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Developing Legal Frameworks for Urban Aboriginal Governance¹

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Introduction

Five centuries of contact between Europeans and the Indigenous peoples have had a profound impact upon all the people who now live in the territory known as Canada. While many benefits from contact have accrued to both sides over the centuries, the overall experience has been devastating to the original inhabitants of this land. No one can deny the ravages of introduced diseases that decimated millions of Indigenous peoples, the loss of the vast majority of their traditional territories, the subjugation of independent nations,² the disastrous effects of colonization, and the legacy of despair endured by generations who attended Indian residential schools and their children.

First Nations have had their sovereignty incredibly undermined by the *Indian Act*,³ as well as other means since Confederation. That said, this distinct federal statute recognizes at least some very limited jurisdiction and community governmental authority while seeking to destroy all aspects of nationhood. As such, it has been a small bulwark against the massive forces of total assimilation that prevailed through much of the nineteenth and twentieth centuries. Although the *Indian Act* was imposed upon First Nations with no respect for their aboriginal and treaty rights or their inherent sovereignty, the mere existence of federal legislation—especially when coupled with a tiny residue of traditional territory as reserves—has helped to ensure the continued existence of First Nations as polities separate from mainstream Canada. The Métis Settlements legislation⁴ in Alberta has played a similar role for the last seventy years for the 5,500 Métis living on the surviving eight settlements with their 1.25 million acres of land.⁵

For First Nations, Inuit, and Métis peoples living off a recognized land base, however, and especially for those living in the more populous southern portions of Canada, the challenge simply to survive as distinct peoples with their own unique needs, interests, and aspirations has been far greater indeed. No non-Indigenous government in Canada has ever been prepared to provide significant space in which governments created by and for Aboriginal peoples can flourish—unless these governments have a recognized, exclusive land base. Even then, Canadian governments have demonstrated no willingness to recognize the legitimate entitlement of Aboriginal communities to retain their traditional governments. Any acceptance of Aboriginal self-government that has emerged over the last few

decades has been grudging, and has been extended only so long as those governments were arranged on terms similar to western democratic forms.⁶

On the other hand, Canada has been blessed with a long history of Aboriginal peoples⁷ seeking to fill a critical void in the provision of important services that have been neglected by federal, provincial, territorial, and municipal governments. Informal organizations and incorporated non-profit societies created by Aboriginal people have operated in urban areas for well over four decades and these entities have tried, with very limited financial resources, to assist those most in need of aid. The Friendship Centre and the Native Court Worker movements began in the early 1960s and associations attempting to represent the political goals of these constituencies sprang up all across the country in the latter part of that decade. Local agencies have been established over time to offer a broad array of services concerning counselling, employment and job training, cultural activities, youth and elders programs, health care, education, housing, child protection, and transitional adapting to the urban environment, among others.

Some of these entities (for example, alternate high schools and child welfare agencies) provide services that fulfill a statutory function, while others interact on a daily basis with government departments and the dominant court system. Provincial governments have also on occasion created frameworks that acknowledge the role of non-governmental organizations (NGOs) in fulfilling functions that possess a formal legislative base and can exercise statutory powers. Provinces embarked upon this strategy generations ago with non-Aboriginal agencies—particularly those grounded on linguistic and religious distinctions. Provincial governments recognized the official status of schools, hospitals, and child welfare services that offered an “acceptable” alternative to similar government-operated institutions, yet met all prevailing statutory requirements. More recently, local Aboriginal organizations have achieved some degree of recognition in a handful of cities. Provincial legislation also exists that authorizes the use of private arbitration as a final and binding mechanism for resolving disputes among any parties who voluntarily reach an agreement in writing to put their dispute forward for binding resolution with the assistance of an independent arbiter or panel.⁸

The purpose of this paper is to draw upon some of the existing literature⁹ and ongoing experiences to assess the current lay of the land in the urban context outside of exclusive Aboriginal lands. I will not be examining any expansion of *Indian Act* reserves as the vehicle to address economic needs and governance in the city, both because this topic has already been carefully examined elsewhere¹⁰ and because its relevance to date has been limited to citizens of an existing specific First Nation. Rather, the alternative considered here is the opportunity for negotiating new bilateral or tripartite agreements that could serve as catalysts for generating federal or provincial legislation providing statutory frameworks for the following:

1. Formal recognition for non-profit Aboriginal institutions exercising statutory mandates;

2. Formal recognition for Aboriginal institutions of governance that possess specified subject areas of law-making jurisdiction;
3. A legal foundation for Aboriginal institutions with the authority to settle disputes. These could be invoked on a voluntary basis by Aboriginal individuals and organizations seeking an alternative to provincial and territorial court systems;
4. An enabling statutory framework in which Aboriginal peoples in an urban area could choose to bring existing institutions and agencies together as the public services of their duly elected government.

This essay will begin by briefly describing common approaches towards governance among countries entailed in the concepts of governance and jurisdiction (I) before reviewing the historical, present and legal situation of Aboriginal peoples within Canadian cities (II). It will then summarize the nature of urban Aboriginal service delivery agencies and outline existing legislative mandates available in selected key sectors (III).¹¹ The paper will explore recent initiatives that could provide an inspiration for elements of urban Aboriginal governance before finally considering major questions that will need to be addressed by any effort to begin making Aboriginal self-government a reality within the urban context (IV). Whether First Nations, Inuit, and Métis peoples wish to seek fully to govern themselves outside an exclusive land base, or simply to exercise more direct control over their lives through more extensive or a greater variety of institutions of governance, is for them to decide.

My focal point within this paper is upon considering potential governance futures for Aboriginal peoples operating collectively, where their numbers are sufficient to support taking distinctive approaches to meet their needs and aspirations. This entails having a population of sufficient size and talent that its members can be actors, rather than recipients, in the exercise of self-governance. I also consider only communities that do not possess a recognized “land base.” By “land base” I mean territorial space that has been traditionally occupied since prior to Crown assertions of sovereignty and is either retained as Aboriginal title under Canadian common law (confirmed by historic or modern treaty commitments) or has been statutorily protected for exclusive use by Aboriginal communities. The scope of this paper is limited to exploring situations where no lands have been recognized by the state and demarcated for the exclusive use of specific First Nations, Inuit communities, or Métis peoples.

A few brief remarks on other topics that are beyond the scope of the paper. The paper does not address the potentially vast universe of circumstances in which Métis, non-status Indians, or both, dominate the local electorate to the extent that they can effectively run municipal governments without any formal identifiable signs that they are functioning as Aboriginal governments. These cases range from Inuit hamlets and villages in the North that are public governments of limited jurisdiction due to their size, to many rural and remote communities

within certain provinces. This paper is geared, rather, toward circumstances in which the Aboriginal population is not the majority—those in which one can not rely upon demographic factors and an active electorate so as to win at the polls. This speculative piece explores what may be possible for First Nations, Inuit, and Métis peoples that wish to carve out jurisdictional space in which to govern their own affairs while residing within the territory of an already-existing public government controlled by non-Aboriginal Canadians.

Further, despite my focus here on service delivery organizations, I do not suggest that providing programs and services equates with being a government. That said, governments do in fact carry out such tasks—at least when they have not subcontracted the role to for-profit or non-profit entities to do so. Scoping the paper as I do also means that many other urgent issues of concern for Aboriginal peoples in Canadian cities will be left untouched.¹²

Finally, it should be noted that the concept of “governance” elaborated by the Royal Commission on Aboriginal Peoples (RCAP) in its groundbreaking 1996 report¹³ is adopted for the purposes of this discussion. RCAP’s principles of good governance were developed with great care, in particular by its First Nation, Inuit, and Métis Commissioners and their staff. They focus on three basic attributes: legitimacy, power, and resources.¹⁴ It is important to appreciate the conceptual breadth involved within the term governance, as opposed to the far narrower, but more widely used, conception of government. In the twenty-first century, the latter construct continues to be heavily influenced by a European experience emphasizing visible manifestations (buildings, law-making institutions, enforcement mechanisms, etc.) and hierarchical structures as the dominating factor regulating discourse between “governments” and Aboriginal peoples in Canada.

