Strait Islander affairs. Cooperation, however, has not governed the relations among the Commonwealth and State governments, with the Commonwealth government often finding itself in the middle of disputes between indigenous peoples and State governments.

Since the 1960s the Commonwealth government of Australia has been grappling with ways of increasing indigenous involvement in policy making. On November 2 1967, six months after the referendum, Prime Minister Harold Holt announced the establishment of a Council for Aboriginal Affairs. "The Council's function was to consult with Aborigines, carry out research and advise the Prime Minister on suitable

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[50] Ibid, p. 15.

organizations to give effect to the Commonwealth's responsibilities."[51] This Council, essentially an independent (although government funded), research-based "think-tank", looked at the diverse State and Territory policies related to Aboriginal people and the responses of Aboriginal people to these policies. It determined that although all of the programs examined were aimed at the assimilation of Aboriginal people into one single Australian community, Aboriginal peoples had strong desires to preserve their separateness and distinctiveness. From 1967 to 1972 the Council took an active role in indigenous political expression and attempted to persuade successive Commonwealth governments that assimilation was not an acceptable basis for policy "and that Australians must accept the right of Aborigines to choose the nature and extent of their involvement in Australian society and must have the resources and power to make that choice a reality."[52]

The Council of Aboriginal Affairs became the Department of Aboriginal Affairs in 1972 leaving the control of indigenous political expression in the hands of emerging community representative organizations. The Council was replaced by a series of more or less government controlled national 'representative' organizations. The National Aboriginal Consultative Committee (NACC) was founded in 1973 by the first Commonwealth Minister for Aboriginal Affairs. "The initiate sought to institutionalize existing indigenous lobby groups, such as the Federal Council for the Advancement of Aboriginal and Torres Strait Islander Concerns (FCAATSIC), and to provide a means by

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[51] H. C. Coombs and C. J. Robinson, "Remembering the Roots: Lessons for ATSIC" in Shooting the Banker: Essays on ATSIC and Self-Determination, Patrick Sullivan (ed.), (Darwin: North Australia Research Unit - Australian National University, 1996), p. 2.

which Aboriginal and Torres Strait concerns could be implemented."[53] In 1975 the NACC was reviewed by the Liberal/National Party Government and replaced with the National Aboriginal Conference (NAC). The NACC and the NAC were both government sponsored bodies designed to overcome divisions within Aboriginal ranks and to provide the government with a body that would be relatively easy to deal with. In 1980 the Aboriginal Development Commission (later succeeded and replaced by the Aboriginal Land Fund Commission) was founded to work along side of the NAC, primarily to develop strategies for the economic development of Aboriginal people. In 1983 the government's attempts at creating an Aboriginal organization were again under question. The criticisms of the NAC mirror many of the criticisms of the NACC. Essentially neither body succeeded in providing a significant instrument of Aboriginal political influence and power, and neither body succeeded in being accountable to or representative of Aboriginal communities. The NAC was abandoned in 1985. Five years later the Aboriginal and Torres Strait Islander Commission (ATSIC) was created.

In recent years Australia's Constitution has again come under criticism by Aboriginal peoples and their supporters, this time for its racist overtones, commitment to the notion of a perpetual British society in the South Pacific, and lack of reference to Aboriginal and Torres Strait Islanders and their interests. The current debate on the move from a Federation to a Republic has opened the doors for discussions of a new definition and a new vision for social democracy in Australia, one that recognizes and

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[52] Coombs and Robinson, p. 6.
[53] Ibid, p. 8.

incorporates the indigenous peoples of Australia. These criticisms and interests are currently being addressed by the Council for Aboriginal Reconciliation.

The Council for Aboriginal Reconciliation is a twenty-five member body (composed of approximately half indigenous and half non-indigenous members) established by the Commonwealth Parliament with cross-party support in 1991. With a ten year time frame, the Council for Aboriginal Reconciliation is undertaking the development of a process of national reconciliation between Australia's indigenous and non-indigenous people. The aim is for an instrument of reconciliation to be in place by 1 January 2001 (the 100th anniversary of the Australian federation). The Council so far has recommended that a new preamble be added to the Constitution acknowledging the prior occupation and ownership, and continuing dispossession of Aboriginal and Torres Strait Islander people. It has not yet decided whether an 'umbrella national document' (such as a treaty or Makarrata) will best advance the process of reconciliation.[54]

AUSTRALIA - INSTITUTIONAL FOUNDATIONS FOR SELF-GOVERNMENT

Institutions in Australia have moved through several eras of policy making for indigenous peoples. Assimilation was adopted as official policy in Australia at a 1937 conference of State and Federal officials convened by the federal government. In 1951, assimilation policy was more clearly elaborated. "It stated that Aborigines 'shall attains the same manner of living as other Australians, enjoying the same rights and privileges,

[54] Noel Pearson, "An Optimist's Vision" in "Indigenous People and Reshaping Australian Institutions: Two Perspectives", N. Pearson and W. Sanders, CAEPR Discussion Paper No. 102, (Canberra: Centre for Aboriginal and Economic Policy Research - Australian National University, 1995), p. 14.

accepting the same responsibilities, observing the same customs and being influenced by the same beliefs, hopes and loyalties."[55] Aimed at full citizenship rights, the 1951 policy did go some distance towards removing the worst inequalities from protective and restrictive state legislation. Its aims of equalizing health, sanitation, housing, schooling, wages and general welfare, however, were not met and have still not been fully met today. Assimilation as nation-wide policy was further review in 1963 and its component parts spelled out more clearly. In response to policy changes made in this review, all States amended their legislation between 1962 and 1969, each defining an Aborigine in a different fashion and each dictating different rights and disabilities.[56] In 1965 the policy of assimilation was replaced by one labeled 'integration', which meant creating 'real and equal opportunities' for Aborigines while allowing them to maintain their cultural distinctiveness. In reality, however, it meant little more than assimilation, seeking to make them part of the Australian society of which they were seen as being outside of.

In 1972, Gough Whitlam's Labour Government introduced the policy of self-determination. The basic objective of Labour's Aboriginal policy was "to restore to the Aboriginal people of Australia their lost power of self-determination in economic, social and political affairs", so that they could take up "as a distinctive and honoured component in the Australia society the position to which their rights as the First Australians entitled them."[57] In March 1973, at a seminar convened by and for white administrators in Aboriginal Affairs, self-determination was defined as "Aboriginal

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[55] Lippman, 38.
[56] Ibid, p. 41.

communities deciding the pace and nature of their future development within the legal, social and economic restraints of Australian society."[58] This policy was called "radical" after almost a century of paternalism.

In 1975 'self-determination' gave way to 'self-management'. Although 'self-management' aimed to make Aboriginal communities (government settlements and missions) autonomous, the long preceding period of dependence made it difficult for the government to develop new decision-making processes or to revive traditional ones in these communities.[59] In the August 1990 final report of the House of Representatives Standing Committee on Aboriginal Affairs (entitled *Our Futures, Our Selves*), the important difference between 'self-determination' and 'self-management' was acknowledged. "The latter term referred to efficient administration, while the former goes beyond this and implies control over policy and decision making especially the determination of structure, processes and priorities."[60] After reviewing the Commonwealth, State, and Territory initiatives to develop machineries for self-determination, the Committee cautioned that:

> ... local government type and other imposed structures cannot by themselves provide a basis for self-determination. Indeed the structure available for community management in the States and in the Northern Territory have less to do with self-determination than they have to do with self-management. They have also been developed by government with the expectation that Aboriginal people will accommodate their imposition.

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[57] Ibid, 71.
[58] Ibid, p. 73.
[59] Jon Altman, "The Aboriginal Economy", in Northern Australia: Options and Implications, Ryse Jones (ed.), (Canberra: Resource School of Pacific Studies - Australian National University, 1980), p. 100.
[60] Tim Rowse, Remote Possibilities: The Aboriginal Domain and the Administrative Imagination, (Darwin: North Australian Research Unit - Australian National University, 1992), p. 54.

> For this reason, these structures have not always been able to meet Aboriginal aspirations.[61]

Until very recent years, self-determination has generally meant to the Commonwealth government increasing the involvement of Aboriginal people in decision-making through consultation and advisory mechanisms of the government's creation, and through the support of government initiated and controlled community service and management operations. [62] While the importance of developments flowing from this period should not be underestimated, it is important to understand that these developments have not corresponded with indigenous peoples' goals and aspirations as they relate to their definition of self-determination - effective decision-making authority within the jurisdiction of their communities.

The indigenous governments with the most legislative and judicial authority exist under what is widely regarded as the repressive Government of Queensland. "Aboriginal and Torres Strait reserves have had a relatively long history of possessing local Councils. These bodies have been created under State legislation with defined by-law making powers similar to those possessed by band governments under the Canadian *Indian Act.*"[63] While these Councils are not fully self-determining or self-governing, they have provided their members and communities with some degree of effective political control over their lives, and have served as important lobbying bodies.

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[61] Ibid, p. 54.
[62] Lois O'Donoghue, "Keynote Address: Australian Government and Self-Determination", in Aboriginal Self-Determination in Australia, Christine Fletcher (ed.), (Canberra: Aboriginal Studies Press, 1994), p. 7.
[63] Morse, p. 84.

"The passing of the *Land Rights (Northern Territory) Act* in 1976 [by the Commonwealth government] appears to be a land-mark in Australian race relations history, and acknowledgment that Aborigines were the original owners of Australia and, as such, were entitled to certain traditional areas and sacred sites under both Aboriginal and white law."[64] With the passage of this Act, land ownership by virtue of being Aboriginal (native title) was affirmed for the first in Australia. Under this Act, possession and control of the land and all reserves and most religious missions throughout the Northern Territory was placed in the hands of *Aboriginal Land Trusts* governed by *Aboriginal Land Councils*.

> They [the Land Councils] are empowered to represent the local inhabitants, administer land, negotiate economic development projects (both joint venture and royalty arrangements), acquire additional lands, and have all the other legal powers of a normal corporation. In addition, they statutory bodies are also political organizations in that they represent their constituents in dealing with federal, state, territorial and municipal governments.[65]

Among Aboriginal people in the Northern Territory, Land Councils seem to enjoy considerable (though locally disputed) legitimacy.[66] Although the Northern Territory Land Councils do not restore anything vaguely approaching sovereignty, they do possess the possibilities for independent political action and have increasingly asserted the interests of their constituents in political and media forums.

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[64] Lippman, p. 67.
[65] Jean-François Tremblay and Pierre-Gerlier Forest, Aboriginal Peoples and Self-Determination: A Few Aspects of Government Policy in Four Select Countries, Groupe de recherche sur les interventions gouvernementales, Université Laval, (Québec: Secrétariat aux affaires autochones, 1993), p. 31.
[66] Tim Rowse, "The Political Identity of Regional Councilors", in Shooting the Banker, p. 44.

In 1992, the indigenous peoples of Australia received important support for their claim to self-determination. On June 3, 1992 the High Court of Australia, in a six to one majority decision, reversed the legal doctrine of *terra nullius* and held that the common law of Australia recognized a form of native title. "The High Court found that native title exists where Aborigines have maintained their connection with the land, and where their tile has not been extinguished by acts of imperial, Colonial, State, Territory or Commonwealth government."[67] Although the Court allowed that the Crown, as sovereign, held 'radical title' and, therefore, under certain conditions 'native title' could be extinguished by legislation[68], this decision is important for recognizing native tile as inherent in nature (an original right that arises out of Aboriginal law and custom and not of Crown derivation). Eddie Mabo's complaint to the High Court was that Queensland's annexation of the Torres Strait in 1879 had not lawfully extinguished his customary ownership of the portion of Murray Island that has long been passed down through his family. This was the first opportunity of the High Court, since its establishment in 1901, to confront the central question of the existence and nature of native title in Australian law. This decision provides unprecedented support for indigenous peoples' claims to self-determination and self-government rights and could result in radical policy change in the years to come.

Some Aboriginal peoples in Australia (primarily in the Northern Territory) have chosen to assert their right to self-determination and self-government by removing

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[67] Geoffrey E. Ewing, "Terra Australia Post Mabo: For Richer or For Poorer" in Aboriginal Power in Australian Society, Michael C. Howard (ed.), (St. Lucia: University of Queensland Press, 1992), p. 157.

themselves from non-indigenous society. The homeland movement (also called the outstation movement and the decentralization movement) is the name given to an outmigration of clans to traditional areas since the early 1970s. The motives associated with this outmigration are primarily linked to:

1. dissatisfaction with life in centralized communities where the breakdown of traditional authority structures and extreme economic dependence were resulting in much social disruption (the push factor); and
2. the possibility of establishing claims to traditional land via occupancy due to the emergence of the land rights movement (the pull factor).[69]

It is essentially a process of self-decolonization. The movements, whether diffuse or definite and organized, are voluntary. They are taking place under traditional leadership. The tasks and burdens involved in the decisions to move are, though onerous, being assumed cheerfully and are regarded as rational and attainable. The controlling aim seems to be to reestablish an authentically Aboriginal society which will assimilate chosen European elements but will not necessitate a continuous 'white' presence or the maintenance of a 'worker-boss' relationship between indigenous and non-indigenous peoples. It seems certain that to some degree being 'in one's own country' is a material and psychological pre-requisites of independence and a distinctively Aboriginal life-style.[70] The Territory and Commonwealth governments have not objected to this movement and appear to support its continuation as long as it does not require their financial support (i.e. the electrification of remote homeland sites).

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[68] Tim Rowse, After Mabo: Interpreting Indigenous Traditions, (Carlton: Melbourne University Press, 1993), p. 5.
[69] Jon C. Altman, "The Aboriginal Economy" in North Australia: Options and Implications, Ryse Jones (ed.), (Canberra: Resource School of Pacific Studies - Australian National University, 1980), p. 97.
[70] Australia, Council for Aboriginal Affairs, Report on Arnhem Land , (Canberra: Australian Government Publishing Service, 1976), p. 6.

Modern Political Movements of Indigenous Peoples in Canada and Australia

While the organization of indigenous peoples in Canada has been occurring since the time of European arrival, the building of national indigenous peoples' movements has been a long an arduous process. Although Indian leaders from across the country had been slowly building up local and regional organizations for several decades, "[t]he first boost to the effort came when the proscriptions on Indian organizing were lifted in the 1951 revision of the Indian Act."[71] The post-war boom also aided the formal organization of a national Indian movement. The employment opportunities it provided meant that more families could afford a car, allowing Indian activists to travel easily to surrounding communities and across their provinces to carryout organizing activities.[72]

It was the Department of Indian Affairs that inadvertently spurred the final organizational drive for a national Indian movement in Canada when it brought together representatives of the various Indian organizations into the National Indian Advisory Board which was mandated to review the *Indian Act*. "The Indian 'advisors' soon discovered that what the department was looking for from them was a stamp of approval for its plan to abolish not only the Indian Act, but also virtually all First Nations rights, including their rights to their reserve lands."[73] While the official meetings involved debates between department officials and indigenous representatives, the real meetings

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[71] Peter MacFarlane, "Aboriginal Leadership" in Visions of the Heart: Canadian Aboriginal Issues, David Alan Long and Olive Patricia Dickason (eds.), (Toronto: Harcourt Brace and Company, Canada, 1996), p. 135.
[72] Ibid.

took place in hotel rooms at the end of the day, where indigenous leaders planned the founding of a national Indian organization.

The creation of the National Indian Brotherhood (NIB) in 1969 under the provisional leadership of Walter Dieter, was a breakthrough in Indian politics. It gave a single voice to status Indians across Canada with a membership in the hundreds of thousands (rather than the hundreds represented by most band chiefs). Within a short time, the NIB was transformed from a loose affiliation of status Indians into "the largest lobbying organization in Ottawa with a mandate to pursue self-government for all of the 50-some First Nations in Canada."[74] In 1982 the NIB changed its structure and its name to the Assembly of First Nations (AFN). Instead of being based on provincial organizations, the new Assembly of First Nations would be made up directly of the bands, represented by their Chiefs.

Similar organizing efforts have occurred among Canada's other indigenous peoples. The 192 000 Métis across the Prairies are represented by the Métis National Council, and the interests of the Inuit at the national level are represented by the Inuit Tapirisat of Canada. Provincial, regional, tribal, urban, community and international organizations and associations have also grown and developed in number and sophistication since the 1950s and 1960s. They now play important representative roles in conjunction with and separate from national bodies, articulating the interests of their members and lobbying governments on their behalf. Federal government funding has been and is an important stimulus to the development of provincial and national

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[73] Ibid, p. 136.

indigenous organizations in most cases remains an important source of revenue. Because indigenous organizations have achieved a high degree of legitimacy (among both indigenous and non-indigenous people) and a high degree of effectiveness, it is difficult for governments to withdraw this support without serious political costs.

Indigenous interests have not developed a similarly strong lobby presence in Australia. The indigenous peoples of Australia identify most strongly with organizations that are in their own local or regional contexts, and consider more broadly based organizations as irrelevant, at least to their immediate life circumstances.[75] The colonial myth that a person with European blood is not a 'real' Aboriginal or Torres Strait Islander person has been used to divide indigenous peoples and keep them apart. The same separation has occurred between urban and non-urban aboriginal groups. As a result "the protests of indigenous peoples have tended to be in parallel operations from each group rather than in united action. It has also been very largely local and about regional issues."[76]

During the 1950s and 1960s a number of indigenous organizations formed in all States to press the case for civil and land rights and to protest against discriminatory legislation. The mining boom and subsequent mineral exploration of northern Australia in the 1950s and 1960s has been called the "second coming" of whites to Australia and was a definite motivator for the organization of indigenous interests in land and political rights. "In the face of the mining threat, Aborigines and their white supporters were led

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[74] Ibid.
[75] H. C. Coombs and C. J. Robinson, "Remembering the Roots: Lessons for ATSIC" in Shooting the Banker, p. 11.

to question the apparent lack of legal rights of Aborigines to sacred traditional lands."[77] Growing international interest in land rights issues in 1969 and 1970, with visits by various black Americans, Maoris and Papua New Guineans, and the Secretary of the British Anti-Slavery Society[78] encouraged the organization and development of indigenous organizations, although this organization occurred primarily at the local and regional levels.

On July 16, 1990, the Aboriginal Provisional Government (APG) was formed by Aboriginal activists Mike Mansell, Geoffe Clarke, Bob Witheral and Josie Crawshaw. "The APG wants an Aboriginal state to be established, with all the essential control being vested back into Aboriginal communities."[79] It envisions land areas scattered far and wide around Australia, with political control of each local Aboriginal community vested in the community itself and with the residual powers of negotiating with foreign governments for trade, coordination of some uniformity between Aboriginal communities and so on, vested in the APG.[80]

> In exchange for Aboriginal people giving up perhaps half of the country to white Australia, there would need to be some compensation package. It need not necessarily be in the form of money ... having access to specialized institutions such as medical facilities, education facilities and telecommunications systems could be a basis for that compensation for ceded lands.[81]

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[76] Rowley, Recovery, p. 23.
[77] Ian Palmer, Buying Back the Land: Organizational Struggle and the Aboriginal Land Fund Commission, (Canberra: Aboriginal Studies Press, 1988), p. 1.
[78] Lippman, p. 50.
[79] Michael Mansell, "Towards Aboriginal Sovereignty: Aboriginal Provisional Government", *Social Alternatives*, 13: 1, (April 1994), p. 16.

[80] Ibid.
[81] Ibid.

The APG aspires to operate alongside all other governments in the world, including the Australian Government, and not be subordinate to it. While the APG claims to be national in scope and does lobby Australia's government on behalf of indigenous people and their interests, it is considered to be a 'radical' organization by governments and also by many indigenous people and their organizations.

While the indigenous peoples of Australia have not developed the same kinds of national and concerted political movements as Canada's indigenous peoples, they have embarked on some interesting and unique campaigns for the recognition of their distinct rights as indigenous peoples. "Apart from marches, placards and demonstrations, they have used such imaginative tactics as a petition to the Federal Parliament written on bark in their own language, a tented Aboriginal Embassy on Capitol Hill, Canberra, and the 'discovery' of England by small boat."[82] These efforts have helped to mobilize support for indigenous peoples within Australia and to demonstrate to the world indigenous peoples' dissatisfaction with the Australian colonial regime.

Aboriginal and Torres Strait Islander peoples have, in some places, and instances, established core organizations of the kind required for self-government ahead of the political achievements of the rights to self-government. "Such developments witnessed for instance in the 1970s in Western Australia and Queensland, provided examples of Aboriginal organizations which were acquiring some experience in the process of self-government while also acting as a pressure group and designer of political reform."[83] These sorts of organizations are also recognizable, perhaps to an even greater degree in

[82] Lippman, p. 176.

Torres Strait. The Island Coordinating Council and the Island Councils (established under *the Queensland Community Services (Torres Strait) Act, 1984*) as well as the older Torres Shire Council have acted as effective political bodies and have provided forums for the discussion of ideas and issues, as lobby state and federal group, and as research bodies.[84] Churches, sporting clubs and the like are also of major social and political importance in Torres Strait, in common with conditions found in most Pacific island countries.[85]

CONCLUSION

According to a 1990 national survey by Angus Reid,

> Canadians have positive feelings about this country's Aboriginal Peoples. They have a special respect for their culture and art, and even more importantly for Aboriginals' relationship with the land and the environment. Canadians feel a basic responsibility toward Aboriginal Canadians and would prefer their government's actions to reflect this feeling of responsibility more effectively.[86]

This same survey revealed that most Canadians believe that past government policies have done more harm than good, ghettoizing indigenous people and making them too dependent on the government. It also reveals that most Canadian's recognize indigenous peoples' need for some control over their own destiny and express support for a

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[83] Coombs and Robinson, p. 5.
[84] J. P. Lea, O. G. Stanley and P. J. Phibbs, "Torres Strait Regional Development Plan 1990-95" prepared for the Torres Strait Coordinating Council (Sydney: Department of Urban and Regional Planning - University of Sydney, 1990), p. 39.
[85] Lea, Stanley and Phibbs, p. 42.
[86] Angus Reid, "Canadians' Views and Attitudes Regarding Issues Associated With Aboriginal Peoples", (Angus Reid Group: Vancouver, 1990) in J. B. Berry and M. Wells, "Attitudes Toward Aboriginal Peoples and Aboriginal Self-Government in Canada" in Aboriginal Self-Government in Canada: Current Trends and Issues, John H. Hylton (ed.), (Saskatoon: Purich Publishing, 1994), p. 221.

significant degree of aboriginal self-government (if accompanied by self-responsibility and self-reliance, particularly in the fiscal realm). "Almost all Canadians would grant at least some level of self-government to aboriginal peoples on reserve lands; however, very few would grant them complete sovereignty with Canadian federal and provincial governments having no authority on native lands".[87] Also, "[a]lmost all Canadians believe that aboriginals should have ownership of the natural resources - such as forestry, the fisheries and oil - on their lands."[88]

The results of this Reid survey are not an anomaly. Surveys conducted immediately following the 1992 Charlottetown Accord referendum indicated some 60 per cent of Canadians supported the constitutional changes that had been proposed to deal with Aboriginal issues.[89] Half of those questioned, notwithstanding the failure of the Accord, were in favour of the government giving a high priority to Aboriginal self-government.[90] In 1994, levels of public support for Aboriginal self-government were estimate at between 65 and 85 per cent.[91]

The attitudes of non-indigenous Australians towards Australia's indigenous peoples stand in stark contrast to those of non-indigenous Canadians. "Australians generally are a chauvinist people, hostile and suspicious towards people who look, behave, believe or think differently from the conventional image they have of

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[87] Ibid, p. 226.
[88] Ibid.
[89] John H. Hylton, "Future Prospects for Aboriginal Self-Government in Canada" in Aboriginal Self-Government in Canada, p. 242.
[90] Ron George, "Poll says majority favour native rights", *Leader-Post* (Regina), Dec. 1, 1992 in Hylton "Future Prospects for Aboriginal Self-Government in Canada", p.242.
[91] David Roberts, "Listening for ways to heal old wounds", *Globe and Mail* (Toronto), Jan. 7 1994) in Hylton "Future Prospects for Aboriginal Self-Government in Canada", p. 242.

themselves,"[92] - white, English speaking and of Western-European heritage. Non-indigenous Australians generally have limited face-to-face contact with indigenous peoples and are vastly ignorant of their histories, cultures, interests, aspirations and goals. They generally understand indigenous politics as a 'zero sum' conflict. "Either Aborigines get sufficient autonomy to destroy the Australian democracy, or Australian society will be 'saved' by the denial of any special rights."[93] Being Aboriginal was, and often still is, construed by the dominant group's members as being in opposition to be "Australian".[94]

The different indigenous and non-indigenous histories, institutions and cultures of Canada and Australia have served to promote distinct perceptions and treatments of indigenous peoples by non-indigenous Canadians and Australians and their governments. These different perceptions and treatments have had an important influence on the development and implementation of self-determination initiatives in Canada and Australia.

