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Comparative Assessments of Indigenous Peoples in Québec, Canada and Abroad

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Introduction

This paper is intended to provide a general overview of the position of Indian, Inuit and Metis peoples in Quebec in comparison with the standing of indigenous peoples elsewhere in Canada and selected foreign countries. The specific purpose of this brief essay is to summarize a large body of material and to highlight salient points for the information and guidance of the members of the Assemblée Nationale and its two commissions on the future of Quebec. It is hoped that this relatively short review will be of assistance to the members in their deliberations.

The paper is divided into two major parts. The first describes the Aboriginal situation in Canada and compares this indigenous reality to that found in other western countries, namely, the USA, Australia, New Zealand, Greenland and Scandinavia. Common elements examined include socio-economic and demographic descriptions, fiscal expenditures, governmental responsibilities and structures, land rights, levels of Aboriginal autonomy and other unique legal features. The next major portion of the paper considers similar issues but from the perspective of comparing the situation in Quebec to that found in other provinces and territories within Canada. The final portion contains concluding comments and overarching assessments.

In order to increase readability, and thereby the utility of this document, jargon, endnotes and quotations have been eliminated or at least reduced to a minimum. Likewise, brevity has been chosen over detailed analysis. It must be appreciated, therefore, that this paper is oriented toward presenting what are generalizations such that many of the subtleties, as well as the details involved in these complex relations, have had to be omitted. This has, hopefully, not led to any unintended misstatements, although for each dominant trend there is always at least one exception.

1. Canada vis-a-vis Selected Countries

In this part 1 will attempt to provide a brief overview of relevant issues in each of the countries under discussion. Each section will begin with a summary of demographic information such that the overall position of the indigenous population in that country can be appreciated. The examination will then proceed to consider the governmental structure for aboriginal affairs policy within that nation followed by fiscal relations where available. This national review will then proceed to describe the legal framework, land rights and other important issues.

1.1 United States

The 1990 census identified an aboriginal population of 1,903,000 consisting of Indians, Aleuts, Eskimos (Inuit), and Native Hawaiians. This represents only 0.77% of the total American population, with Indian reservations constituting almost 2.5% of the total land mass of the United States. The Indian people belong primarily to 505 federally recognized tribes as well as many other tribes that do not possess federal recognition. While many Indians reside upon

reservations, a sizeable number live outside of reservations in cities and rural areas. American Indians represent the vast majority of this aboriginal population. They are in many ways the poorest of the poor in the country with extremely low income and educational levels, inadequate housing, high infant mortality rates, lower life expectancy and high unemployment rates.

The situation regarding education has considerably improved in recent years. The Bureau of Indian Affairs (BIA) of the federal government maintains direction and control of all educational programs on reservation through funding restrictions. The BIA funds 182 educational facilities on reservations, many of which are operated by tribal governments or educational authorities they have created under tribal law. The BIA also funds 27 tribal colleges across the U.S., which have become a vital mechanism for progress. Approximately 6000 Indian students were attending these and other colleges and universities in 1988 with federal funding. A further 383,000 Native students attend public schools. Although major progress has been made in increasing performance levels of Indian people, they still face a high school drop out rate of 36%.

The federal government also provides health and medical services without charge through the Indian Health Services (IHS) to over 1 million Native Alaskans and Indians within their territories. IHS operates hospitals and clinics on reservations directly, while BIA also gives tribes the option of delivering these services themselves under contract.

Housing and economic development assistance is also available to tribes, Native Alaskan villages and Native Hawaiian authorities from the federal government through BIA as well as several other line departments by virtue of express legislation. Despite significant progress in recent years, the indigenous population in all 50 states remain at or near the bottom of all of the indices of quality of life.

1.1.1 Expenditures

The precise magnitude of federal and state expenditures on the aboriginal population is unclear. The federal Department of Education devoted $75,762,000 in 1991 for meeting its obligations under the Indian Education Act. A further $34,977,000 was spent in 1991 to enable Indian students to attend post-secondary institutions in the U.S. by the BIA along with $49,044,000 for adult education, scholarships, vocational training and tribal colleges. The BIA spent an additional $452,520,000 on the operations of Indian schools. The entire budget of BIA for education in 1991 was $536,541,000 while the Office of Indian Education was allocated an additional $75,364,000 in the 1991 fiscal year. The 1992 appropriation by Congress reduces this total expenditure from $611,905,000 to $486,172,000.

A further $274.3 million was budgeted for Indian health care in 1992 with an unknown additional amount for the repair, maintenance and construction of hospitals through the IHS. Finally, an unkown but substantial amount of federal and some state funds are provided directly to tribes to implement a range of governmental responsibilities, while many states also provide special grants and programs to individual Indians, Native Alaskans and Native Hawaiians.

Nevertheless, aboriginal people outside of reservations receive little attention and few specifically culturally appropriate services from state, federal or local governments such that pressing needs go unmet.

1.1.2 Governmental Structure

As is apparent from the prior discussion, the Bureau of Indian Affairs is the primary agency of the federal government to carry out its relations with the 505 federally recognized Indian tribes and the Native Alaskans, including federal trust responsibilities regarding reservation lands and tribal resources. The BIA is part of the Department of the Interior whose Secretary is a member of the President's Cabinet. The BIA works with tribal governments to help provide normal government services such as, road construction and maintenance, social services, policing, judicial services, economic development, education, and support for governmental administration. Certain other federal departments also must carry out obligations assigned by statute.

The remainder of the indigenous population is largely ignored. Native Hawaiians are basically excluded from the jurisdiction of the BIA, however, they do benefit from certain federal programs as a result of explicit legislative provisions. The small Metis population and members of Indian tribes that have not received federal recognition are completely ignored by Congress and the federal bureaucracy. There is, however, a recently developed procedure whereby Indian tribes can apply to the Secretary of the Interior under the Code of Federal Regulations for official recognition. The BIA also largely ignores tribal members who are residing outside of their home reservations.

On the other hand, a number of states also provide certain programs to Indian people who possess minimum levels of Indian ancestry off-reservation or regardless of location (e.g., Michigan provides specialized legal services and tertiary educational support for any person of 1/4 Indian «blood» or more). Some states also enter into formal relations with those Indian tribes that they recognize. This results in a situation in which some tribes are recognized by the federal government, some by a state, and some by both levels of government with the balance unrecognized and unable to obtain the unique rights recognized at law for Indian tribes or to access programs and funding tailored to meet their special needs.

1.1.3 Legal Status

The U.S. Constitution does not contain any specific provisions establishing or protecting the existence of indigenous nations or their rights. The Constitution in fact only refers to Indian tribes in passing, with the most important clause being the one extending legislative jurisdiction to the Congress regarding interstate commerce and trade. This was understandable at the time as Indian tribes were independent nations who represented economic importance in regard to trade and a military threat to the fragile new nation (the latter element is particularly evident in the clause that grants an exception to the general rule that only Congress can wage war where

a state is actually invaded or becomes aware of an intention by «some nation of Indians to invade such state»). The more general clause declares that Congress has the sole and exclusive right vis-a-vis the states of «regulating the trade and managing all the affairs with the Indians, not members of any of the states: provided, that the legislative power of any state within its own limits be not infringed or violated.»

The American courts quickly built upon the prior British governmental practice and judicial direction in the early years after the Revolution by confirming the existence of aboriginal title and the inviolability of Indian treaties. The U.S. Supreme Court, under the leadership of Chief Justice Marshall in a string of decisions, further elaborated the «domestic dependent nation» theory whereby the sovereign status of Indian nations was recognized by the common law, but reduced through the loss of authority to conduct foreign affairs (see, for example, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831)).

These minimal constitutional references to Indian nations were, however, subsequently interpreted by the courts as granting exclusive jurisdiction to the federal government, as opposed to the states, in exercising the exclusive authority to deal with the Indian tribes. The U.S. Supreme Court later revisited this interpretation to redefine the import of the Indian commerce clause so that it no longer merely gave to Congress and the executive branch the power to negotiate treaties but instead created the plenary power doctrine. This doctrine emanating solely from the judiciary grants to Congress unlimited power to pass legislation concerning Indian nations, their property and their affairs. The net effect of this has meant a critical diminution in the residual or inherent sovereignty of the Indian tibes that was retained under the domestic dependent nation doctrine. Congress can, therefore, intrude upon the sovereignty of Indian nations as it wishes, but that in the absence of any federal statute the residual sovereignty remains.

Thus, Indian tribes possess the sovereign authority to establish whatever form of government that they choose without any obligation to comply with the United States Constitution or its doctrines championing the separation of church and state or the emphasis upon checks and balances through three branches of government. Tribal governments are generally free to pass their own laws regulating membership, law enforcement, administration of justice, economic affairs, general welfare, estates, corporations, family matters, torts, tax, and all other non-criminal matters. This civil jurisdiction can apply in reference to all persons and other legal entities within the territory of the tribes. Another example of the status of Indian tribes is that they also possess sovereign immunity such that they cannot be sued without an «unequivocally expressed» waiver of this immunity. This doctrine also applies in relation to any entity created by the tribe to manage collective assets.

Tribal governments also can enact a broad range of criminal laws other than concerning 16 major offenses which have been removed from tribal jurisdiction through federal legislation. By virtue of a US Supreme Court decision (*Oliphant* v. *Suquamish Indian Tribe*), tribal governments and courts have no jurisdiction over non-Indians in the criminal sphere unless expressly

authorized by Congress. The USSC also further restricted the criminal jurisdiction of tribes only to their own members (*Duro* v. *Reina*) in 1990. Congress recently overruled that judgement by statutorily restoring tribal jurisdiction over Indians who are not tribal members. The tribe's criminal laws, which may be traditional, western or an amalgam of both, are usually enforced by a separate tribal court system containing Indian judges and court personnel. Tribal courts in the US now handle over 400,000 cases per annum through more than 350 judges and hundreds more lawyers, prosecutors and other court personnel.

Although there is no explicit constitutional provision recognizing and affirming aboriginal and treaty rights, the American courts have generally been positive in articulating the scope of these rights and vigilant in their protection. As a result, treaties are considered solemn and binding agreements on the federal government that must be liberally construed from the perspective of how they were understood by the Indian signatories. On the other hand, Congress was free to terminate the treaty-making process in 1871 by express legislation. Since that time, new rights and land settlements have emanated from federal legislation. As the vast majority of Indian tribes possess existing treaties or special legislative guarantees, the importance of aboriginal rights in the United States has lessened. It continues to retain vitality as the foundation for internal sovereignty and as the source of aboriginal title to many lakes and rivers as well as ensuring rights to water, which is a particularly relevant issue in the western states.

Treaties remain of great relevance as they provide paramountcy for rights to harvest game and fish. Specific treaties have been enforced by federal courts in landmark decisions in the 1970s in Washington (by Judge Boldt) and Michigan (by Judge Fox) resulting in a guarantee of 50% of the fishery for Indian tribes for food, ceremonial and commercial purposes, thereby leading to major realignment of the fisheries and enhancing economic revival for the tribes affected. Treaties also frequently confirm the rights to reservation lands for tribes.