I. Conceptual Background: Governance and Jurisdiction

Governments are generally conceived within legal, political science, and public policy frameworks as existing in territorial terms. That is, they are commonly defined through delineating the precise geographic boundaries in which they exercise law-making jurisdiction and governmental responsibilities in relation to the population (including those members permanently residing and temporarily present) within their spatial domain. We are familiar with three common models:

1. A single, exclusive government over the entire territory (for example, a city state like Singapore);
2. The two-tier model of national and municipal governments (for example, New Zealand); and
3. The classic model of federalism (with a federal government, a regional, provincial or state level government, and municipalities or local governments).

All of these schemes function as governments with jurisdiction over the populace. They are most commonly justified ideologically through reference to the active (or passive) consent of the people. While the emphasis upon democracy emerged in the eighteenth century in the West, with its stress upon the representative nature of governments (reflecting the will of the adult male landowners only), monarchies and dictatorships also continue to exist as accepted forms of government without seemingly needing to draw upon the explicit endorsement of the populace. Although most often overlooked in classical descriptions of varying governance structures, Indigenous governments may also exist within the two-tiered and federal models outlined above. Their jurisdiction may be tied to their inherent sovereignty as original governments and their continuance as distinct peoples from the rest of society, as are the jurisdictions of Indian tribes in the United States and First Nations reserve governments in Canada.

The presence of federalism inevitably leads to the acceptance that jurisdiction can be tied to subject matter (for example, the federal government possesses jurisdiction in some areas and provinces in others). Unitary states may choose to delegate powers over certain topics to local governments (usually through legislation) while reserving full power to alter or withdraw that authority at any time. Truly federal states require some form of constitutional instrument that formally divides the heads of power between the national and regional levels of sovereign governments, along with a mechanism to resolve conflicts arising from overlapping jurisdictions.

Finally, and most often overlooked, jurisdiction is also tied to “people.” For example, a government can have jurisdiction in relation to its citizens regardless of their locale or residency. This occurs with applying domestic criminal and tax laws to citizens despite their being outside the country’s territorial limits. National governments have also recognized this situation as obtaining in the Indigenous context in North America. The *Indian Child Welfare Act*¹⁵ in the United States confirms that tribal courts, rather than state courts, possess primary authority over off-reservation member children concerning adoption and child protection matters—unless the tribe or its tribal court declines to exercise its jurisdiction.¹⁶ Within the Yukon, those Yukon First Nations with self-government agreements have a similar form of extraterritorial jurisdiction in child welfare matters arising outside their territories when their child members are involved.¹⁷

Both the Yukon First Nation and United States tribal examples of jurisdiction in child welfare represent an extension of the geographic reach of a territorially based government. The same is true for citizenship models proposed by a number of First Nations and tribal councils in Canada; these currently provide services to their members (more recently labelled “citizens”) in the cities. Some First Nations move beyond delivering programs to declaring that they can apply their laws to their own citizens outside their territories.¹⁸ Moving away from a territorial core for the jurisdiction has proven much harder, however.¹⁹ Martin Dunn suggested over two decades ago that self-government was possible by relying upon a voluntary

formation by individuals of a “community of interest” based upon shared cultural affinity through their common self-identity. Notably, this shared identity would be based upon aboriginality, not on origin from a common nation.²⁰

II. Historical, Statistical, and Legal Background

History Regarding Aboriginal Peoples in Urban Areas

Having laid out certain shared approaches to governance and jurisdiction, I turn to a brief review of the history of Aboriginal peoples in urban areas. East of the Rockies, most non-Aboriginal Canadians think of First Nations, Inuit, and Métis peoples as living predominantly in rural and remote areas, with some only moving to the cities in recent decades. In reality, however, most cities in Canada are located in historic First Nation settlements—many of which became church missions in the East. Many First Nation settlements in Ontario and the Prairies became trading posts or forts (often with significant Métis populations) from the 1800s onward. Aboriginal people are not in fact newcomers to cities who have arrived since World War II; rather, they have always been there. This is strikingly evident in Vancouver, where the Squamish, Burrard, Musqueam, and Tsawwassen First Nations possess reserve lands within the Greater Vancouver Regional District, and in Calgary with Tsuu T’ina and Edmonton with the four Hobbema Nations. However, this is not nearly as apparent and well understood in much of Canada.

Turning now to relocation or returning to the reserves, many First Nations members relocated to cities in the early twentieth century in order to avoid having their children effectively kidnapped and placed in Indian residential schools²¹ or through experiencing enfranchisement under the *Indian Act*. Others could not bring themselves to return home after leaving the schools; having suffered too traumatically from the abuse and emotional dysfunction brought about by their horrendous residential school experiences, they could no longer speak their own language or re-integrate into their home First Nations. Many other individuals left to pursue military service in both Canadian and American armed forces, to seek far better employment opportunities, or to further their education at secondary and tertiary levels.

The growing urban Aboriginal population both created and responded to a need to develop community services. This began in the 1960s with friendship centres and native court worker programs established through raising local funds and the efforts of many volunteers.²² In the early 1970s, the federal government (which had favoured emptying reserves and mainstreaming First Nations peoples since the 1880s) gave financial support for what it initially labelled “migrating peoples” programs to the newly created friendship centres across Canada in small and large cities; it also offered 50-50 cost sharing of native court worker programs with willing provinces. These initiatives were followed by funding from the Canadian Mortgage and Housing Corporation to purchase or repair off-reserve rural and

urban Aboriginal housing. Over the years, these initiatives have been delivered by independent service agencies. Notably, such agencies operate strictly as non-profit societies or corporations with no statutory base and no legal powers of a governmental nature.²³

The Present: Increasing Urbanization, Growing Populations

Approximately 1.7 million people within Canada self-identified as possessing some Aboriginal ancestry in the 2006 census.²⁴ This represents 4.4% of the total population, up from 3.8% in 1996.²⁵ This is a marked leap from the 1.3 million people who reported having at least some Aboriginal ancestry in 2001.²⁶ Of the 2006 total Aboriginal ancestry population, 1.17 million people self-identified as being North American Indian, Inuit, or Métis.²⁷ The Indian Registry indicated that there was a 130% increase in registered Indians between 1982 and 2006—an increase heavily influenced by over 100,000 non-status Indian people regaining (or obtaining for the first time) official recognition under the *Indian Act* due to the Bill C-31 amendments of 1985. This significant population growth for registered Indians was dwarfed by an even larger increase for Métis—a group that has seen a 91% jump in the last ten-year data cycle alone, accompanied by a marked decline in those self-identifying as Indians with no official status. Overall, “between 1996 and 2006, the Aboriginal population grew by 45%, compared with 8% for the non-Aboriginal population.”²⁸

Not only has the overall Aboriginal population increased dramatically in recent years, but there has also been a particular change in locale of residency. Rapid urbanization has become an immense factor, with 54% of the entire Aboriginal population living in urban centres as of 2006. Again, this data demonstrates the ever-growing rapidity of change, as the 2001 census indicated that 49% of Aboriginal people lived in urban areas, compared to 47% in 1996. Not surprisingly then, the population that lives on reserves declined from 33% to 31%.²⁹ This jump in numbers of urban residents does not reflect solely growth of the local Aboriginal population continuing to live within their traditional territories (including those who may have moved within the region to urban areas); it also captures long distance relocations far removed from traditional territories (the Inuit populations in Ottawa and Montreal are now larger than almost all northern Inuit communities).

The single First Nation background that is clearly predominant in the Maritimes (Mi’kmaq in Charlottetown, Sydney, and Halifax), or the presence almost solely of closely allied nations from the same confederacy (the Mi’kmaq and Malecite Nations in Fredericton and Saint John) is definitely not the norm in urban areas from Québec westward to the Pacific. Although historically, all of these cities originated within the traditional territory of one or two nations, the reality of most urban Indigenous populations in six of ten provinces is that they consist of individuals from many different languages and cultures. This reality somewhat

complicates assertions of aboriginal and treaty rights by Aboriginal peoples living in urban centres.

Aboriginal and Treaty Rights: A Justification for Urban Self-Government?