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[92] H. C. Coombs, "Implications of Land Rights" in North Australia, p.128.
[93] Rowley, Recovery, p. 148.
[94] Jan Pettman, "Whose Country is it Anyway: Cultural Politics, Racism and the Construction of Being Australian", Working Paper No. 39, (May 1988), (Canberra: Peace Research Centre, Research School of Pacific Studies - Australian National University), p. 22.

CHAPTER 3

THE DISMANTLING OF DIAND AND THE CREATION OF ATSIC: INDIGENOUS SELF-DETERMINATION'S MEANING IN PRACTICE IN CANADA AND AUSTRALIA

Political, economic and cultural self-determination has been the articulated goal of indigenous peoples in Canada and Australia for at least the past three decades. Indigenous peoples in both countries assert that self-determination is necessary to ameliorate their devastating socio-economic plight, to bring healing to their communities, and to return to them control over their cultural, economic and political development. These objectives have not yet been fully addressed by the respective governments. As indigenous peoples in the two countries have become increasingly organized and vocal, the governments of both Canada and Australia have been forced into taking action on indigenous peoples' demands for self-determination and have developed and implemented a variety of indigenous self-determination policies and initiatives. These policies and initiatives represent responses to indigenous peoples' articulated aspirations, goals and demands for reconstituted indigenous-state relations. Of course, these responses are mediated by governments' willingness and/or ability to accommodate these desires and to mold them into workable solutions, and thus to give a meaning in practice to self-determination.

Self-determination, then, is not a neutral term, but is rather context specific. Its meaning in practice in Canada is now being actively pursued by indigenous peoples and

governments via *self-government* policies and initiatives. In contrast, in Australia, its meaning in practice is presently limited to the pursuit of policies and initiatives directed towards *self-management.*

This distinction emerges from differences in each country's unique historical patterns of institutional relationships between indigenous peoples and governments as detailed in Chapter 2. These relationships have influenced what indigenous peoples define and articulate as their self-determination aspirations, goals and demands in each country, and the extent to which their respective governments have accepted these definitions and articulations in public policy. In Canada, the centralization of Indian (Aboriginal) Affairs, highly bureaucratized indigenous-state relations, a policy history premised on assimilation, and the historic signing of treaties have resulted in the pursuit of self-determination through self-government by indigenous peoples and governments. In contrast, the decentralization of Aboriginal (and Torres Strait Islander) Affairs, less bureaucratized indigenous-state relations, a policy history premised on exclusion, and the absence of treaties have resulted in the pursuit of self-determination through self-management in Australia. These different approaches are illustrated through a comparison of the dismantling of the Department of Indian Affairs and Northern Development (DIAND) initiative in Manitoba, Canada and the creation of the Aboriginal and Torres Strait Islander Commission (ATSIC) in Australia.

HISTORICAL PATTERNS OF INSTITUTIONAL RELATIONSHIPS IN CANADA AND AUSTRALIA

The centralization of Indian (Aboriginal) Affairs and a high degree of bureaucratization have been constant characteristics of indigenous-state relations in Canada. Indian Affairs has been an operating arm of government in Canada since the mide-1700, falling under the jurisdiction of the British Imperial Government until 1867 when it was transferred to the Dominion (Federal) Government of Canada. With the passage of the first *Indian Act* in 1876 and the accompanying institution of an Indian Affairs branch of the Secretary of State (the first incarnation of the Department of Indian Affairs), the federal government of Canada unequivocally assumed jurisdiction over the lives and lands of indigenous peoples in Canada. The *Indian Act* and its administration by a centralized government department permitted the systematic and bureaucratic administration of indigenous peoples by the federal government. Perceptions of indigenous peoples as wards of the state in need of protection gave rise to the colonialist/paternalistic character of the *Indian Act* and of the Department of Indian (Aboriginal) Affairs which has changed little over the years. Accordingly, indigenous peoples and their communities were left with very limited social, economic and political autonomy.

Until the early 1970s, the central objective of Aboriginal Affairs policy in Canada was the eventual assimilation of indigenous peoples into the wider Canadian society. From 1867 to 1945, assimilation was actively pursued through strategies based on the

practices of segregation, wardship and protection.[1] These strategies sought to 'civilize' indigenous peoples by outlawing traditional social, economic and political practices and pushing indigenous peoples toward becoming 'responsible' and 'productive' members of Canadian society. From 1945 to 1973, the assimilation of indigenous peoples was articulated as a desire for 'integration' through strategies based on formal equality.[2] This so-called 'modern' approach to assimilation was exemplified by the infamous 1969 White Paper which outlined the federal government's plans to terminate the special relationship between indigenous peoples and the federal government and 'normalize' their entry into Canadian society through the abolition of treaty privileges and special status, and the entrenchment of formal legal equality for indigenous peoples as individual citizens of Canada.

Indigenous peoples overwhelmingly rejected the 1969 White Paper and began to articulate a counter strategy based upon demands for recognition of rights as First Peoples anchored in law (namely the *Royal Proclamation, 1763*) and in treaties. The *Royal Proclamation*, a document that eventually gained constitutional status in Supreme Court of Canada decisions, explicitly recognized the Aboriginal tribes of the Americas as "nations-within", with a claim to treatment as distinct peoples with self-determining and self-governing rights. It also acknowledged the existence of native title to all of the lands not ceded to or purchased by the Crown, and set out a process for extinguishing native title through the signing of treaties. Indigenous peoples assert that they entered into

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[1] Augie Fleras and Jean Leonard Elliott, The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand (Toronto: Oxford University Press, 1992), p. 10.
[2] Ibid, p. 10.

treaties with the government of Canada as Nations - distinct political and cultural groups defined by language, cultural, society and polity. They further assert that the Canadian government and its agents accepted their status as such by engaging in the treaty-making process. Although disagreement about the nature and scope of treaties continues, what is crucial is that their existence has provided indigenous peoples in Canada with a legal basis to assert broadly based aboriginal rights. Using the treaties as a defense of their claims, indigenous peoples in Canada have been able to successfully place aboriginal rights in the same context as general rights, facilitating their pursuit of self-determination through self-government.

In summary, the failure of past polices and the vocal opposition to them by indigenous peoples in Canada have gradually forced the federal government to change the premise of Aboriginal Affairs policy from assimilation and integration to self-determination. This new policy directive, now being pursued through self-government, is widely supported by indigenous peoples, governments and non-indigenous peoples Canadians. In 1994, levels of public support for aboriginal self-government were estimated at between 65 and 85 per cent.[3]

In contrast, Aboriginal Affairs has been highly decentralized and characterized by a much lesser degree of bureaucratization in Australia. During Australia's colonial past, relations with Aboriginal and Torres Strait Islander peoples were officially a matter

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[3] David Roberts, "Listening for ways to heal old wounds", *Globe and Mail* (Toronto), January 7, 1994, in John H. Hylton, "Future Prospects for Aboriginal Self-Government in Canada," in John H. Hylton (ed.), Aboriginal Self-Government in Canada: Current Trends and Issues (Saskatoon: Purich Publishing, 1994), p. 242.

within Imperial control exercised in the name of the Crown. In reality, these relations were delegated to the local colonial governments for actual implementation. With the establishment of the Australian Federation jurisdiction over Aboriginal and Torres Strait Islander people was transferred to the State governments expressly excluding a Commonwealth role in Aboriginal Affairs until the 1967 constitutional amendment. While characterized by some degree of bureaucratization, Aboriginal Affairs in the various States were not administered in a comprehensive or systematic manner; rather, policies and regulations were developed and implemented in an ad hoc fashion. Consequently, the administration of Aboriginal Affairs in Australia has been decentralized and only moderately bureaucratic.

Aboriginal Affairs policy in Australia has been largely premised upon the exclusion of indigenous peoples from the wider Australian society. European newcomers viewed the indigenous peoples of Australia as 'primitive' and sub-human, possessing nothing recognizable to them as governments, cultures, land ownership, economies or law. "Therefore there was no willingness to negotiate Treaties, to develop friendship, to promote trade, to purchase land or to engage in government-to-government relations."[4] As a result, the non-recognition and dismissal of indigenous peoples and their interests, and thus their exclusion from Australian society characterize the history of Australia. In the words of C. D. Rowley, "[a] feature unique to the Aboriginal predicament is the

[4] Bradford W. Morse, Aboriginal Self-Government in Australia and Canada, (Kingston: Institute of Intergovernmental Relations – Queen's University, 1984), p. 7.

irrelevance to it in the policies and practices of the Australian colonies and, from 1901, of the states and the Commonwealth...."[5]

Assimilation was adopted as the official policy in Australia in 1937 and further elaborated in the 1950s and 1960s.[6] Aimed at equalizing health, sanitation, housing, schooling, wages and general welfare, this policy was directed more towards indigenous peoples' attainment of the same standard of living as non-indigenous Australians than it was to bringing indigenous peoples into the wider Australian society, perpetuating the practice of exclusion. In 1965, the policy of assimilation was replaced by one labeled 'integration' which meant creating 'real and equal opportunities' for indigenous peoples while allowing them to maintain their cultural distinctiveness. In reality, this meant teaching indigenous peoples the Euro-Australian way of life so that they might live according to the norms, beliefs and standards of the wider Australian society. Still, 'black' and 'white' society remained separate and apart in policy and practice.

It was not until the 1970s that a policy of self-determination was introduced. Defined as "Aboriginal communities deciding the pace and nature of their future development within the legal, social and economic restraints of Australian society"[7] this policy was called "radical" after almost a century of paternalism and neglect. Successive governments in Australia have remained variously committed to the policy of self-determination, and this policy continues to provoke fierce opposition from many non-indigenous Australians. It must be remembered that the opinions of the early European

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[5] C. D. Rowley, Recovery: The Politics of Aboriginal Reform (Ringwood: Penguin Books, 1986), p. 106.
[6] Lorna Lippman, Generations of Resistance: The Aboriginal Struggle for Justice, (1st ed.; Melbourne: Longman Cheshire, 1981), p. 38.

arrivals have been propagated from one generation of non-indigenous Australians to the next through history books, public education, and the media. They have culminated in a securely entrenched acceptance of indigenous peoples as weak and inferior to 'white' Australians. This situation has resulted in a much weaker claim for indigenous rights in Australia, greatly frustrating indigenous peoples' pursuit of self-determination.

THE DISMANTLING OF DIAND AND THE CREATION OF ATSIC

The dismantling of DIAND and the creation of ATSIC are two very different self-determination initiatives currently being implemented in Canada and Australia. Although both seek to put self-determination into practice, they do so in very different, in fact almost contrasting, ways. Broadly conceived, the dismantling of DIAND seeks to dissolve a well established government department (DIAND), to transfer its jurisdiction, powers and responsibilities to First Nations Governments of Manitoba, and to give these newly empowered governments executive, legislative, judicial and administrative power over their communities. This initiative represents a clear attempt at achieving self-determination through self-government, with intergovernmental negotiations providing the framework for the initiative. In contrast, the creation of ATSIC seeks to devolve the jurisdiction and administrative responsibilities of two former government agencies (the Department of Aboriginal Affairs (DAA) and the Aboriginal Development Commission (ADC)) to a largely elected Aboriginal and Torres Strait Islander body, to create a national Aboriginal and Torres Strait Islander representative body within government,

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[7] Ibid., p. 73.

and to give this new body an advisory role to government. This initiative more closely represents an attempt to accommodate self-determination through self-management, with the Australian government directing the initiative. Although vastly different in scope and approach, both of these initiatives are heralded as new and unique approaches to self-determination in their respective countries, justified claims in their historical-institutional contexts.

THE DISMANTLING OF DIAND

The idea of dismantling the federal department of Indian Affairs in Canada is not new. The federal government has been seriously contemplating such an initiative since at least the 1950s, clearly outlining its objectives in the 1969 White Paper. At this time, the dismantling of DIAND (and complementary initiatives) was seen by the federal government as a means to discharge its financial and social responsibilities to indigenous peoples (specifically to status Indians) and to extricate itself once and for all from the quagmire that was Indian Affairs. For at least as long, the indigenous peoples of Canada have also been contemplating the dissolution of the federal department and/or the appropriation of its sphere of jurisdiction, responsibilities and powers as a means to decolonization and self-determination. They wished to do so, however, while retaining and reinforcing their special constitutional status, their distinct place in Canada's history and their unique relationship with the state.

Over the past two decades, the federal government of Canada has come to accept at least some degree of fiduciary responsibility to indigenous peoples, recognized and

entrenched aboriginal rights in the Constitution, accepted self-determination as a primary policy principle, and seriously begun to consider self-government as a workable policy solution. Coupled with indigenous peoples' increased organizational, political, and media relations skills, and the Canadian public's increased knowledge and support of indigenous peoples self-determination aspirations, these changes have created a changed political context. This new context provides a new meaning to the dismantling of DIAND, making it a palpable alternative for both the federal government and indigenous peoples. The First Nations of Manitoba and the federal government are seeking to redefine indigenous-state relations in such as way as to allow for the First Nations of Manitoba to reclaim governance over their communities, while maintaining their special status within the nation-state of Canada. The existence of treaties between indigenous nations and the Crown provide the legal and political foundation upon which an initiative like dismantling can be built.

The Framework Agreement for the dismantling initiative is premised upon a mutual desire to rectify the Canadian government's breach of agreement and trust with First Nations in Manitoba (as highlighted by the broken treaties), and to restore to the First Nations of Manitoba the former and rightful jurisdiction of their governments. It is about rediscovering a partnership between the First Nations of Manitoba and the federal government based on mutual respect, equality and nation-to-nation negotiations. Rather than a department *dismantling* process or a self-government *creation* process, the Framework Agreement really defines a treaty *restoration* process. The first four guiding

principles of the Framework Agreement specifically address the prominence of treaty rights in the dismantling initiative:

> **5.1** First Nations' Treaty rights, Aboriginal rights and Constitutional rights will in no way be diminished or adversely affected by this process;
> **5.2** The inherent right to self-government, First Nations' Treaty rights and Aboriginal rights will form the basis for the relationships which will be developed as a result of the process;
> **5.3** In this process, the Treaty rights of First Nations will be given an interpretation, to be agreed upon by Canada and First Nations, in contemporary terms while giving full recognition to their original spirit and intent;
> **5.4** First Nations governments in Manitoba and their powers will be consistent with Section 35 of the *Constitution Act, 1982* [which recognizes and affirms existing Aboriginal and Treaty rights].[8]

As Phil Fontaine (Grand Chief of the Assembly of Manitoba Chiefs (AMC) during the development of the dismantling agreement) explains: "This process is a Treaty implementation process. The fundamental premise of this agreement is a commitment to restore all jurisdiction under the treaties, that is, to finally honour the treaties."[9] Importantly, it is not just the written words of the treaties that are to be reinvigorated, but also their broadly conceived spirit and intent. Again in the words of Phil Fontaine, "For the first time in our history, we've convinced the federal government to commit itself to joint planning to give a contemporary interpretation to the Treaties, including and most importantly, the spirit and intent."[10] Nevertheless, the current agreement is not a treaty

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[8] Canada, *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdiction to First Nations Peoples in Manitoba and Recognition of First Nations Government in Manitoba: Framework Agreement*, (December 7, 1994), p. 3.
[9] Phil Fontaine, "Message From Phil Fontaine, Grand Chief, Assembly of Manitoba Chiefs", *The Peoples' Decision*, 1: 1, (June 1995), p. 3.
[10] Fontaine, "Message From Phil Fontaine ...", p. 3.

process in legal terms, and the final agreement will not be a treaty. At the insistence of the Chiefs of Manitoba, the dismantling agreement is defined as an "intergovernmental political process" that will result in a political agreement negotiated by two governments dealing with each other on an equal basis.[11]

The Liberal Party's 1993 federal election platform can be seen as the first building block of the dismantling of DIAND initiative. During the 1993 federal election, the Liberal Party, led by Jean Chrétien, outlined its proposed governing approach and objectives in *Creating Opportunities: The Liberal Plan for Canada* also know as the *Red Book*. Three aspects of the Liberals' policy offered hope to First Nations communities for restructured relations with a Liberal government:

1. The *Red Book* explicitly acknowledged that past policies had failed to rectify the socio-economic conditions in Aboriginal communities, and extended to these communities an offer to "define and undertake together creative initiatives designed to achieve fairness, mutual respect, and recognition of rights."
2. The *Red Book* committed a Liberal Government to "act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right."
3. The *Red Book* promised that "[a] Liberal government will be committed to gradually winding down the Department of Indian Affairs at a pace agreed to by First Nations, while maintaining the federal fiduciary responsibility."[12]

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[11] The Manitoba Chiefs made this proposal to the government because: a) Canada's history of treaty making with First Nations has been schizophrenic and does not provide a reliable precedent; b) the rules and boundaries of intergovernmental processes and agreements are clearly understood and respected by both parties; c) the AMC does not specifically represent Manitoba's treaty groups and therefore probably does not have the authority to negotiate a new treaty on their behalf; and d) the process began as with a political agreement between two government agents (Phil Fontaine and Ronald Irwin) and therefore an intergovernmental political process appeared to be the most obvious course to follow. To these ends, the Framework Agreement is accompanied by a letter from the Minister agreeing to the Chiefs' proposal that the agreement not be a treaty process but rather an intergovernmental process.

[12] Liberal Party of Canada, *Creating Opportunities: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), pp. 97-98.

Although these aspects of the Liberal *Red Book* represented a notable departure from past policy principles, First Nations in Manitoba were not overly surprised by the Liberals' proposed policy agenda and direction. It had been largely derived from the recommendations made in 1990 by the Aboriginal Peoples Commission of the Party, and from the policy resolutions passed unanimously at the 1992 National Liberal Party Convention.[13] Prior to the release of the *Red Book*, the AMC had already passed a resolution to begin the process of dismantling DIAND's Regional Office in Manitoba.[14]

Following the release of the *Red Book*, the Manitoba First Nations took the Liberal plan at its word and began work immediately to prepare for the anticipated change in policy direction. On October 1, 1993, the General Assembly of the AMC passed a resolution directing its provincial executive to establish a joint working group with the federal government to examine the idea of dismantling the Manitoba Regional Office of DIAND. Operating within the mandate, AMC Grand Chief Phil Fontaine commissioned a former bureaucrat in Indian Affairs, Don Goodwin, to prepare a workplan and costing for the proposed endeavour.[15] Following collective deliberations among the leaders of the Manitoba First Nations, this workplan, embodying the mandate and initiative for the project, was formally adopted and became the basis for subsequent

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[13] Kathy Brock, "Taking Control: Dismantling Indian Affairs and Recognizing First Nations Governments in Manitoba" in Douglas M. Brown and Jonathan W. Rose (eds.), State of the Federation 1995, (Kingston: Institute of Intergovernmental Relations - Queen's University, 1995),p. 149.
[14] Fontaine, "Message From Phil Fontaine...", p. 3.
[15] Kathy Brock, "Taking Control: Dismantling Indian Affairs and Recognizing first Nations Government in Manitoba", (Unpublished manuscript prepared for The State of the Federation [Kingston: Institute of Intergovernmental Relations - Queen's University, Aug 1995]), p. 9.

negotiations.[16] "The extent to which their preparedness surprised the federal officials was apparent in the negotiations when the workplan was first tabled. The officials inquired into the origins of the document and criticized it as being too comprehensive."[17]

Formal bilateral negotiations for the dismantling experiment began in December of 1993, less than two months after the Liberals took federal office. Meetings between Minister Irwin and the Chiefs of Manitoba, were followed by meetings between Minister Irwin, Grand Chief Fontaine, staff and the AMC legal advisor.[18] Through these meetings a political understanding to guide subsequent negotiations was collectively reached. The process was then broadened to include the direct participation of more representatives of the First Nations communities and tribal councils through the initiation of technical meetings, tribal council consultations, and an AMC general assembly. The negotiations concluded with a series of formal events. In September 1994 at the general assembly at Dakota Tipi, the Manitoba Chiefs authorized the execution of the Framework Agreement on dismantling in a resolution. Although support for the resolution was not unanimous it was substantial and the resolutions passed. On November 22 1994 the federal Cabinet approved the Framework Agreement on dismantling, despite the cautions expressed by the departments of Justice and Finance. And finally, on December 7 1994 the official signing ceremony marked the successful conclusion of negotiations and the commencement of implementation.

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[16] Ibid.
[17] Brock, "Taking Control ..." in State of the Federation 1995, p. 167.
[18] Ibid., p. 152.

Throughout the discussions and negotiations leading up to the conclusion of the Framework Agreement, there were fears among the Chiefs and First Nations people of Manitoba that the dismantling initiative could result in the federal government abandoning its responsibilities (specifically its treaty responsibilities) to First Nations people in Manitoba. The Chiefs and First Nations peoples feared that they might lose control of the process and/or its outcome to the government or outside advisors; that current resources and programs provided by Indian Affairs might be negatively affected; and that they might not agree with the outcome of the process. These fears are addressed in the Statement of Principles in the Framework Agreement itself and in a Memorandum of Understanding signed by Fontaine and Irwin on April 20 1994. The Statement of Principles includes:

- assurance that the initiative will not adversely affect or diminish treaty rights, Aboriginal rights or Constitutional rights;
- assurance that the initiative does not dismiss the federal government from its fiduciary obligations to First Nations, or its liability for past actions;
- acknowledgment that the inherent right to self-government, to treaty rights and to Aboriginal rights forms the basis of the agreement; and
- provisions for the protection and empowerment of First Nations: by placing liabilities and responsibilities for their actions with First Nations governments; not impairing the ability of individual First Nations to enter into other agreements; providing First Nations with the choice of ratifying or declining any new arrangements; and, by making individual First Nations the primary locus of First Nations Governments in Manitoba.[19]

The Memorandum of Understanding reiterates:

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[19] *Framework Agreement*, and Brock, "Taking Control ..." in State of the Federation 1995, p. 156.

1. It will be business as usual during the life of this process;
2. there will be no budget cuts during this process; and
3. the entire process will be consistent with the inherent right to self-government.[20]

On December 7 1994 the Assembly of Manitoba Chiefs, on behalf of 60 First Nations in Manitoba, and the Minister of Indian Affairs and Northern Development, on behalf of the Crown, signed a historic Framework Agreement entitled: *The Dismantling of Indian Affairs and Northern Development, The Restoration of Jurisdiction to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba.* This unprecedented Agreement and its accompanying Workplan (signed on November 22 1994) outline the guiding objectives and principles of the dismantling initiative and define the activities, funding and time-frame for the transfer of federal jurisdiction from Indian Affairs to First Nations Governments in Manitoba. Although popularly referred to as the "Dismantling Agreement", the dismantling of DIAND is only one of the Agreement's three stated objectives to further the goal of self-government for the First Nations of Manitoba. The three objectives of the Framework Agreement are to:

1. Dismantle the existing departmental structures of the Department of Indian Affairs and Northern Development (...) as they affect First Nations in Manitoba;
2. Develop and recognize First Nations governments in Manitoba legally empowered to exercise the authorities required to meet the needs of the First Nations; and
3. Restore to First Nations governments their jurisdictions (including those of the other federal departments);

[each objective to be] consistent with the inherent right of self-government.[21]

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[20] Fontaine, "Message From Phil Fontaine ...", p. 3.

[21] *Framework Agreement*, p. 3.