1.1.4 Special Legislation

Congress has passed a number of statutes in recent years of interest to Quebec and Canada. The Indian Civil Rights Act of 1968 was enacted to extend most of the American Bill of Rights to Indians on reservation (other than the right to bear arms) as the tribal governments were not subject to those constitutional provisions due to their unique position. This Act also imposed maximums upon criminal penalties that were available under tribal law and order codes.

The Indian Child Welfare Act of 1976 is a particularly interesting and relevant statute to Aboriginal peoples in Canada. Although tribal governments and courts already possessed exclusive jurisdiction regarding child welfare matters arising within the boundaries of Indian country, many tribal children were being apprehended by state, local and private child protection and adoption agencies outside of the reservations. As a result, a significant concern was raised about the high numbers of Indian children that were ending up being raised in non-Indian homes. The response to this crisis by Congress was legislation that compelled state courts to transfer all child welfare cases involving tribal members to the tribal courts of the

home reservation, unless the tribal court with jurisdiction refused to accept jurisdiction over the child or if the parents opposed the transfer.

Another Congressional initiative of relevance is the passage of the American Indian Religious Freedom Act of 1978. As the title indicates, the purpose of this statute is to guarantee religious freedom and to protect the «inherent right» to exercise traditional religions by the Indian, Eskimo, Aleut, and Native Hawaiians from federal and state laws that might undermine the exercise of these religions and their specific practices, including access to sacred sites and the use of sacred objects.

The final statute especially worthy of note is the Indian Self-Determination and Education Assistance Act of 1975. This law was designed by Congress to compel all federal government agencies to accept the right of Indian tribes to be self-determining and to advance that status in all federal actions, programs and relations with tribes. This Act has helped significantly in re-orienting the BIA away from its legacy of paternalism and colonialism toward a new era. The BIA is now required to encourage and support the economic advancement of tribes and the enhancement of their capacity to govern their own affairs. The Act also contains a strong declaration of Congressional policy, which refers to such matters as defining Indian education and self-determination as «a major national goal» while commiting the federal government to maintaining its «unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy».

1.1.5 Natural Resources

As indicated earlier, aboriginal title was recognized by Congress in its initial development of the law (see, for example the Non-Intercourse Act of 1790 that adopts the basic provisions contained in the Royal Proclamation of 1763 regarding the purchase of Indian lands). Numerous treaties were negotiated between the US government and Indian nations whereby much of the country was ceded to the US while the tribes reserved to themselves certain enumerated rights and lands. The treaties and the assertion of radical title by the federal government formed the foundation for a judicially elaborated federal-tribal trust relationship. Title to all reservation lands and natural resources is held by the United States, unless a particular treaty or statute contains a provision to the contrary, such that the US government must sanction all sales, conveyances, leases, licences or other encumbrances of these lands and resources. The courts have declared that the United States must hold its title to reservation lands as a trustee for the specific tribe. The Indian interest, which is «as sacred as the fee simple of the whites» (per Chief Justice Marshall), extends to all of the surface and subsurface resources including timber, minerals, sand and gravel, water, fish and wildlife.

The original pattern was for the Bureau of Indian Affairs to exercise total control over such transactions for the supposed benefit of the individual tribes. The elaboration of the trust doctrine by the American courts coupled with Congressional legislative inititiatives in the 20th century has meant that tribal councils have a far greater say in the way in which the BIA carries

out its trustee duties in leasing reservation lands and natural resources (e.g., minerals, petroleum, timber, etc.) to third parties than was previously the case. Many Indian reservations are rich in natural resources as nearly 5% of the proven reserves of petroleum, 30% of the low-sulfer coal and over 50% of the uranium in the United States is located upon reservation land. Despite this wealth, many tribes became impoverished as the BIA engaged in long term leases as low as $2 per barrel of oil and 15 cents a ton of coal. The Omnibus Leasing Act was passed by Congress in 1938 that imposed certain restraints and safeguards on the leasing of reservation lands including a ten year maximum for mineral leases entered into by tribal councils. The Secretary of the Interior, however, was declared able to override most of these protections. The more recent Indian Mineral Development Act of 1982 is designed to foster economic self-determination through maximizing financial return for tribes. The Act authorizes tribes not only to lease subsurface resources but also to embark upon joint ventures or tribally owned mining companies.

Some tribes have become very successful economically as a result of this natural resource wealth. A group has gathered together as the Council of Energy Resource Tribes (CERT) that has sometimes been called the Indian OPEC. The *Winters* doctrine from the USSC (1908), whereby reservations possess rights to appropriate water under federal law that prevail over conflicting rights of use under state law, has also had a major effect upon tribal economic development in the western US as well as upon tribal-state relations.

It is also important to realize that tribal sovereignty has an impact upon this area as it means that the tribes have the authority to legislate in relation to natural resources. Thus, tribes possess the right to tax mineral development on tribal land by Indian or non-Indian companies (see, for example, *Merrion* v. *Jicarilla Apache Tribe* (USSC, 1982) and *Kerr-McGee Corp.* v. *Navajo Tribe of Indians* (USSC, 1985). At the same time, the courts have ruled that state governments have no power to impose taxes upon the mineral royalties that tribes earn or upon the mining companies directly as this would infringe tribal self-government and reduce tribal revenue.

Likewise, tribal sovereign immunity exists in this sphere such that tribes and their wholly owned corporate enterprises cannot be sued without an express waiver. Many tribes do create companies that waive this immunity so that outside businesses will engage in joint ventures. Individual tribal members are, of course, always subject to suit in tribal court. On the other hand, certain federal statutes of a general nature may apply, such as environmental protection legislation.

1.2 Scandinavia

The indigenous peoples of Sweden, Finland and Norway are called the Sami (formerly often called the Lapplanders), who reside primarily in the far north of each of these countries. There are 17,000 Sami in Sweden, which represents 2% of the total population. In Finland the numbers are lower as there are only 5700 Sami according to the 1990 census, or 1.1% of the

country. Norway has the largest group of Sami numbering over 30,000 people constituting 0.71% of the nation.

1.2.1 Socio-economic Information

While the Sami experience greater socio-economic disadvantages in comparison to the general population, including a lower standard of living, their position overall appears very positive from a distance when contrasted with the situation confronting indigenous peoples globally and in Canada. Traditionally, reindeer herding was the primary livelihood of the Sami in all three countries. It has declined in recent years such that only approximately 10% of the Sami are now employed in this capacity. Nevertheless, its well-being is seen as a bellwether for the overall prosperity of the Sami people as reindeer herding is inextricably linked with their cultural survival and self-determination. The Sami also continue to engage actively in hunting, fishing, trapping and traditional crafts, such as in leather, wood, pewter and antler.

1.2.2 Governmental Structures

As unitary states, the governmental structure is rather simple in that dealings with the Sami remain primarily with the national governments of all three countries. An interesting institutional and political development in Norway and Finland, however, is the creation of Sami Parliaments. Both countries have accepted the importance of recognizing separate legal entities to represent the interests of the Sami people in dealing with the national governments.

These two Sami Parliaments are more than non-profit organizations or political parties as they are officially constituted by the national governments with the clear power to make recommendations and to act formally as an advisory body to their respective governments. The main function of the Sami Parliaments is to assert the rights and to protect the interests of the Sami people by submitting proposals and initiatives regarding legal, economic, social and cultural issues that directly affect the Sami. Although they have no legislative powers as such, they have the potential to make important contributions to national governmental decision-making by lobbying in favour of proposals that the Sami Parliaments may generate and in responding to initiatives by the national governments of these two states. These two special parliaments are representative institutions with their members elected periodically by adult Sami and consisting of 20 parliamentarians in Finland and 39 members in Norway.

A different structure is in place in Sweden called the Department Work Group. This body act as a liaison between the national government and the Sami people. Not only does it have no decision-making power, but its advisory role is also far more circumscribed.

1.2.3 Legal Rights

The Swedish government has been especially sensitive to the interrelationship between language and education. Thus, Sami children have the opportunity of attending government funded Sami

schools or the regular municipal schools for the first 9 years, however, the latter provide instruction in the Sami language where numbers warrant. The former Sami school system is autonomous and in which the Sami are responsible for curriculum design. The objective of the government is that Sami children, regardless of which school system they follow, will receive the same overall quality of instruction while exposing them to the Sami language and culture. The government of Finland has been more reticent in this regard, however, amendments to the School System Act in 1983 and to the Comprehensive School Act in 1985 has guaranteed special status to the Sami language in the schools within the Sami region in the north.

The Act on the Cultural Activities of the Municipalities of Finland ensures that the Sami language is given an equivalent status to Swedish and Finnish. This had resulted in media production in the Sami language and other limited initiatives. The Sami Language Act was passed last year and came into force on January 1, 1992. Under the terms of this Act, a Sami has the right to use his/her language with any public authorities. Upon request, the Sami have the right to receive translation services without charge. Any laws, decrees, public notices or decisions of the government must be published in the Sami language. In Norway, the Sami people also have the right to use their mother tongue before official institutions, the police, the legal system and health services, as well as to receive replies in their language.

Sweden has also enacted the Reindeer Husbandry Law, which has as its main purpose the promotion of more efficient reindeer breeding while ensuring the opportunity for the Sami to preserve this aspect of their culture and traditional lifestyle. The statute provides land and water rights for reindeer breeders as an occupational benefit that does, however, recognize their unique position. If a Sami should cease partaking in this economic activity, then he or she must give up these special benefits granted by the law.

Norway recognizes reindeer herding as both a culturally and economically important activity of the Sami. A special pension scheme was set up in 1990 to benefit those Sami who have had reindeer herding as their primary occupation for their entire working life or for a minimum of 15 out of the last 20 years. This scheme provides a guaranteed retirement pension for any Sami herders who meet this criteria upon reaching the age of 62. Although apparently not based upon the guaranteed income scheme for Cree wildlife harvesters under the James Bay and Northern Quebec Agreement (JBNQA), it does bear some interesting parallels to that ground breaking initiative.

The Sami have had very limited success before the courts in obtaining respect and recognition for their aboriginal rights and they are not generally seen as parties to treaties with the states. A plausible explanation for this limited recognition is that the Scandinavian governments and societies wish to avoid defining themselves as non-indigenous. One important exception can be found in a decision of the Swedish Supreme Court in 1981. In the Taxed Mountains case, the Court decided in favour of the Sami and supported the principle that ownership of land and water could be derived from customary use.

The Sami have had far less success in Norway, where the government has been particularly reluctant to recognize Sami ownership of any portion of their traditional territory or control over the extraction of natural resources. This has occurred despite the recognition that the Sami do have some level of land and water rights. The basis for the acceptance of the latter rights emanates from a decision of the Norwegian Supreme Court in 1862 in which the Court concluded that «a definite nomadic right for Norwegian Lapps [to use land and water] ensues from the 1751 Convention, on the basis of reciprocity with rights granted to Swedish Lapps in Norway».