There is a vast literature regarding the assertion of aboriginal and treaty rights in the political, historical, anthropological, native studies, and legal realms,³⁰ although this literature takes one far beyond the scope of this paper. Litigation on aboriginal and treaty rights began to swell in the 1960s, but there has been a veritable explosion of it since the recognition and affirmation of “aboriginal and treaty rights” was added to the Constitution of Canada in 1982 through subsection 35(1).³¹ Nevertheless, exceedingly little of the jurisprudence has directly addressed the status of these rights within the urban context—except in relation to members of urban reserves.³² It is therefore impossible to draw upon court decisions to assert confidently that all Aboriginal peoples residing in cities possess all aboriginal and treaty rights. Individuals are clearly entitled to benefit from rights that, by their very nature, are exercised by individuals. (Harvesting rights, for example, are collective in nature but hunting and fishing is carried out by individual human beings.) They can also benefit from advantages made available to specified beneficiaries, such as treaty annuity payments. This does not, however, get one very far in determining the likelihood of a court assertion that collective rights are protected by s. 35(1) in an urban context without an exclusive, recognized land base. Even in the absence of such an assertion, though, there are still a number of potential avenues for at least nascent urban Aboriginal governance using existing legal instruments.

The Advantage of Unity: Options for Homogeneous Aboriginal Groups

Situations involving a united Métis Nation, or only a single or several allied First Nations, generate options that are far more readily available than is the case in more diverse contexts. For example, a single united Aboriginal group or nation can more easily:

- Establish and administer its own post-secondary education institution (for example, the Gabriel Dumont Institute³³ was founded by the predecessor of the Métis Nation of Saskatchewan in 1980).
- Establish and administer its own language programs (similar to the Maori of Aotearoa/New Zealand, who possess their own daycare language nests and have supported the creation of many primary and secondary schools that function solely in Maori; the general school system includes some training in Maori as part of the curriculum for all children³⁴).
- Establish and administer its own school, even at the tertiary level, including a shared foundation of language, history, culture, etc.
- Trigger the general school system to adapt its governance and

curriculum, as Nova Scotia has done through its *Education Act* of 1996.³⁵

- Establish a single, province-wide child welfare agency, as has been done with the Mi'kmaq Family and Children's Services that can exercise all powers under the provincial *Children and Family Services Act*³⁶ in relation to all "Indian" children within Nova Scotia.

It is obviously much harder in cities with people from many different First Nations and Métis communities without shared languages or traditions to develop common institutions of governance. It is even more complex where there is a significant Inuit population, as is the case in Ottawa and Montreal.

Nevertheless, it is not impossible. There are many extremely small nations around the world, such as island states in the Caribbean, South Pacific, and Malta, as well as continuing principalities (e.g., Monaco), small protectorates (San Marino), self-governing quasi-trust territories (e.g., Tuvalu, Niue, Cook Islands), and one unique religious enclave (the Vatican). While all of these states do possess defined territorial boundaries for governance, their existence demonstrates the capacity for even a limited population to be fully self-governing. It is also important to note that the Aboriginal population in a number of cities is larger than the population of many regional centres or smaller cities, as well as that of some of these foreign countries.³⁷ We have decades of examples in Canada of religious-based entities with state powers (Jewish and Catholic schools, hospitals and child welfare agencies) working as alternatives to provincial government agencies. Similarly, we have recognized the authority of official language communities (both for the French and English speaking populations within Quebec as well as official language minority communities elsewhere) to operate child and family services agencies (CFSAs), school systems, and hospitals. More recently, we have seen formal recognition extended to newer religious schools in Canada, such as Islamic and Christian schools. In sum, the opportunity to build forms of Aboriginal governance in many Canadian cities is open.

III. Policy and Legal Instruments in Highly Diverse Cities

The Federal Urban Aboriginal Strategy Initiative

The discussion now turns to a federal government initiative that might support the creation of nascent forms of Aboriginal governance in urban centres. In 1998, the federal government introduced the Urban Aboriginal Strategy (UAS) as a discrete part of its overall response to the Final Report of the Royal Commission on Aboriginal Peoples.³⁸ The strategy is intended to focus upon developing partnerships—by the federal government with provincial and local governments, community groups, and Aboriginal peoples—as a response to issues facing Aboriginal peoples in the urban environment.³⁹ The federal minister responsible for the UAS carries the distinct Cabinet assignment of the Federal Interlocutor for

Métis and Non-Status Indians. This ministerial level responsibility was created by Prime Minister Brian Mulroney in 1985, in response to complaints voiced by the Métis National Council and the Native Council of Canada (later renamed as the Congress of Aboriginal Peoples) that they were excluded from the mandate assigned to the Minister of Indian and Northern Affairs. Conceived as an effective point of entry into the federal system to advance the goals of Métis and non-status Indians, one federal minister has always received a special added responsibility as the Federal Interlocutor. A small secretariat (the Office of the Federal Interlocutor for Métis and Non-Status Indians, or OFI) was developed in support of this role within the Privy Council Office (PCO). In July 2004, Andy Scott was assigned the responsibility along with his post as the new Minister of Indian and Northern Affairs; the Office of the Federal Interlocutor then also moved from the PCO to Indian and Northern Affairs Canada.

Building upon several years of discussions within the federal government as well as some external consultations, the UAS was developed in 1997, announced in 1998, and renewed in 2004 by the extension of pilot projects and increased funding of \$50 million over four years.⁴⁰ Renewal and enhancement of the UAS ensured that pilot projects could expand beyond the original locations. In 2007 the federal government allocated a further \$68.5 million over five years to the UAS.⁴¹

At the time of writing, the Urban Aboriginal Strategy includes over 300 projects established in thirteen Canadian urban communities: Vancouver, Prince George, Edmonton, Calgary, Lethbridge, Saskatoon, Regina, Prince Albert, Winnipeg, Thompson, Toronto, Thunder Bay, and Ottawa.⁴² These thirteen cities represent 26.8% of Canada's Aboriginal population. By 2012, the federal government hopes the UAS will have achieved the following outcomes:

- Increased and strengthened partnerships to address urban Aboriginal issues;
- Enhanced leveraging of investments from partners;
- Increased intergovernmental collaboration in urban areas;
- Specific socio-economic performance indicators and measurements developed in collaboration with provinces, municipalities, and Aboriginal organizations;
- Improved outcomes in the areas of education; employment and business development; and a reduction in the number of Aboriginal women, children, and families living in poverty;
- Strategic management of urban Aboriginal issues locally;
- Increased federal responsiveness to community needs;
- Increased local research and interest in urban Aboriginal work;
- Increased publicly available statistics and research on urban Aboriginal issues;

- Less dependency on Canada's social programs; and
- Increased self-reliance of Aboriginal people and communities.⁴³

It should be noted that none of these goals expressly—or even indirectly—address the aspirations for self-government that Aboriginal peoples in the urban context may possess. That said, it may advance them in any case—primarily through the nature of its delivery models. The UAS is to be delivered through a community-driven process using either the Community Entity Model or the Shared Delivery Model. In the Community Entity Model, an existing community organization is chosen to work with the government to deliver UAS services within a particular city. The Community Entity must oversee the specific projects that have been funded and report back to the Regional Office of the Federal Interlocutor. In the Shared Delivery Model, a local UAS Community Committee is developed to deliver such programs with representation from both the local Aboriginal community and the three levels of government. Funding is available for non-profit organizations, individuals, municipal governments, educational institutions, Aboriginal service provider organizations, service organizations that cater to an Aboriginal clientele, research organizations, and research institutes. For-profit entities are also allowed access to funding so long as their project aids off-reserve urban Aboriginal peoples.⁴⁴

Urban Aboriginal Strategy pilot projects are tests of the responsiveness and effectiveness of a partnership between the federal government and local groups. Each community may focus on certain areas that it feels need work, such as housing, crime reduction, employment, child poverty, education, or economic development, to name a few.⁴⁵ The key areas attracting financial investment include projects aimed at: improving life skills, such as encouraging continuance of education; helping with integration into urban school systems and neighbourhoods; hosting mentorship programs, leadership programs, and summer camps; promoting job training, skills, and entrepreneurship (including increasing literacy and networking skills); and supporting women, children, and families through poverty reduction, urban integration, crime reduction, and counselling services.⁴⁶

The UAS could be instrumental in encouraging the development of urban Aboriginal governance structures. It funds community-driven initiatives to provide practical assistance to Aboriginal peoples regarding services normally available from other governments. The literature is unanimous in the conclusion that Aboriginal people must be directly involved in the delivery of services to their community; thus, it only makes sense that Aboriginal peoples would be fully involved in delivering UAS to the urban community. The strategy has helped foster the development of coordination and planning committees that, in many cities, draw together many of the key existing Aboriginal service deliverers. These committees could themselves become the precursor to formal institutions of urban Aboriginal governance in the future—ones that would encompass the many existing agencies within each city.