The process for the achievement of these objectives, as detailed in the Framework Agreement, is directed towards the amendment or repeal of the *DIAND Act* and the *Indian Act* as they affect First Nations in Manitoba, and the establishment and recognition of First Nations Governments in Manitoba, with the process to be directed by First Nations people and their communities. According to the terms of the Framework Agreement, if ratified, the final agreement will witness the creation of fully constituted First Nations Governments in Manitoba, constitutionally recognized and protected under Section 35 of the *Constitution Act, 1982*.[22] In sum, the dismantling initiative is an agreement to create a distinct order of government by and for the First Nations people of Manitoba.[23]

According to the Framework Agreement, funding for the process is to be provided by the federal Minister on the basis of annual, flexible transfer payments. The funding is to be provided out of the existing DIAND budget for the Manitoba Regional Office, (to avoid adversely affecting other First Nations), with the proviso that existing programs and services will not be diminished or adversely affected during the dismantling process. Initial cost projections for the dismantling initiative by the federal negotiating team were under $100 000. The AMC initially estimated the project costs at $5 million.[24] This cost discrepancy underlines the gap in understanding the perceived scope and magnitude of the project between the federal government and the AMC. Negotiation of the Framework

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[22] Phil Fontaine, interview with the author, (Assembly of First Nations National Office, Ottawa), April 21, 1998.
[23] Ibid.

Agreement and Workplan alone cost in excess of $800 000, and the dedicated funding for Phase 1 of the process (detailed below) is over $5 million.

The dismantling process has a projected time-frame of ten years, but this time-frame is flexible. The Framework Agreement states that "the achievement of the Objectives is not finite as to term and will endure until they have been achieved on a mutually agreeable basis."[25] Other terms of the Framework Agreement, including funding, "will be in force until the achievement of the Objectives on a mutually agreeable basis or ten years, which ever comes first, or such longer period as may subsequently be agreed to by the parties."[26] The process will be evaluated at the end of the third, sixth and tenth years. If the Objectives have not been achieved at the end of the tenth year, the parties will review how and on what term the process should continue. Despite initial delays, Phase 1 of the dismantling initiative is now underway with funding of over $5 million (funding for subsequent phases will be negotiated in a timely manner).

Phase 1 Activities and Their Dedicated Funding

Consultation	$1 170 909
Communications	579 000
Project Management	302 732
Activity A - Research on all Existing Programs and Services	250 000
Activity B - Analysis of Information and Development of Options for Change	542 428

[24] Brock, "Taking Control ...", in State of the Federation 1995, p. 38.
[25] Canada, *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdiction to First Nations Peoples in Manitoba and Recognition of First Nations Government in Manitoba: Workplan* (November 22, 1994), Section 9.
[26] *Workplan*, Section 9.

Activity C - Recommendations for Governmental Powers and Framework		1 116 854
Items to be Expedited:		
A	Transfer of DIAND Capital Programs to Manitoba First Nations Governments	250 000
B	Transfer of DIAND Education Programs to Manitoba First Nations Governments	500 000
C	Transfer of DIAND Fire Safety Program to Manitoba First Nations Governments	434 468
Assignment of 10 First Nations Representatives within DIAND		500 000
TOTAL		**$5 498 468**[27]

As of 1998, both the federal government and the First Nations of Manitoba remain strongly committed to the dismantling initiative and foresee a successful conclusion of the process within the projected ten year time-frame.[28]

The dismantling initiative genuinely represents a new approach to indigenous-state relations in Canada. Unlike previous initiatives in Canada, the dismantling initiative is not an experiment in the devolution of administrative responsibilities from the federal Department of Indian Affairs to federal government created 'band governments' for the federal government defined benefit of First Nations communities. As Frank Cassidy and Robert Bish explain:

> [Many First Nations leaders] would contend that delegated federal powers under the Indian Act are not a path to full Indian government as much as they are a path leading towards bands and tribal councils increasing their capacity to implement INAC [Indian and Northern Affairs Canada] programs, which are based on principles that deny the essential spirit of Indian government.[29]

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[27] Brock, "Taking Control ..." in State of the Federation 1995, pp. 154-156.
[28] Fontaine, interview.
[29] Frank Cassidy and Robert L. Bish, Indian Governments: Its Meaning in Practice, (Lantzville, Halifax: Oolichan Books, The Institute for Research on Public Policy, 1989), p. 50.

That kind of devolution had already occurred in Manitoba. "By 1995, Manitoba First Nations directly administered 95 percent of DIAND's regional budget of more than $530 million. However, ... , DIAND still defines the recipients and expenditures of the funds."[30] Band governments (defined and recognized by the federal government as the political authorities of First Nations' communities) do not have the authority to define and prioritize problems within their communities or to design and target policies and programs that would address those problems without outside interference. In this respect, then, the dismantling initiative goes well beyond devolution. As stated in the Framework Agreement:

> **5.7** The Primary locus of First Nation government will be the individual First Nation ...
>
> **5.11** First Nations governments in Manitoba will be able to undertake legislative, executive, administrative and judicial functions, based on agreements which are consistent with the inherent right of self-government and, with that proviso, will include but not be limited to, the protection and promotion of their cultures, identities, institutions, traditions, citizenship, lands, waters, economies, and languages.[31]

According to Ronald Irwin, (Minister of Indian Affairs and Northern Development during the development of the Dismantling Agreement):

> This historic document [the Framework Agreement] jointly commits us to the dismantling of the Department of Indian Affairs in Manitoba and the restoration of jurisdiction that will enable First Nations to take over the provision of services to your people under your control according to the decisions and laws of your governments, not by other governments.[32]

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[30] Brock, "Taking Control ..." in State of the Federation 1995, p. 148.

[31] *Framework Agreement.*

[32] Ronald A. Irwin, "A Message From Ronald A. Irwin, PC., M.P., Minister of Indian Affairs and Northern Development", *The Peoples' Decision*, 1:1, (June 1995), p. 5.

The effect of the dismantling experiment will be to provide First Nations Governments in Manitoba with the power to design and target programs and services without interference from the federal and provincial governments. In the short term, these will include fire safety, education and capital programs (these three program areas were agreed to as items to be expedited and are currently under negotiation); in the medium term, child welfare; and in the longer term, more complicated areas of jurisdiction such as natural resources and the environment. At this stage the process is entirely open ended - the powers of First Nations Governments of Manitoba have yet to be clarified (with the exception of the three items to be expedited); the structure of First Nations Governments have yet to be defined; and what powers will be assigned to which levels of government have yet to be determined. These decisions are to be undertaken at the grassroots level, by the First Nations people of Manitoba, in their own communities, with the assistance of First Nations researchers, advisors and consultants directed by the AMC, and at a pace that corresponds to the communities' needs for consultation, deliberation and decision-making.

The dismantling experiment is without precedent in Canada. It is a unique comprehensive project developed jointly by First Nations in Manitoba and the federal government. As explained in the Workplan:

> It is, ... , a major and highly complex undertaking and an enormous challenge for both Government and First Nations leadership. While attempts have been made in the past to establish practical examples of aboriginal self-government, none have been as comprehensive as this. This is not a question of a single First Nation taking control over its own

> affairs but of 60 First Nations working in concert. This is not is not a question of displacing the powers of DIAND alone; but of displacing the functions of other federal departments associated with First Nations. Most complex of all will be the creation of fully functioning First Nations Governments in Manitoba.[33]

As Phil Fontaine and other supporters of the dismantling initiative assert, the dismantling experiment serves as an important benchmark for self-determination and self-government in Canada.[34] The initiative represents an intergovernmental decolonization process, initiated by the federal government, but largely controlled and directed by First Nations, whose successful resolution will result in fully constituted First Nations Government in Manitoba protected under the Canadian Constitution.

THE CREATION OF ATSIC

Successive federal governments in Australia have been struggling with ways of increasing indigenous involvement in policy making since the 1967 referendum. The inspirations for this goal have been three-fold:

1. to respond to demands from indigenous peoples for more control over the decisions that affect their lives;
2. to improve the material and social well-being of indigenous peoples; and,
3. to meet Australia's international obligations to advance indigenous self-determination according to international standards.

Without recourse to domestic instruments, such as treaties, to secure a basis for indigenous rights claims (including the right to self-determination), indigenous peoples

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[33] DIAND and AMC, *Towards Fist Nations Governments in Manitoba: Workplan*, (Ottawa, Winnipeg: Indian and Northern Affairs Canada, Assembly of Manitoba Chiefs, 1994), A.

in Australia have focused on international instruments, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and recently, on the United Nations Draft Declaration on the Rights of Indigenous Peoples to secure their rights claims.[35] Harshly criticized in the international community for its treatment of Aboriginal and Torres Strait Islander peoples and their devastating socio-economic plight, the Commonwealth government has actively sought to improve its image at the international level by pursuing self-determination via self-management. Although the Commonwealth government has formally adopted the concepts of self-determination and self-management as policy benchmarks in Aboriginal Affairs since the 1970s, the reality is that indigenous peoples' influence on the policy agenda in Australia has been limited. There is a paucity of formal opportunities for participation in the policy process and effective indigenous organizations with a vision and capacity to influence policy formation processes at State, Territory or federal levels have been absent.[36] Recognizing this reality, the Commonwealth government has sought convenient mechanisms to quickly obtain 'the indigenous viewpoint' and incorporate it into the policy process with the hope of meeting its international obligations and ameliorating indigenous peoples' socio-economic condition. Invariably this has meant turning to

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[34] Fontaine, interview.
[35] Australia, Aboriginal and Torres Strait Islander Social Justice Commission: First Report 1993, Commissioner: Michael Dodson, (Canberra: Australian Government Publishing Service, 1993), p. 83.

indigenous peoples' organizations, or if they did not exist, creating new structures which could articulate presumably the collective voice of indigenous peoples who do not know or want to speak in such a voice.[37]

From 1972 until March 1990, at the Commonwealth level, Aboriginal and Torres Strait Islander Affairs, were administered mainly through a Department of State, the former Department of Aboriginal Affairs (DAA), and the Aboriginal Development Commission (ADC), (a statutory body whose role was to further the economic and social development of Aboriginal and Torres Strait Islander peoples). These were advised by a series of ill-fated government-sponsored indigenous representative bodies - the National Consultative Committee (NACC) 1973-1977, and the National Aboriginal Conference (NAC) 1978-1985. Although the DAA and ADC gave Aboriginal and Torres Strait Islander peoples a nominal role in their own affairs (through the recruitment and appointment of indigenous staff), they also insisted they do so within the limits of the administrative processes created for them by the state. The NACC and the NAC were designed as government-controlled national indigenous representative organizations with a mandate to represent indigenous interests and advise the government on indigenous-related policy issues. Comprised of elected indigenous representatives, both the NACC and the NAC were harshly criticized for not providing adequate representation or

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[36] Michael Dillon, "Institutional Structures in Indigenous Affairs: The Future of ATSIC" in Patrick Sullivan, (ed.), Shooting the Banker: Essays on ATSIC and Self-Determination, (Darwin: North Australia Research Unit - Australian National University, 1996), p. 90.

[37] A defining characteristic of the indigenous domain in Australia is its localism (defined socially, geographically or both) in which political, economic and social representation and imperatives lie in more restricted forms and institutions rather than in broader more encompassing ones. (Australia, Royal Commission into Aboriginal Deaths in Custody, National Report, vol. 2, [Canberra: Australian Government Publishing Service, 1991], p. 527).

accountability to indigenous communities, as well as for having limited power and resources to implement their concerns into policy.[38] Unlike the National Indian Brotherhood-Assembly of First Nations, which was created and designed by and for First Nations people of Canada with a mandate accorded by First Nations people to represent their interests nationally, the NACC and NAC were created and designed by the Commonwealth government with a mandate accorded by the Commonwealth to serve the indigenous representative needs of government (which did not always correspond with those of indigenous people and communities).

In sum, the Commonwealth's early attempts at increasing indigenous involvement in policy making were dismal failures. "In 1986 and 1987, while casting around for some arrangement to replace the NAC, the Hawke government settled on the idea of an Aboriginal commission which would attempt to combine both representative and executive roles and so allay the criticism that decision-making power over Aboriginal affairs policies had never been fully given to Aborigines."[39] The new commission was envisioned to combine regional and national assemblies of elected Aboriginal and Torres Strait Islander people with the program administration roles of the DAA and other Aboriginal affairs portfolios, such as the ADC. In essence, the initiative sought to create a geographically decentralized federal bureaucracy with powers and responsibilities delegated to indigenous representatives. This structure, absent a national assembly,

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[38] See L. R. Hiatt, *Australian Committee of Inquiry into the Role of the National Aboriginal Consultative Committee*, Chairman: L. R. Hiatt, (Canberra: Australian Government Publishing Service, 1976); and H. C. Coombs, *The Role of the National Aboriginal Conference*, (Canberra: Australian Government Publishing Service, 1984).

mirrors Canada's practice since at least the 1970s of devolving DIAND powers and responsibilities to band governments and tribal councils.

The concept of an Aboriginal and Torres Strait Islander Commission (ATSIC) was developed from bureaucratic knowledge and a variety of finding and recommendations from L. R. Hiatt's 1975 review of the NACC, H. C. Coombs 1984 review of the NAC, Lois O'Donougue's 1986 revamping of Coombs' recommendations, the Seaman Report of Western Australia and numerous parliamentary reports, all of them bipartisan.[40] "Initial proposals [for ATSIC] were developed by an informal working party of consultants and staff from the office of the Minister of Aboriginal Affairs, in liaison with senior staff from portfolio agencies such as DAA."[41] Following the development of the ATSIC proposal and its official announcement, the Australian government undertook the most extensive consultation process ever undertaken by an Australian government to explain the ATSIC proposal to indigenous peoples and solicit their comments. Between January 23 and March 10 1988, the government organized 46 3-day meetings throughout Australia involving approximately 6 000 representatives of Aboriginal and Torres Strait Islander groups.[42] Reactions to the proposal were not always positive and the consultation process itself was criticized by some observers as a

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[39] Wil Sanders, "Reconciling Accountability and Aboriginal Self-Determination/Self-Management: Is ATSIC Succeeding?", *Australian Journal of Public Administration*, 53: 4, (December 1994), p. 475.
[40] Hiatt, *Australian Committee of Inquiry into the role of the National Aboriginal Consultative Committee*; Coombs, *The Role of the National Aboriginal Conference*; Lois O'Donogue, *Proposal for an Aboriginal and Islander Consultative Organization*, Discussion Paper (Canberra: Australian Government Publishing Service, 1986); and H. C. Coombs and C. J. Robinson, "Remembering the Roots: Lessons for ATSIC", in Shooting the Banker.
[41] David Smith, "From Cultural Diversity to Regionalism: The political Culture of Difference in ATSIC", in Shooting the Banker, p. 23.
[42] Lorna Lippman, Generations of Resistance, (3rd ed.; Melbourne: Longman, 1994), p. 78.

paternalistic exercise that did not give indigenous people adequate time to contemplate the complex proposal. Still, it did give indigenous people an unprecedented degree of input into the development of an indigenous policy instrument and some important changes were made to the ATSIC proposal as a result of these meetings. Unlike the Framework Agreement for the dismantling initiative, however, the ATSIC proposal was not negotiated on a government-to-government basis. It was developed by the Commonwealth government with the government's final proposal subject to indigenous comment, and then only on a consultative basis.

As well as the consultations, numerous inquires were made by the government into the workings of the DAA and the ADC, which called into question the probity and public accountability of both bodies. As a result, when the revised legislation for the commission was introduced to the Parliament in April 1989, there was an increased emphasis on the public accountability of the new commission to the Parliament through the Minister.[43] Clearly the Hawke government's national self-management proposal pushed the outer boundaries of an acceptable definition of self-determination in Australia.

The ATSIC legislation had a difficult passage. In the later part of 1988 and through 1989, ATSIC was the subject of heated debate in the federal parliament. The conservative Opposition, assisted by senior bureaucrats involved in Aboriginal Affairs, tried to present indigenous people in general as knaves and fools, incapable of being entrusted with financial responsibility or with administering their own programs. It

placed tremendous emphasis on evidence of corruption in Aboriginal organizations and communities.[44] The Coalition parties also expressed the fundamental fear that the government was creating a separate Aboriginal parliament, which would threaten the unity of the Australian nation. From April to October 1989, no fewer than 91 further amendments were made to the proposed legislation, many though certainly not all of which had to do with public accountability. Despite its commitment to ATSIC, the government was forced to agree to many of the Bill's amendments in order to achieve the required support - notably without further consultation with indigenous peoples. As Lippman has commented: "[t]he haste with which ATSIC legislation was passed through the parliament (by 2 November 1989) reflected the fear of the Labour government and particularly Minister Hand that it must be in place before the Opposition could throttle it. They certainly tried."[45] Despite having been significantly involved in the amendment process, the Coalition parties still voted against the final ATSIC legislation. The final Bill was debated in the Senate for over 40 hours and amended more than 100 times.[46] According to Michael Dillon, "In terms of feasibility, the ATSIC proposals represented the outer bounds of what was possible and achievable at the time in Australia."[47] The final ATSIC model, thus, was a "re-negotiated policy bargain". On the one hand, the principle of self-management was widened and deepened by giving a largely elected body of indigenous commissioners executive control over almost all Commonwealth

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[43] Sanders, "Reconciling Public Accountability and Aboriginal Self-Determination/Self-Management ...," p. 476.
[44] Lippman, Generations of Resistance, (3rd ed.), p. 80.
[45] Ibid, p. 88.

Aboriginal Affairs portfolio expenditures, but on the other hand the new commission was to be subject to stringent financial accountability, extensive ministerial oversight, and specified procedures of conduct.

On November 2, 1989, the Commonwealth Parliament enacted the *Aboriginal and Torres Strait Islander Act 1989*, which established, in March 1990, the Aboriginal and Torres Strait Islander Commission (ATSIC), amalgamating and replacing the DAA and the ADC and incorporating an indigenous representative structure. The implementation of the *ATSIC Act* involved a significant transfer of power over funding decisions from the Minister of Aboriginal Affairs to ATSIC. In 1990 ATSIC took over the total budgets of the ADC and DAA totaling some $400 million and has seen its budget since grow to $900 million in 1995.[48] Before the creation of ATSIC, the Minister for Aboriginal Affairs exercised total control over funding decisions across all sectors of Aboriginal Affairs, advised by a hierarchically organized department totally removed from the day-to-day lives and realities of indigenous people. In contrast, ATSIC provides for a significant devolution of decision making to indigenous peoples over a range of issues which would otherwise be determined by non-indigenous people.

The ATSIC structure incorporates at least four levels of planning by indigenous people themselves: at the national level by the Board of Commissioners; at the State level, particularly through the State Advisory Councils; at the regional level by Regional

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[46] Frank Brennan, Sharing the Country: The Case for an Agreement Between Black and White Australians, (Ringwood: Penguin Books, 1991), p. 91.
[47] Michael Dillon, "Institutional Structures in Indigenous Affairs ..." in Shooting the Banker, p. 92.
[48] Ibid.

Councils; and, at the local level by community members and their elected Councilors. In so doing, it represents the first time in Australian history that indigenous people have been given executive rather than advisory powers over Commonwealth programs dedicated to their welfare. It is celebrated as the leading example of the Commonwealth government's endorsement of the principles of self-determination and self-management.

Although the *ATSIC Act* is intended, at least in part, to give domestic expression to Australia's international treaty obligations to uphold indigenous self-determination, neither the *ATSIC Act*, nor its Preamble mentions 'self-determination'. The Preamble refers to the objective of overcoming disadvantage and facilitating the enjoyment of culture in a manner consistent with 'self-management' and 'self-sufficiency', and although it describes the purpose of the Act as one of national reconciliation, it only concedes to Aboriginal and Torres Strait Islander people the status of 'inhabitants' rather than prior owners'.[49] In this way, it falls considerably short of realizing self-determination as it has been understood and put into practice in Canada.

The ATSIC initiative seeks to:

- centralize the administration of Aboriginal and Torres Strait Islander Affairs by creating a national Aboriginal and Torres Strait Islander body;
- to ensure indigenous representation in policy making by creating new national, regional and local representative structures; and,
- to devolve at least some degree of decision making authority from the Commonwealth Government to indigenous peoples by creating new administrative structures with statutory functions and responsibilities.

To these ends, the *ATSIC Act*, defines four objectives:

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[49] Patrick Sullivan, "All Things to All People: ATSIC and Australia's International Obligations to Uphold Indigenous Self-Determination" in Shooting the Banker, p. 118.

1. to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
2. to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
3. to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
4. to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.[50]

To achieve these objectives, "ATSIC was established as a statutory authority with legislative powers and functions extending across a bipartite hierarchy of nationally elected indigenous representatives on the one hand, and an equally hierarchical administrative arm on the other."[51] Unlike the DIAND initiative, which will provide constitutional recognition and protection to First Nations Governments in Manitoba, the ATSIC is devoid of any constitutional recognition or protection. Given the fact that "past gains are quite vulnerable to changes in government and to policy reversals that are largely beyond the ability of Aborigines to control,"[52] ATSIC's legislative basis provides an insecure foundation for this agency's development and future.

ATSIC's structure is complex, with representative and administrative arms operating at national, regional, state, and local levels. Its representative arm consists of Regional Councils, State Advisory Committees, a Torres Strait Islander Advisory Board,

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[50] Ibid., p. 119.
[51] David Smith, "From Cultural Diversity to Regionalism...", in Shooting the Banker, p. 24.

and a Board of Commissioners including an Office of Torres Strait Islander Affairs. Its administrative arm consists of Regional Offices, State Offices, and a Central Office including a Chief Executive Officer and an Office of Evaluation and Audit.

At the base of ATSIC's representative arm are 35 Regional Councils, (established as separate legal entities), comprising approximately 600 councilors.[53] Regional Councilors are elected every three years by the Aboriginal and Torres Strait Islander constituents of each region and have the following statutory functions:

- to prepare a regional plan (and revise it from time to time) for improving the economic, social and cultural status of Aboriginal and Torres Strait Islander peoples living in the region;
- to assist, advise and cooperate with ATSIC and other governmental bodies in the implementation of the regional plan;
- to make proposals in accordance with the requirements of the *ATSIC Act* for ATSIC expenditure in relation to the region;
- to receive and to pass on to ATSIC and other governmental bodies the views of Aboriginal and Torres Strait Islander peoples about ATSIC and other government activities in the region;
- to represent Aboriginal and Torres Strait Islander people living in the region and to act as an advocate of their interests; and
- to do anything else that is required to be done by the *ATSIC Act* and to perform other functions incidental to the above.[54]

"Regional Councils are deeply embedded within the local and regional Indigenous social, cultural and political domains, with decisions, particularly those on program delivery and funding allocations, typically made on the basis of particular Indigenous, rather than on

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[52] C. Scott, "Political Spoils or Political Largess? Regional Development in Northern Quebec, Canada and Australia's Northern Territory", CAEPR Discussion Paper No. 27 (Canberra: Centre for Aboriginal Economic Policy Research – Australian National University, 1992), p. 5.
[53] The original ATSIC legislation created 60 Regional Councils comprising 800 councilors, but legislative amendments in 1993 reduced the number of Regional Councils from 60 to 36, and then to 35 following the creation of the Torres Strait Regional Authority. (Ibid., p. 25).
[54] ATSIC, *Layperson's Guide to ATSIC*, (Woden: ATSIC, 1995), p. 43.

any objective needs-based, assessments."[55] Although Regional Councils have executive responsibility for developing and monitoring all ATSIC policy and programs at the regional level, they do not directly receive or spend funds. Rather, they decide upon program funding allocations within their regions on the basis of the priorities defined in their self-developed Regional Plans. These plans represent an unprecedented devolution of decision-making authority and responsibility from the government to indigenous peoples. "ATSIC intended that the Regional Planning process would focus on the preparation of regional goals and strategies Councils could work towards over a specified time frame, usually between three to five years."[56] By encouraging community participation in Regional Planning, the ATSIC initiative seeks to implement self-management principles by reversing the tradition of government controlled decision-making that has characterized Aboriginal Affairs in Australia in the past. It also recognizes the importance of localism to Australia's indigenous peoples.

Through zone-based electoral colleges, the Regional Councils elect 17 indigenous Commissioners, who, along with one other indigenous Commissioner appointed by the Minister and a ministerially appointed indigenous Chairperson[57], constitute the Board of Commissioners (also know as 'the Commission' or sometimes as 'ATSIC'). The Board

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[55] D. F. Martin, "The NATSIS as a Regional Planning and Policy Tool" in J. C. Altman and J. Taylor, (eds.), "The 1994 National Aboriginal and Torres Strait Islander Survey: Findings and Future Prospects," CAEPR Research Monograph No. 11, (Darwin: Centre for Aboriginal and Economic Policy Research - Australian National University, 1996), p. 176.