A more recent decision of the same court in 1982 was far less satisfying for the Sami as their attempt to halt the construction of a major hydroelectric dam, partly on the basis that the dam was alleged to interfere with their aboriginal rights, was rejected. Since the Court seemed to rely on an analysis of the evidence that led the judges to conclude that the risk of interference with the aboriginal rights of reindeer herding was insignificant, the government chose to respond in a conciliatory fashion. Ironically, this defeat for the Sami in the courts has led to a re-evaluation of Sami rights under national and international law as well as sparked new proactive legislation.

1.2.4 Natural Resources

The lack of express legislation guaranteeing any unique legal rights to the Sami in relation to renewable or non-renwable resources has left the position of the Sami in this regard rather uncertain. Since they have not chosen to use the courts actively as a means to secure their rights, the Sami are left in a situation in which they are making political assertions with little judicial confirmation. As a result, one would have to conclude that, at present, the Sami are not viewed as possessing any rights to the subsurface and only limited rights to use their traditional territory and its waters.

1.3 Greenland

The population of Greenland totals approximately 53,000 people of which roughly 41,000, or 78%, are Inuit born in Greenland, while the remaining are primarily Danes who were either born in Denmark or in Greenland. The world's largest island was a colony of Denmark for two and a half centuries before obtaining a restoration of self-government. In 1979, Greenland became the first jurisdiction in the world in which the Inuit predominate to once again achieve a significant degree of autonomy. The Inuit of Greenland play an active role within the Inuit Circumpolar Conference, while the Home Rule government played co-host with Denmark last September to a United Nations meeting of experts, indigenous leaders and representatives from a number of countries (including Canada) sponsored by the UN Commission on Human Rights. This official gathering resulted in the Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government

The traditional economy of the Inuit has been based upon harvesting renewable resources, especially seal, whale, fish and fur-bearing animals. This harvest would provide both the

primary source of food as well as cash income for more recent generations. Although the fishery has experienced rapid modernization of late about 20% of the population still relies upon the hunting of sea mammals for their livelihood.

The success of the animal rights movement over the past 15 years has had a devastating effect upon the economy of Greenland. The EEC ban on the import of seal products into Europe in 1983 deprived Greenland of one of its major markets and sources of revenue. While the Home Rule government has responded by subsidizing the trade in sealskin pelts to help compensate for the decline in sales and prices, many hunters are no longer able to earn their living from this activity. The only major alternative was to expand the fishery in terms of increasing mechanization and capital expenditure, expanding the territory harvested, and the development of new resources such as shrimp. The fishing industry now employs almost one-third of Greenland's population and accounts for 83% of total exports.

1.3.1 Fiscal Expenditures

The Home Rule government has full authority to raise revenue through imposing a broad range of direct and indirect taxes. Nevertheless, the economy of Greenland is too small and fragile to provide a tax base sufficient to meet all of the needs of the population. As a result, the majority of the government's budget comes from the provision of transfer payments annually as approved by the Danish Parliament. The Home Rule government is, therefore, still financially dependent upon the generosity of Denmark to which it must demonstrate its fiscal responsibility for the revenue granted. Greenland also obtains much of its economic investment from the Danish government and private sector, however, it is seeking to maximize revenue from renewable and non-renewable natural resources, as well as tourism, so as to become economically independent.

1.3.2 Governmental Structure

Although still officially a part of Denmark, the country was granted Home Rule by the Danish Parliament. As a result, the people of Greenland now possess full control over education, culture, land use, the economy and national political matters. The Danish Parliament retains control over foreign affairs, the military, currency and a limited range of subjects that directly affect the lives of Greenlanders.

All Danes and Inuit have the right to vote for and to be elected to serve in the Parliament of Greenland. The country is divided into 18 municipalities. These governments, which are also elected, exercise limited jurisdiction over local matters. It is the Home Rule government and the Parliament of Greenland, however, that have the dominant governmental role in the lives of the people. Somewhat similar to the situation in the Northwest Territories of Canada, the bureaucracy still contains many Danes in senior and technical positions while the Parliament is more representative of the ethnic make-up of Greenland as a whole.

The Home Rule government is responsible for the overall administration of all primary and lower secondary schools through its Directorate of Culture, Education and Labour Market. Each municipality also exercises responsibility over public education for the lower grades. There is as well a three-year program of upper secondary courses regulated by the Home Rule government that leads to exams that will determine the potential for further education.

Control over health services in Greenland was just transferred from the Danish Ministry of Health to the Home Rule Authority on January 1, 1992. The Greenland Officer of Health is in charge of public hygiene, food control, environmental protection and the control of infectious diseases. The Greenland government is now responsible for the provision of medical services and hospitals, which are available to all free of charge.

All land in Greenland is considered public property. Formally held by the Danish government in the name of the Crown, the Home Rule government now exercises full authority over the development and use of all land. Since construction costs are very high due to the small market, the need to import almost all materials, and the climate, substantial housing subsidies are available. The Home Rule government provides a number of programs consisting of grants and low interest loans for the construction, acquisition, repair and improvement of homes.

1.3.3 Language

Inuktitut, or Greenlandic as it is called locally in English, is recognized as the main language. Both Greenlandic and Danish have the equivalent of official language status, however, Danish remains the more common in governmental circles.

1.3.4 Legal Situation

The normal language of aboriginal and treaty rights does not truly fit the Greenlandic context. Since the Inuit are the majority population and control the government, there is no need to obtain guarantees of exemption from externally imposed laws. The Inuit are themselves the legislators and the decision-makers such that they can readily protect their own cultural, linguistic, economic and political interests. This does not create a paradise as there are economic and social problems, which themselves have given rise recently to an increase in crime. Nevertheless, through home rule the Inuit possess the opportunity to address these problems on their own terms and to determine their own future as they wish.

1.3.5 Natural Resources

For the same reasons as in relation to the absence of aboriginal and treaty rights, the Inuit of Greenland do not have any particular guarantees or rights in relation to renewable or non-renewable surface and subsurface resources. As a public government, these resources are owned by the state and managed by the Home Rule government for the benefit of all Greenlanders, both Inuit and Danes. There is, however, a great concern to protect the

environment and to authorize land development only in ways that will not be disruptive to people who are living off the natural resources of the lands and seas.

1.4 New Zealand

The indigenous population of New Zealand are the Maori. Although belonging to many different tribes of the 3 major islands, they speak a single language and are all derived from the original seafarers who came to Aoteroa (translated from Maori as the Land of the Long White Cloud) over a millennia ago. The 1991 census identified 512,000 Maori in New Zealand, which represents more than 15% of the total population. Most of the balance are people of British ancestry who began to settle in the country in the late 1700s with a growing population of more recent immigrants from around the world, and especially from other islands in the South Pacific. The Maori regard any person of Maori ancestry who chooses to self-identify as being Maori. There has never been a legal system of sub-dividing Maori through registration or otherwise such that some are excluded from being members of Maoridom.

Similar to the position of Aboriginal peoples in Canada, the Maori suffer from chronic unemployment, poverty, lower education levels, higher rates of incarceration and poorer health. This situation has begun to undergo dramatic and positive change in recent years.

A growing number of programs and educational institutions are committed to promoting and respecting the Maori language. The first major initiative in this regard was the development by Maori people of what are called Maori nests. These are daycare and pre-kindergarten programs, many of which are self-financed, in which Maori elders are the staff and the sole language in use is Maori. As a result, the number of Maori youth and children who are speaking their language fluently has skyrocketed in recent years, thereby reversing what had been a long term decline in the use of the language. Performance in schools overall has dramatically improved and many public and secondary schools now function at least in part in Maori as the language of instruction.

The health care system is only just beginning to incorporate traditional practices and to develop community based approaches geared toward prevention and targeted toward the Maori under their control.

One of the particularly positive initiatives of late is the enhancement of a Maori media. There are now 14 radio stations that operate under local Maori control and broadcast to a large degree in their language. A national Maori news service has been created and a proposal to establish an independent Maori TV station is very far advanced.

1.4.1 Government Structure

As a unitary state, the primary level of government in New Zealand is the national government operating under a parliamentary system augmented by municipal and regional councils with

delegated powers of a local nature. A Department of Maori Affairs, headed by a cabinet minister, existed for many years as the focal point for relations between the Maori and the state. The Labour Government of David Lange launched a major revision that was designed to transfer virtually all governmental programs and funds related to the Maori directly to regional Iwi (a Maori expression roughly equivalent to tribe). This resulted in the dissolution of the former Department and its replacement with the Ministry of Maori Affairs - to serve as a co-ordinating and policy arm of the national government - and the Iwi Transition Agency. The latter was, as its title indicates, given a mandate to implement the complete devolution of governmental services and to serve on a temporary basis as the vehicle for this fundamental change. A variety of initiatives were launched, such as the development of Maori agencies to deliver child welfare, educational, health and social services.

The new National Party government elected in late 1990 has substantially reversed this process. A new Ministry of Maori Development was created in January of 1992 to replace both the former Ministry and the Iwi Transition Agency. The new policy is to promote «mainstreaming» through which the Ministry would merely facilitate the linkages between the Maori and large government departments. As a result, whatever funding the Maori will now receive will come directly from the normal state authorities, such that distinction based on the unique political position of the Maori as the original inhabitants will be de-emphasized.

1.4.2 Fiscal Expenditures

The total budget for redistribution by the Iwi Transition Agency to Iwi and other Maori activities for the fiscal year ending June 30, 1991 was $154,674,000 NZ. One of the recipients was the National Maori Congress, which consists of members from Maori tribes or Iwi. Its objectives include the general advancement of the Maori, the exercise by each Iwi of its own authority, and the provision of a national forum in which tribal representatives can promote their economic, social, cultural, legal and political interests. A variety of governmental departments are also involved in providing direct grants and otherwise devoting financial resources to Maori programs and individuals.

1.4.3 Legal Rights

The British and a number of the Maori chiefs of the North Island negotiated the Treaty of Waitangi in 1840, which was subsequently adhered to by many other chiefs throughout the country. The Treaty is widely regarded as the founding document of the new land as it structured the original relationship between the British Crown and the Maori people. The Treaty was negotiated and recorded both in English and in Maori, however, the significant differences between the two versions has been a source of continuing controversy ever since its signing. The Treaty not only created a strong link between the two societies and their political representatives, but it has also come to symbolize the partnership and commitment to mutual understanding between the two cultures. Great debate has ensued, however, over whether the chiefs surrendered complete sovereignty or merely control over external affairs while preserving

internal sovereignty. At the very least, both sides agree that it confirmed the continued land and traditional economic rights (especially over fisheries) of the Maori people.

The Treaty was not properly respected or implemented for many years, even though the courts ruled early on (in *R.* v. *Symonds* in 1861) that it as well as the common law recognized the aboriginal title of the Maori. Part of the rationale for this deficiency was the failure of the Treaty to be ratified by Parliament coupled with the absence of any written constitutional guarantees in a unitary state such that the Diceyan view of parliamentary supremacy allowed the government to ignore its treaty obligations.