Linking together all existing agencies under a single umbrella body that acquires legitimacy through direct accountability to the urban Aboriginal population as a whole, perhaps through elections to this new entity, would lay a foundation for governance. This would not be easy by any means, as some cities possess a large array of independent entities with their own supporters and employees who could feel threatened by such a significant change in the landscape.⁴⁷ The challenge is to move from self-administration of programs and provision of services that are controlled and designed by provincial and federal government departments to a position in which an Aboriginal government establishes the terms of these functions and provides their legal powers.

Indigenous Led and Operated Urban Initiatives

Beyond the promise of the Urban Aboriginal Strategy, Canada also has some other very important and longstanding repositories of experience in the creation of vital Aboriginal institutions outside the reserve context. I will explore these briefly by sector, moving from education to child and family services, health, arbitration, and governance.

Education

Saskatchewan has been in the vanguard in providing for First Nation and Métis influence on the delivery of tertiary education. It is the home to the First Nations University of Canada (formerly the Saskatchewan Indian Federated College founded in 1976 with a longstanding affiliation with the University of Regina), primarily controlled by the Federation of Saskatchewan Indian Nations. It also is the home of the Gabriel Dumont Institute,⁴⁸ a Métis-administered post-secondary educational institution established by the forerunner to the Métis Nation-Saskatchewan (MNS) almost three decades ago.

In elementary and primary education, Ontario demonstrates that Aboriginal alternative schools can exist and flourish, at least on a small scale, in several cities. In Ottawa, for example, the Odawa Friendship Centre operates an alternative high school for Inuit, Métis, and First Nations youth who all attend together. To the author's knowledge, the oldest educational initiative for Aboriginal children and youth in a major city began in 1977 as the Wandering Spirit Survival School in Toronto. Officially recognized by the Toronto Board of Education as a Cultural Survival School in 1983, it was renamed six years later as the First Nations School of Toronto (FNST). Today the school is a complete elementary school, offering education from junior kindergarten to grade 8.⁴⁹ The school has approximately sixty-five students, the majority of whom are in junior kindergarten. There is also room for thirty pre-school and school-age children in the Gizhaadaawgamik Daycare Centre. The FNST seeks to integrate Aboriginal values, spirituality, culture, and the Ojibwa language into a curriculum that still adheres to "the requirements set by the School Council, the Toronto District School Board and the Ontario Ministry of Education."⁵⁰ While the school has paid staff, it also relies

upon volunteers and the assistance of organizations such as Native Child and Family Services Toronto and the Aboriginal Peacekeeper Unit of the Metropolitan Toronto Police Service to enrich its services within an Anishnaabe framework.⁵¹ This orientation means that FNST does not attempt to present a fully pan-Aboriginal approach.

A number of provinces officially permit “private,” “charter,” or “independent” schools to operate as alternatives to the public school system while compelling them to rely upon their own sources of funds. Some provincial governments fund these schools, either directly through grants or indirectly through a “voucher” scheme in which the choice of school is left to the parents. These opportunities could be applied to permit Aboriginal schools to flourish. However, population size and income levels would likely mean that such schools would still have to rely to a significant degree upon government funding and be pan-Aboriginal rather than exclusively serving students from one nation. It should be noted that specifically Cree or Métis schools could be feasible in some western cities—for example in Edmonton or Regina—where numbers are sufficiently large.

Child and Family Services

An instance of Aboriginal jurisdiction in the area of child and family services is provided in Manitoba, where the Métis Child and Family Services Authority was launched in 2003.⁵² The Aboriginal Justice Inquiry of Manitoba⁵³ had recommended such an initiative in its 1991 Report; it was embraced in 1999 by the Manitoba Aboriginal Justice Implementation Commission.⁵⁴ This recommendation was adopted by the province and the Manitoba Métis Federation through a Memorandum of Understanding (MOU). Signed in 2000, the MOU contained a three-year transition plan. The province-wide Métis authority was established to function along with the Métis Family and Community Institute, an organization responsible for developing relevant policy direction and research, although it is dependent upon provincial legislation to carry out its mandate.

Ontario exemplifies lost opportunities in this sector. Part 10 of its *Child and Family Services Act*⁵⁵ has recognized the ability to sanction “Indian and Native children and family services” for almost thirty years. This statutory authority was quickly invoked when passed to certify the Tikinagan CFSA in northern Ontario, with other largely reserve-oriented CFSA developed over the intervening years. Again, these agencies rely upon the provincial statute to authorize involuntary services and child apprehensions.

British Columbia provides a third interesting scenario in this sector. The provincial government, in consultation with Aboriginal social services agencies, started in 2002 to develop a Regional Aboriginal Authority (RAA) model. Interim RAAs supported the delivery of local child and family services, both on and off-reserve, regarding First Nations, Métis, and Inuit families. Five RAAs were established to cover distinct regions of the province in order to improve coordination and quality of services offered while increasing Aboriginal control. Legislation was drafted to

give a statutory base to these entities. The provincial government had announced plans to table the Regional Aboriginal Authority Bill on April 30, 2008. Yet the minister withheld the bill at the eleventh hour due to opposition from the Union of British Columbia Indian Chiefs, which declared on April 29 that there had been inadequate consultation with its First Nation members, who were not ready for it to proceed.⁵⁶ Information on plans to pass the bill has disappeared from the website of the Ministry of Children and Family Development, as has any clarity of how the province plans to proceed in this regard.⁵⁷ It appears unlikely that the bill will ever go forward, given the vigorous objections from chiefs about the inadequacies of the consultation process and the subsequent change in provincial minister—although a Recognition and Reconciliation Protocol on First Nations, Children and Families was signed on March 30, 2009, by the First Nations Leadership Council and the Minister.⁵⁸ Setting the process aside, the bill itself provides a possible model of a comprehensive, targeted Aboriginal explicit statute rather than a general child and family service law with a small Aboriginal specific segment within it. Such a statute could provide a statutory foundation for Aboriginal entities generally. Rather than operating as non-profit societies or corporations with their inevitable limitations, such entities could carry legislatively grounded powers as well as have a law-making mandate.

Health

Ensuring the availability of quality, culturally appropriate health care is another area that could witness considerably more attention beyond the existence of delivery agencies like Wabano Centre for Aboriginal Health⁵⁹ in Ottawa and Anishnawbe Health Toronto.⁶⁰ As an initial step, the Ontario government created the “Aboriginal and First Nations Health Council” as an advisory body to the Ministry of Health and Quebec has established more meaningful regional health authorities. These consultative initiatives of provincial governments could readily become a preliminary step in moving forward to recognize more fundamental health care authority for agencies of this nature.

Arbitration

A further vehicle for expanding the autonomy of Aboriginal institutions is through invoking longstanding arbitrations legislation. Common across Canada, these statutes are intended to provide a legislative basis for private, consensual arbitration to settle disputes in a binding fashion as an alternative to litigating in the general provincial courts. While mainly used in commercial matters for many years,⁶¹ they are currently also used by certain religious groups (especially conservative Jewish and Muslim ones) to resolve family, matrimonial property, and contractual disputes before arbitrators who are particularly knowledgeable about religious law and dictates in relation to such disputes. This has been an especially controversial issue in Ontario in recent years due to concerns that women and their equal rights under Canadian law would suffer in such a private, invisible

system of dispute resolution.⁶² Nevertheless, private arbitration is on the rise. This method could be used by members of Aboriginal communities to settle a broad array of civil disputes—as well as even some minor criminal matters, if the parties agree to handle them through this non-criminal approach.

Governance

Although less numerous than examples in service delivery sectors and arbitration, there has also been limited statutory recognition of non-territorial Aboriginal groups in the area of governance. Primary among these is the *Métis Act*⁶³ passed by the Saskatchewan Legislature. The chief purpose of the act is to recognize the major contributions of the Métis to the development of the province.⁶⁴ Although the Act gives no direct legal authority to the Métis Nation-Saskatchewan (MNS) and its subsidiary entities beyond that of a normal corporation, it does empower the province and the MNS to negotiate and develop memoranda of understanding on vital matters in the following broad terms:

Bilateral process

3(1) The Government of Saskatchewan and the Métis Nation-Saskatchewan will work together through a bilateral process to address issues that are important to the Métis people, including the following:

- (a) capacity building;
- (b) land;
- (c) harvesting;
- (d) governance.