[56] Julie Finlayson and Alan Dale, "Negotiating Indigenous Self-Determination at the Regional Level: Experiences with Regional Planning," in Shooting the Banker, p. 71.

[57] Initially, the Chairperson was chosen by the Minister from among the Commissioners appointed by the Minister. Pursuant to a 1993 amendment, the Minister may now choose a Chairperson from among all Commissioners. In 1993 the Board of Commissioners proposed that it be responsible for electing its own Chairperson. The government rejected this move toward greater autonomy.

of 19 Commissioners has "executive power to set national policy, determine national financial priorities and develop draft budgets; formulate and monitor programs; and provide advice to the Commonwealth government and to the Minister,"[58] within its statutory limits. Within the representative arm, the Board of Commissioners is responsible for decisions in those ATSIC programs considered to be of 'national scope', and the Regional Councils decide on the local distribution of an increasing proportion of ATSIC's funds. In this way ATSIC is unique - no other agency at any level of government in Australia puts elected indigenous Australians in charge of programs and services for indigenous citizens.[59]

Also included within ATSIC's representative arm is a Torres Strait Islander Advisory Board (TSIAB). The TSIAB provides advice to the Minister and the Commission for the purpose of furthering the social, economic and cultural advancement of Torres Strait Islanders living outside the Torres Strait area. The TSIAB is a national Islander representative body while the Torres Strait Regional Authority (TSRA) (which replaced the Torres Strait Regional Council (TSRC) in 1994) is effectively a Torres Strait Region representative body. There is thus a dual constituency structure within ATSIC for the representation of Torres Strait and Torres Strait Islanders interests and concerns. This structure ensures that they are not disregarded or amalgamated with Aboriginal interests and concerns as they have been in the past. Unlike the dismantling initiative,

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[58] Smith, "From Cultural Diversity to Regionalism...", p. 26.
[59] Tim Rowse, "The Political Identity of Regional Councillors," in Shooting the Banker, p. 43.

which only applies to status Indians in Manitoba, ATSIC encompasses all of Australia's indigenous peoples within its structure.

ATSIC's administrative arm is divided into three tiers at the Regional, State and National office levels. At the base of the administrative arm are 28 Regional Offices responsible for the administration and delivery of ATSIC programs and services. The Regional Offices administer the funding allocated by Regional Councils to Aboriginal organizations and communities, and national program funds allocated by the Board of Commissioners. Regional Offices are supported by State Offices (one in each capital city) with responsibilities to "coordinate grant administration and budget preparation, monitor programs and liaise with Commissioners in their State and with State governments in relation to the provision of services."[60]

The administrative arm of ATSIC also includes an Office of Evaluation and Audit (OEA) located in Canberra. While the OEA is staffed by ATSIC and its expenses are met by ATSIC, it is quite independent from ATSIC. The OEA looks for direction to a Statutory Director (the head of the Office) appointed by the Minister in consultation with the Board of Commissioners, and is expected to provide financial accountability for ATSIC to Parliament.[61] With such a responsibility, the OEA is placed in a very precarious position, balancing between accountability to the Minister and to the representative and administrative arms of ATSIC.[62] As in Canada, the devolution of administrative responsibilities has not been accompanied by a devolution of funding

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[60] Smith, "From Cultural Diversity to Regionalism ...", p. 27.

[61] Ibid.

control. While ATSIC, like band government in Canada, has been given authority to define funding priorities, it has not been given authority to define its funding needs. It must rather define its funding priorities within an insecure government controlled funding allocation.

At the apex of ATSIC's administrative arm is the Chief Executive Officer, appointed by the Minister (with agreement from the Regional Commissioners) for a five year renewable term. Although the *ATSIC Act* does not require the CEO to be an Aboriginal or Torres Strait Islander person, the first and present CEO is Aboriginal and there appears to be a consensus within ATSIC and the Commonwealth that the CEO be indigenous. ATSIC's CEO carries out his/her functions from ATSIC's Central Office in Canberra. "The CEO has authority for the daily administration of the organization, and has to balance direct responsibility to the Minister in performing these duties with a legislative requirement to exercise powers in accordance with policies and directions given by the indigenous Board of Commissioners."[63] Whereas the Board of Commissioners determines policy in accordance with the *ATSIC Act*, the CEO ensures that those policies are put into effect by Commission staff.

Although ATSIC represents a substantial devolution of power and responsibility from the government to indigenous peoples, the Minister for Aboriginal Affairs retains a substantial degree of authority over the new body and its activities. In addition to appointing 2 of ATSIC's 19 Commissioners (including the Chairperson) and its CEO, the Minister for Aboriginal Affairs is responsible for:

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[62] Legislative attempts in 1993 by the Commission have the OEA placed directly under its control failed.

- establishing general guidelines within ATSIC;
- closely monitoring priorities set by the regions (to ensure that ATSIC does not conduct affairs outside of its defined powers and functions);
- overseeing the budget process;
- giving final approval to ATSIC policies and programs and their financing;
- taking complete control of ATSIC's financial decisions if he/she deems necessary; and,
- directing the Office of Evaluation and Audit and approving all estimates.

The Minister also has the power to dismiss Commissioners for misbehaviour and to determine what constitutes 'misbehaviour', (the *ATSIC Act* explicitly defines one instance of misbehaviour as Commissioners making recommendations in contradiction of a Ministerial decision over finance). This degree of ministerial discretion has been criticized as not only curtailing Aboriginal and Torres Strait Islander control over ATSIC, but also as severely limiting the practice of self-determination and self-management in general.

ATSIC receives its funds from the Commonwealth government under the following appropriation items:

1. Community Development Employment Projects (CDEP)
2. Payments to Aboriginal Hostels Ltd.
3. Native Title Claims Assistance
4. Operating Expenses (including salaries)

ATSIC is primarily funded by Parliamentary appropriations, but some finance is also received from other government contributions and from interest income. "In the financial year ending 30 June 1994, Parliamentary appropriations were $875 480 000; other

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[63] Ibid., p. 26.

government contributions $204 000 and interest income $26 142 000."[64] ATSIC can borrow money on overdraft from Approved Banks, but only to meet temporary deficits, and borrowing is subject to limits set by the Treasurer. The Commission can not raise money by any other means. ATSIC is subject to strict financial accountability at various levels - under its own establishing legislation, other legislation and parliamentary requirements - making it the most accountable agency of the Commonwealth according to most observers.

In comparison to other agencies, ATSIC's grants administration and general operating systems are lacking in sophistication and place demands far in excess of other agencies on Regional Councils and funded organizations. "Where other state and commonwealth agencies can operate financial and administrative systems for funding proposals that can provide for assessment and approval with as little as two or three levels of approval, ATSIC's system requires up to five or six levels of approval."[65] As Marion Hansen has commented:

> The system appears to have been designed to frustrate and confuse community organizations, workers and regional councillors alike. ... The demand that funded organisations are accountable on a line by line basis for expenditures and comparative quotes for even minor purchases makes a mockery with principles of self-determination.[66]

The Commonwealth's ATSIC legislation "outlines a scheme of regional government, but [only] in respect to those programs hitherto controlled by the

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[64] ATSIC, *A Laypersons's Guide to ATSIC*, p. 25.

[65] Marion Hansen, "Procedural and Systems Reform," 1994 ATSIC Annual Conference: *Effective Representation and Decision Making*, Dreamtime Cultural Centre: Rockhampton, 8-10 August 1994 (Canberra: ATSIC, 1994).

Department of Aboriginal Affairs (DAA) and the Aboriginal Development Commission (ADC)."[67] Approximately two of every five dollars spent on Aboriginal and Torres Strait Islander people by the Commonwealth government are allocated by the Departments of Employment, Education and Training, and Community Services and Health, bodies over which there is no control by indigenous representation.[68] Also, "[d]espite the importance of the Commonwealth's policy and program initiatives, general arrangements in Aboriginal Affairs remain a shared responsibility with the States and Territories. In many important areas, including the provision of education, mainstream health delivery and essential services and infrastructure, the States and Territories have retained a major role."[69] In practice then, ATSIC is notably limited in its ability to give effect to policies of self-determination and self-management.

ATSIC's Aboriginal Chairperson, Lois O'Donoughue, hails ATSIC as the leading example of the Commonwealth's endorsement of the principles of self-determination and self-management and as "a radical advance in the application of self-determination principles within Commonwealth government arrangements."[70]

> I am not suggesting that ATSIC is an instrument of self-government for Aboriginal and Torres Strait Islander peoples, although clearly its elected arm shares some of the features of government. It is, however, a very important representative body for our people, and its structure can

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[66] Ibid.
[67] Tim Rowse, Remote Possibilities: The Aboriginal Domain and the Administrative Imagination (Darwin: North Australia Research Unit - Australian National University, 1992), p. 57.
[68] Tim Rowse, "ATSIC's Heritage: The Problems of Leadership and Unity in Aboriginal Political Culture", *Current Affairs Bulletin*, (January 1991), p. 12.
[69] Lois O'Donogue, "Keynote Address: Australian Government and Self-Determination" in Christine Fletcher, (ed.), Aboriginal Self-Determination in Australia (Canberra: Aboriginal Studies Press, 1994), p. 11.
[70] Tim Rowse, "The Political Identity of Regional Councillors" in Shooting the Banker, p. 44.

> accommodate the variations in arrangements which exist at the different state, regional, and community levels.[71]

Although heralded as a new approach to indigenous-state relations in Australia, the ATSIC initiative represents a policy of devolution similar to the Canadian federal government's approach to the governance of indigenous peoples since the end of the Second World War. Given Australia's historical pattern of institutional relations between indigenous peoples and government, however, this advance is noteworthy.

CONCLUSION

Although Canada and Australia share many pre- and post-colonial experiences, their different historical patterns of institutional relationships between indigenous peoples and governments have resulted in different self-determination pursuits: self-government in Canada and self-management in Australia. In Canada, a history of centralized indigenous-state relations created a special relationship between indigenous peoples and the federal government. After a long struggle, the federal government assumed a role of working with indigenous peoples to implement policies designed to address their self-determination aspirations. In Australia, decentralized indigenous-state relations resulted in no special relationship between indigenous peoples and the Commonwealth government. The pursuit of self-determination was most frequently contingent on the

[71] O'Donogue, "Keynote Address ...", p. 12.

goodwill of diverse State governments. The Commonwealth only recently took a lead in developing self-determination policies and only when international pressures forced it to.

In Canada, the centralization of indigenous-state relations resulted in highly bureaucratic indigenous-state relations. Historically, then, the government pursued the devolution of administrative responsibilities to indigenous peoples within these bureaucratic structures. Eventually, these very structures were targeted by indigenous peoples as colonialist/paternalistic impediments to self-determination. Their reform or abolition is now being sought in a determined effort to restore self-governance to indigenous peoples. In Australia, less bureaucratic indigenous-state relations seem to have inspired the Commonwealth government to seek to administer Aboriginal Affairs according to bureaucratic principles more systematically. Because the identification of this goal has roughly corresponded with intensified demands for self-determination on the part of Australia's indigenous peoples and increased international pressure to implement self-determination principles, the devolution of responsibility from the government to indigenous peoples is being incorporated into new administrative structures as they are created.

In Canada, colonial and subsequently federal governments devised a policy premised on the eventual assimilation of indigenous peoples. The fundamental policy question was '*how* can indigenous peoples enjoy a place within Canadian society?' It was only recently that the government began to change the question: 'what place, if any, do indigenous peoples *themselves* want in Canadian society?' 'How can these wants then be addressed?' Indigenous peoples have answered, 'through *self-government.*' In

Australia, by contrast, indigenous peoples have only recently (and minimally) been recognized as a *possible* component of the wider Australian society. The fundamental question has thus been '*should* Australians recognize that indigenous peoples have a place within *their* society?' It is only recently that the Australia state has answered this question in the affirmative and begun to contemplate the questions 'how?' or 'to what extent?'

Finally, the historic signing of treaties between the government of Canada and indigenous peoples reflects an initial acceptance of indigenous peoples as nations, and created a legal basis for eventual claims to rights to self-determination, self-government and title to land. In Australia, the absence of treaties or of any form of initial agreement between indigenous peoples and new arrivals in Australia provided a much weaker claim for indigenous rights, including the right to self-determination. Without recourse to domestic legislation, indigenous peoples in Austria have been forced to appeal to international instruments to pressure their government to accept and act upon their self-determination claims and aspirations.

CHAPTER 4

THE CREATION OF NUNAVUT AND THE DEVELOPMENT OF RESPONSIBLE TERRITORIAL GOVERNMENT FOR TORRES STRAIT: PRACTICAL SOLUTIONS FOR INDIGENOUS EMPOWERMENT IN HINTERLAND REGIONS

Although important indigenous self-determination initiatives like the self-government based dismantling of DIAND and the self-management based creation of ATSIC are being implemented in Canada and Australia, indigenous self-determination is also being pursued by indigenous peoples in these countries' hinterland regions of Nunavut and Torres Strait via the institution of *responsible territorial government* (also termed 'public government' and 'regional government'). In Canada, the Inuit of Nunavut (in Canada's eastern Arctic) and the federal government are currently involved in implementing the long negotiated 1993 *Nunavut Land Claims Agreement* (NLCA) and accompanying Political Accord. This agreement will establish the Territory of Nunavut and the Government of Nunavut on April 1 1999. In Australia, the Torres Strait Islanders of Torres Strait are currently working within the ATSIC structure to develop their pre-existing local government-like bodies as a transitional arrangement for the development of responsible territorial government for the Torres Strait region. A target date of 2001, to correspond with Australia's centenary, has been established for the institution of responsible territorial government for Torres Strait. It is highly unlikely, however, that this target will be achieved.

Both the Nunavut and Torres Strait responsible territorial government initiatives are directed towards the realization of self-determination through self-government. The concept of self-government, however, does not enjoy the same level of acceptance in Canada and Australia. In Canada, self-government was introduced as a possible means to achieve indigenous self-determination by indigenous leaders during negotiations for the 1982 Constitutional Accord. Over the next two decades self-government gained popular appeal from politicians and the general public resulting in the inclusion of indigenous peoples' inherent right to self-government in the 1992 Charlottetown Constitutional Accord. Despite the failure of the Accord in the 1992 referendum, surveys conducted immediately following the referendum indicated that some 60 percent of Canadians supported the Accord's provisions as they related to indigenous peoples.[1] In 1994, public support for self-government was estimated to be between 65 and 85 percent.[2] By defining their pursuit of responsible territorial government as a practical means to achieve self-determination, the Inuit of Nunavut have been able to capitalize on the popular appeal of this concept and thus gain widespread support for their initiative.

In Australia, by contrast, self-government has not yet been introduced as a possible means to achieve self-determination. Even the broader concept of self-determination, introduced in Australia in 1970s, is still widely rejected by politicians and the general public alike. Although some indigenous leaders confidentially confess to

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[1] John H. Hylton, "Future Prospects for Aboriginal Self-Government in Canada" in John, H. Hylton (ed.), Aboriginal Self-Government in Canada: Current Trends and Issues (Saskatoon: Purich Publishing, 1994), p. 242.

[2] David Robert, "Listening for ways to heal old wounds", *Globe and Mail*, January 7 1994 (p. 4) in Hylton, "Future Prospects for Aboriginal Self-Government in Canada" in Hylton (ed.), Aboriginal Self-Government in Canada, p. 242.

discussing self-government possibilities among themselves, they are adamant that most Australians are not yet ready to accept self-government as a possible and practicable policy option and that its introduction would only serve to radicalize indigenous demands in the eyes of non-indigenous Australians. Indeed, the Torres Strait Islanders initial call for secession and thus the self-government of a distinct nation state were considered radical. In order to achieve a practical solution, however, Torres Strait Islanders have had to situate their pursuit of responsible territorial government within the more accepted concept of 'citizenship rights' in order to gain some degree of public support for their initiative.

Responsible territorial government refers to the devolution of governing powers to the population of a geographically-defined region, largely consistent with the existing constitution of a given state. In this respect, responsible territorial government does not fit the classic definition of indigenous self-government – that being government specifically by and for indigenous people(s). Nevertheless, in the regions of Nunavut and Torres Strait, the institution of responsible territorial government is, in effect, a form of indigenous self-government for two reasons. First, in Nunavut and Torres Strait the Inuit and Torres Strait Islanders respectively constitute approximately 85 percent and 74 percent of these regions' total populations. High birth rates and low immigration rates in both regions support the conclusion that the numeric predominance of Inuit and Torres Strait Islanders in their respective regions will not be much altered in the foreseeable future. Responsible territorial government in these regions, then, will be government *for* Inuit and Torres Strait Islanders simply by virtue of the principle of majority rule.

Second, in both Canada and Australia, the Inuit and Torres Strait Islanders are largely directing the creation of responsible territorial governments for their regions. Because the indigenous future constituents of these governments are largely ordering their structures and designs (within the limits defined by the constitutional structures of their respective countries), these new governments can also be described as governments *by* indigenous peoples. The creation of Nunavut and the development of responsible territorial government for Torres Strait are therefore important indigenous self-determination initiatives directed towards the attainment of a form of indigenous self-government.

The pursuit of self-government via responsible territorial government by the Inuit and Torres Strait Islanders, however, is not without its problems. First, responsible territorial government must necessarily be pursued within the defined constitutional structures of Canada and Australia. These structures create different contexts for the pursuit of responsible territorial government, defining unique ranges of possible and impracticable processes, boundaries and outcomes for responsible territorial government in the two countries. More importantly, these structures force the Inuit and Torres Strait Islanders to pursue their self-government goals within largely non-indigenous political milieus. Although some degree of indigenous innovation can likely be accommodated within these structures, the fundamental institutions and principles of government which underlie Canada and Australia's constitutions must still be given primacy. The result is a notable limitation on the Inuit's and Torres Strait Islanders' abilities to freely develop

responsible territorial governments that they consider culturally appropriate and effectively able to meet the needs and aspirations of their peoples and communities.

Second, the pursuit of self-government via responsible territorial government does not ensure the indigenous self-government of Nunavut and Torres Strait into perpetuity. Although the Inuit and Torres Strait Islanders currently hold majority status in their respective regions and are expected to do so into the foreseeable future, this numeric predominance is neither guaranteed nor insurable. If Nunavut and Torres Strait experience a population swing in favour of non-indigenous people some time in the future, responsible territorial government will no longer offer them a form of indigenous self-government. Given their informed decision to pursue their self-determination aspirations through the institution of responsible territorial government, they will also likely have no recourse to an alternative arrangement. Recognizing the problems inherent to the pursuit of self-determination/self-government via responsible territorial government, the Inuit of Nunavut and the Torres Strait Islanders of Torres Strait have nonetheless determined that this pursuit is a practical solution for indigenous empowerment in their regions.

The similar pursuit of self-determination via responsible territorial government by the Inuit of Canada's eastern Arctic and the Torres Strait Islanders of Australia's Torres Strait emerges from shared geo-political circumstances. Both the Inuit and Torres Strait Islanders live in isolated northeastern hinterland regions of their respective countries. They both constitute the indigenous people in their regions and both enjoy substantial numeric predominance in their homelands. Both peoples also experienced colonization

later than and differently from their southern indigenous neighbours. Finally, colonial governments have administered the Inuit and Torres Strait Islanders differently than other indigenous peoples in their countries.

Although the broadly conceived goal of responsible territorial government is the same for both the Inuit and Torres Strait Islanders, the processes for achieving it in Nunavut and Torres Strait are quite distinct. This distinction emerges from Canada and Australia's different legal histories. In Canada, a general acceptance of the concept of aboriginal rights, including native title, in law has made the creation of Nunavut possible via a comprehensive land claim. In Australia, the absence of an acceptance of aboriginal rights in law or otherwise and a very recent and limited acceptance of native title in law (the 1992 Mabo decision) have made the creation of responsible territorial government for Torres Strait achievable only through a gradual devolution of government powers and responsibilities to existing government structures in the region. The processes for the development of responsible territorial government in the two regions also had markedly different beginnings in the two countries. In Canada, the process began with a call for the division of the Northwest Territories in order to create an Inuit homeland. By contrast, in Australia it began with a call for the secession of Torres Strait from the rest of Australia.

The two initiatives also differ in their content. The creation of Nunavut will result in a new Territory governed by its own Territorial government and controlled by the Inuit majority of the region. Because of the Nunavut Land Claims Agreement (NLCA), the Nunavut initiative includes guaranteed land, water and resource ownership and control for the Inuit, funds for economic, political and social development, and other provisions

that will facilitate the creation, maintenance and development of responsible territorial government in Nunavut. As a modern treaty, the NLCA is constitutionally protected. This not only ensures its terms and provisions against unilateral alteration, but also its implementation. The political accord defines the structure, processes and institutions of the new territorial government. Negotiated by the Inuit and the federal and territorial governments, it provides a solid foundation for the development of the political aspects of the initiative. Although the political accord is not considered a modern treaty, and thus is not constitutionally protected, it is closely tied to the NLCA and is strongly supported by all parties making its successful conclusion highly likely.

The development of responsible territorial government for the Torres Strait does not have as firm a foundation as the Nunavut initiative and is unlikely to be as comprehensive. The absence of coherent and comprehensive land claims processes comparable to Canada, and no constitutional recognition of treaty or other indigenous rights in Australia makes the pursuit of responsible territorial government by Torres Strait Islanders a substantially more difficult endeavour. Despite Torres Strait Islanders strong desire to obtain some degree of control over their communities and their well developed political skills, the achievement of their goal ultimately rest on nothing more substantial that the goodwill of the Commonwealth and Queensland governments. Given the past apathy and at times outright hostility of these governments to indigenous aspirations, especially as they concern self-determination, this goodwill is tenuous at best. If a responsible territorial government agreement is achieved for Torres Strait, it will most likely take the form of Queensland legislation (which could be unilaterally altered or

abolished) providing for some devolution of political control from the Queensland government to Torres Strait Islander political bodies. Without a precedent or legal basis for comprehensive provisions, such an agreement is not likely to include land, water and resource ownership and control, guaranteed funding or any of the other more encompassing terms and provisions of the NLCA.

GEO-POLITICAL CIRCUMSTANCES

GEOGRAPHY AND DEMOGRAPHICS

The traditional homeland of the Inuit stretches from Siberia across the Pacific to northern Alaska, over all of the Western, Central and Eastern Arctic, down the Labrador coast and across the Atlantic to Greenland. Nunavut, which mean "our land" or "homeland" in the Inuktitut language, refers to the new Territory of Nunavut to be established on April 1, 1999, and includes the Nunavut Settlement Area defined in the *Nunavut Land Claim Agreement, 1993* (NLCA). Comprising approximately 1 900 000 square kilometres of land (with native title to approximately 350 000 square kilometres) in Canada's central and eastern Arctic region, Nunavut consists of all of Canada north of 60° N and east of the boundary shown on the map in Figure 4:1 which is not within Quebec or Newfoundland, and all of the islands of Hudson Bay, James Bay and Ungava Bay that are not within Manitoba, Ontario or Quebec.[3]

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[3] "Geographic Names: Aboriginal Communities – Nunavut", http://geonames.mrcan.gc.ca/cgndb/english/schoolnet/nunavut.html, p. 1 [Source: CPCGN Secretariat (1994): "Nunavut", *Canoma*, Vol. 20(1), p. 4].