This unfortunate history began to change with the passage of the Treaty of Waitangi Act, 1975. This statute created an independent and bicultural tribunal to receive complaints and hold hearings into alleged treaty violations. Although the tribunal's jurisdiction was not invoked for sometime thereafter, the Waitangi Tribunal has become very active over the past decade. Its primary mandate is to examine any disputes, determine the appropriate interpretation of the Treaty's terms within the context of the complaint, and to recommend practical resolutions. The Tribunal conducts its own research, hears evidence and receives legal submissions based upon which it issues a specific report with its recommendations. The experience to date is that all of its proposed solutions have been accepted by government even though its decisions are not binding. Its major conclusions have included providing a guaranteed share of the fisheries for the Maori (which currently has been set at 10% of the total available catch through negotiations) and the rejection of a pipeline that would have damaged the beds of a traditional shellfish harvest area.

The former Labour Government had established four principle objectives to guide all policy, namely:

1. to enable Maori to achieve standards of excellence comparable to the best international standards;
2. to ensure Maori are able to participate fully in decision-making;
3. to ensure that the Maori language and culture is preserved and enhanced; and
4. to deal speedily and fairly with outstanding grievances.

One of the methods used to meet these objectives was to include an interpretive clause in all relevant statutes whereby it is directed that the legislation is to be interpreted in accordance with the terms of the Treaty of Waitangi and to advance its purpose. Another highly interesting statutory initiative was the passage of official language legislation through which New Zealand recognized both English and Maori as having equal status. In doing so, senior New Zealand officials closely studied the Canadian experience with official languages and adopted bilingualism based largely upon our model.

Another important recent achievement was the passage of the Resource Management Act. It is designed to promote sustainable development of both natural and physical resources. Among its

many provisions it defines the relationship of the Maori and their culture and traditions with their ancestral lands, water sites and sacred sites as matters of national importance.

A far older element of the New Zealand situation is the presence of guaranteed representation in Parliament. A minimum of four seats are reserved for the Maori who choose to register to vote either on the exclusive Maori list or on the general list for their district. Although this scheme was implemented initially to restrict Maori voting strength solely to four seats at a time in which they were the majority population, this guarantee has served as a bulwark against assimilation while ensuring that the Maori voice is heard in Parliament.

Another 19th century initiative designed for a colonialist purpose was the creation of the Maori Land Court. Its raison d'etre was to facilitate the leasing or sale of Maori lands to pakeha (non-Maori). These lands were declared by law to be held in tenancy in common and to pass on to future generations through inheritance by will or intestacy. As the number of descendants increased in relation to any particular property it became progressively more difficult to find suitable uses agreeable to all legatees such that conveyance to pakeha was favoured. This Court still exists, however, its standing in Maori eyes has dramatically improved over the last decade as many of the judges are now Maori and those pakeha on the bench are very knowledgeable both in this branch of the law as well as in reference to Maori customs and aspirations. Several members of this Court, including its Chief Judge and Deputy Chief Judge, are members of the Waitangi Tribunal.

The final point to mention is the tabling of the Runanaga a Iwi Bill in 1990. This proposed legislation is designed to extend legal authority to the Iwi or to structures they designate so that they can receive and distribute government funds as well as formally enter into contracts. The Bill would also give full effect by legislation to rangatiritanga (the governmental authority of the chiefs referred to in the Treaty), thereby allowing the Iwi authorities to take complete control of their resources. Much of the tribal lands at present are instead in the control of Maori trustees elected by the beneficiaries.

1.4.4 Natural Resources

The extent of Maori rights to natural resources is uncertain. Those lands which remain within exclusive Maori collective hands, which are usually administered by Maori trustees elected or appointed by all of the adult Maori who possess an interest in the lands in question, generally include all of the natural resources, such as timber and minerals. Some Maori trusts have developed very active logging operations on their lands. These lands also benefit from normal rights to water under common law riparian rights doctrine as modified by national legislation.

Several of the claims filed by the Maori with the Waitangi Tribunal have related to natural resources. Perhaps the most significant decision of this Tribunal to date has resulted in the national government allocating 10% of the deep sea and inshore fishery to Maori harvesters.

It is anticipated that the issue of ownership of natural resources will be a major one in the near future in New Zealand. Presently, any existing Maori rights to natural resources are regulated under the prevailing national legislation or common law rather than in accordance with new or customary Maori law.

1.5 Australia

The indigenous population in Australia is comprised of two major groups, namely, the Aboriginals of the mainland and the Torres Strait Islanders of the islands to the north of Queensland neighbouring the southern islands of Papua New Guinea, to whom the Torres Strait Islanders are related culturally, racially and economically. These two groups are completely distinct with relatively little in common other than having shared the ravages of colonization. The combined population of the two groups totals approximately 230,000 people, or 1.5% of the country. The Aboriginals are by far the larger group and are in fact subdivided into many different linguistic, political and cultural societies living in some cases dramatically different lifestyles with quite divergent aspirations for the future.

The Aboriginal population is extraordinarily poor and disadvantaged to an extent that is unknown in any of the other countries under discussion, including Canada. In addition, the level of racism is completely unparalled in these other nations. For example, the pattern of openly shooting Aboriginal people in the northwestern part of Western Australia for sport or spite (in the Kimberley Mountain region in particular) only disappeared a few decades ago, as did the virtual enslavement of Aboriginals as drovers in many cattle stations.

Therefore, it is not surprising that the Aboriginal people suffer from extremely high unemployment, low levels of educational achievement, inadequate health and social services, extensive discrimination, extraordinarily high rates of incarceration (especially for non-payment of fines and alcohol offenses), tragically high levels of suicide and accidental death (particularly shortly after being placed in jail), a far greater likelihood to suffer from contact with the child welfare system, and far too little control over their own affairs. The recent report of the Royal Commission Investigating Deaths of Aborigines in Custody, in reference to the sudden deaths of over 100 Aboriginals in the custody of prison, police or juvenile detention institutions in all jurisdictions across Australia since 1980, provides graphic evidence of the degree to which the justice system has failed to respond properly to the needs of Aboriginal people even when accused of the most minor offenses - and the level of racism that has become institutionalized. Although the commission did not conclude that any of the deaths were a direct result of violence by guards, it did find an extraordinarily high rate of incarceration of Aboriginals and numerous deficiencies in governmental policies.

Although there is no system of legal subdivision whereby Aboriginals or Torres Strait Islanders are differentiated between those who are accepted as Aboriginal by law and those who are excluded, there are many other similarities with the Canadian experience, in addition to the disastrous consequences of colonization and dispossession. Australian law in some states used

to distinguish among Aboriginals based upon the level of European ancestry, through using terms such as quadroon and octaroon rather than Metis/halfbreed and non-status Indian. Fortunately, the indigenous population has generally overcome this part of their history as they have developed a three part definition, which has received almost universal acceptance by the laws and governments within Australia. The constituent elements of the definition are that the individual must:

1. be of Aboriginal ancestry [although no precise percentage or «blood quantum» are required;
2. choose to self-identify as Aboriginal; and
3. be accepted by the Aboriginal community as being Aboriginal [although this can be from any Aboriginal community rather than solely from the one from which the person's Aboriginal ancestry is derived].

This approach effectively avoids the debate over proving entitlement or seeking recognition for entire communities as in Canada as well as avoiding a statutory process of segregating Aboriginals into categories of those who are legally recognized from those who are not. Nevertheless, a person must be recognized by the specific Aboriginal group that possesses title to specified Aboriginal lands or the rights of residency on a particular reserve in order for that individual to acquire rights in relation to that territory. The same holds true in relation to acquiring a share in the royalties or other funds that might emanate from these lands. This can lead to some internal conflicts between rural and urban Aboriginals.

The Commonwealth Government has initiated a number of new programs to attempt to redress the terrible socio-economic position of the Aboriginal population. There are 76 Aboriginal and Torres Strait Islander health organizations throughout the country that are controlled by the local Aboriginal communities. They have helped to launch national efforts to immunize all children against hepatitis B, improve health and hearing services, and attack substance abuse. A similar effort was commenced in 1989 to redress the very poor educational success rates of Aboriginal students in the public school system and the minute numbers who enroll in tertiary institutions. The National Aboriginal and Torres Strait Islander Education Policy of the federal government is designed to ensure that:

1. Aboriginal people are involved in educational decision-making;
2. equity of access is provided to all educational services;
3. participation of Aboriginal people is improved; and
4. indigenous history and culture is part of the educational system.

Particular inroads have been made in the broadcasting field. Aborigines are involved in a range of enterprises in both the commercial and public sectors of television and radio. This is a particularly vital source of information and community development in the Outback of central Australia.

Since over 35% of the Aboriginal labour force is unemployed, in part due to the fact that almost half live in rural and remote regions of the country, the federal government has recently opted for a large scale job training strategy. More than 12,000 Aborigines and Islanders are being placed in jobs annually due to federal training programs. Some of the state governments are also supporting this approach with complementary programs.

One of the areas in which the Commonwealth has been particularly innovative has been concerning the delivery of legal services. Aboriginal groups have been funded for almost two decades to operate their own legal aid programmes using staff lawyers and Aboriginal field officers. The latter perform a somewhat more limited version of the role of native courtworkers in Canada. There are now 20 different and independent Aboriginal Legal Services corporations providing criminal and civil legal assistance in almost all parts of Australia. Somewhat surprisingly, these Aboriginal legal service programs have sponsored little in the way of test case litigation (although there have been some very important exceptions, such as the development of the *Anunga Rules* governing appropriate methods for police interrogation of Aboriginal accused persons) and have not made as significant an impact upon how the justice system operates as one might expect after 20 years of existence.

A number of Aboriginal child care agencies have also been financially supported over the past 10 years. They are having some success in reversing the extraordinarily high rate of apprehension of Aboriginal children and in obtaining recognition for the importance of relying upon the extended family or other Aboriginal people as foster parents where removal from the home is absolutely necessary.

1.5.1 Expenditures

The exact magnitude of expenditures devoted toward Aboriginal people is unknown. The Commonwealth Government spent at least AUS$1,316.9 million in the 1991-92 fiscal year. This included $149.5 million on education; approximately $46 million on health care; $325.3 million on employment and job training; and $588.7 million to the Aboriginal and Torres Strait Islander Commission (ATSIC).

1.5.2 Governmental Structure

The Australian Constitution of 1901 only addressed the indigenous population in a negative fashion. It declared that the requirement to conduct a regular census did not mean the inclusion of Aborigines and the ability of the federal government to enact laws for specific races explicitly did not encompass the Aboriginal race. The latter phrase was judicially interpreted as meaning that only the state governments could pass laws specifically designed to affect Aboriginal people. As a result, the federal role in this sphere was limited to the territories or to affecting Aboriginal people through general legislation. This state of affairs was changed by a constitutional amendment in 1967 that obtained an overwhelming endorsement from the voters through a referendum.

The current constitutional situation is that both levels of government are able to pass laws expressly in relation to Aboriginals. Where co-operative federalism is not possible, then a federal law prevails in case of conflict. Nevertheless, the Parliament has been highly reluctant to engage in direct clashes with state governments wherever possible. The sole exception to this policy of avoiding confrontation was in reference to the former National Party government of Joh Bjelke Peterson of Queensland. Even in this case one federal law designed to override state legislation was never proclaimed. In another more dramatic situation former Prime Minister Bob Hawke backed down on an election promise to pass national land rights legislation due to the opposition of the Premier of Western Australia.