While the *Métis Act* has yet to have a profound impact upon relations between the provincial government and the Métis Nation-Saskatchewan, it clearly has the potential to become the first baby step on the road toward developing a far more significant and enduring partnership in the years to come. It also could include in the future formal provincial recognition of Métis Nation governments at local, regional, and/or province-wide levels.

Summary: The Need for Formal Recognition

One can readily envision moving beyond a single sector statute (for example, in the child welfare field) into comprehensive enabling of legislation from either the Parliament of Canada or provincial and territorial legislatures that would permit urban First Nations, Inuit, and Métis peoples to establish their own institutions to displace provincial and territorial government ones in a wide variety of key realms that affect the daily life of most individuals. This approach has been widely used concerning self-government agreements involving First Nations⁶⁵ and for the Inuit of Labrador.⁶⁶ However, these Aboriginal governments all possess an exclusive land base to govern. Such a legislative initiative could also include the

capacity to link together a number of individual entities, including longstanding ones, as institutions of a single urban Aboriginal government. This would likely be based on a negotiated Bill setting out the governance structure, jurisdictions, election mechanism, and accountability system along with addressing the applicability of prevailing privacy and access to information legislation.

While Acts of Parliament or legislatures are usually drafted in a declaratory fashion that sets out powers and obligations within the body of the statute, an alternative model has been widely used regarding comprehensive land claims since the James Bay and Northern Quebec Agreement (JBNQA).⁶⁷ The JBNQA broke the mold for domestic agreements⁶⁸ in 1977 with a short enabling statute to which the 454 page Aboriginal title agreement was attached. In this manner, it meant that Aboriginal parties were directly partners with the Crown in negotiating the terms of both the settlement document as well as the enabling law to give the land claim agreement added legal weight. All subsequent comprehensive land claim settlements have been treated in this same way.⁶⁹ Canada has subsequently used this model in relation to education⁷⁰ and reserve land laws by enacting statutes that implemented previously negotiated bilateral framework agreements.⁷¹

An example of proposing to use legislation to enable or confirm formal status has been underway in British Columbia for the past two years—this time in the on-reserve context. A joint First Nation Leadership Council-BC Recognition Working Group had been meeting intensively to develop a statutory framework to implement the New Relationship promised by Premier Campbell in February 2005.⁷² That commitment led to the signing of the Transformative Change Accord on November 25, 2005, by the premier, the then prime minister, Paul Martin, and the First Nations Leadership Council.⁷³ This occurred in part in support of the Kelowna Accord,⁷⁴ a political accord reached by all governments and the five national Aboriginal organizations. A bill was being drafted jointly to address provincial obligations to adhere—in fulfilling its duty to consult and accommodate First Nations concerns as well as to recognize aboriginal title—to the standard the Supreme Court of Canada described as the “Honour of the Crown” in the Haida Nation case.⁷⁵ The B.C. government had also indicated its willingness to pursue shared decision-making and possible revenue and benefit sharing from natural resources.⁷⁶ The provincial government then released the “Discussion Paper on Instructions for Implementing the New Relationship.”⁷⁷ Although this proposal was put on hold until after the provincial election, with the return of the Campbell government, the concept was revived. On August 28, 2009, however, an all-chiefs assembly decisively rejected its terms and called instead for an immediate implementation of the United Nations Declaration on the Rights of Indigenous Peoples.⁷⁸

Although the New Relationship initiative stalled, it is always possible—and even likely—that this legislation, if reactivated, would extend recognition of First Nations authority at some level beyond the borders of reserves. Its whole purpose

was to give meaning to continuing Aboriginal title in the province outside the miniscule reserve lands.

It is only through the presence of a legislated or treaty-based approach that one can anticipate the general courts and public governments will accept the presence of Aboriginal governments in Canadian cities, as opposed to Aboriginal administration of non-profit service agencies that is now widespread in urban settings. Regardless of the mechanism or process, the key to moving from the current scenario—one of taking advantage of those opportunities provided by existing provincial legislation largely designed for other purposes—toward real governance is to develop an ideological foundation for Aboriginal governments. Relying upon the inherent right of self-government or the international law recognition of the right to self-determination⁷⁹ is problematic as it is tied to qualifying as a “people.” The thrust of this thinking is concentrated upon a singularity of a people sharing a common language, history, tradition, and identity. For most Canadian cities, by contrast, the urban Aboriginal population is comprised of individuals from many “peoples.” This suggests that another source may be needed.

IV. Key Questions Requiring Consideration

It was indicated above that a broadly framed approach is required if genuine Aboriginal governments are to arise in Canadian cities. That said, there are a plethora of major questions that will need to be addressed before one can anticipate proceeding. The most basic of these questions is: what is the fundamental legal and policy rationale underpinning such a development? That is, what should the basis for self-government be in circumstances without a defined land base? Should it be grounded on the acceptance by federal, provincial, and territorial governments that Aboriginal governance is simply the most effective way both to respond to existing socio-economic needs and to redress historic injustices? Alternatively, does self-government in this context merely reflect that they are rights-bearing peoples in a collective sense—the same as those Aboriginal peoples who possess a clear land base already? Another scenario is to see institutions of Aboriginal governance as a vehicle to coagulate an amalgamation of rights-bearing individuals who are not part of a distinct nation or community. As we have virtually no judicial guidance to rely upon,⁸⁰ no one can assert a definitive answer to any of these possible questions from a legal perspective. There have, however, been a number of attempts to analyze the likelihood of an inherent right to self-government in relation to people who have an exclusive land base and/or compelling arguments that substantiate their assertions of aboriginal title.⁸¹

In addition to this foundational conceptual question, as well as the inevitable federal-provincial debates on where fiscal obligations lie and which order of government possesses the constitutional authority to act, there are a host of pragmatic issues that need to be considered, including:

1. Who controls and for whom? That is, should the Aboriginal government be

organized on a pan-Aboriginal basis, or with First Nations and Métis separate from the Inuit (two unique non-profit housing corporations currently operate in Ottawa in this fashion)? Or should there be three fully separate streams? Should it be First Nation-by-First Nation, city-by-city (as with friendship centres and some housing corporations), or province-wide (like Manitoba with the Métis Child and Family Services Authority and Skigin-Elnoog Housing in New Brunswick)?

2. What jurisdictions might be included? The desire for exercising control over both education and child and family services agencies as well as the substantive law on which such agencies and schools ultimately depend seems readily apparent, but what about health? Social services? Justice? Others? Aboriginal communities without an exclusive land base—not to mention urban situations without even residential adjacency in neighbourhoods—raise unique challenges that distinguish them from *Indian Act* reserves and comprehensive land claim settlements, as well as from provincial and territorial governments. Yet this does not mean that they must be restricted to municipal type powers. Could Aboriginal communities not also actively move to protect Aboriginal languages, cultures, traditional values, sacred sites, and other spheres that do not fall readily within the domain of municipalities?
3. How does the individual Aboriginal person relate to his or her Aboriginal government? Is it through a voluntary provision and acceptance approach with individual choice to opt for the mainstream on a case-by-case basis? Alternatively, could each individual make an initial choice between the public or Aboriginal government and then be bound by that election for a period of time? Or would it be compulsory for all who fall within the eligibility rules? This decision will likely impact on general provincial and municipal government support, as Canadians cherish individual liberty, while existing governments will want the efficiency that is available only through a single option scheme with sufficient economy of scale.
4. Identity and membership issues, especially regarding Métis people and non-status Indians, will be a major challenge to overcome. Who decides who is a member and on what criteria? Will there be any system of appeal or judicial review available? If so, who will establish the legal system in which it is embedded? Can membership be transferred or lost? Can individuals have multiple memberships simultaneously (for instance, vote in band elections in her original home community in which she is a member, but also in urban Aboriginal government elections)? The experience with Maori election rolls in New Zealand provides a very interesting model of a comprehensive scheme that has worked for generations in national elections.⁸²
5. First Nations all across southern Canada have never relinquished their assertions that they possess continuing Aboriginal sovereignty. As a result, they philosophically, and sometimes loudly, challenge the Crown for unilaterally

declaring that it possesses absolute sovereignty despite the lack of consent to that Crown assertion by the original sovereign nations of this land.⁸³ How does one fit the creation of urban Indigenous governments into this context if they lack the consent of the Indigenous nations—the traditional owners and sovereigns of that territory? Alternatively, would the absence of consent from the current descendants of the original Indian nations of that region mean that Aboriginal governance in the city lacks a level of necessary legitimacy?