Torres Strait is defined both geographically and culturally with rather indefinite boundaries in both cases. Geographically defined, the Torres Strait is a passage 150 kilometres wide in northeastern Australia bordering on Papua New Guinea. The Torres Strait incorporates the northernmost part of the Great Barrier Reef, other extensive reef areas, islands, islets, cays and mangroves as well as some of the most extensive sea-grass areas in the world.[4] Defined culturally, Torres Strait is a region traditionally occupied by Torres Strait Islanders. It consists of 150 islands, 16 of which are permanently occupied, and two Cape York Communities established in the 1940s – Bamaga and Seisia.[5] "The area likely to be identified for future regional government is that currently falling within the jurisdiction of the TSRA [Torres Strait Regional Authority]: the islands of Torres Strait, excepting Barn and Crab Islands, and the Cape communities of Bamaga and Seisia."[6]

The isolation of these two regions has preserved their relatively homogeneous populations and the numeric predominance of Inuit and Torres Strait Islanders in Nunavut and Torres Strait respectively. As explained in greater detail in Chapter 1, the Inuit and Torres Strait Islanders[7] represent relatively homogenous ethnic categories, each with a common origin and history. The isolation of these regions and their assumed

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[4] Sandra J. Kehoe-Forutan, Torres Strait Independence: A Chronicle of Events, Research Report No. 1 (St. Lucia: Department of Geographical Sciences – University of Queensland, [July] 1988), p. 2.
[5] Monia E. Mulrennan and Peter Jull, "Indigenous Peoples and Sustainability: The Politics of Regional Development in Australia's Torres Strait and Canada's Nunavut", paper for the 1992 Conference of *The Association for Canadian Studies in Australia and New Zealand (ACSANZ)*, Victoria – University of Wellington, December 14-16, 1992), p. 2.
[6] Wil Sanders, ""Reshaping Governance in Torres Strait: The Torres Strait Regional Authority and Beyond", *Australian Journal of Political Science*, Vol. 30, (1995), p. 505.
[7] Although a notable degree of racial mixing has occurred among the Torres Strait Islanders of Torres Strait, connections to Islander culture has remained strong.

uninhabitability (Nunavut because of its harsh climate, Torres Strait because of its vast dispersion over small often 'lifeless'[8] islands) mitigated against settlement and immigration, even before the arrival of Europeans to Canada and Australia. Although trade, especially in the case of Torres Strait Islanders, did bring these peoples into contact with other peoples from distant lands, these other peoples did not generally settle in the Nunavut and Torres Strait regions. The Inuit and Torres Strait Islanders, then, represent the indigenous peoples in their respective regions. Although important region differences do exist in both Nunavut and Torres Strait, common ethnic backgrounds and common hinterland experiences among Inuit and Torres Strait Islanders have facilitated a common sense of peoplehood and unity, especially on political fronts.

An important demographic difference, however, exists between Inuit and Torres Strait Islander populations. While the vast majority of Canada's Inuit people live in their Arctic homeland and more precisely in Nunavut, the vast majority of Torres Strait Islanders live in other parts of Australia. According to the statistics of the Nunavut Planing Committee, there are approximately 25 000 Inuit Canada wide with 17 500 living in Nunavut.[9] The Inuit population of Nunavut therefore represents approximately 70 percent of the total Inuit population of Canada. According to the 1991 Australian Census, of 26 000 self-identifying Torres Strait Islanders Australia wide, some 20 000 live outside the immediate vicinity of Torres Strait.[10] The Torres Strait Islanders of

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[8] While the lack of animal life or substantial vegetation on many of the islands of Torres Strait compels many to describe these islands as lifeless, many Torres Strait Islanders and other aboriginal peoples would decry this description based on the bountiful resources of the sea, just as Inuit decry the description of their land as 'uninhabitable' based on their people's millennia old ability to subsist on its bounties.

[9] "General Information about Nunavut", http://npc.nunavut.ca/eng/nunavut/general.html, p. 1.

[10] Sanders, "Reshaping Governance in Torres Strait", p. 502.

Torres Strait therefore represent only 23 percent of Australia's total Torres Strait Islander population. The large-scale net migration of Torres Strait Islanders from Torres Strait, (which began only in the post war era), has now slowed. Nonetheless, this population dispersion does present difficult questions of constituency and representation to the architects of responsible territorial government for Torres Strait. Because the Inuit and Torres Strait Islanders are using responsible territorial government to achieve self-determination, constituency and particularly representation take on new importance and meaning. In Nunavut, because the vast majority of Inuit reside within the defined territory of the proposed responsible territorial government, constituency and representative responsibilities of the new government are self-evident. In Torres Strait, there is some agitation for a new governance arrangement to include somehow Torres Strait Islanders outside of the Strait in its constituency and/or its representative responsibilities.

Like Nunavut, Torres Strait and the rest of the Tropical coast of Australia really 'belong to' the Circumpolar Arctic[11] according to Peter Jull, that is "to the wider realm of 'first world' hinterlands where Europeans are pressing into the last remaining indigenous homelands."[12] Still, an important difference between Nunavut and Torres Strait

[11] In the Northern Hemisphere, the Arctic represents not only a geographic region but also a sociological 'last frontier' whose land and peoples are still considered foreign to Europeans. In the Southern Hemisphere, Antarctic being devoid of people is largely uninhabitable, it is Torres Strait and the Tropical Coast of Australia that encompass this sociological 'last frontier' whose lands and peoples need to be 'discovered' and 'conquered. It is in this sociological sense that Jull included Torres Strait and the Tropical coast of Australia in the Circumpolar Arctic along with Nunavut and other Northern Hemisphere hinterlands.

[12] Peter Jull, "Torres Strait Autonomy: Towards Indigenous Constitutional Developments to Scale", submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into greater autonomy for the Torres Strait Islanders, September 5 1996), p. 2.

influences governments' actions in these northern peripheral regions, namely the relative importance of their geographic locations to each nation-state. Nunavut is isolated and removed from the rest of Canada and its daily relations with the world.[13] Although rich in natural resources, this frozen tundra is of little consequence to Canada as a nation-state. In the words of Wil Sanders, it is Canada's 'back garden'.[14] In contrast, Torres Strait is Australia's gateway to the Pacific and its only international border. It is therefore intimately connected to the rest of Australia and to its daily relations with the world, namely with the Asia-Pacific region. As such, it is Australia's 'front garden'.[15] Issues such as immigration, quarantine, and smuggling that are of no consequence to the development of responsible territorial government for Nunavut are of central importance in Torres Strait. The isolation of both regions facilitates the move towards responsible territorial government for both Nunavut and Torres Strait by offering the hope of more relevant and presumably more efficient administration in these remote regions. Complex areas of Commonwealth jurisdiction currently being administered in Torres Strait, however, may frustrate or limit the development of responsible territorial government in this region.

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[13] Except perhaps in the case of occasional sovereignty disputes, but in these cases the Inuit's traditional occupation of the Arctic severs as Canada's international defense of it sovereignty claims.
[14] Wil Sanders, interview with the author, Canberra: Centre for Aboriginal Economic Policy Research - Australian National University, May 27 1997.
[15] Sanders, interview, May 27 1997.

COLONIZATION AND ADMINISTRATION

Not only do the Inuit and Torres Strait Islanders share northeastern hinterland existences, relatively homogeneous populations and numeric predominance in their respective regions, but also they share similar experiences with colonization. Lying on the northeastern peripheries of Canada and Australia, both Nunavut and Torres Strait experienced colonization later than the more southern indigenous peoples of their countries. This later colonization also manifested itself differently, especially as regards the administration of Inuit and Torres Strait Islanders by governments.

Although eastern Inuit groups have experienced fleeting contact with Europeans for many centuries, a sustained Euro-Canadian presence in the Canadian Arctic came late.[16] Early contact with the Norse and with European explorers had a minimal impact on the Inuit and their way of life. It was not until the nineteenth century that the Inuit began to experience close contact with Europeans and its effect on their traditional ways of life. The nineteenth century brought four overlapping waves of European migrants to the Canadian Arctic – explorers in search of the fabled Northwest Passage, whalers, fur traders and missionaries. Each wave introduced a new and a successively greater array of European trade goods, diseases, and social structures.[17] Although these four waves of migrants to the Arctic did have an adverse impact upon the Inuit and their culture, they resulted in less social and cultural upheaval for the Inuit than for other indigenous

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[16] Alan D. McMillan, Native Peoples and Cultures in Canada: An Anthropological Overview, (2nd ed.; Vancouver: Douglas and McIntyre, 1995), p. 269.

[17] For more information on the specific effects of these waves of migration please refer to Chapter 10 of McMillan's Native Peoples and Cultures in Canada (2nd ed.), particularly pp. 283-285.

peoples in Canada. This relative stability is due in part to the fact that the Inuit remained outside the realm of government administration until the early twentieth century.

Because the Inuit remained outside of the realm of government administration, they were not overtly subjected to the Dominion Government's destructive assimilation policy, as were southern indigenous peoples. Instead, the Inuit were covertly subjected to the persuasive integration efforts of the new European arrivals in their midst, aimed largely at facilitating resource exploitation. While integration did have its negative impacts, notably the abandonment of a diversified subsistence economy to one based on single product resource exploitation, integration did allow the Inuit to retain a relatively high degree of cultural continuity throughout their first century of sustained contact with Europeans. The numerical predominance of the Inuit in the Arctic region during this period also facilitated cultural continuity in the face of European arrivals.

Because the Inuit lived in the remote and 'inhospitable' Arctic and remained outside of the realm of government administration throughout the nineteenth century, they were not subject to the treaty process as were most southern indigenous peoples in Canada. They were not compelled or forced to surrender or cede any of their lands to the dominion or colonial governments and so, at least theoretically, retain title to these lands by virtue of the *Royal Proclamation, 1763*. This fact has been influential in the development of responsible territorial government for Nunavut. Not only does it reinforce Inuit claims to land and more broadly based aboriginal rights, but also it makes the comprehensive land claims process open to the Inuit.

The Canadian government did not make its presence felt in the northern land of the Inuit until a threat to its sovereignty in the High Arctic compelled it to take action.[18] In 1903, the Canadian governments established three North West Mounted Police (later the Royal Canadian Mounted Police) posts in the Arctic in an attempt to assert its sovereignty claims. Although the police were not there to administer the Inuit, they did bring with them foreign concepts of law and justice that had a negative impact on the Inuit and forcefully suppressed many Inuit practices that they found offensive. The federal government provided no services to the Inuit outside of the police presence, leaving the missionaries to provide what rudimentary education and health services they could.

World War II and the onset of the Cold War focused increased attention on the strategic importance of the Arctic and subsequently on the federal government's neglect of the Inuit people. An active, albeit minimal, role in Inuit administration was thus assumed by the federal government in the 1950s. Services formerly provided by missionaries, fur traders and police were transferred to government administrators who became a permanent feature of northern communities; nursing stations and health programs were established; schools were built in many Inuit settlements; and social welfare services were extended to the Inuit on the same basis as to other Canadians.[19]

To foster more convenient, efficient and cost effective administration of the Inuit, the federal government encouraged them to settle in permanent government created

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[18] McMillan, p. 285.
[19] Ibid, p. 286.

communities and relocated Inuit from smaller settlements to larger administrative centres. "A caste-like system quickly developed between the Inuit and the *Qallunaat*, the White, generally temporary residents of the north"[20] in these centres, separating the Inuit from the colonizers and the decision-making authority they had over their lives and lands. In other instances, Inuit from smaller communities were forced by the government to relocate to remote areas, presumably for better access to game but also, and perhaps more importantly, to bolster Canada's sovereignty claims over the northern islands of the Arctic.[21] Depression, alcoholism, suicide, violence and health problems among the Inuit quickly escalated as the effects of dislocation manifested themselves in physical, cultural and emotional decline. This change from a semi-nomadic way of life governed by Inuit tradition and authority to a more sedentary way of life governed by colonial norms and authority had a greater impact on the Inuit and their culture in a period of several decades than the culmination of effects from a previous century of European contact.

Although colonization and its devastating effects cannot be disregarded, the Inuit's experience of colonization was relatively less damaging than that of more southern indigenous peoples, coming later and manifesting itself quite differently. First, the Inuit's isolation and wide dispersion over the vast and assumedly inhospitable Arctic region insulated them from rampant European settlement and its inevitable assimilationist tendencies. Second, the lack of any government interest or presence in the Arctic until the early twentieth century, and then only minimally until the 1950s, served to provide

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[20] Ibid.
[21] Ibid, p. 287.

the Inuit with a degree of cultural continuity not possible in more southern regions. Third, southern fascination with the Inuit and their ability to survive in the harsh Arctic environment coupled with the Canadian government's need of the Inuit's traditional occupation of the Arctic to assert its claims to Arctic sovereignty, resulted in a generally positive, if naïve, image of the Inuit among the general population of Canada. All of these factors have facilitated the pursuit of self-determination via responsible territorial government for the Inuit of Nunavut.

Like the Inuit, Torres Strait Islanders experienced colonization later than did other indigenous peoples of their country. Since their undetermined arrival in Torres Strait, the Torres Strait Islanders have had a strong seafaring and trading tradition that brought them into contact with other indigenous peoples, particularly the Papuans, of the Asia-Pacific region. Although Torres Strait was discovered for Europeans as early as 1606 (when Luis Vaez de Torres passed through the region), contact was brief and infrequent until the foundation of the Australian colony in 1788. Even then, the new European arrivals used the Strait only as a seaway. The passing vessels of the colonizers did not disrupt the Torres Strait Islanders' way of life, though they did disturb it violently on more than one occasion.[22]

A true and sustained foreign presence in Torres Strait dates back to 1871 when the London Missionary Society began its work of religious conversion in the region.[23] Although the introduction of Christianity to Torres Strait, commonly referred to by

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[22] Jeremy Beckett, Torres Strait Islanders: Custom and Colonialism (Melbourne: Cambridge University Press, 1987), p. 5.
[23] Ibid.

Torres Strait Islanders as 'The Coming of the Light', did bring about substantial social and cultural change, the introduction of new religions to the region was not new. Torres Strait Islanders' strong seafaring and trading tradition had previously brought them into contact with new spiritual concepts and practices which they occasionally adopted/integrated into their own traditions. According to Jeremy Beckett, "It seems likely that the Islanders initially viewed the mission as simply the latest in the series of cults that came to them from time to time, albeit one that promised unprecedented power and wealth."[24] The new order created by the London Missionary Society did, however, require them to move to a village around a church; a considerable adaptation for Western and Central Islanders accustomed to moving about in search of food.

In 1879 the British colony of Queensland fully annexed the islands of Torres Strait (with the exception of Dary Island) for strategic and economic purposes. With this annexation, the government of Queensland began a precarious relationship with and had a powerful impact upon the Torres Strait Islanders.[25] The Queensland government allowed the London Missionary Society to run the island communities for approximately 20 years, until they phased over their operations to the Anglican Church. At this point, the Queensland Department of Native Affairs and Aboriginal and Torres Strait Islander Advancement took over provision of local government-type functions and almost all basic services in Islander communities on 'reserve' lands.[26] These were administered

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[24] Ibid, p. 40.
[25] Kehoe-Forutan, p. 4.
[26] Sanders, "Reshaping Governance in Torres Strait", p. 507.

from Brisbane through teacher/supervisors appointed to reside in each 'reserve' community and carry out the administrative directives of the Queensland government.

Within this administrative structure, elected local indigenous councils were established in 1899 by the first Government Resident in Torres Strait (1886-1904), the Honourable John Douglas. Douglas saw the Torres Strait Islanders as 'superior' to Australian Aborigines. Asserting that they were capable of exercising all the rights of British citizens and should be regarded as such, Douglas advised a separate administration of Aborigines and Torres Strait Islanders in the colony of Queensland and thus gained support for the idea of elected indigenous councils.[27] In an act of benevolent despotism then, the Queensland government permitted some vestige of community control in Torres Strait even as it asserted its colonial authority over the region and its inhabitants. These local representative structures gave Torres Strait Islanders a rather weak advisory capacity to the European residents living in their communities, having notably less power and authority than other local government structures in Queensland. Still, they provided a degree of involvement in decision-making processes far greater than that of other indigenous peoples in Australia. This stands in striking contrast to Queensland's autocratic treatment of Aboriginal peoples living within its territory and is without parallel in Australian colonial practices anywhere. "From modest beginnings in local government, these councils came to act as intermediaries in relations between the Islanders and the outside world, reinforcing the island community as the basic building

[27] Beckett, Torres Strait Islanders, p. 45.

block in the colonial order".[28] These councils also encouraged the development of strong oratory and political skills among Torres Strait Islanders resident in Torres Strait, skills that have facilitated the articulation of Islander interests and demands over the years and forced governments' response.

Beginning in the early 1900s, the 'White Australia' movement spurred policies of extermination, dislocation and assimilation directed towards Aboriginal peoples in all of Australia's colonies. In Queensland, however, the geographic isolation of Torres Strait largely preempted the necessity of such policies being directed towards Torres Strait Islanders. Instead, policies of segregation supported by labour exploitation were used by the Queensland government to ensure that Torres Strait Islanders did not threaten the 'white' character of its colony. With unimpeded access to their islands, Torres Strait Islanders believed they still owned them, and the Queensland government encouraged this belief until the 1960s to mitigate against Torres Strait Islanders moving from 'their' islands to the mainland.[29] The Queensland government further discouraged migration by using the seafaring Torres Strait Islanders as a skilled labour force for the lucrative shipping and marine resource exploitation industries. This offered financial incentives for Torres Strait Islanders to remain in Torres Strait, while at the same time bolstering the Queensland economy. "Since the Islanders were already performing a useful economic role and making no demands on the taxpayer, the government had no occasion to

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[28] Ibid, p. 17.
[29] Jeremy Beckett, "The Murray Island Land Case and the Problem of Cultural Continuity", in W. Sanders (ed.) *Mabo and Native Title: Origins and Institutional Implications*, CAEPR Research Monograph No. 7 (Canberra: Centre for Aboriginal Economic Policy Research – Australian National University, 1994), p. 10.

contemplate their eventual integration with the majority Australian population."[30] Unlike the experiences of other indigenous peoples in Australia, the colonial authority in Queensland made no objection to island customs, practices and ways of life. "While it suppressed practices it found offensive, it did not expect Islanders to become like white people, but rather to live in a manner appropriate to their presumed stage of cultural evolution."[31] Torres Strait Islanders are also set apart from other indigenous peoples in Australia in that they never experienced displacement from their homelands. Still, as the twentieth century progressed, the Queensland government began to exert more control over Torres Strait Islanders and their communities by way of increasing the authority of teacher/supervisors and imposing more regulations on Torres Strait Islanders and their activities.

Using the skills acquired from their participation in island councils, Torres Strait Islander began asserting their discontent and making demands on the Queensland government early into the twentieth century. "Protesting over the increasing control of their lives, the Islanders took the first of a series of political actions in the form of the Maritime Strike of 1936."[32] As a result of the strike, the Queensland government was embarrassed into making changes in the administration of Torres Strait Islanders. The two most important of these were:

1. The removal of the teacher/supervisor from reserve communities; and
2. The formation of an inter-island councilors' conference, the Island Advisory Council (the forerunner of the current Island Coordinating

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[30] Beckett, Torres Strait Islanders, p. 59.
[31] Ibid, p. 7.
[32] Kehoe-Forutan, p. 6.

> Council), to coordinate the administration of Torres Strait Islander communities in the Strait and on the tip of Cape York.[33]

Although the government still retained many economic controls, the Torres Strait Islanders gained more autonomy in their communities, a separate legislative identity to that of the Aborigines and the rescindment of many unpopular regulations.[34]

The advent of World War II brought new changes to Torres Strait. All civilians in Torres Strait were evacuated south and some 800 Torres Strait Islanders became soldiers in the Torres Strait Light Infantry based on Thursday Island. As soldiers, Torres Strait Islanders were treated with equal status to non-indigenous soldiers, and, after minor strike action, were party to equal wage rates. "Those strikes provided the forum for ex-servicemen, after the war, to lobby for new rights, less restrictions and for the Commonwealth to take a more active role in their affairs – the Commonwealth being analogous to citizens rights."[35] Despite fervent objections on the part of the Queensland government, "[i]nitial attempts at Commonwealth intervention in Torres Strait Islander administration provided Torres Strait Islanders with full citizenship and the vote, and allocated basic social services (excluding unemployment benefits which were not available until 1974) years before the mainland Aborigines were granted such rights."[36] In general, then, Torres Strait Islanders resident in Torres Strait have historically enjoyed

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[33] The Torres Shire Council, established in 1903 and incorporated under the Queensland *Local Government Act 1936*, became responsible for the administration of Thursday Island (the regional capital), Horn Island and Prince of Wales Island (all with substantial non-Islander populations) and the Aboriginal communities of Cape York. In this way the administration of Torres Strait Islander and non-Islanders/Aboriginals became differentiated.

[34] Kehoe-Forutan, p. 6.

[35] Ibid.

[36] Ibid, p. 8.

more favourable administration by both the Queensland government and the Commonwealth government than other indigenous peoples in Australia and have been relatively effective in forcing governments to respond to their demands.

The later colonization of Torres Strait and the unique administration of Torres Strait Islanders have both set Torres Strait Islanders apart from other indigenous peoples in Australia. These circumstances have promoted a relatively strong degree of cultural continuity, a common sense of peoplehood and strong political skills among Torres Strait Islanders, creating the unity considered necessary by Australian governments to make self-determination an achievable goal. Their numeric predominance in Torres Strait, the homeland from which they were never forcibly dislocated, has facilitated the pursuit of this goal via responsible territorial government by providing a geographically defined region with a relatively homogeneous population over which such a government could presumably exercise some degree of authority.

NATIVE TITLE

Like the Inuit of Nunavut, the Torres Strait Islanders of Torres Strait believe that the geo-political circumstances that set them apart from other indigenous peoples in their country make responsible territorial government an acceptable and realizable means to achieve self-determination/self-government for their peoples and communities. Unlike the Inuit, however, the Torres Strait Islanders cannot couch their responsible territorial government pursuit within a broader land rights package. While Canada has a long history of legally recognizing native title and a more recent history of accepting the

concept in practice, the concept of native title only gained legal recognition in Australia in 1992 and has yet to receive general acceptance.

Canada's recognition of native title dates back to the *Royal Proclamation,1763*. Although Canada has no clear definition of native title, or 'aboriginal title' as it is more frequently called, native title is recognized under the common law of Canada and exists alongside the treaty-making process. "These aboriginal or native title rights are rights arising from a pre-existing legal regime which has survived the assertion of British sovereignty. Treaties serves as a recognition of the existence of such title."[37] A 'clear and plain' intention to extinguish these rights by the sovereign is required to extinguish native title or an aboriginal right in Canada. Since the landmark *Calder v Attorney-General of British Columbia (1973)* case, which declared that native title continues to exist, the Canadian government has followed a two-streamed process to resolve aboriginal claims. The first stream applies to *Specific Claims*. "These allow treaty groups to seek fulfillment of lawful treaty obligations (including government defaulting on land entitlements) and redress for governments' past mismanagement of Indian lands. Claims are judged individually on facts and merits and compensation is based on legal principles and established criteria."[38] The second stream, which is of crucial importance to the Inuit of Nunavut, applies to *Comprehensive Claims*. The comprehensive claims process allows non-treaty groups to negotiate claims to traditional land based on their traditional occupancy and use of such lands. "[Comprehensive claims] normally involve

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[37] "Native Title: International Responses", *ATSIC: Current Issues*, (Canberra: Aboriginal and Torres Strait Islander Commission, [June] 1993), p. 4.
[38] Ibid.

a group of bands or native communities within a geographic area and are comprehensive in their scope, including such elements as land title; specified hunting, fishing and trapping rights; financial compensation; and other economic and social benefits."[39] The resolution of comprehensive claims, however, does require the cession and surrender of native title in return for defined rights – an element of the process that has provoked a strong reaction from many indigenous people in Canada. Still, the acceptance of native title in law and a specific, comprehensive process to deal with native title claims, coupled with a general acceptance of more broadly based indigenous rights, have greatly facilitated the Inuit in their pursuit of responsible territorial government.

The recognition of native title in Australia dates only to 1992 and the High Court of Australia's monumental Mabo decision. The Mabo proceeding began in 1982, when Eddie Mabo and four other Meriam[40] people began court action against the Queensland State Government seeking confirmation of their traditional land rights. They did so by challenging the annexation by Queensland in 1879 of the Murray Islands (the eastern-most islands of Torres Strait), claiming that their traditional communal land rights had not been validly extinguished and still existed.[41] On June 3 1992, by a 6 to 1 majority, the High Court of Australia upheld the communal native title of the Murray Islanders and discarded the doctrine of terra nullius. Although this ruling did entrench the concept of native title in the common law of Australia, it could not entrench the concept in the

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[39] Ibid.
[40] The term 'Meriam' refers to the people of the Murray Islands, the northeastern-most islands of Torres Strait.
[41] Lorna Lippman, "The Mabo Decision: Chapter 10", Generations of Resistance (3rd ed.; Melbourne: Longman Cheshire, 1994), p. 169.

mindset of most Australians. Fear campaigns launched by pastoralists and others following the ruling proclaimed that 'no land in Australia is safe from a native title claim' and served to propagate and entrench general animosity towards native title. In response to the Mabo ruling the Commonwealth government enacted the *Native Title Act* in 1993.