Therefore, both levels of government frequently operate programs intended to ameliorate the conditions facing Aboriginal people. The Commonwealth remains very active on the legislative front in reference to the Northern Territory and concerning racial discrimination while leaving aboriginal and land rights issues largely to the states. This has obviously meant that there is no uniform system of law or programs in existence. It has also too often resulted in a situation in which the state government, which is the one that faces the most direct consequences of recognizing any special legal rights for Aboriginal people, has dominated the debate and has adopted policies contradictory to the interests of Aboriginal people.

Both levels of government have also maintained their own departments of Aboriginal affairs. The federal government has also pursued the approach of establishing special semi-independent commissions to operate at some distance in the areas of sponsoring economic development, providing housing grants and purchasing land for Aboriginal communities. The latest initiative is the establishment of ATSIC in 1990. This agency was formed through the merger of the Department of Aboriginal Affairs and the Aboriginal Development Commission. The new Commission is an attempt to give the Aboriginal and Torres Strait Islander people the direct power to control the programs that affect them. The Commissioners are all Aboriginals elected regionally by their constituents such that they can ensure that Aboriginal cultures, values and aspirations are reflected in the design and delivery of services as well as in the allocation of priorities.

Another new federal initiative directed toward providing a new climate in which the goals of Aboriginals can be advanced is the creation of the Council for Aboriginal Reconciliation in December of 1990. The intention behind the Council is to promote a deeper appreciation of Aboriginal culture, as well as a greater understanding of the effects of their dispossession and continuing disadvantages within Australian society.

1.5.3 Legal Rights

Aborigines and Torres Strait Islanders are generally subject to the same laws as all other Australians. There has been no history of negotiating treaties between the Crown and the original owners of the land, despite repeated directions to do so in the 19th century by the Colonial Office in England. Only one treaty was actually signed (the Bateman Treaty), however, it was

voided by the Colonial Governor of what is now Victoria as the treaty was signed by a private individual for his own benefit without approval from the Crown.

British settlement of Australia started in 1788 with the landing of the ships in Botany Bay containing prisoners transported to build a new colony. The subsequent development of disparate colonies in parts of the continent and Tasmania resulted in the dispossession and dispersal of Aboriginal peoples from their coastal and other lands that were viewed as productive by the colonists. Although there was active resistance by the Aboriginal people, their military skills and equipment were no match for the newcomers. In addition, Aboriginal societies were structured in a relatively loose fashion with people primarily residing within extended family groupings of small numbers such that it was not possible for them to organize a large scale fighting force to counteract the invasion of their territory.

The first British explorer in this region, Captain Cook, was under explicit instructions to pursue a policy of creating peaceful relations with any indigenous peoples that he encountered. Subsequent colonial representatives were regularly instructed to respect the land rights of the Aboriginals and to negotiate treaties to ensure peaceful relations and to acquire land for settlement. These instructions were repeatedly ignored or resisted by local officials.

Eventually, after almost a century of colonization, the doctrine of *terra nullius* was invoked to justify colonial practice. That is, the land was treated as if it had been vacant or desert so as to be available for claim by any nation that established settlements upon it. The fact that the land was not empty of people was discounted by the assertion that the Aboriginal people were so primitive that their occupation was inconsequential. Since they had not cultivated the land in a fashion similar to European methods of farming, and since they were believed to have no system of law or government, they could be regarded as little more than wild animals. The debate that was undertaken within Australia was so racist that the more enlightened viewpoint was represented by the perspective that Aboriginal people were in fact humans and in need of protection under British law so as to ensure that they would not simply be exterminated by settlers with impunity. This argument was ratified by the colonial courts, which also ruled that Aboriginals were subject to the common law whether they understood it or not while their systems of laws, that had been in existence for perhaps as much as 40,000 years, were ignored.

The courts have largely played a very negative role in dealing with aboriginal rights questions in Australia. Even the Privy Council chose to distinguish between the Canadian and Australian situation when it delivered its judgements in *St. Catherine's Milling and Lumber Co.* v *The Queen in reference to aboriginal title and Treaty No. 3 in Ontario and in Cooper* v. *Stuart* in reference to Queensland only months apart. The Australian courts have been little better over the past two decades. The Northern Territory Supreme Court rendered judgement in 1971 in *Malirrpum* v. *Nabalco Pty. Ltd.* in which it ruled that the doctrine of aboriginal title did not apply in Australia even though Aboriginals has maintained organized societies for thousands of years with their own legal systems and intricate uses of the land. Despite the fact that this was only a trial court decision from the Northern Territory, it has acquired a status as the ruling

decision on this issue for the whole country. It is worth noting that this decision of Mr. Justice Blackburn relied upon the *Calder* decision of the British Columbia Court of Appeal, which was subsequently reversed on its interpretation of the law by the Supreme Court of Canada on appeal. The Malirrpum decision has also been rejected by the Canadian courts, while the Australian High Court expressed a willingness in its decision in *Coe* v *Commonwealth* to consider the aboriginal title issue in the future in an appropriate case. A test case in reference to the aboriginal title claims of the Torres Strait Islanders (*Mabo* v. *Queensland*) should be decided by the High Court in the near future as the facts in the case have been judicially determined by a trial judge at the direction of the High Court.

Despite the lack of success before the courts in the past, the issue of Aboriginal land rights has received great public support and some very concrete results through legislative recognition. The first such initiative was the Land Rights (Northern Territory) Act, 1976 passed by the Commonwealth Parliament in reference to its responsibility and ultimate authority over this region. This Act enables the traditional Aboriginal owners to make claims to unalienated Crown land by lodging a formal claim with a judge who has been appointed as the Commissioner under this Act. The Commissioner conducts a formal hearing in which the claimants have to prove their direct spiritual and physical attachment to the land while others may challenge the validity of the claim or the eligibility of the land for this process. The Commissioner than renders a report to the federal Minister of Aboriginal Affairs with recommendations for action. Although the Commissioner's decision is not binding, virtually all of the reports since the creation of this process over 15 years ago have been implemented. As a result, 459,952 square kilometers of land within the Northern Territory have been conveyed to Aboriginal trustees in inalienable freehold title to hold for the traditional owners. This consists of all of the remaining Aboriginal reserves and missions, as well as huge tracts of land including the Uluru (Ayers Rock) National Park which is leased back to the Australian Parks Service, reflecting one-third of the entire Territory. There is no compensation scheme to redress the historical loss of use or regarding the land which is ineligible for claim. The Aboriginal owners must rely upon mining royalties for surface exploration rights or other means to raise funds to meet their economic needs.

The Government of South Australia also responded in a positive fashion to the land claims of the Aborigines in the northern part of the state. Legislation was passed to grant inalienable freehold title to the Pitjantjatjara, and later for another adjacent region to the Maralinga people, which comprises virtually the entire top end of the state other than one mining district or approximately 176,000 square kilometers. Similarly to the federal statute for the Northern Territory, these Aboriginal groups do not receive title to the subsurface and are still subject to the general laws in force in the state. They do, however, have a statutory right to propose the adoption of regulations designed to protect the environment within their region.

Limited land rights legislation has been passed by the state legislatures in New South Wales and in Victoria. The statues in the latter state refer solely to certain former reserves whereas in New South Wales not only was title to all reserves conveyed but local and statewide Aboriginal land councils were created to receive a portion of the state property tax revenue (7.5%) for a period

of 15 years for the Aborigines to purchase other lands on the open market and to develop the lands acquired.

Aboriginal groups also possess a number of reserves in Western Australia and Queensland. In the former the title remains with the state whereas in the latter fee simple deeds have been conveyed in trust to the communities.

Outside of these initiatives, the Aboriginal and Torres Strait Islander people are merely squatters within their homeland. So long as the courts refuse to recognize the application of the doctrine of aboriginal title to Australia, the indigenous population is left relying upon the generosity of legislative action. This means that for many of the Aboriginal groups, especially those whose traditional territory has been taken through settlement, there are no land rights. Even for those who have been fortunate in obtaining recognition for their historic ownership they possess only the most limited powers of local self-management rather than true self-government. Since there is no constitutional protection for aboriginal rights, the Aboriginal landowners are always vulnerable to a change in governmental policy that might reduce or eliminate their rights. The Land Rights (Northern Territory) Act has repeatedly been amended by Parliament since its passage in 1976, thereby demonstrating this vulnerability very graphically.

Despite the severe limitations of the Australian approach to land rights, it is important to note that almost 15% of the country has been set aside for the exclusive use of the original inhabitants of the land. This has occurred even though there has been no legal compulsion on governments to act. Due to the latter reason and the failure of the national government to demonstrate true leadership and commitment to this issue, the experience has been highly varied. Many Aboriginal groups have no land whatsoever while others have only postage stamp size communities, yet some have a huge land base consisting of virtually all their original territory. The latter is far more true for those who live in the desert and semi-desert regions of the centre or in the far north - that is, in regions that settlers have not desired. Although there is no system of discriminating among Aboriginal people based upon status or ancestry in blood quantum terms, the people of the cities, country towns and farming areas have received almost no benefit from land rights recognition. The limited statutory rights for wildlife harvesting does, however, apply to all Aboriginal people within that jurisdiction.

One of the other interesting statutory initiatives in Australia has been the passage of sacred sites legislation in many parts of the country. These statutes are designed to: confirm the right of those Aboriginal people who possess a spiritual connection to certain land to travel to and upon the land regardless of who holds title to the land; ensure that sacred sites are not destroyed; and empower the relevant Minister of the Crown to prohibit development that might damage or disrupt these places. Some of these statutes also provide protection to sacred and spiritually important objects. One example demonstrating this type of legislation is the Aboriginal and Torres Strait Islander Heritage Act passed by Parliament in 1984.

1.5.4 Natural Resources

Since the doctrine of aboriginal title has not yet been recognized in Australia, it is not surprising to discover that Aboriginal and Torres Strait Islander people are not viewed by the courts as possessing any common law rights to renewable or non-renewable natural resources. They do, however, possess certain preferential rights to harvest traditional foods, including some game, as well as exemption from certain wildlife harvesting regulations as a result of express statutory provisions. The major land rights legislation in Australia, namely the South Australian (regarding the Pitjantjatjara and Maralinga) and the Commonwealth statutes (regarding the Northern Territory) solely provide fee simple, or full, title to the traditional territory without mineral rights. Thus, the Aboriginal owners can use the surface for any purpose that they wish (such as, cattle grazing, tourism, parks, housing, etc.). The state or the Commonwealth, as the case may be, has retained full beneficial ownership over all precious metals, petroleum and other minerals.