6. How does one reconcile the idea of self-government as an inherent right belonging to each distinct, historic people with the reality of multi-national urban Aboriginal populations? Are we still able to see the latter as “political communities” able to assert s. 35 rights if they are not direct, present-day successors to the full Indigenous nations of the past?
7. How will these systems of governance be financed? Through a tax on their members who can redirect part of the existing taxes they pay now to Aboriginal governments, as Ontario has allowed with school taxes that can be directed by a homeowner to either public or separate school boards? By agreeing that certain sales taxes on goods or services can be kept by Aboriginal governance entities?⁸⁴ Alternatively, can a guaranteed system of transfer payments be created by intergovernmental agreement whereby funds are provided annually, or committed over a number of years,⁸⁵ from federal, provincial, and/or municipal governments? If this idea were considered, could the system be built upon our current equalization formula that has had a constitutional foundation and guiding principles under s. 36 of the *Constitution Act, 1982*.⁸⁶ Another option would be to fund these governments through a distinct charge on all Canadians. This could be analogous to the scheme in place by the CRTC that imposes discrete charges on all cable and satellite TV subscribers to support certain Canadian specialty channels, including Aboriginal Peoples Television Network.
8. How will relations between Aboriginal and non-Aboriginal individuals (the breakdown of mixed marriages, contract disputes, auto accidents, etc.) be handled? Which government’s jurisdiction and legislation will be relied upon to apply to the dispute? Which government’s justice system will be invoked to render a decision if negotiations among the parties are unsuccessful? Is this at the choice of the parties, and—if no agreement—with a default mechanism to favour one or the other justice system? Alternatively, will the mainstream courts simply be the default arbiter?
9. What geographic or spatial boundaries would these governments or institutions of governance have? Would they be limited to single neighbourhoods (somewhat akin to an urban reserve) as opposed to the whole city/metro area, so as to overlap with municipal territory? Do they extend solely to exclusive Aboriginal-owned lands (for example, those owned by non-profit Aboriginal housing corporation, friendship centres, and other agencies) or to privately

- owned lands as well? If coextensive with municipal governments, how can any potential duplication of services be eliminated? How can costs be kept sufficiently low to be viable and rivalries avoided?
10. How should societies deal with the inevitable conflict of laws issues that will arise where various governments enact provisions that do not readily mesh well together, yet seek to apply to the same people or space? Should clear paramountcy rules be established, as negotiated Self-Government Agreements and Comprehensive Land Claims Agreements have been doing for years in Canada? Or could this be resolved through some other means? Merely leaving this matter unresolved will indirectly constitute an invitation to the general courts to decide, with a high likelihood that judges will favour the laws they know best from the non-Aboriginal governments.
 11. How does one effectively address the fears of city governments and the general non-Aboriginal public regarding: (a) the loss of some level of jurisdiction and power; (b) the fear that this will become the “thin edge of the wedge” that will lead to the floodgates opening as other minorities may invoke this development for its precedential effect in advancing similar goals; and (c) the well-entrenched, if not ingrained, liberalist ideology that all Canadians are (or at least should be treated as) equal to one another, even if they are from different cultures and national ancestries, with the same rights as citizens under the Charter? While the position of all Aboriginal peoples within Canada is legally, politically, historically, and culturally unique, merely asserting this uniqueness will not fully dispel these fears amongst other Canadians or municipal governments.
 12. Why not just tie all First Nation, Inuit, and Métis individuals back to their “home” governments, which could exercise governance concerning their urban members? This model is reflected to some extent in the Yukon and Nisga’a agreement; it has also been a linchpin position of the Assembly of First Nations for many years. On the other hand, many Aboriginal residents of urban areas have not lived in their “home” communities for decades, or they have no tie to these communities whatsoever. Why, some might argue, would they not identify their personal identity with where they have lived for years rather than with a community from which they descend? Furthermore, many First Nations have displayed little interest or possess inadequate capacity to fully meet the needs even of their off-reserve members (although there are many examples of exemplary efforts by, for example, the Saskatoon Tribal Council, the Prince Albert Grand Council, the Nisga’a Nation, and others), let alone of those with an ancestral tie insufficient to qualify for citizenship in their “home” First Nation.
 13. Will Aboriginal urban residents choose to insist that their governments must embrace some of the modern developments that are impacting upon other public governments, such as, ensuring transparency and accountability

through providing freedom of information, guaranteeing access to government information, protecting privacy, etc.? For example, the Ontario legislation affecting municipalities has undergone a dramatic transformation so far this decade. Municipalities finally became defined as a level of government in 2006,⁸⁷ were required to hold meetings in public,⁸⁸ and were subject to a complaint procedure in this regard.⁸⁹ Municipal governments now fall within the jurisdiction of the Ontario Auditor General, the Ombudsman, and the Information and Privacy Commissioner, as well as being subject to the *Municipal Freedom of Information and Protection of Privacy Act*.⁹⁰ One may anticipate demands from long-term urban Aboriginal residents for similar safeguards to be guaranteed by their institutions. However, a relatively small population base with limited financial resources may not have a realistic capacity to offer all of these protections on its own. In such cases, a reasonable solution might be to develop intergovernmental agreements to utilize the services of existing provincial agencies.

V. Concluding Remarks

Tragically, Aboriginal-Crown and Aboriginal/non-Aboriginal relationships are all too rarely discussed on a holistic and long-term basis in Canada. Virtually all non-Aboriginal Canadians would readily accept that First Nations, Inuit, and Métis peoples have been unjustly treated in the past, have been dispossessed of much of their traditional territory, and remain in socio-economic conditions that bear far too close a resemblance to those in third world countries. Many Canadians would even accept that most of our beautiful land was stolen from its original owners, who continue to face political subjugation. Yet there have been few periods in recent decades when these issues have received serious national attention. The exceptions, albeit brief periods, have been:

- Four First Ministers Conferences from 1983⁹¹ to 1987, along with numerous ministerial and senior official level negotiation sessions with full participation by four national Aboriginal political organizations.⁹² These conferences had a dominant focus on seeking new constitutional arrangements regarding Aboriginal self-government—with some limited considerations of the urban context. The conferences collapsed without agreement.
- The Charlottetown round of constitutional negotiations from 1991 to 1992.⁹³ Seeking a comprehensive package of constitutional amendments to address demands from Quebec and western Canada, they included Senate reform and renewed attention to Aboriginal goals.⁹⁴ While the thirteen governments and four Aboriginal associations reached full agreement on a broad array of constitutional amendments known as the Charlottetown Accord and the accord was signed by all First Ministers and national Aboriginal leaders, it was rejected by a majority of Canadians in a referendum in October of 1992.⁹⁵

- The Royal Commission on Aboriginal Peoples, especially from 1994 to 1996. The commission convened an urban round table⁹⁶ and issued its final report.
- The Kelowna Accord process from 2004 to 2005. All fourteen governments and the leadership of the five national political Aboriginal organizations agreed on an agenda for action. While the change in federal government in January of 2006 resulted in the death of this Accord—at least in the short term—it remains an outstanding political agreement of the highest order. It continues to serve as a landmark against which to compare subsequent efforts at reconciliation, as well as social, economic, education, and health improvements so desperately needed.⁹⁷

As previously mentioned, a distinct minister with responsibility for Métis and non-status Indians and the Office of the Federal Interlocutor for Métis and non-status Indians have existed since 1985. The core of OFI's existence includes the mandate and responsibility to advance tripartite off-reserve Aboriginal self-government with willing provinces and to serve as the federal negotiating party. Federal efforts to develop an Urban Aboriginal Strategy have also assured at least some minimal level of federal attention to these issues.

Nevertheless, as a nation, we lack a coherent, sustained approach with detailed, feasible and creative thinking coupled with intense community discussions and a genuine willingness to negotiate new futures different from the colonial remnants that continue to shape the status quo. One can only hope that we may soon alter our path and embrace the prospect of change on a far more fundamental and meaningful scale.