The *Native Title Act, 1993* sets out a process for the determination of native title claims, but it is extremely limited in its application and provides none of the comprehensive provisions of Canada's specific and comprehensive land claims processes. Although the Act recognizes the common law principle of native title, as established by the High Court in the Mabo decision, at the same time it grants validity to past grants of interest in land or waters made invalid because of native title. This prevents Aboriginal and Torres Strait Islander peoples from successfully claiming land over which a freehold or non-pastoral leasehold interest has been already been granted.[42] No provision of compensation for these previously alienated lands is included in the Act. The Act also required successful native title claimants to have continuously maintained their traditional association with the land claimed – a difficult requirement to fulfill for most of Australia's indigenous peoples who were forcefully or persuasively dislocated from their lands many years ago. In addition, the Act ensures the validity of legislation governing economic activities offshore (like commercial fisheries and oil drilling), provides that governments can confirm any existing ownership of natural resources (including forests and minerals), ensures that normal compulsory acquisition procedures

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[42] *Face the Facts: Some Questions and Answers about Immigration, Refugees and Indigenous Affairs*, produced by the Federal Race Discrimination Commissioner, (1997), p. 31.

can apply to native title land, and allows existing access to beaches, waterways and other recreation areas to be confirmed.[43] Although the Act exempts native title holders from licensing requirements for hunting, fishing and gathering that are non-commercial, it also provides that general laws and regulations covering such matters as heritage protection, environmental and health control and fishery regulation also apply to native title land. Because native title and a land claims process to secure it are new, notably limited and only grudgingly accepted in Australia, Torres Strait Islanders have not been able to use these means to support their pursuit of responsible territorial government for Torres Strait. As a result, responsible territorial government is being pursued by Torres Strait Islanders through successive proposals to the Queensland and Commonwealth governments. These proposals are directed towards a gradual devolution of administrative and legislative responsibilities within the ATSIC structure, underlain with an intent to eventually move outside of this structure and negotiate an unprecedented responsible territorial government agreement with the government of Queensland.

Although the pursuit of responsible territorial government by the Inuit of Nunavut and the Torres Strait Islanders of Torres Strait are both inspired by similar geo-political circumstances that equate the attainment of responsible territorial government with the attainment of self-determination and self-government, the two pursuits are notably divergent. The Nunavut initiative is anchored in constitutional law, is now nearing its implementation phase after over 20 years of negotiation and will result in the creation of

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[43] Australia, Department of Foreign Affairs and Trade, International Public Affairs Branch, *Mabo and Australia's Native Title Act*, Fact Sheet, (July 1994), p. 3.

a new Territory with its own government. The Torres Strait initiative is not anchored in constitutional law nor even in legal precedent, is only in the early phases of its negotiation, and has an uncertain outcome.

THE CREATION OF NUNAVUT

The first proposal to divide the Northwest Territories (NWT) dates to 1960 when the Diefenbaker government suggested dividing the NWT into Nunatsiaq in the east and Mackenzie in the west.[44] This proposal, however, had little to do with Inuit empowerment and much to do with administrative convenience. The next proposal for the division of the NWT and the true starting point for the creation of Nunavut came from the Inuit Tapirisat of Canada[45] (ITC) in 1976. The ITC proposal to government advocated a division of the NWT in order to establish a single Inuit homeland – Nunavut - over which the Inuit would have some degree of authority. The federal government's comprehensive land claims settlement process was identified as the key negotiation tool for achievement of the ITC's goal. The initial proposal to government included a desire to negotiate comprehensive land claims on behalf of Inuit across the Arctic. Disagreements between Inuit leaders, however, led to the institution of two distinct negotiating parties - the Tunngavik Federation of Nunavut (TFN) for the eastern Inuit and

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[44] Augie Fleras and Jean Leonard Elliott, The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand (Toronto: Oxford Press, 1992), p. 9.

[45] Formed in 1971,the ITC is a association of various Inuit leaders of the Arctic mandated to represent the Inuit of Canada to promote Inuit culture and identity nationally, and to present a common front on political, economic and environmental issues. Originally constituted by six regional organizations representing Inuit from Labrador to the Mackenzie delta, the ITC today represents only the central and eastern Arctic Inuit (the Inuvialuit of the western Arctic withdrew in the late 1970s and formed their own representative organization).

the Committee of People's Entitlement (COPE) for the western Inuit or Inuvialuit[46] – and thus two different negotiation processes. The COPE negotiated the Western Arctic Land Claim on behalf of the Inuvialuit, which resulted in the Western Arctic (Inuvialuit) Land Claim Agreement (WALCA), finalized in 1984. The TFN negotiated the Nunavut Land Claim on behalf of Inuit of the Central and Eastern Arctic, which resulted in the Nunavut Land Claim Agreement (NLCA), finalized in 1993. The TFN also negotiated a political accord, legally distinct from but conceptually linked to the NLCA, to create a new Territory – Nunavut – with its own responsible territorial government. Although it is Article 4 of the NLCA that commits the federal government to the creation of the Nunavut Territory and Government, it is the political accord that details the establishment of said Territory and Government.

The separation of land claim settlement and political development was not desired by the Inuit but was forced by the federal government's policy of negotiating the two issues separately. It was not until the federal government agreed to the inclusion of Article 4, however, that the Inuit were prepared to settle their comprehensive land claim. The inclusion of Article 4 is without precedent in the settlement of land claims in Canada and was accommodated so that the Inuit would agree to surrender unextinguished title and rights to large tracts of land. The surrender of title and rights is a component of all land claims settlements in Canada, but it was a particularly disturbing provision for the Inuit of Nunavut. Although the Nunavut Settlement Area (the area over which the Inuit

[46] The Inuit of the western Canadian Arctic differ from other Canadian Inuit, most closely resembling their kin in northern Alaska. They today consider themselves separate from other Canadian Inuit and prefer to be known as Inuvialuit (literally, "real people"). [McMillan, pp. 276-277].

gain title) is large – approximately 350 000 square kilometres or roughly the size of Germany – it represents less than 20 percent of the land for which the Inuit can demonstrate traditional use and occupancy.[47] According to Kevin Grey, "The history of the negotiations has demonstrated that obtaining a Nunavut political territory was the primary consideration [of the Inuit] for surrendering unextinguished Inuit title."[48]

THE NUNAVUT LAND CLAIMS AGREEMENT (NLCA)

Before the federal government would agree to proceed on the Inuit land claim for the creation of Nunavut, it required agreement on the division of the NWT from the NWT's citizens. This was achieved in the April 14, 1982 government plebiscite. The plebiscite passed by a narrow 56.5 to 43.5 in favour of division, with the eastern Arctic solidly in favour and the western regions generally against.[49] This east-west split in the plebiscite is not surprising. Although the Dene, Métis and Inuvialuit of the western Arctic are generally supportive of the Inuit's desire to create an Inuit homeland, they are also fearful that the creation of Nunavut will negatively affect their political power in the western Arctic. The creation of Nunavut poses a threat to the Dene, Métis and Inuvialuit of the Western Arctic because "partition [will] reduce the overall aboriginal majority in the Legislative Assembly and the Dene and Métis rely on the Inuit members to bolster the

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[47] Terry Fenge, "The Nunavut Agreement: The Environment, Land and Sea Use and Indigenous Rights" in Peter Jull, Monica Mulrennan, Marjorie Sullivan, Greg Crough and David Lea (eds.) Surviving Columbus: Indigenous Peoples, Political Reform and Environmental Management in Northern Australia (Darwin: North Australia Research Centre – Australian National University, 1994), p. 32.
[48] Kevin R. Gray, "The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: The Uncharted Path to Effective Self-Government", *University of Toronto Law Review*, Vol. 52, No. 2 (Spring, 1994), [source: http://www.law-lib.utotonto.ca/law-review/utlr52-2/gray.htm], p. 12.
[49] McMillan, p. 291.

Native ranks against those of non-Natives."[50] "A subsequent contentious issue was the establishment of a boundary which would separate Nunavut from the lands of the Dene, Métis, [Inuvialuit] and the majority of non-aboriginals, provisionally to be called Denedeh."[51] The boundary question was a particularly difficult issue and threatened the Nunavut Land Claim on more than one occasion, especially when the Inuvialuit opted not to join Nunavut. After considerable debate and negotiation, an essentially east-west division was agreed upon and approved by a narrow margin in a 1992 referendum.

While the issues of division and a boundary were being debated and resolved, other aspects of the Nunavut land claim were also being negotiated. Resolving issues such as land ownership, mineral rights, compensation, resources management, training and others was a complex task, requiring significant time and effort on the part of the TFN, the federal government (including most of its departments), the territorial government, and, from time to time, other stakeholders. To the TFN's credit, the Inuit largely directed the negotiation process. The TFN drafted positions quickly and responded to government positions promptly. "By forcing government to react to their positions, Inuit were better able to set and control the negotiations agenda."[52] After an agreement in principle was reached in Igloolik in 1990, the final Nunavut Land Claim Agreement was ratified and signed by the Inuit of Nunavut, the government of Canada and the government of the Northwest Territories in 1993.

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[50] Fleras and Elliot, The Nations Within, p. 109.
[51] McMillan, p. 291.
[52] Fenge, p. 34.

Negotiated over close to 20 years, the Nunavut Land Claims Agreement is the most innovative of the "modern day treaties" concluded in Canada. Some of the most outstanding of its 41 articles include:

- title to approximately 350 000 square kilometres of 'valuable' land[53], of which 35 257 square kilometres include mineral rights;
- equal representation of Inuit with government on a new set of wildlife management, resource management and environmental boards;
- the right to harvest wildlife on lands and waters throughout the Nunavut settlement area;
- capital transfer payments of $1.18 billion, payable to the Inuit over 14 years;
- a $13 million Training Trust Fund;
- a share of federal government royalties for Nunavut Inuit from oil, gas and mineral development on Crown lands;
- where Inuit own surface title to the land, the right to negotiate with industry for economic and social benefits from non-renewable resource development;
- the right of first refusal on sport and commercial development of renewable resources in the Nunavut Settlement Area;
- the creation of three new federally funded national parks; and
- an agreement to establish the new Territory of Nunavut (on April 1 1999) and to negotiate a political accord that provides for the establishment of a new government for the Territory.[54]

The provisions of the NLCA provide a solid foundation for the economic, cultural and political development of Nunavut both as a settlement area and as a Territory. The Nunavut Tunngavik Incorporated (NTI) was established in 1993 to ensure that the federal government implements the provisions of the NLCA. The NTI is also responsible for

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[53] According to Article 17 of the NLCA, "The primary purpose of Inuit Owned Lands shall be to provide Inuit with rights in land that promote economic self-sufficiency of Inuit through time, in a manner consistent with Inuit social and cultural needs an aspirations." Inuit owned lands include areas of value principally for renewable resources and reasons related to the development of non-renewable resources; commercial value, and areas of archaeological, historical or cultural importance. [Nunavut Land Claim Agreement, "Article 17: Purpose of Inuit Owned Lands" (source: http://www.tunngavik.com/site-eng/nlca/article17.htm).]

[54] "History and Overview of N.T.I.", [source: http://www.tunngavik.com/site-eng/overview.htm], pp. 1-2.

"advancing and protecting Inuit interests in the creation of the Nunavut Territory in 1999 by assuring that the terms of the Nunavut Political Accord are lived up to."[55] Since the NLCA is considered a to be a modern treaty, it is protected under section 35 of the *Constitution Act, 1982.* A failure to implement any of the NLCA's provisions would therefore constitute a constitutional violation. The Nunavut Political Accord is not part of the NLCA nor does it constitute a treaty right in the meaning of section 35, and therefore does not have the same constitutional protection.

In negotiating this remarkable settlement the Inuit drew upon the experiences of two important Canadian precedents: the James Bay and Northern Quebec Agreement (JBNQA) of 1975 and the Western Arctic (Inuvialuit) Land Claim Agreement (WALCA) of 1984. Taking positive and negative lessons from these to comprehensive land claims, the Inuit negotiated a comprehensive land claims package that has received international attention, from both indigenous peoples and government.

The JBNQA[56] was the first native land claims settlement in Canada. "In return for surrendering their aboriginal title to the land so that the Quebec government could proceed with hydroelectric development, the Cree and Inuit [or Naskapi] of northern Quebec received a cash settlement (the Inuit share was about $900 million), ownership of certain land (nearly 9 000 square kilometres for the Inuit), and exclusive hunting, fishing and trapping rights over a much larger area."[57] It also provided for aboriginal responsibilities in environmental and wildlife management, and economic and social

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[55] Ibid, p. 1.
[56] The JBNQA was extended in 1978 to northeastern Quebec to include one group of Innu (the Naskapi of Schefferville) by virtue of the Northeastern Quebec Agreement.
[57] McMillan, p. 290.

development of the area. Despite its comprehensive nature, the JBNQA lacked any legal obligation to implement its provisions and its vague terms resulted in numerous disputes over interpretation. As a result, implementation was slow and ineffective.[58] Despite frustration over Quebec's failure to fulfil its obligations under the JBNQA, some important provisions are working well. The financial plight of aboriginal peoples in northern Quebec has improved; many trained Inuit and Cree are employed in bureaucratic positions; and the various hunting and trapping regimes have been successful.[59] "The most significant gain was the realization of s. 9 of JBNQA, which stipulated an obligation to institute self-government for the Cree,"[60] and Naskapi. This was achieved through the *Cree-Naskapi Act*, which created a municipal-type or regional government more powerful than any form of municipal government in Canada.

The Nunavut Agreement differs from the JBNQA in a number of ways and attempts to address some of the problems inherent to the JBNQA. First, Nunavut will have an administration that encompasses a much larger territory than the JBNQA and more broadly based powers than those afforded to the Cree and Naskapi under the *Cree-Naskapi Act*. Second, the Agreement itself establishes a detailed framework for the Nunavut administration, which will protect Inuit political power. As land claims agreements' provisions are now responsibilities enshrined in s. 35 of the Constitution (they were not at the time the JBNQA was negotiated), failure to implement the

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[58] Gray, p. 8.
[59] B. Diamond, "The James Bay Experience" in M. Boldt and J. A. Long (eds.), The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985), p. 284, in Gray, "The Nunavut Land Claims Agreement and the Future of the Eastern Arctic", p. 9.
[60] Gray, p. 9.

provisions of the NLCA would constitute a violation of a constitutional right. Third, an Implementation Program ancillary to the NLCA established guidelines, defines terms, and provided funding and budget estimates for the implementation of the NLCA in the hopes of avoiding the implementation problems of the JBNQA. Finally, unlike the JBNQA, which was hastily negotiated under a set deadline, the Nunavut Agreement is a product of thorough consultation and dialogue between the parties over a long period. As the Nunavut Agreement was carefully, some would say painstakingly, drafted its terms are assumedly more fully understood by all parties and it is thus less likely to fall prey to the interpretation problems that plagued the JBNQA.[61]

The 1984 Western Arctic (Inuvialuit) Land Claim Agreement also serves as a precedent for the Nunavut Agreement. In exchange for surrendering their aboriginal title, the Inuit of Inuvialuit received $45 million in compensation and title to about 91 000 square kilometres of land, some of which includes subsurface rights.[62] The WALCA also provides exclusive harvesting rights to Inuvialuit, measures to protect Arctic wildlife and Inuvialuit membership on various environmental management boards. Although astute management of the compensation monies has brought economic development to the region, and environmental management strategies have been notably successful, a significant omission from the WALCA is the proposal for responsible territorial government know as the Western Arctic Regional Municipality (WARM) discussed during the negotiations.[63] Another problem with the agreement relates to its negotiation

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[61] Ibid, pp. 9-10.
[62] McMillan, p. 290.
[63] Gray, p. 10.

and ratification. A centralized negotiation process and no popular ratification of the final agreement served to divide Inuvialuit leaders from community members leaving many Inuvialuit alienated from a process supposedly dedicated to their empowerment.

By obtaining popular support for the Nunavut Agreement through a plebiscite, Nunavut officials avoided any criticism that the process overlooked community needs. Information campaigns and community meetings also served to ensure that the largely centralized negotiation process was not completely divorced from Nunavut communities.[64] Of course the Nunavut Agreement also stands apart from the WALCA in that it will result in the creation of a Nunavut Government to administer the new Territory of Nunavut.

The creation of Nunavut was also inspired by two other initiatives: the settlement of native land claims in Alaska in 1971 and the attainment of "home rule" by Greenlandic Inuit in 1979.[65] Drawing from the positive and negative experiences of their Inuit brothers and sisters in Quebec, Inuvialuit, Alaska and Greenland the TFN pursued the Inuit goal of self-determination on two related fronts: settlement of their land claim and the achievement of responsible territorial government for the new Territory of Nunavut. Although the land claim and political accord for the development of responsible territorial government are legally separate and distinct entities, in reality they are conceptually intertwined. Together they provide for the creation of Nunavut, a new Territory with its own government, on April 1, 1999.

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[64] Ibid.
[65] McMillan, p. 292.

THE NUNAVUT POLITICAL ACCORD

Article 4 of the NLCA commits the government of Canada to legislate for the creation of "a new Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories."[66] To this end, Article 4 also commits the federal government, the NWT Government and the TFN to negotiate a political accord to deal with the establishment of Nunavut.[67] This political accord was negotiated concurrently with the NLCA and was finalized prior to the ratification of the NLCA in 1992. The political accord provides for "the types of powers of the Nunavut Government, certain principles relating to the financing of the Nunavut Government, and the time limits for the coming into existence and operation of the Nunavut Territorial Government."[68] In general, it provides the framework and implementation plan for the realization of the Inuit goal of Inuit political control over their Nunavut homeland.

The Territory of Nunavut will come into existence on April 1, 1999 and will represent the first change to the map of Canada since Newfoundland joined confederation in 1949. The territorial jurisdiction of Nunavut is approximately 1 900 000 square kilometres – the size of Argentina or two times the size of Mexico. Covering one-third of Canada, Nunavut will be Canada's largest province or territory. The Territory of Nunavut is made up of three distinct regions (Qikiqtaaluk, Kivalliq, and Kitikmeot) and twenty-eight communities with a total population of approximately 22 000, roughly

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[66] Nunavut Land Claim Agreement, Section 4, subsection 1.1 [source: http://www.tunngavik.com/site-eng/nlca/article4.htm]
[67] Ibid, Section 4, subsection 1.2.
[68] Ibid.

17 500 of whom are Inuit.[69] "Accordingly, the Nunavut Government will be decentralized with government departments and agencies set up in communities throughout, thereby sharing the economic benefits and responding to the particular needs of each region."[70]

Based in the capital Iqaluit, the Government of Nunavut will consist of a 19 member elected Legislative Assembly, a Cabinet and an untrialed court system called "the single level trial court system". It will also have one federal Member of Parliament and one Senator. Although the direct election of a Premier for the Nunavut Legislative Assembly is supported in principal by the NTI, because of the determined need for further work and research on the issue, this matter has been deferred for consideration by the new government. The Government of Nunavut will be established on April 1 1999 and is expected to be fully functioning at the end of its first year of operations.[71] To this end, "[t]he Office of the Interim Commissioner has been mandated to recruit and staff 150-250 government positions for April 1, 1999; establish systems and processes for the government; and, enter into intergovernmental agreements for programs, funding, and the division of assets and liabilities."[72] In order for Nunavut to have an elected Legislature for April 1, 1999, and a Member of Parliament and a Senator for Nunavut, a package of Nunavut Act Amendments needs to be tabled and passed by the Government of Canada in the near future.

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[69] "General Information about Nunavut", p. 1.
[70] "Nunavut Government Structure and Political Development", [source: http://npc.nunavut.ca/eng/nunavut/govern.htm], p.2.
[71] "NTI Role in the Development of Canada's New Territorial Jurisdiction – Nunavut", [source: http://www.tunngavik.com/site-eng/nti_role_in_the_development_of_t.htm], p. 1.
[72] Ibid, pp. 1-2.

The creation of a new government for the new Territory of Nunavut is not an inexpensive venture. The Government of Canada has committed to providing $150 million to cover the costs associated with the creation of Nunavut. "Of that $150-Million, $39.8-Million has been set aside for training Nunavummiut (people of Nunavut) for government positions. The overriding objective is to recruit and employ a representative workforce, which would be comprised of 85% Inuit at all job levels (management, professional, para-professional and administrative)."[73] Additionally, the Government of Canada has identified approximately $173 million for infrastructure development for the new government, with $129 million set aside for housing and office facilities. The Nunavut Construction Corporation (NCC), an Inuit firm made up of four birthright development corporations, will build, own and manage the facilities, and lease them to the Government of Nunavut[74], ensuring that this government investment will not flow outside of the Territory of Nunavut.

The Nunavut Government will be a responsible territorial government, serving both Inuit and non-Inuit residents of the Territory of Nunavut. In fact, "the issue of political rights for aboriginal people cannot easily be separated from the evolution of sovereign government for the NWT and, indeed, at the most basic level the two become intimately intertwined."[75] The Nunavut Political Accord envisions the powers of the Government of Nunavut to eventually mirror those found under section 92 and 93 of the Constitution Act, and for the Nunavut Government to undertake international activities as

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[73] Ibid, p. 2.
[74] Ibid.
[75] Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution (Toronto: Methuen, 1984), p. 94.

they relate matters of interest to its predominantly Inuit constituency. In reality, however, Nunavut remains a Territory and as such falls under the legislative authority and sovereign jurisdiction of the federal government of Canada. Unlike provincial governments, the Government of Nunavut will not have exclusive legislative authority or sovereign jurisdiction. Instead, the federal government, at its own discretion, will define the scope of the Government of Nunavut's authority and jurisdiction. Although the Government of the Northwest Territories has had its scope of authority and jurisdiction gradually expanded by the federal government over the past few decades (and this scope will not likely be narrowed with the institution of the Government of Nunavut), it is still remarkably limited in comparison to that of a province.

"The Nunavut Assembly will not resemble aboriginal self-government in the "sovereign" sense; rather it will operate as part of the Canada's parliamentary system, with the Inuit in effective control by virtue of the fact they comprise 85 percent of the population."[76] There is no element of separatism in this self-government arrangement. It is rather a practical solution for the empowerment of Inuit within Canada's pre-existing institutional structures. Kevin Gray explains:

> Inuit concerns are more likely to be addressed, and Inuit aspirations to flourish, when the solution is acceptable to the government. Public government does not mandate self-government for the Inuit. It is only a logical extension of democratic principles to another jurisdiction of Canada. Consequently, this renders Nunavut a more acceptable model of self-government for the federal authorities because it gives ... internal self-determination without compromising fundamental traditional values.[77]

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[76] Augie Fleras and Jean Leonard Elliot, Unequal Relations: An Introduction to Race, Ethnic and Aboriginal Dynamics in Canada (2nd ed.; Scarborough: Prentice Hall Canada Inc., 1996), p. 197.
[77] Gray, p. 6.

"Demands of sovereignty and nationhood, as legitimate as they might be, accomplish little except to isolate First Nations from the government position. In effect, Nunavut represents an adherence to the principles of sovereignty and self-determination, tempered by a measure of realism."[78] Inuit representation in government already influences Territorial policy. Through the creation of a new Government of Nunavut, Inuit hope to increase their representation in government and their political authority to ensure that Inuit interests, aspirations and goals are accommodated in the development of Nunavut.

Political arrangements in Nunavut were heavily inspired by the attainment of 'home rule' by the Inuit of Greenland (Greenland is a self-governing territory of Denmark) in 1979. The Inuit in Greenland run their government much like a Canadian province. With a ratio of 4 to 1 of Inuit to Europeans, the popularly elected legislative assembly caters largely to Inuit interests, concerns and aspirations. "Originally, this was criticized as not effecting a complete withdrawal from the Danish authorities. However, Greenlanders have asserted de facto control over social, cultural, and environmental matters without any express powers or rights of self-government. This suggests that in Nunavut any Inuit concern, existing or future, that the Agreement fails to acknowledge can be remedied by the Nunavut administration."[79] Like the Greenland example, the creation of Nunavut with its responsible territorial government system essentially guarantees much of what those who advocate indigenous self-government seek to achieve – that being indigenous control over the institutions of government. The important

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[78] Ibid.
[79] Peter Jull, "Greenland: Lessons of Self-Government and Development", *Northern Perspectives* (7:8), 1979, p. 4, in Gray, p. 7.

qualifier, however, is that this control must be exercised within the limits of Western institutions and principles of government.