These governments also have full legislative and proprietary capacity to determine who will develop any such resources. On the other hand, the Aboriginal owners have the right to control access to their lands. This means that any mining or petroleum company who wished to explore for or exploit subsurface resources would have to obtain a licence from the Aboriginal owners to cross Aboriginal lands and to establish any facilities on the surface of those lands. A refusal to grant such a licence by the Aboriginal owners can, in the final analysis, be overridden by the state or Commonwealth government that enacted the land rights legislation in the first place. The Commonwealth government has threatened to do so on several occasions thereby encouraging the Aboriginal owners to reach agreement with the mining company. The government has also refused to exercise this power on other occasions. It should be noted, however, that this particular issue has been the subject of great debate within Australia generally and has led to repeated amendments by Parliament of the *Aboriginal Land Rights (Northern Territory) Act.*

Another means of exercising some control over subsurface resource development has been through the sacred sites legislation as it can enable the appropriate Aboriginal group to request governmental intervention to block development where a sacred or significant site would be affected. The final decision in such a case, however, rests with the relevant government minister.

Although water is extraordinarily precious in most of Australia, there have been no special arrangements or recognition of the rights of Aboriginals and Torres Strait Islanders under either statute or the common law. Likewise, there have been no restrictions on their rights. As a result, it appears that they possess similar status to other landowners and lessees in relation to water. The same holds true in reference to other surface resources such as timber and gravel.

1.6 Canada

The situation in Canada is sufficiently well known that it is unnecessary here to describe it in great detail. Instead, the purpose is to draw comparisons with the other countries described. Nevertheless, certain basic information should be identified to facilitate this comparison.

The Aboriginal peoples of Canada consist of three major groups, namely, the Indians, Inuit and the Metis. The total population comprises approximately one million people or 4% of the country. According to the Department of Indian Affairs and Northern Development (DIAND), there were 32,260 Inuit in Canada in 1990. Due to the Indian Act, the Indian population has been divided into those who are registered, or have status, under that Act and those who are not recognized as legally being Indians for the purposes of that statute or the services made available by DIAND and Health and Welfare Canada. The 1990 statistics of DIAND recorded 490,178 registered Indians, of whom 86,000 gained status through the 1985 amendments to the Act (Bill C-31), while it estimated the Metis and non-status Indian population at 370,000. The Native Council of Canada estimates the latter two groups as comprising 750,000 people. The 1991 DIAND estimates projected a total of 521,461 registered Indians, of whom 205,188 reside outside of reserves, or 39.3% of the total status Indian population.

Although great progress has been made over the past two decades, the Aboriginal population in Canada remains the poorest of the poor with lower life expectancies, educational levels, employment rates, etc. as well as extraordinary over-representation in the prisons and child welfare agencies across the country. There are now, however, some 262 First nation managed schools serving 31% of the status Indian students who live on reserve. Post-secondary enrollment had mushroomed from almost nothing 20 years ago to 18,500 in 1990.

1.6.1 Financial Expenditures

The budget estimates for the 1992-93 fiscal year of DIAND project expenditures of $4.3 billion. This consists of $816 million for social assistance and welfare services; $903 million for education, including $202 million for post-secondary costs; and $92 million for the Prime Minister's so-called native or four pillars agenda. DIAND also estimates 2,682 person years for staffing the Department in the new fiscal year. In addition, the Department of Justice announced a modest new initiative last August of $25 million over five years while the Solicitor General's budget for Indian policing on reserves will double in 1992-93 as a result of the transfer from DIAND of funding for this program of about $30 million. The Secretary of State maintains responsibility to fund the core operations budgets of friendship centres and political organizations as well as Aboriginal language initiatives (in 1991-92 this totalled approximately $57 million dollars, although over $14 million of this was temporary constitutional consultation funding), while Health and Welfare Canada funds all health initiatives, including uninsured health care for status Indians and the Inuit. A range of other departments and federal agencies (for example, CMHC, CEIC, etc.) also fund specific programs that are of importance to all aboriginal people.

It is important to note that the lion's share of federal expenditures are limited to the Inuit and on-reserve Indians while the off-reserve population is left to their own devices or to be assisted by the provinces. Federal data suggest that the off-reserve population pay from $4 to 6 billion per year in taxes while on-reserve Indians, who are exempt from income and a number of taxes on goods consumed on reserve, pay an unknown amount of taxes for goods consumed off reserve or for those buried within the purchase price of goods and services.

1.6.2 Land Base

There are 2,301 reserves across the country totalling 6.55 million acres held by the Crown in trust for the approximately 600 bands or First Nations. This reflects about 1% of the land mass of the country. A further 25.25 million acres have been dedicated for exclusive Aboriginal use under the three land claims settlements that have been implemented to date, two of which are in Québec. Two other comprehensive claims that have been negotiated but not yet ratified contain 123.16 million acres.

1.6.3 Legal Status and Constitutional Structure

The Canadian Constitution in 1867 assigned exclusive responsibility to Parliament under section 91(24) for «Indians, and Lands reserved for the Indians». This gave Parliament two heads of legislative jurisdiction as it could enact laws for both the people referred to in the Constitution as «Indians» and also in relation to all of the lands that remained unceded territory (which is not the same as Indian reserves set aside under the Indian Act). Parliament has exercised this authority since 1868 by passing legislation in relation to some of the Indian people and some of their lands.

The jurisdiction of Parliament regarding «Indians» was determined by the Supreme Court of Canada to include the Inuit (in *Reference re Eskimos* in 1939) and has been used by Parliament to vary the definition of Indians narrowly or broadly over the intervening years. While the federal 91(24) jurisdiction was traditionally viewed as permissive rather than mandatory, this may have changed as a result of the development of the fiduciary obligation doctrine by the courts upon the Crown in right of Canada and the terms of s. 35 of the Constitution Act, 1982. It is interesting to note that the federal government did quickly assume both its jurisdiction in theory and in practice in Québec by taking over all expenditures for health and social services for the Inuit after the Supreme Court's decision.

The position of the Metis in regards s. 91(24) has remained a subject of legal and political debate for many years with the federal and Alberta governments taking the view that the Metis do not fall within s. 91(24) while all other provinces and most commentators, as well as the Metis, assert the contrary perspective. Although in my opinion the Metis are within s. 91(24), the continuing uncertainty in this regard has left the Metis as a political football passed back and forth between the two levels of government resulting in no special legislation outside Alberta and few governmental initiatives designed to meet their needs.

In addition to the Indian Act, the federal government has absorbed the role formerly reserved to the Imperial government of negotiating treaties in the name of the Crown. Literally hundreds of treaties were negotiated with the Indian nations in the pre-confederation era in what are now the Atlantic provinces, southern Quebec, southern Ontario and Vancouver Island. Since 1867, the Crown in right of Canada has entered into 11 numbered treaties in northern Ontario, the Prairie provinces, northeastern British Columbia and parts of the Yukon and NWT as well as the Williams Treaty of 1923 in eastern Ontario. These post-confederation treaties, along with those from the earlier era in Upper Canada, on their face share in common the surrender of exclusive land rights to the Crown by the Indian parties in return for annuities, confirmation of wildlife and fishing harvesting rights, the preservation of certain lands for exclusive Indian use as reserves, and other commitments. The Indian version of many of these treaties, however, differs dramatically from the written word.

The Inuit, with a few minor exceptions, did not sign treaties. The land rights of the Metis were also recognized as, for example, through signing the adhesion to Treaty No. 3 in Ontario as a distinct indigenous people. The more common approach was for the Metis frequently to join in the treaties with their Indian relatives or to take scrip under the Manitoba Act and subsequent Dominion land legislation. As implemented under federal laws which are currently being contested before the Manitoba courts by the Manitoba Metis Federation and the Native Council of Canada), Scrip entitled the holder to exchange this certificate for a specified number of acres of land to be held in fee simple by the individual rather than collectively as in the case of reserve lands.

The Constitution Act, 1982 has dramatically changed the relationship between all Aboriginal groups and the rest of Canada. Not only does section 25 of the Charter protect «aboriginal, treaty or other rights or freedoms» of the Aboriginal peoples from being abrogated by the remaining provisions of the Charter, but section 35 confirms the «existing aboriginal and treaty rights» as part of the «supreme law of Canada» (s. 52(1)). «Aboriginal peoples» is also defined in s. 35(2) so as to clearly include «the Indian, Inuit and Metis peoples,» while their unique rights have been guaranteed equally among female and male Aboriginal persons through the 1984 amendments adding s. 35(4). These latter amendments also made certain that prior and future land claims settlements will receive the same constitutional status as treaties (ss. 25(b) and 35(3)) so as to encompass the two settlements reached in the 1970s in Quebec and that no future amendments to the constitutional provisions that explicitly apply to Aboriginal people can occur without having a First Ministers' Conference to which their representatives will be invited (s. 35.1).

The effect of these provisions has had a significant impact upon the jurisprudence as well as upon the political stature and public profile of the Aboriginal peoples in Canada. The precise nature of the changes in the caselaw outstrips the scope of this paper but suffice it to say that our perceptions of what constitutes a treaty has been broadened considerably by the decisions of the Quebec Court of Appeal and Supreme Court of Canada in the *Sioui* case while it is now clear as a result of the latter court's decision in *Sparrow* that aboriginal and treaty rights can

render federal and provincial laws inapplicable to Aboriginal people in appropriate situations. The Court also recognized in *Sioui* that Aboriginal peoples at least once constituted independent, sovereign nations (without commenting upon their current status) who could enter into treaties as such with the Crown and its representatives. The Supreme Court has also developed a new doctrine called fiduciary obligations in the *Guerin* and *Sparrow* cases and stated that it applies to restrain the behaviour of both federal and provincial governments in the way they deal with Indian, Inuit and Metis peoples. Let me mention one other recent and important decision of the Supreme Court that has a bearing and that is the *Simon* case, in which the Court made clear that treaty rights are not limited to status Indians but can apply to any descendant of the treaty beneficiaries.

1.6.4 Natural Resources

The subject of natural resources in relation to Indian, Inuit and Métis peoples and their lands in Canada is an extraordinarily complex area with great diversity in legal circumstances across the country as well as a significant degree of uncertainty in the law. This is a function of the great variations among the terms that have been negotiated in relation to this subject in the treaties over the many decades as well as in the modern land claims agreements (such as the JBNQA, Northeastern Quebec Agreement, the Inuvialuit Agreement, as well as the most recent ones that have not yet been ratified for the Yukon Indians, the Gwichin and the Inuit of Nunavut). In addition, the *Indian Act*, and its Indian Minerals Regulations, as well as the Indian *Oil and Gas Act* have a direct affect on this issue in reference to reserve lands. To further complicate matters, some provinces (notably British Columbia through Order in Council and Ontario under its 1924 Indian Lands Agreement now replaced by a 1986 version with a similar provision) assert rights in relation to a share of specified subsurface resources on reserve lands when they are exploited at the decision of the First Nation. British Columbia has a further claim to seize up to 1/20th of each reserve for public roads and related purposes including the sand and gravel necessary for such roads.