I have posed an immense array of questions grouped together in thirteen sets that had linkages amongst them that seemed to make sense to me. Various readers of earlier drafts have said that they value the questions, but want to see answers. To these my reply must be that it is not the place of a non-Aboriginal academic to suggest what the answers may be—and moreover, that they will vary from city to city. Ultimately, it is up to the Aboriginal peoples in those locales to decide for themselves how they want the future to unfold for their children—as well as for those of their non-Aboriginal neighbours—and then the discussions can begin as partners in building the future for us all.

Endnotes

- 1 I would like to acknowledge with appreciation the considerable research assistance in the form of preparing a bibliography and literature review by Ms. Alison Ronson, LL.B. candidate at the University of Ottawa, in the preparation of this paper. I further thank Ian Peach and Cheryl Mathews, as well as the Office of the Federal Interlocutor for Métis and Non-Status Indians, for serving as the financial sponsor and organizer of a workshop hosted by the First Nations House of Learning at the University of British Columbia in June of 2008, where an earlier version of this paper was presented. A more advanced version was presented at the Aboriginal Policy Research Conference in Ottawa in March of 2009, at which the very helpful comments of Evelyn Peters and David Newhouse were provided, along with those of various anonymous reviewers. Thanks must also be extended to the University of Ottawa, Faculty of Law, for providing financial support. I sincerely thank Jodi Bruhn for her excellent editorial advice and John Graham of the Institute on Governance (IOG) for his encouragement, as well as immense patience that saw this paper through to its conclusion. Finally, I thank the many First Nations and Métis people who have shared so many insights and experiences with me over the decades. I have benefitted from their knowledge, which has so heavily influenced my thinking and understanding. Nevertheless, all responsibility for any errors or important omissions is that of the author.
- 2 For an enlightening discussion on how different political theories have been used to suppress Aboriginal self-government, see Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).
- 3 *Indian Act*, R.S.C. 1985, c. I-5 [hereinafter “*Indian Act*”].
- 4 See the *Métis Settlements Act*, c. M-14, R.S.A. 2000, as amended.
- 5 Alberta Government, “Municipal Affairs and Housing.” <http://www.municipalaffairs.alberta.ca/am_types_of_municipalities_in_alberta.cfm>
- 6 Martin Dunn, a longstanding Métis employee of the former Native Council of Canada, advocated the concept of “community of interest” for many years to attempt to find a bridge that might be more palatable to Canadian governments. See e.g., *Access to Survival: A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1986). See also Jill Wherrett and Douglas Brown, “Models for Aboriginal Government in Urban Areas” (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1994).
- 7 The term “Aboriginal peoples” will be used herein when generally referring to First Nations, Inuit, and Métis peoples collectively, unless the context requires otherwise. It must be realized that there are well over six hundred First Nations in Canada that represent individual communities from many different original nations with eleven different languages and over fifty distinct dialects. Similarly, there are dialect differences amongst the Inuit peoples across the far north of Canada as well as among the Métis peoples.
- 8 See e.g., Ontario’s *Arbitration Act*, 1991, S.O. 1991, c. 17, as amended. Other provinces have similar legislation giving legal force to general consensual arbitration along with many statutes for particular employees.
- 9 See e.g., the material contained in the article by Evelyn J. Peters for this purpose, “Self-Government for Aboriginal People in Urban Areas: A Literature Review and Suggestions for Research” (1992) 12 *Canadian Journal of Native Studies*, 51.
- 10 See e.g., F. Laurie Barron and Joseph Garcea, *Urban Indian Reserves: Forging New Relationships in Saskatchewan* (Saskatoon: Purich Publishing, 1999).
- 11 This review is inevitably superficial as it is done primarily to suggest that these agencies could be an embryonic form of governance if they evolve from administrators of the programs of other governments that are modified as much as they can to meet unique needs.
- 12 For an excellent collection that covers quite a spectrum of urban Aboriginal issues, see David Newhouse and Evelyn J. Peters, *Not Strangers in These Parts: Urban Aboriginal Peoples* (Policy Research Initiative, 2003).
- 13 Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996) hereinafter RCAP.

- 14 Canada, *Report of the Royal Commission on Aboriginal Peoples*, Volume 2, *Restructuring the Relationship*, Part I, (Ottawa: Canada Communications Group, 1996) at pp. 163–165. It is noted that RCAP has crafted a different set of attributes for governance than that adopted by the Institute on Governance, the United Nations, and many others.
- 15 *The Indian Child Welfare Act*, Public Law 95-608, November 8, 1978, 25 U.S.C., ch. 25, ss. 1901–1903. For further information, see B. J. Jones, Kelly Gaines-Stoner, Mark W. Tilden, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* (Chicago: American Bar Association, 2008).
- 16 See e.g., *Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 109 S.Ct. 1597.
- 17 See e.g., the Champagne and Aishihik First Nations Self-Government Agreement, in which jurisdiction is granted over “adoption” (s. 13.2.6) and “guardianship, custody, care and placement of Champagne and Aishihik First Nations children, except licensing and regulation of facility-based services off Settlement Land” (s. 13.2.7).
- 18 See e.g., R. L. Bish, “A Practical Guide to Issues in Gitksan-Wet’suwet’en Self-Government.” Prepared for the Gitksan-Wet’suwet’en Tribal Council, School of Public Administration, University of Victoria, British Columbia.
- 19 See e.g., Chris Anderson and Claude Denis. “Urban natives and the nation: Before and after the Royal Commission on Aboriginal Peoples” (2003) 40 *Canadian Review of Sociology and Anthropology*, 373.
- 20 Dunn, *supra*, note 5.
- 21 See e.g., John S. Milloy, *A National Crime: The Canadian Government and the Residential School System 1879–1986*, (Winnipeg: University of Manitoba Press, 1999) and RCAP, *supra* note 9.
- 22 Evelyn J. Peters, “Developing Federal Policy for First Nations People in Urban Areas: 1945–1975.” (2001) 21 *Canadian Journal of Native Studies*, 57.
- 23 Katherine A. Graham, “Urban Aboriginal Governance in Canada: Paradigms and Prospects,” in John H. Hylton, ed., *Aboriginal Self-Government in Canada* (Saskatoon: Purich Publishing, 1999).
- 24 Statistics Canada, “Aboriginal Peoples in Canada,” 2006 Census, <<http://www12.statcan.ca/census-recensement/2006/rt-td/ap-pa-eng.cfm>>.
- 25 Statistics Canada, “Aboriginal Peoples in Canada,” 2001 Census, <<http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm#1>>.
- 26 *Ibid.*
- 27 *Supra*, note 23. The Statistics Canada data again likely suffers from a significant undercounting of Aboriginal peoples, as it only captured 698,025 people self-identifying as being “North American Indian,” while INAC at the same time recorded 763,555 registered Indians alone (including those on-reserve, on Crown land, and off-reserve). The INAC records, of course, omit non-status Indians that should have been included within the 2006 census. First Nations and Northern Statistics Section, Department of Indian and Northern Development, “Registered Indian Population by Sex and Residence 2006,” <http://www.ainc-inac.gc.ca/pr/sts/rip/rip06_e.pdf> at ix.
- 28 *Supra*, note 23.
- 29 Indian and Northern Affairs Canada, *Basic Developmental Data 2004*, <http://www.ainc-inac.gc.ca/pr/sts/bdd04/bdd04_e.pdf> at pp. 8–9 and 14.
- 30 See e.g., Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: University of British Columbia Press, 1998); Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing Ltd., 2001); William C. Wicken, *Mi’kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002); Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen’s University Press, 1996); and Bradford Morse, “Aboriginal and Treaty Rights in Canada” (2005) 27 *Supreme Ct. Law Rev.* 499.
- 31 This provision is contained in Part II of the *Constitution Act, 1982*, being Schedule B to the