THE DEVELOPMENT OF RESPONSIBLE TERRITORIAL GOVERNMENT FOR TORRES STRAIT

According to C. Scott,

> Partly because of constitutional histories, partly because of the greater length of time that self-government has been on the political agendas of Aboriginal organisations, and perhaps also for cultural reasons (in both Aboriginal and mainstream populations), the development of regionally-based Aboriginal government structures controlling a 'holistic' range of portfolios, seems to be coming about more readily in parts of Canada than in Australia.[80]

The possible exception to this general rule is the development of responsible territorial government for Torres Strait. Although a target date of 2001 has been identified for the institution of responsible territorial government in Torres Strait, most observers agree that this initiative is at least ten to twenty years behind developments in Canada, namely the creation of Nunavut. In a country where self-determination discourse has only recently and minimally encompassed the concept of self-management, where land claims processes are limited in their application and their provisions, and where indigenous self-government is considered too radical to deserve mention let alone serious contemplation, the struggle for responsible territorial government in Torres Strait is guaranteed to be a long and arduous one.

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[80] C. Scott, "Political Spoils or Political Largess? Regional Developments in Northern Quebec, Canada and Australia's Northern Territory", CAEPR Discussion Paper No. 27 (Canberra: Centre for Aboriginal and Economic Policy Research – Australian National University, 1992), p. 6.

The development of responsible territorial government in Torres Strait does not have a native title component to it as does the creation of Nunavut, but rather focuses on political development alone. This is not because land rights are not important to Torres Strait Islanders (there are currently over sixty registered claims for determination of native title in Torres Strait covering both land and marine aspects[81]), but rather because land claims processes are not as well developed in Australia as they are in Canada. Neither Commonwealth nor Queensland legislation[82] offers anything comparable to Canada's specific or comprehensive land claims processes that could offer Torres Strait Islanders a degree of political empowerment as they seek title to their traditional lands. By virtue of Queensland Acts of Parliament passed in 1980 and 1987, the majority of Torres Strait Islanders hold 'title' to their reserve lands as Deeds of Grant in Trust – a form of perpetual lease granted by the Government of Queensland. The exception is the people of Mer Island who would not accept the Queensland offer of a Deed in Grant of Trust for their traditional Islander home. They took their grievance to court and were subsequently granted native title to their Island in the High Court's 1992 Mabo decision. Because of the inadequacy of land claims processes in Australia, Torres Strait Islanders are pursuing their goal of political autonomy outside of land claims processes. They are instead seeking responsible territorial government through the development of pre-

[81] J. C. Altman, W. S. Arthur and W. Sanders, "Towards Greater Autonomy for Torres Strait: Political and Economic Dimensions", CAEPR Discussion Paper No. 121 (Canberra: Centre for Aboriginal Economic Policy Research – Australian National University, 1996), p. 11.

[82] A State-by-State approach to land rights has been followed in Australia, with the Commonwealth government assuming responsibility and considering legislation where a State Government is unwilling or unable to do so.

existing local and regional political structures with no legal/constitutional context or precedent for their initiative.

The pursuit of responsible territorial government for Torres Strait began with at least four successive calls by Torres Strait Islanders for the secession of Torres Strait from Australia. The first call for secession came in 1977-78 by a fringe political party called the Torres United Party which made a submission to the United Nations Special Committee on Decolonization asking for an inquiry into an Islander case for sovereignty as a separate nation. Mr. Getano Lui (Chairman of the Island Coordination Council) made the second call for secession in 1985, following the dissolution of the National Aboriginal Conference, when the Commonwealth did not respond to the Torres Strait Islanders' proposal for a separate representational structure for their region. Autonomy again became an issue in 1987 when Mr. Mye, claiming Island Coordination Council support included, 'sovereign independence' as part of a list of demands to then Minister for Aboriginal Affairs, Mr. Holding. The final, and most effective call for sovereignty came at a three-day public meeting to consider the Commonwealth's ATSIC legislation, attended by the councils of all Torres Strait Islanders and representative of several mainland Islander groups.

General frustration over the Commonwealth's management of Torres Strait Islander Affairs compounded with fear that the proposed ATSIC legislation would decisively amalgamate Islander interests with those of Aboriginal peoples quickly turned the agenda of the meeting from consideration of the proposed ATSIC legislation to consideration of Torres Strait independence. "On 20 January [1988] Mr. Mye moved a

motion that Torres Strait Islanders secede from the Commonwealth and form a new sovereign entity. This received overwhelming support."[83] Unlike previous calls for secession, this call was fairly well developed, clearly articulated and strongly supported. Whereas the first three agitations for independence were not taken seriously, this third demand made front-page news not only domestically but also internationally. This is due in part to the fact that it was supported by a substantial number of Torres Strait Islanders, but also because it came during the much publicized ATSIC consultations and (perhaps most importantly) during Australia's bicentennial year.

Not surprisingly, independence was totally unacceptable to both levels of Australian Government and the reaction to the situation from all sectors was swift. "Eventually negotiations were down graded to an issue of regional autonomy which was seemly acceptable to all parties involved."[84] Many Islander leaders now admit privately, and even on occasion publicly, that indigenous control over their own lives, resources and future plans, and not sovereign independence, was (and is) their true goal. It was the Commonwealth's longstanding neglect of Torres Strait Islander interests and concerns that forced a 'radical' response. By demanding the impossible, Torres Strait Islanders opened the door to the attainment of more realistic expectations.

Although articulations of the past have focused on political change for Torres Strait Islanders resident both within and outside of Torres Strait, current demands are for responsible territorial government of the Torres Strait region. This shift in

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[83] Ross Babbage, The Strategic Significance of Torres Strait, report prepared for the Department of Defense by the Strategic and Defense Studies Centre (Canberra: Strategic and Defense Studies Centre and Research School of Pacific Studies – Australian National University, 1990), p. 48.
[84] Kehoe-Forutan, p. 25.

conceptualizing the potentially relevant constituency for self-government has three inspirations: practicality, demographics, and characteristics of non-Islanders. First, developing a public governance system for a territorially defined region is simply easier than attempting to develop a self-government system for a geographically dispersed people. Second, Torres Strait Islanders now realize that even with a more general regional constituency they will represent a clear majority in the region and thus attention to their interests will be ensured. Finally, Torres Strait Islanders no longer see 'others' as a necessary threat to their interests. Many non-Islanders resident in Torres Strait have family links with Torres Strait Islanders through marriage and family members who are of Islander descent. This makes the Islander/other division vague and likely inconsequential. Also, "some of those 'others' are public servants on tours of duty from elsewhere, who probably will not see their long-term futures in the Strait, and hence may take only a limited interest in local and regional representative structures."[85] For these reasons, responsible territorial government in Torres Strait, as in Nunavut, is understood as a practical vehicle for the attainment of effective, if not declared indigenous self-government.

The Torres Strait Islanders of Torres Strait are pursuing responsible territorial government through the development and fairly significant strengthening of the existing structures of regional governance within Torres Strait. There are currently eighteen local and two regional structures of political representation in Torres Strait. Seventeen of the eighteen local government structures are Island Councils incorporated under the

[85] Sanders, "Reshaping Governance in Torres Strait", p. 516.

Queensland *Community Service (Torres Strait) Act, 1984.* To hold office on an Island Council one must be an Aboriginal or Torres Strait Islander person who has lived in the area for not less than two years but voting is open to all residents who meet the standard Queensland *Local Government Act, 1993* criteria. "The island councils have responsibility for the order and local government of their communities and are the prime vehicle for negotiations with external authorities, agencies and individuals."[86] The eighteenth local government structure is the Torres Shire Council (TSC) incorporated in the *Community Services (Aborigines) Act, 1984.* The TSC consists of an Administrator based in Cairns, a Shire Clerk and an Advisory body comprised of local representatives. Office holding and voting for the TSC is open to all residents of the TSC area (which theoretically includes all the islands of the Strait and Cape York down to 11 degrees).

The TSC, however, is effectively restricted to being a local government for Thursday Island, Horn Island and Prince of Wales Islands in the inner Torres Strait Islands group. "This is because the seventeen Island Councils (and three Aboriginal Councils) within the larger theoretical TSC area are given the functions of local governments within their areas and also because residents in these areas who vote for the Islander (and Aboriginal) Councils are not allowed to vote for the TSC."[87] This distinction is a result of the concurrent operation of the *Community Services (Torres Strait Islander) Act, 1984* and the *Community Services (Aborigines) Act, 1984.* Although the Island Councils and TSC are creations of the Queensland government, they are

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[86] Babbage, p. 8.
[87] W. Sanders and W. S. Arthur, "A Torres Strait Islander Commission? Possibilities and Issues", CAEPR Discussion Paper No. 132 (Canberra: Centre for Aboriginal Economic Policy Research – Australia National University, 1997), p. 4.

strongly supported by their Torres Strait Islanders constituents and are generally not considered to be 'foreign' political structures. This is likely owing to the fact that their predecessors, (the elected local indigenous councils established by the first Government Resident in Torres Strait), began their operations in 1899 and have since served as important vehicles for Torres Strait Islanders interests.

The two regional structures of political representation in Torres Strait are the Island Coordinating Council (ICC) and the Torres Strait Regional Authority (TSRA). The Chairpersons of the seventeen Island Councils come together to form the ICC which was also established under the Queensland *Community Services (Aborigines) Act, 1984.* The ICC has an additional member elected by the Aboriginal and Torres Strait Islander residents of Tamway and other areas on the northern half of Thursday Island with predominant Islander populations. The primary function of the ICC is to advise and make recommendations to the Minister for Aboriginal and Torres Strait Islander Affairs on matters affecting the development and well-being of Torres Strait Islanders resident in Torres Strait.[88]

The second regional structure is the TSRA. "The TSRA, established under the Commonwealth *Aboriginal and Torres Strait Islander Commission Amendment Act, 1993*, comprises all these ICC members plus two other Aboriginal and Torres Strait Islander representatives; one of these is drawn from the southern Port Kennedy area of Thursday Island and the other from Aboriginal and Torres Strait Islander residents of

[88] Kehoe-Forutan, p. 13.

Horn and Prince of Wales Islands combined."[89] The TSRA replaced the Torres Strait Regional Council (TSRC) established under the *ATSIC Act, 1989* and represents the first step in the move towards responsible territorial government in Torres Strait. The TSRA is an autonomous statutory authority under the *ATSIC Act* and performs all the functions and has all the powers of ATSIC. Unlike ATSIC Regional Councils, the TSRA has its own budget line and substantial policy and program independence. "In recommending the creation of a new Torres Strait Regional Authority, the Aboriginal and Torres Strait Islander Commission saw its creation as a transitional arrangement providing a basis for a progressive negotiated movement towards greater regional autonomy in the delivery of programs and services for the Torres Strait."[90]

Torres Strait Islanders strongly advocated the creation of this new Authority and also see it as a transitional arrangement. As Getano Lui, TSRA Chairman, explains:

> The framework is already there. All we need to do is to expand on the present structure that is already in place ... For the time being we will remain within the ATSIC framework, under the ATSIC Act ... Our long-term aim is to become independent of ATSIC but, at the same time, to work in conjunction with ATSIC. We are not attempting to break away from our brothers and sisters on the mainland nor do we want to break away from Australia.[91]

Like the Inuit of Nunavut, the Torres Strait Islanders of Torres Strait are seeking increased autonomy for their people through the development and adaptation of pre-existing political structures rather than through the creation of new political structures. "Since 1988, when Islanders convinced the Commonwealth to take on the existing ICC,

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[89] Sanders and Arthur, "A Torres Strait Islander Commission?", p. 5.
[90] TSRA, Corporate Plan 1994-95 (Thursday Island: TSRA, 1994), p. 13.
[91] Getano Lui, "Self-Government in the Torres Strait Islands" in Christine Fletcher (ed.) Self-Determination in Australia (Canberra: Aboriginal Studies Press, 1994), p. 127.

with slight additions, as ATSIC's new TSRC, Islanders in the Strait have largely been establishing the parameters of debate and the Commonwealth has been responding."[92] Devolution is an important step in the process.

Devolution of Commonwealth and Queensland authority in Torres Strait is an important step in the process towards responsible territorial government for Torres Strait. The TSRA has already indicated that it is seeking 'devolution' and 'greater local control and authority over decision making' in many areas in which other government authorities operate.[93] These include the marine environment (an area of crucial importance to Torres Strait Islanders), health and education, policing, customs, immigration and quarantine. The willingness of the Queensland and Commonwealth governments to devolve such important areas of jurisdiction, however, has not yet been confirmed. Devolution is advocated not only to further political development in Torres Strait but also to provide more efficient and effective administration in the region. There are currently thirty-five government departments in Torres Strait looking after the interests of between 8 and 10 000 Torres Strait residents.[94] Many Torres Strait Islanders are resentful of an unnecessarily complicated bureaucratic system administered largely by short-term (1 to 2 years) officials with limited administrative experience and limited knowledge of the Torres Strait and Torres Strait Islanders. By focusing their arguments around efficiency and effectiveness, instead of self-government, Torres Strait Islanders are attempting to gain popular support for their initiative and a positive government response.

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[92] Sanders, "Reshaping Governance in Torres Strait", p. 521.
[93] Altman, Arthur and Sanders, "Towards Greater Autonomy for Torres Strait", p. 7.
[94] Lui, "Self-Government in the Torres Strait Islands", p. 126.

In July 1996 the Chairperson of the TSRA, Getano Lui (Jnr) met with Prime Minister John Howard to discuss the next steps in this progressive negotiated movement. "He called for a 'single line appropriation' for the TSRA direct from the Commonwealth Department of Finance, rather than through ATSIC, and for a Commonwealth/State task force to examine the possibility of Torres Strait self-government, hopefully by the year 2001."[95] In response, the Prime Minister referred the issue of Torres Strait autonomy to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA). The advice of the HRSCATSIA on this issue will no doubt be crucial to the success of failure of the Torres Strait initiative. The fact that past standing committees have tended to be more sympathetic to indigenous causes than politicians and the general public offers some hope of a favourable response. Although the current Commonwealth government has not demonstrated a strong support of indigenous interests thus far in its term, it appears to view the Torres Strait initiative as its best opportunity to fulfill its international obligations to uphold indigenous rights without risking a major disruption of the current Australian state order.

Responsible territorial government is not yet a reality for Torres Strait. Islanders are now examining the self-governing Australian territories of Norfolk Island and the Cocos (Keeling) Islands and Canada's Nunavut as possible models for the development of responsible territorial government for Torres Strait. Torres Strait, however, is not a territory but rather a geographically distinct region of the state of Queensland. This sets it distinctly apart from the self-governing territories Torres Strait Islanders are using for

[95] Altman, Arthur and Sanders, "Towards Greater Autonomy for Torres Strait", p. 1.

inspiration and direction in the development of responsible territorial government. There is no real precedent for the Torres Strait initiative. It is new and therefore its future is unpredictable. Torres Strait Islanders cannot rely on constitutional law, land rights processes or even public support to forward the development of responsible territorial government for Torres Strait. They instead must rely on their own political skills and the goodwill of governments to propel the initiative through the current 'transitional arrangements' and onto more concrete arrangements dedicated to the institution of responsible territorial government. Although Torres Strait Islanders want to see the institution of responsible territorial government by 2001, most observers of the process think that this is unlikely.

CONCLUSION

Although the goal of indigenous self-determination – a restoration of control by indigenous peoples over their lives and communities - is the same for the indigenous peoples of Canada and Australia, its pursuit is notably different in the two countries. In Canada, self-determination is directed towards the attainment of self-government with indigenous peoples largely directing the process and non-indigenous peoples generally supportive of this pursuit. In Australia, the pursuit of self-determination is directed towards the attainment of self-management with Commonwealth and State governments largely directing the process and non-indigenous Australians generally opposed to this pursuit. This difference results from the different historical, institutional and cultural contexts of Canada and Australia within which the pursuit of self-determination is necessarily situated. It is these unique contexts that largely determine how self-determination goals are articulated by indigenous peoples, how governments respond to these articulations, and which self-determination outcomes are defined as negotiable and achievable or non-negotiable and unrealistic by indigenous peoples and governments.

Canada's history, institutions and culture have provided a more favourable context for the pursuit of self-determination by Canada's indigenous peoples than have those of Australia. The concurrent colonization of Canada by two nations facilitated initial relations between indigenous peoples and colonizers that were generally friendly and mutually beneficial. Both Britain's and France's initial interests in Canada were

inspired by competitive desires for territorial expansion and resource exploitation. To gain a competitive advantage, both groups of colonizers actively solicited indigenous peoples' knowledge, skills, friendship and allegiance. The colonizers' recognition of the value of indigenous peoples to their colonial and economic pursuits resulted in indigenous peoples' institutional accommodation early in Canada's history.

The *Royal Proclamation, 1763* explicitly recognized the indigenous peoples of Canada as "nations-within" with a claim to treatment as distinct peoples with self-determining and self-governing rights. It also acknowledged the existence of native title and established a clear process for extinguishing native title through the signing of treaties. The recognition granted in the *Royal Proclamation* provides clear support for indigenous peoples pursuit of self-determination via self-government by giving theoretical colonial recognition to indigenous peoples' status as nations. The treaties, as land acquisition agreements traditionally negotiated between sovereign powers, further support this pursuit. At least symbolically, they give recognition to indigenous peoples' equal relations, or partnership, with the colonizers during the early colonial enterprise. By focusing attention on these legal documents, whose continued validity has been recognized in domestic as well as international law, the indigenous peoples of Canada have been able to strongly assert their right to inherent self-determination and self-government and also achieve a relatively high degree of support for their pursuit from non-indigenous Canadians and governments.

The concurrent colonization of Canada by two nations has also facilitated the pursuit of self-determination by providing a historical recognition and acceptance of

collective rights. Although the struggle for sovereignty over Canadian lands and waters was decided in Britain's favour, the numeric strength of the French settlers necessitated the accommodation of the French language, culture and law in Canadian society. These collective rights of French Canadians were incorporated in Canada's *British North America Act, 1867*and strengthened in the *Constitutional Act, 1982* and its accompanying *Charter of Rights and Freedoms*. Finding support for the concept of collective rights in Canada's historical context has enabled indigenous peoples in Canada to situate their self-determination demands within a familiar rights context.

Support for self-determination has also been facilitated by non-indigenous Canadians' general acceptance of cultural difference and generally positive attitudes towards indigenous peoples. Canadians' general acceptance of cultural difference is founded in Canada's long history of immigration, which is recognized as an important foundation of the Canadian nation-state. The legitimacy of cultural difference is recognized and supported in Canada's *Charter of Rights and Freedoms* as a fundamental characteristic of Canadian society, and is celebrated through Canada's domestic and international designation as a 'multicultural society'. Although indigenous peoples see themselves as one of Canada's three founding nations, rather than merely one of its multicultural components, the general acceptance of cultural difference as a positive and fundamental component of Canadian society has resulted in a relatively fertile environment for cultivating positive attitudes towards indigenous peoples. Of course, racism is also a notable feature of Canadian society. Negative stereotypes of indigenous peoples certainly do exist and often manifest themselves in systemic as well as overt

racism and discrimination. Such attitudes, however are at odds with one of the fundamental characteristics of Canada, its multiculturalism, and therefore are very unlikely to manifest themselves in political articulations or public policy without harsh criticism from the general public.

There appears to be a general attitude among non-indigenous Canadians that Canadian society has some obligations to indigenous peoples. This feeling of responsibility is likely a result of Canada's colonial and institutional history. This conclusion is supported by the inclusion and protection of 'aboriginal and treaty rights' arising from the *Royal Proclamation*, the friendship, numbered and lettered treaties as well as from modern-day land claims agreements in sections 25 and 35 of Canada's *Constitution Act, 1982*. Legally, as well, it is recognized that the federal government has a fiduciary responsibility for indigenous peoples. Widespread support for the proposed expansion of aboriginal rights to include the 'inherent right of self-determination and self-government' in the failed Charlottetown Constitutional Accord of 1992 is further evidence of Canadians' sense of responsibility towards Canada's indigenous peoples.

Relatively open sharing of indigenous cultural information by the indigenous peoples of Canada has also promoted the development of positive attitudes towards indigenous peoples. With few restrictions on the transmission of cultural knowledge, the indigenous peoples of Canada have used public information campaigns, input into school curricula, and the promotion of indigenous art and media, to share their world-view with non-indigenous Canadians. This has created a general awareness and positive knowledge of indigenous peoples, their cultures and their histories. The result has been a general

understanding among non-indigenous Canadians of the importance of self-determination and self-government to indigenous peoples for the perpetuation and development of their unique cultures and societies within the Canadian nation-state.

This sharing of cultural information and the promotion of self-determination aspirations has also been facilitated by the existence of strong national and regional indigenous representative organizations. A shared sense of 'aboriginality' among Indians, Métis and Inuit, while not negating the importance of local identities, has supported the creation and development of these organizations. These organizations have been instrumental in disseminating information about the pre- and post-colonial histories, cultures and societies of Canada's indigenous peoples, and in developing a recognition and respect for indigenous peoples' unique place in Canadian history and society. They have greatly facilitated the pursuit of self-determination by providing a relatively coherent articulation of indigenous self-determination aspirations to governments and the general public and a strong lobby force to ensure these aspirations are positively addressed by governments. Because of their proven ability to mobilize indigenous and non-indigenous support for their positions, government cannot easily ignore these organizations and their demands without risking political fallout.

National and regional indigenous organizations have also helped indigenous peoples to influence significantly the course of self-determination in Canada, a course now plotted toward the achievement of self-government. By articulating coherent self-determination and self-government goals, developing comprehensive strategies for their realization, and using the popular media to attract attention to their cause, indigenous

organizations have forced governments to react to their proposals. In this way, indigenous organizations have been instrumental in establishing the parametres of the self-determination discourse in Canada according to their own agenda.

The dismantling of DIAND and the creation of Nunavut both illustrate how Canada's historical, institutional and cultural contexts have facilitated the pursuit of self-determination via self-government. The intergovernmental-style negotiation processes involved in both initiatives demonstrate recognition of indigenous peoples as nations. Both are founded on the recognition of native title. Both have been largely directed by indigenous regional organizations supported by indigenous national organizations. And although both the dismantling and Nunavut initiatives represent notable advancements in the pursuit of self-determination/self-government, neither governments nor the general public has negatively targeted either initiative. Instead, both are promoted domestically and internationally as positive steps toward a renewed partnership between indigenous and non-indigenous Canadians.

Australia's historical, institutional and cultural contexts have not provided as fertile an environment for the pursuit of self-determination by Australia's indigenous peoples. Australia was established as a penal colony by one nation (Britain) for the purpose of colonial expansion. The new European arrivals to Australia did not consider the friendship and allegiance of indigenous peoples to be necessary to ensure the success of either their penal colony or their dominance in the new land. They therefore did not endeavour to secure any form of agreement or partnership with the indigenous peoples of 'their' new land. Although Imperial authorities clearly advocated respect for indigenous

peoples and accommodation of their interests, because negative consequences could not be ascertained, this credence was entirely disregarded. The indigenous peoples of Australia were instead treated with either overt hostility or absolute disregard. Australia was declared *terra nullius* and indigenous peoples were effectively removed from the history and development of Australia. With no recognized place in Australia's history, indigenous peoples have found it difficult to gain positive recognition from non-indigenous Australians and justify their self-determination aspirations.

Australia's colonial history provides no recognition of indigenous peoples as nations, no recognition of their past possession of or current right to self-determination and self-government, and no recognition of the existence of native title. Instead indigenous peoples were labeled a dying race and accorded no institutional accommodation. Jurisdiction over their lives and welfare was the responsibility of the governments of each Australian colony/state who instituted policies designed to ensure either their extermination or their swift assimilation into the general population. It was only in 1967 that Aboriginal and Torres Strait Islander people (they are not yet recognized as distinct peoples) were recognized in Australia's constitution, and only in 1992 was the concept of *terra nullius* officially abandoned and the existence of native title affirmed. Despite these recent institutional recognitions of Australia's indigenous peoples and their rights to land, negative attitudes towards indigenous peoples remain firmly entrenched in Australian culture.