It should also be realized that the Canadian courts have been less than forthcoming as to the precise parameters of aboriginal title when it comes to ownership of or an interest in both surface and subsurface resources. The vast majority of decisions have simply avoided these questions or used rather vague language. The most detailed judgement in recent years on this point was the Bear Island decision at trial by Mr. Justice Steele. He concluded that aboriginal title did encompass rights to natural resources but only to the degree to which they were used traditionally. Through this frozen in time, or museum diorama, image the Teme-Augama Anishnaabe were declared to possess rights to hunt, fish, and trap all wildlife, to use timber, clay, and other substances for the same purposes that were done historically (e.g., pipes, snowshoes, canoes, etc.). The Supreme Court of Canada dismissed the appeal from the decision but expressly stated they were not adopting the legal views stated in the lower courts. As a result, this relatively clear, but extremely narrow, articulation of aboriginal rights to natural resources is of dubious validity.

The situation in Canada, therefore, is so diverse that it is impossible to generalize in national terms. Instead, the best approach is to examine the rights of each First Nation or other Aboriginal group in light of all of these factors to determine which of them are relevant in reaching a conclusion. Even with such a local examination, however, it should still be realized that there may not be a definitive answer available as our jurisprudence is quite limited upon some very vital questions, such as rights to water.

1.7 Overall Assessment Among States

How then does Canada compare to these other countries? The answer is a mixed one. Canada looks very enlightened and positive in relation to Scandinavia and Australia but far less so when examined in comparison to many aspects of American and New Zealand policy. Even these statements are crude, however, as there are aspects of our experience that are better than other countries under inspection as well as facets that are worse. It is necessary, therefore, to examine certain key points of analysis more closely.

The existence of constitutional protection for aboriginal and treaty rights is unique to Canada among the countries studied, although constitutional guarantees of rights for indigenous peoples are also present in the new constitutions of Brazil, Columbia and Nicaragua. On the other hand, the right of Aboriginal peoples to govern themselves and determine their own futures under their own laws has yet to be recognized in Canada as it has been in the United States for over 200 years. This has occurred even though our doctrine of aboriginal title has been based largely upon the same decisions of the U.S. Supreme Court that articulated the «domestic dependent nation» concept of residual Indian sovereignty at the same time as determining the existence of aboriginal rights and title as part of the common law. Indian tribes in the U.S.A., therefore, have clear jurisdiction to enact all civil laws to apply to anyone within their territory along with criminal laws over Indians, except for 16 major crimes. Aboriginal peoples may have the same sovereign status in Canada protected by s. 35 of the Constitution Act, 1982, but our courts have not yet declared the Canadian law to incorporate this part of the American jurisprudence. The official position of federal and provincial governments, at least if one judges their position based upon their arguments in court and their actions on the ground - as opposed to occasional political statements from some Premiers - is that the right of self-government or internal sovereignty is dependent upon obtaining a constitutional amendment.

The Indian and Inuit peoples in some parts of Canada are clearly seen as having a legally recognized interest in their traditional lands such that land claims settlements have been reached in recent years or are under active negotiation. These settlements look reasonably good in comparison with the position of indigenous peoples in the other countries examined. On the other hand, the Metis are excluded from land claims negotiations in Canada except in the NWT (and possibly in Labrador where a recent claim has been filed with the federal government by the Labrador Metis Association), while non-status Indians are likewise left out except in the two northern territories and in Labrador concerning the Innu. From the perspective of southern Metis and non-status Indians, the Canadian policy appears to be one based on aspects of apartheid and

inequality tied to federal recognition solely of bands and Inuit communities that renders Canada worse than all of the other countries under review. The colonialist inspiration for the Indian Act still plays a determinative role in 1992 in defining the nature and content of federal and most provincial policies on land claims.

If one considers aboriginal questions from the vantage point of total land quantum that is currently in the hands of or dedicated for the exclusive use of the original owners of the land, then Australia has the best record even though its courts have failed to accept the application of the common law doctrine of aboriginal title to that nation. Scandinavian treatment of the Sami would then deserve the worst rating with New Zealand a close second.

The American Indian tribes are also in the best position in terms of legal recognition of their rights over natural resources within their reservations as well as in their treaty areas. They have further obtained the most recognition for their aboriginal rights to water and the beds of waters. The Congress has been pursuing a number of very positive legislative initiatives over the past 15 years that are in keeping with its recognition of the sovereign status of the tribal governments and their needs for economic and social assistance in order to become fully strong and self-sufficient communities.

Canada does, however, appear to make the largest devotion of fiscal resources to the indigenous population of any of these nations, while also having the largest bureaucracy employed on aboriginal affairs. It is achieving relatively the best success in addressing the needs for post-secondary education and improved health care while devolving less control over these matters than in the USA.

2. *Quebec vis-a-vis Other Provinces*

Since the federal government has the lead constitutional role in reference to Aboriginal peoples, there is nothing resembling uniformity in the policies or practices of the provincial governments in this realm. Some are very active in reference to services and legal issues while others have done almost nothing and rely upon the federal government to pursue any policy thrusts in these areas. Rather than reviewing each province separately, I have chosen to examine a number of themes that are of particular relevance to Quebec in order to determine how its response compares to that taken by other provincial governments.

Before exploring certain specific issues in detail, let me provide some relevant data. According to the 1986 census, which has been widely accepted as an underestimate even by Statistics Canada, the total Aboriginal population in Québec at that time was 80,945, or 1.2% of the overall Québec population. This figure is divided into 46,725 registered Indians (although official DIAND data only recorded 38,962 status Indians in that year), 2,270 Inuit and 47,785 Metis and non-status Indians. The DIAND data for 1990 merely recorded 48,551 status Indians of which 34,744 were residing on reserve and 13,807 off reserve. This translates into a ratio of

71.6% living on reserve, or a much higher ratio than the average in Canada. As is true across the country, the percentage of registered Indians living outside of reserves is continuing to grow; for example, almost 82% of all status Indians were living on reserve in Québec in 1976 such that over 10% of this population has migrated away from reserves in the past 15 years thereby moving primarily into the realm of provincial jurisdiction and fiscal responsibility.

The registered Indian population in Québec as of 1990 represents 9.9% of the Canadian total in comparison with 3.9% in the Atlantic, 23% in Ontario, 14.7% in Manitoba, 15.4% in Saskatchewan, 12.3% in Alberta, 17.1% in British Columbia, 1.3% in the Yukon and 2.4% in the NWT. As this data makes apparent, the largest registered Indian population in Canada lives in Ontario followed by B.C. with Québec ranked 6th. According to a study conducted by Professor Vic Valentine tabled by the Native Council of Canada on March 12, 1992 at the Ministers' Conference on the Constitution, Québec contains the lowest social distance, in accordance with socio-economic criteria, of any province between the Aboriginal and non-Aboriginal populations.

Lands exclusively dedicated to Aboriginal use cover 14,770 square kilometers of Québec. Almost 95% of this total have been set aside under the James Bay and Northern Quebec Agreement in reference to the Cree and the Inuit and the Northeastern Quebec Agreement regarding the Naskapi. The remaining 5% is allocated as reserves and settlements to the other two-thirds of registered Indians in the province, while the Metis and non-status Indians have no lands exclusively for their use. Nevertheless, the amount of land recognized as belonging exclusively to Aboriginal people in Québec is much higher than in any other province as a result of the two land claims settled in the 1970s.

2.1 Aboriginal Languages

There are 53 distinct languages that have survived centuries of colonization and linguistic suppression in Canada with numerous dialects emanating from 10 major language families. Tragically, many experts predict that up to 40 of these languages may disappear within the next two decades with some having only a few living speakers left. Only three of these languages are on a reasonably solid foundation (Inuktitut, Cree and Ojibway) and even they are not adapting sufficiently quickly to develop new words to respond to increasing consumerism and technological change.

The importance of language to self-identity and transmission of knowledge cannot be overstated. Basil Johnston, an Ojibwa writer from Ontario, has stated that when languages disappear Aboriginal peoples «lose not only the ability to express the simplest of daily sentiments and needs, but they can no longer understand the ideas, concepts, insights, attitudes, rituals, ceremonies, institutions brought into being by their ancestors; and, having lost the power to understand, cannot sustain, enrich or pass on their heritage.» This means that «no longer will they think Indian or feel Indian».

It almost goes without saying that there is no homeland other than North America for these languages. They cannot be revitalized by immigrants or through returning to a mother country. Thus, when they disappear here they truly vanish from the face of the earth. Aboriginal languages can sometimes cease to exist within a region while still surviving elsewhere. For example, Malecite and Huron are no long spoken by these Nations within Quebec but the former survives (albeit barely) in New Brunswick while efforts are underway by linguists and the people of Loretteville/Wendake to revive the latter.

Overall, the situation in Quebec is far better than most regions of Canada as 8 languages are still spoken. Fortunately, Inuktitut (spoken in 14 Arctic communities), Cree (spoken on 9 communities), Montagnais (spoken in 11 communities), Attikamek (spoken in 3 communities), Algonquin (spoken in 9 communities), and MicMac (spoken in 3 communities) have a significant degree of use. The Mohawk language is undergoing a renaissance at Kahnawake through the efforts of the Mohawk Survival School (Karonhia-Monhnha). The Abenaki language is facing extreme jeopardy and there are serious concerns about the future of Attikamek.

One of the major achievements emanating from the James Bay and Northern Quebec Agreement (JBNQA) has been the strengthening of formal instruction in Cree and Inuktitut by the Cree and Kativik School Boards respectively. The JBNQA provided a clear commitment that the education systems in Norther Quebec would be radically changed to accommodate the aspirations of the Cree and Inuit for curriculum that would more effectively meet their needs, including the preservation and promotion of their languages. The Department of Education has supported this development actively as well as concretely through financial assistance. The Assemblée Nationale has also played a positive role through enabling legislation.

Although French has been declared to be the dominant language of the province through the Charter of the French Language (Bill 101), the Preamble of the Charter expressly recognizes the right of Indians (Amerinds) and Inuit to preserve and develop their own languages and cultures. The Charter expressly exempts reserves from its application, while formally ensuring the Cree and Inuit of their authority to provide instruction to their children in their respective languages (s. 87). The Cree and Kativik School Boards are committed by the Charter, however, to pursue the use of French as a language of instruction to enable students to have the opportunity for postsecondary education in French institutions within Québec and to develop the capacity to conduct their administrative affairs in French (s. 88).

There has been some resistance to the application of the Charter among certain Aboriginal groups. There is no exemption for the off-reserve population and their languages such that they are treated as if they were immigrants in reference to their own languages with schooling options determined the same as for long resident French and English speaking peoples. Those First Nations and the Inuit who have relied upon English as a second language have voiced some concern over the possible removal in the future of the limited exceptions in the Charter that currently apply to them unless they obtain federal or constitutional assurances.

No other provincial government has made the limited yet relatively concerted efforts to support the survival of Aboriginal languages on a par with Québec, although the Province of Ontario has provided some financial help to encourage Aboriginal language broadcasting.

2.2 Education

The Government of Quebec has in general been far more supportive of educational initiatives, particularly for the Cree and Inuit, than any other provincial government in Canada. This has also been true at the post-secondary level. Approximately 48% of status Indian and Inuit students are enrolled in provincial schools through tuition payment agreements with DIAND. A further 31% attend band-operated schools while the remaining 21% go to federal schools. Only the latter two types offer any culturally relevant courses. The government of Québec allocated $92,030,343 in the 1990-91 fiscal year toward the education of Aboriginal peoples with the vast majority of this committed to the Cree and Inuit by virtue of provisions within the JBNQA. It should be realized, however, that this greater expenditure is a result of provincial obligations negotiated through the JBNQA.