To a large extent, being Australian is still defined as being white, English-speaking and of Anglo-Saxon heritage. Those who do not fit this description are

expected to adopt the largely Anglo-Saxon based mores and practices of the dominant society and abandon those of their heritage. The myth of a 'White Australia' and its perpetuation through cultural assimilation has fostered a racist popular culture in Australia that has promoted and maintained negative attitudes towards indigenous peoples and thus a wide gulf between indigenous and non-indigenous society.

Racist comments and policy proposals are not uncommon in Australian politics and do not inspire the same degree of popular backlash similar comments and policies would inspire in Canada. Despite scathing comments about Australia's indigenous peoples by Pauline Hanson (leader of Australia's new right wing One Nation Party) and her coherent policy positions against any recognition of indigenous rights, Hansen has not been overtly criticized by the current Commonwealth government and membership in her party continues to grow. Similarly, Australia's popular media is decidedly biased against Australia's indigenous peoples. Aboriginal and Torres Strait Islander people are notably absent from Australian television shows and advertisements. When they are the subjects of news reports, the focus is almost always negative, highlighting alcoholism, drug abuse, violence, welfare dependency and a myriad of other problems attributed to indigenous peoples themselves (and rarely to governments' inadequate response to their needs). A lack of knowledge and understanding among non-indigenous Australians of Australia's indigenous peoples has likely facilitated the perpetuation of negative attitudes from the colonial era to today.

Because Aboriginal Law defines strict regulations on the transmission of much indigenous cultural information, non-indigenous Australians generally possess very little

knowledge about their country's original inhabitants and their world-views. The information they do possess is largely negative and inaccurate, resulting from colonial misunderstandings of Australia's indigenous peoples and their cultures. Although Australia's indigenous peoples are now attempting to share what non-sacred cultural information they can with non-indigenous Australians, they have found it difficult to dislodge two centuries worth of misinformation about their peoples. With a common understanding of indigenous peoples as physically, mentally, socially and politically underdeveloped, few non-indigenous Australians can grasp the importance of self-determination to indigenous peoples or conceptualize it as a practical and obtainable goal. Popularizing their self-determination aspirations has been difficult for Australia's indigenous peoples, not only because of historically entrenched attitudes and beliefs but also due to the absence of broadly based indigenous representative organizations.

Strong, if not primary, identification with local affiliations by Australia's indigenous peoples has mitigated against a common sense of 'aboriginality' and thus against a common articulation of interests. Broadly based indigenous representative organizations like those in Canada are absent in Australia. The result has been a less coherent articulation of indigenous self-determination. Although a plethora of more locally based organizations have attempted to articulate their diverse but interconnected self-determination aspirations to governments, governments' response has been minimal. The diversity of the self-determination appeals and the inability of indigenous organizations to mobilize substantial non-indigenous support for their positions have been successfully manipulated by governments to justify inaction on self-determination

demands. Instead, governments themselves have defined self-determination, allowing its parameters to extend only as far as self-management, and directed its pursuit to fulfill international obligations and promote economic efficiency.

The creation of ATSIC and the development of responsible territorial government for Torres Strait illustrate how Australia's historical, institutional and cultural contexts have served to limit self-determination in both its definition and practice. By creating ATSIC, a national indigenous representative body largely under its control, the Commonwealth government has effectively negated locally articulated self-determination demands and forced indigenous peoples to pursue self-determination according to its preferred model – universally based self-management. Although Torres Strait Islanders' common sense of peoplehood and regional representative structures have facilitated their coherent articulation of the goal of responsible territorial government, they are still forced to work within the government's model to pursue their goal. Both ATSIC and the development of responsible territorial government for Torres Strait have received harsh criticism from governments and non-indigenous Australians. They are considered radical initiatives with tentative futures and clearly represent the outer-most bounds of self-determination in Australia.

Some observers of indigenous self-determination in Canada and Australia have commented that the pursuit of self-determination by governments and indigenous peoples in Australia is approximately twenty years behind the same pursuit in Canada. These observers point to similar developments in Australia in the 1990s as occurred in Canada in the 1970s to support their conclusion. These include the development of regional and

national indigenous organizations, the recognition of native title in law, and the promotion of 'self-management' as a primary policy goal. Concluding that these similar events place the pursuit of self-determination on a comparative time line, however, ignores the importance of context to said pursuit.

Australia in the 1990s is not a mirror of Canada in the 1970s. Different cultural, institutional and historical circumstances surrounded these events in the two countries. Although the developments may appear similar, the fact remains that the actions and reactions of indigenous peoples and government have been and are inspired by different socio-political circumstances specific to their contexts. This conclusion also risks taking the 'self' out of self-determination by postulating some universal evolutionary process from colonized to self-determining, ignoring the unique interests, concerns and aspirations of diverse and distinct indigenous peoples and the particular non-indigenous societies within which they now live. The tendency to ignore the diversity within indigenous populations and the colonial systems under which they live must be resisted. Self-determination refers to choices by indigenous peoples on how power should be organized and exercised in order to realize their self-identified needs and aspirations.

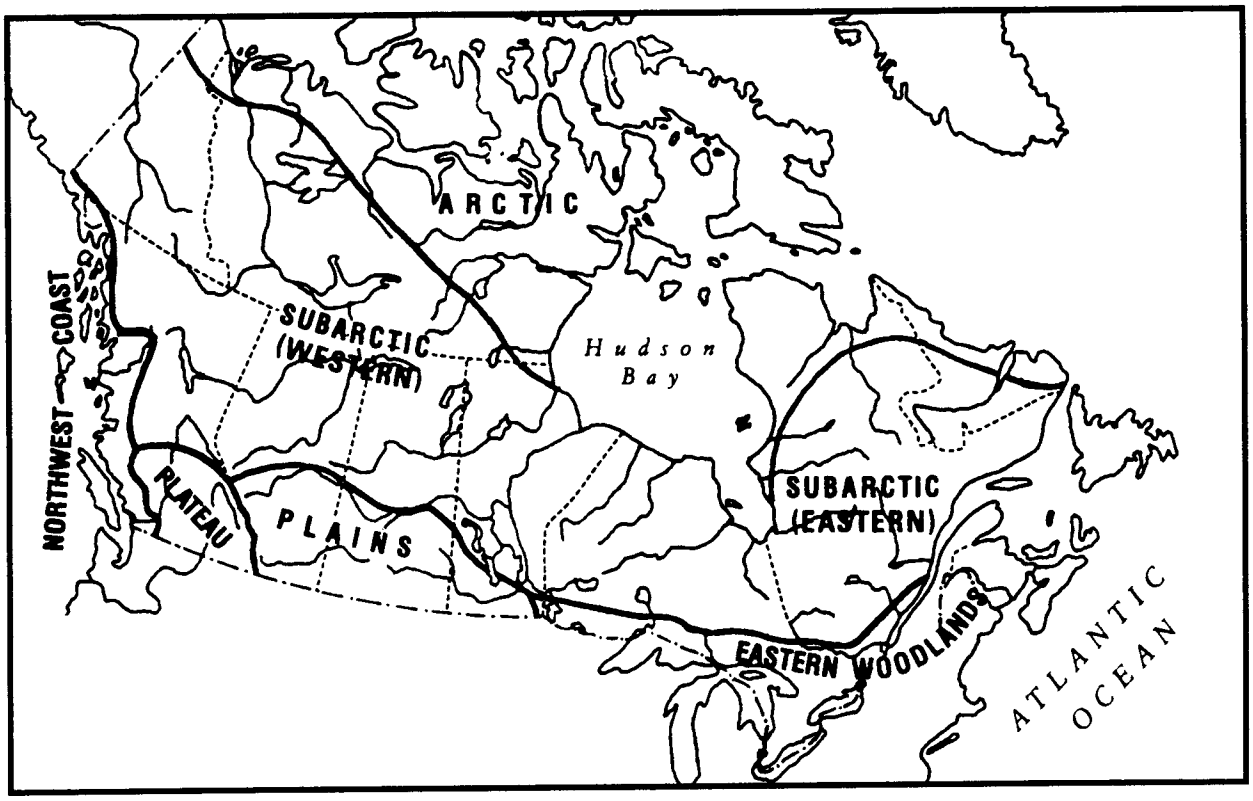


Figure 1:1 - Map of Canada's Culture Areas

Alan D. McMillan, Native Peoples and Cultures of Canada:
An Anthropological Overview, (2nd ed.; Vancouver: Douglas & McIntyre, 1995), p. 2.

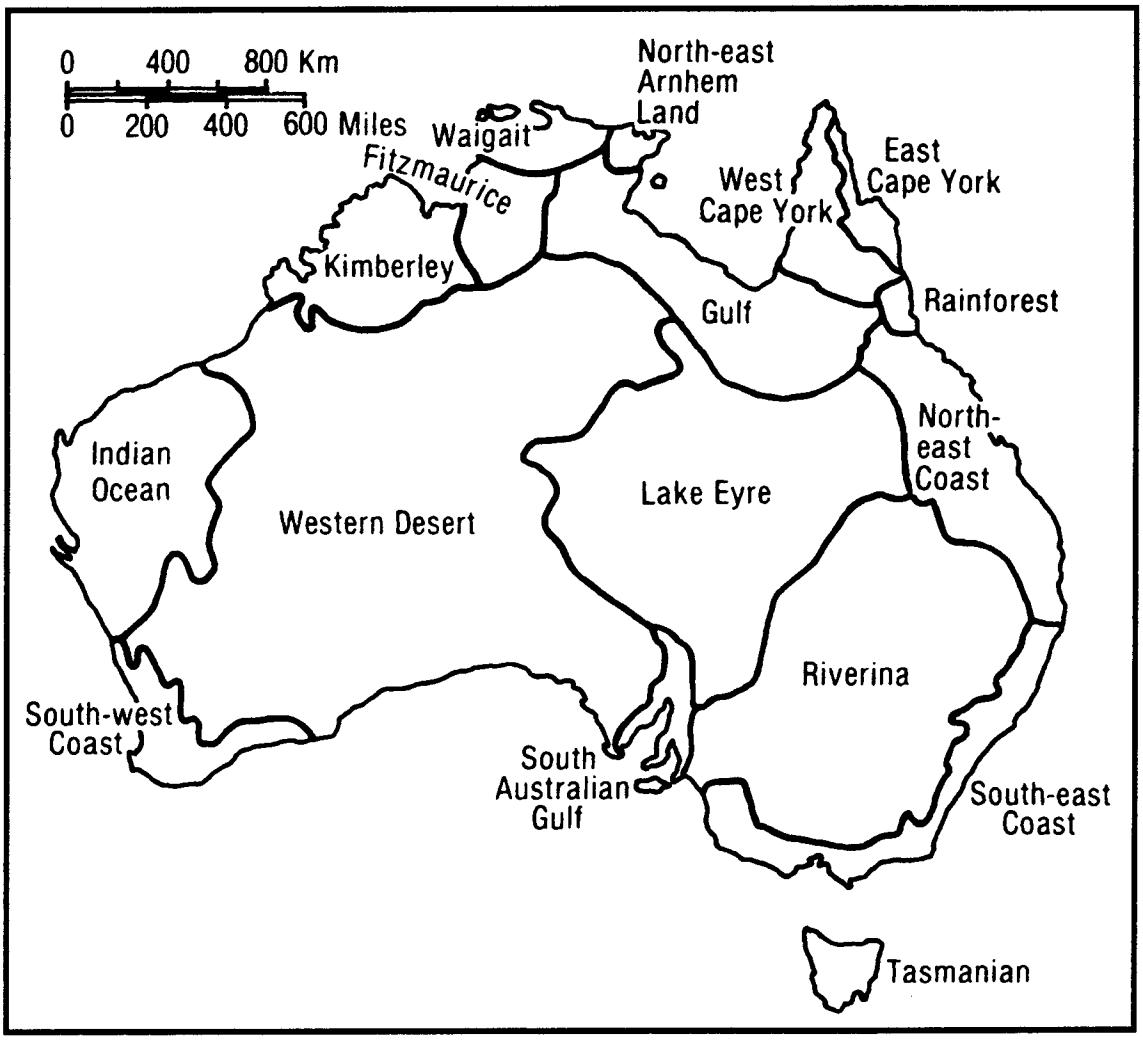
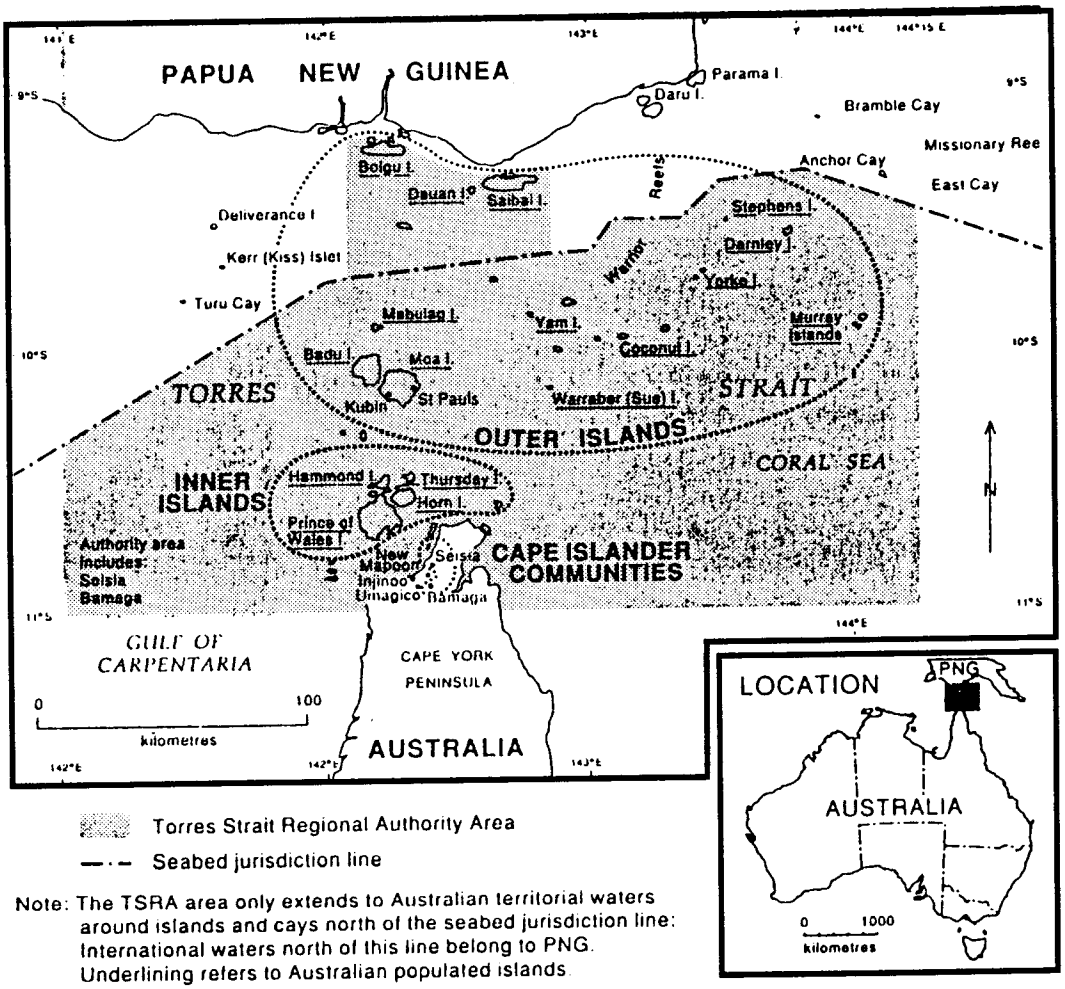


Figure 1:2 - Map of Aboriginal Cultural Regions (Australia)

John Rickard, The Present and the Past: Australia A Cultural History, (2nd ed.; London: Longman, 1996), p. 6.



Note: The TSRA area only extends to Australian territorial waters around islands and cays north of the seabed jurisdiction line: International waters north of this line belong to PNG. Underlining refers to Australian populated islands.

Figure 1:3 - Map of Torres Strait

Will Sanders, "Reshaping Governance in Torres Strait: The Torres Strait Regional Authority and Beyond", Australian Journal of Political Science, Vol. 30, (1995) , p.503.

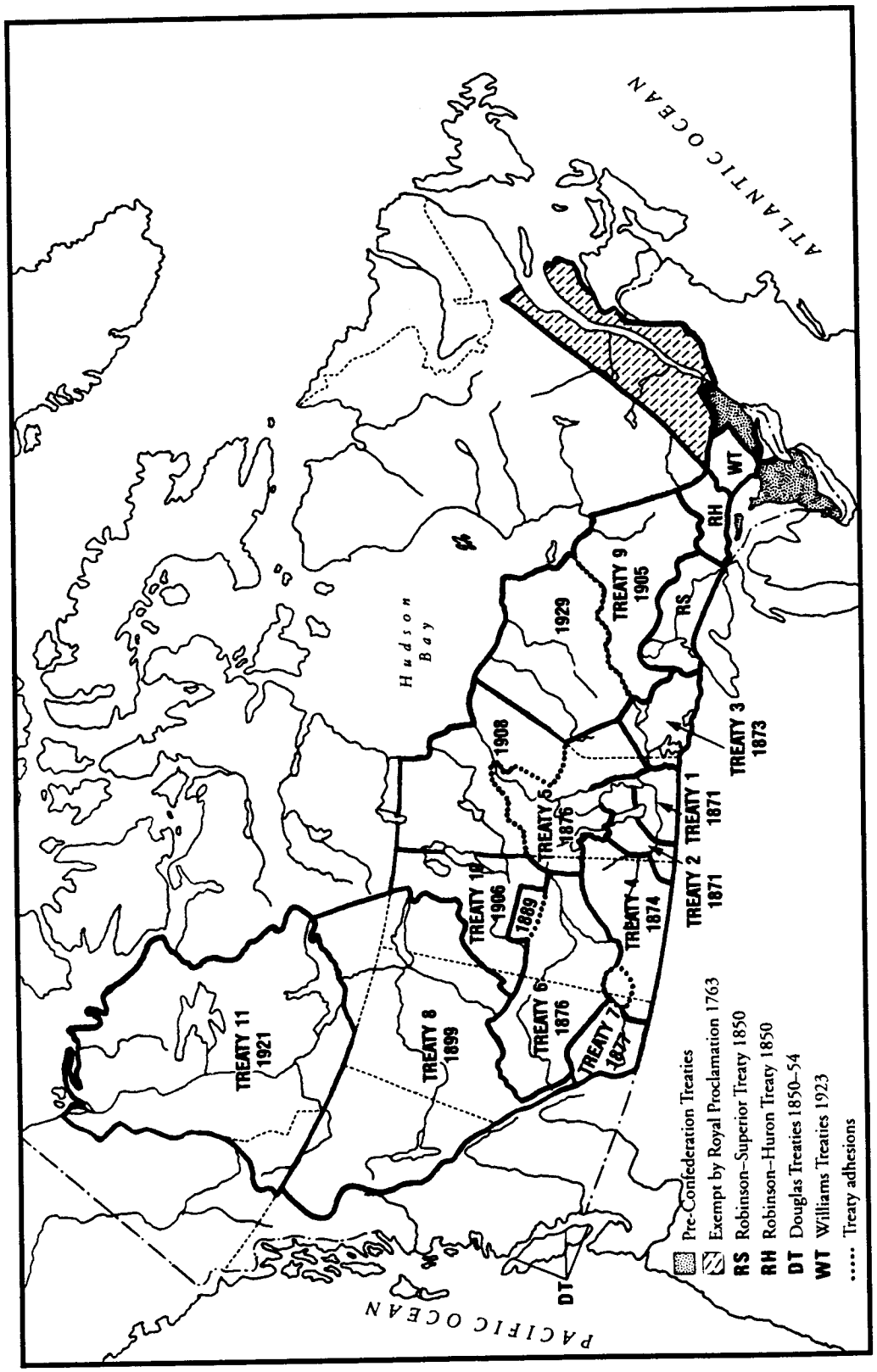


Figure 2:1 - Map of Treaty Areas

Alan D. McMillan, Native Peoples and Cultures of Canada:
An Anthropological Overview, (Vancouver: Douglas & McIntyre, 1988), p. 294.

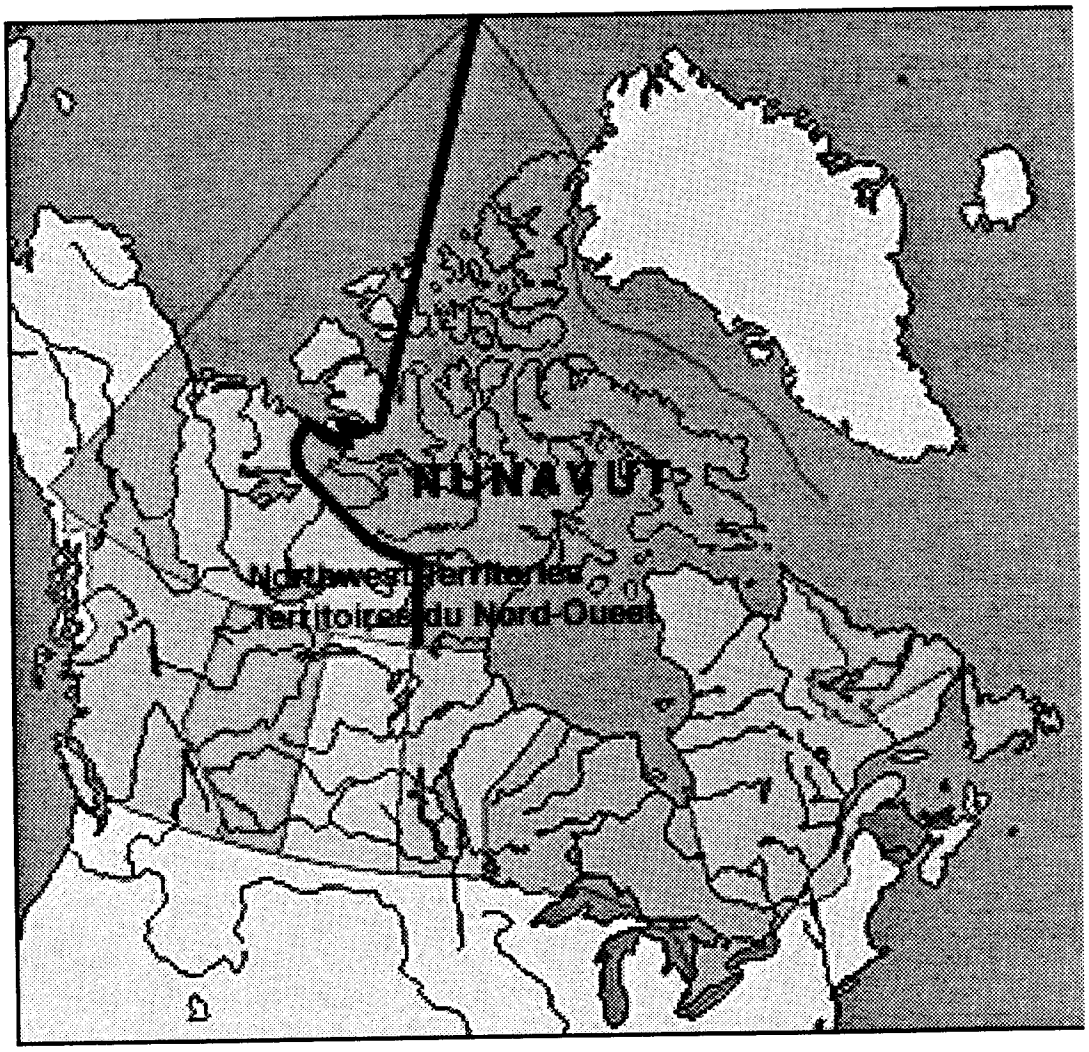


Figure 4:1 - Map of Nunavut

"Geographic Names: Nunavut", http://geonames.nrcan.gc.ca/cgndb/english/schoolnet/nunavut.html

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