2.3 Health and Social Services

The Québec government devoted $55,508,480 during the 1990-91 fiscal year through the Ministry of Health and Social Services to providing services directly or via Aboriginal organizations. A number of the latter have been established to operate as an adjunct to the existing provincial social service network. The Province of Québec has not been seen as a leader in facilitating the development of autonomous Aboriginal organizations in this sphere although its record is far superior to that of many other provinces. Manitoba has been in the forefront in co-operating in the creation of Indian controlled child and family services agencies in conjunction with DIAND since 1980. This lead has now been followed to a lesser degree in Ontario and Alberta.

One of the more innovative efforts of Québec has been through enacting An Act to Ratify the Agreement Concerning the Building and Operating of a Hospital Centre in the Kahnawake Territory in 1984. This statute authorized the Mohawks of Kahnawake to construct the hospital and to receive provincial funds for its operation as a private establishment completely administered by the Mohawks. To the best of my knowledge, this legislation and arrangement is unique in Canada.

2.4 Economic Initiatives

Québec has been a leader among provinces in sponsoring economic development within Aboriginal communities and First Nations through provision of special grant programs. One of the most innovative initiatives is a direct result of provisions contained within the JBNQA and the Northeastern Quebec Agreement. An income support programme was negotiated under the JBNQA to encourage and perpetuate the traditional hunting, fishing and trapping lifestyle and

economy of the Cree and Inuit. This commitment has been further implemented by An Act Respecting the Support Program for Inuit Beneficiaries of the James Bay and Northern Quebec Agreement for their Hunting, Fishing and Trapping Activities of 1982. The total amount allocated to meet this purpose in 1990-91 by the province was $2,725,743, which was spent for assisting these activities through the provision for funds for equipment, travel, courses, marketing, wildlife studies and other related matters.

The province also devoted over $11 million under An Act Respecting Income Security for Cree Hunters and Trappers Who are Beneficiaries Under the Agreement Concerning James Bay and Northern Quebec of 1989 to subsidize these harvesting activities for individuals who were unable to earn a sufficient income from the commercial aspects of this labour while seeking to maintain this traditional lifestyle. Again, this positive initiative is somewhat tempered by the realization that it reflects obligations undertaken as part of the JBNQA through which aboriginal title was surrendered for the benefit of the province by the Cree and Inuit to a territory the size of France.

Another interesting effort of the Government of Québec was the passage of An Act Respecting the James Bay Native Development Corporation in 1980 to stimulate investment and economic activity within the Cree territory.

2.5 Land Claims

The Province of Québec was the first province in Canada to accept the continued existence of aboriginal title and to respond to this recognition through seeking to negotiate land claims settlements. This was not due to altruistic reasons or a function of a change in political perspective as it reflected the decision of Mr. Justice Malouf in the Kanatewat Case of 1973. Nevertheless, the Province did quickly respond to the substance of this decision positively rather than rely upon the vacation of the injunction granted by Mr. Justice Malouf one week later by the Court of Appeal. The Court of Appeal subsequently reversed Malouf J. two years later. The JBNQA of 1975, followed by the Northeastern Quebec Agreement three years later, presented a major breakthrough in the relations between Aboriginal peoples and other levels of government in Canada. Although both Agreements have been criticized over the years for a broad range of reasons, it must be appreciated how significant they were for their time and how they represented a dramatic change with prior policy.

This willingness to negotiate aboriginal title rather than pursue endless litigation, as has historically been the approach of British Columbia, has clearly been a far more enlightened policy. It is currently being followed in relation to the negotiations with La Conseil Attikamek Montagnais in the North Shore. The same approach has not, however, been consistently applied when it comes to the Mohawks, Algonquins, Micmac and many off-reserve Indian and Metis groups. Nevertheless, in comparison to the attitude of other provinces, Québec has adopted an overall position that can be perceived as far more favourable to Aboriginal peoples and their interests in their traditional territory.

2.6 Self-Government

The Government of Québec has also been the provincial leader in fostering the desires of Aboriginal people to exercise greater control over their lives and the affairs of their communities. The JBNQA once again has showed the way to some degree through its provisions guaranteeing the creation of new regimes and modifications to existing ones in a large number of spheres of human endeavour. The commitments contained in this Agreement have resulted in provincial legislation (e.g., the Northern Villages and Kativik Regional Government, An Act to establish the Makivik Corporation, and the Cree Villages Act) as well as the Cree-Naskapi (of Quebec) Act by Parliament. Although these statutes merely provide delegated powers to the Cree, Naskapi and Inuit, as opposed to implementing the widespread Aboriginal desire for recognition of an inherent right to self-government, they still represent an advance over the prior situation. Only the Sechelt First Nation of B.C. has obtained any enhancement of the powers available to bands under the Indian Act, and this was obtained solely in 1986 and primarily by federal legislation.

The Assemblée Nationale took a further bold step forward in 1985 with the adoption of a resolution in favour of the sovereignty of most of the Aboriginal nations within the province (not including the Malecite and the Metis). The Resolution endorsed the acceptance of the ancestral rights of the Aboriginal peoples, their culture and their right to autonomy in Québec. These rights were recognized based on the historical legitimacy of their claims and on the value to Québec society to have harmonious relations with the indigenous population. The Resolution demonstrates a significant degree of respect and active support by the government for the goals and unique position of the identified Aboriginal groups.

While the Government of Ontario has signed a Declaration of Political Intent with the First Nations in that province in 1985, and more recently a Statement of Political Relationship in August of last year, these have been accords with the government rather than resolutions of the Legislature. It should be noted, however, that the latter document does pledge the provincial government to respect and recognize the inherent right of the first nations to self-government, whereas the Resolution of the Assemblée does not. Neither of these policy thrusts provide similar recognition to off-reserve Indians and Metis. They also have not been replicated to date by any other provincial government or by the Parliament of Canada.

The latest effort of the Government of Québec has been to develop a new policy on Aboriginal matters. This has been pursued through a series of symposia in four regions of the province during the last fall. The results of this process is outlined in five discussion papers recently released. A new policy should be submitted to the Cabinet in the very near future.

Negotiations for self-government agreements are underway in many parts of Canada between the federal government and First Nations recognized under the Indian Act. These negotiations are occurring outside the context of a consitutional amendment and generally do not involve the relevant provincial government. Ontario is somewhat of an exception to this pattern (as is the

Yukon Territory) as it is directly involved in a number of major self-government negotiations. A further exception relates to the Province of Alberta that has negotiated a local government arrangement with the Metis settlements, which have been implemented through provincial legislation.

Conclusions

The policies and attitudes of the Government of Québec in relation to Indian, Inuit and Metis peoples have been the subject of great controversy within as well as outside the province. The sense of negativity that has often been directed toward the provincial government has, in many ways, been triggered by a handful of incidents of great import rather than by the overall approach of the government. The events at Kahnawake and Kanesatake of 1990, as well as the overwhelming changes introduced to the lifestyle and territory of the Cree through James Bay I, have created an image of the province as one that resists Aboriginal aspirations. The active resistance of the Cree to La Grande Baleine has only fueled this sense of animosity as has the frequent expression of hostility toward this opposition by senior officials of Hydro-Québec and other representatives of the provincial government. The fact that the Grand Council of the Crees has regularly been compelled to initiate court action to obtain recognition of the environmental provisions of the JBNQA and their applicability to la grande baleine, and the judicial approval of their arguments, has further enhanced the image that the Province is willing to ignore the concerns of the Cree to meet the interests of the southern majority. The possibility of separation, coupled with the assertions by MNAs that there is no requirement to obtain the consent of the Aboriginal population within the borders of Québec, has only further inflamed passions.

If one attempts to examine objectively the record of the federal government in comparison with other countries, and of Québec in relation to other provinces within Canada, one cannot help but conclude that the performance of both Québec and Canada has been superior, relatively speaking, in most areas. This is not to suggest that the record has been outstanding, as the effects of colonization and dispossession of the Indian, Inuit and Metis peoples have been tragic beyond belief. Our history has been one in which our European ancestors at an early stage pursued positive and respectful policies toward the Nations they encountered due to economic, political and military self-interest. This attitude, however, was quickly jettisoned when the motivating forces disappeared and our self-interest switched to favour oppression and assimilation so as to facilitate the purchase - or theft - of their lands and its resources as well as the denial of their inherent rights to maintain their ways of life, traditions, cultures, religious beliefs, laws and governments. The history of colonization in the land now called Canada has been an unmitigated disaster from the perspective of Aboriginal peoples and from the view of any neutral observer.

It has only been over the past two decades that as a society we have moved away from the policies of complete assimilation, that was championed in the federal White Paper of 1969. This has not been an easy transformation in the thinking of non-Aboriginal peoples. This change has,

however, been made far more difficult for federal and provincial governments that have vigorously resisted the development of a new relationship based upon mutual respect and the sharing of the bounty of this land that was at the cornerstone of the original relationship symbolized by the treaties of peace and friendship of the Atlantic and the Two Row Wampum of the Iroquois Confederacy of the 1600s and 1700s.

Significant progress has been made over the last 20 years spurred on as a result of a number of major court cases, the constant pressure of Aboriginal peoples and their political organizations, the receptivity of the Canadian public to Aboriginal demands, the constitutional changes of 1982 recognizing and affirming the «existing aboriginal and treaty rights of the aboriginal peoples of Canada», the perception that prior policies were a disaster, numerous inquiries and parliamentary reports and the acceptance by at least some governments that justice and Canadian law required the negotiation of new arrangements. This progress should not be underestimated as we have come a long way in the legal and political arenas.

On the other hand, governments should not be quick to pat themselves on their collective back for doing what they are often compelled by the courts to do in order to honour their legal obligations. Likewise, the fact that Québec and Canada appear reasonably progressive when compared to a number of other western economically developed countries says more for how poor the track record is in those other regions than serving as a commendation for our track record. It must also be noted that our «achievements», if they can truly be called that, have been regionally limited within both the country as a whole and within Québec. While Québec has a very impressive record in comparison to other provinces when examining province-wide data, this declines dramatically when the effects of the James Bay and Northern Québec Agreement are excluded. Other major initiatives on the legal and policy fronts within Québec and within Canada as a whole are similarly limited to particular Aboriginal groups or regions of the country and province.

Therefore, there is still a very long road to travel before the Governments of Canada and Québec can properly claim to be global leaders in developing a new relationship with indigenous peoples that throws off the remaining shackles of colonialism and apartheid policies. Far too many Aboriginal people continue to live in third world conditions confronted by little more than poverty and despair despite the richness of their original territory and the achievements reached by generations of immigrants to their lands. We have yet to accept fully that a proper basis for our future is mutual respect of our differences, including the Aboriginal desire for autonomy or self-determination, and partnership in the enjoyment of this land and in the decision-making processes that will regulate our collective future for the betterment of all.