*Canada Act 1982 (UK) 1982, c 11 (hereinafter *Constitution Act 1982*).*

- 32 See e.g., the leading Aboriginal right-to-fish case of *Regina v Sparrow* [1990] 1 SCR 1075 that confirmed the right of a member from Musqueam First Nation within Vancouver's borders to fish. This also was the first landmark in which the Supreme Court of Canada had the opportunity to analyze the profound impact of s. 35.
- 33 <<http://www.gdins.org/home.html>>
- 34 <<http://www.minedu.govt.nz/NZEducation/EducationPolicies/MaoriEducation.aspx>>
- 35 *Education Act*, S.N.S. 1995-6, c. 1, as amended through (1) the establishment of a Council on Mi'kmaq Education; and (2) regulating all school boards to: (a) provide programs to promote Mi'kmaq education and (b) include materials on history, language, heritage, culture, traditions, and the contribution to Nova Scotian society of the Mi'kmaq people within the provincial curriculum for all schools.
- 36 *Children and Family Services Act*, S.N.S. 1990, c. 5, as amended.
- 37 I acknowledge with thanks the comments of Evelyn Peters on an earlier version of this paper in which she reminded me that the Aboriginal population in Montreal and Thunder Bay is equivalent to all of Labrador City, while Ottawa's Aboriginal residents are equivalent to Thompson, Manitoba.
- 38 The response was entitled, "Gathering Strength: Canada's Aboriginal Action Plan," obtained at <www.ahf.ca/pages/download/28_13342>.
- 39 Indian and Northern Affairs Canada, Office of the Federal Interlocutor, "Urban Aboriginal Strategy" at <<http://www.ainc-inac.gc.ca/ai/of/ias/bkg-eng.asp>>.
- 40 For an early and positive assessment of this strategy see, Katharine A. H. Graham and Evelyn Peters, "Aboriginal communities and urban sustainability" (2002), Canadian Policy Research Networks, <<http://www.cprn.com/doc.cfm?doc=163&l=en>>. A less complimentary approach is reflected in several of the papers written or co-authored by Calvin Hanselmann for the Canada West Foundation, e.g., "Urban Aboriginal People in Western Canada: Realities and Policies" <<http://www.cwf.ca/V2/cnt/06dba2ddd5fd59f787256bd500625504.php>>.
- 41 Indian and Northern Affairs Canada, "Backgrounder: Urban Aboriginal Strategy" at <<http://www.ainc-inac.gc.ca/ai/of/ias/bkg-eng.asp>>, and Indian and Northern Affairs Canada, Office of the Federal Interlocutor, "Urban Aboriginal Strategy" at <<http://www.ainc-inac.gc.ca/ai/of/ias/index-eng.asp>>.
- 42 Indian and Northern Affairs Canada, "Urban Aboriginal Strategy: Backgrounder," at <<http://www.ainc-inac.gc.ca/ai/of/ias/bkg-eng.asp>>.
- 43 Indian and Northern Affairs Canada, Office of the Federal Interlocutor, "Urban Aboriginal Strategy" at <<http://www.ainc-inac.gc.ca/interloc/ias/pgl-eng.asp>>.
- 44 Indian and Northern Affairs Canada, Office of the Federal Interlocutor, "Terms and Conditions—Urban Aboriginal Strategy Contribution Program," <<http://www.ainc-inac.gc.ca/ai/of/ias/tnc-eng.asp>>.
- 45 Indian and Northern Affairs Canada, "Backgrounder: Urban Aboriginal Strategy," at <www.ainc-inac.gc.ca/ai/of/ias/bkg-eng.asp>.
- 46 Indian and Northern Affairs Canada, Office of the Federal Interlocutor, "Urban Aboriginal Strategy" at <www.ainc-inac.gc.ca/interloc/ias/index-eng.asp>. For a list of UAS projects from 2003 to 2008 in each city, see the UAS webpage at <www.ainc-inac.gc.ca/ai/of/ias/prj/index-eng.asp>. The Treasury Board of Canada Secretariat has a list of Plans, Spending and Results for the UAS for 2007 through 2010 at <www.tbs-sct.gc.ca/hidb-bdih/initiative-eng.aspx?Org=2&Hi=47>.
- 47 See e.g., Report on Colloquium, "Emerging Realities of Métis, Non-Status and Urban Aboriginal Populations: Building a New Policy Research Agenda." (Ottawa: Carleton University, 2008).
- 48 See *supra*, note 32.
- 49 Toronto District School Board, "First Nations School of Toronto, Jr. and Sr." (2008–2009) at <www.tdsb.on.ca/profiles/5360.pdf>.
- 50 Toronto District School Board, "First Nations School of Toronto, Jr. and Sr." (2008–2009) at

- <www.tdsb.on.ca/profiles/5360.pdf>.
- 51 Toronto District School Board, “First Nations School of Toronto, Jr. and Sr.” (2008–2009) at <www.tdsb.on.ca/profiles/5360.pdf>.
- 52 See <mmf.mb.ca/index.php?option=com_content&task=view&id=139&Itemid=47>. For another example on a land base, one can look to the Métis Settlements Child and Family Services Authority at <www.metissettlementscfsa.gov.ab.ca/home/>.
- 53 The 3 volumes of the report are available at <www.ajic.mb.ca/volume.html>.
- 54 <www.ajic.mb.ca/index.html>
- 55 *Child and Family Services Act*, R.S.O. 1990, c. 11.
- 56 <www.fraa.ca/_pdfs/documents_releases_080512.pdf>. The concept was subsequently studied by Kelly A. MacDonald, *The Road to Aboriginal Authority over Child and Family Services Considerations for an Effective Transition* (Vancouver: Canadian Centre for Policy Alternatives and the Centre for Native Policy and Research, 2008).
- 57 <www.mcf.gov.bc.ca/about_us/aboriginal/delegated/index.htm>
- 58 The full text is available at <www.mcf.gov.bc.ca/publications/Recognition_Reconciliation_Protocol.pdf>.
- 59 <www.wabano.com/main.html>
- 60 <www.aht.ca/>
- 61 It should be noted that labour arbitration does not make use of this same legislation, as it is regulated by distinct legislation dealing with trade unions and employer relations; however, any disputes relating to interpretation or application of the terms of any collective agreements between union and management are also resolved through arbitration. Separate labour arbitration legislation also exists for civil servants, as well as certain essential service sectors, such as police, firefighters, and hospital employees.
- 62 See note 7, *supra*, also the report prepared for the Government of Ontario by a former attorney-general of that province, Marion Boyd, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” (2005), Executive Summary, p.1; available at <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>. See also, Natasha Bakht, “Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women,” (2004) 1 *Muslim World Journal of Human Rights*.
- 63 S.S. 2001, Chapter M-14.01.
- 64 *Ibid.*, s. 2.
- 65 See, e.g., the *Westbank First Nation Self-Government Act*, S.C. 2004, c. 17.
- 66 *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27.
- 67 <www.collectionscanada.gc.ca/webarchives/20071115160724/>, <http://www.ainc-inac.gc.ca/pr/agr/que/jbnq_e.html>
- 68 The Government of Canada has frequently used this approach of giving domestic legal effect to some international treaties (e.g., bilateral tax treaties and the Migratory Birds Convention) for many decades.
- 69 Indian and Northern Affairs Canada, “Agreements,” <www.ainc-inac.gc.ca/pr/agr/index_e.html#Self-GovernmentAgreements>.
- 70 See, *Mi’kmaq Education Act*, S.C. 1998, c. 24 and <www.kinu.ns.ca/milestones.html> for a history of its development. See also, *First Nations Jurisdiction over Education in British Columbia Act*, S.C. 2006, c-C-34.
- 71 *First Nations Land Management Act*, S.C. 1999, c. 24.
- 72 Text available at <www.newrelationship.gov.bc.ca/shared/downloads/new_relationship.pdf>.
- 73 The full text is available at <www.newrelationship.gov.bc.ca/shared/downloads/transformativ_change_accord.pdf>.
- 74 <www.parl.gc.ca/information/library/PRBpubs/prb0604-e.htm>
- 75 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] SCC 73.

- 76 First Nations Leadership Council Information Bulletin, January 2009, volume 3, issue 9, at <www.ubcic.bc.ca/News_Releases/UBCICNews01200901.htm>; and First Nations Leadership Council Information Bulletin, October 2008, volume 3, issue 7, at <www.ubcic.bc.ca/News_Releases/UBCICNews10010801.htm>.
- 77 Discussion Paper on Instructions for Implementing the New Relationship, February 19, 2009, <www.gov.bc.ca/arr/attachments/implementing_the_new_relationship_0309.pdf>.
- 78 <www.fns.bc.ca/pdf/AllChiefsAssembly_MediaStatement.pdf>
- 79 The International Covenant on Civil and Political Rights (Art 1(3)), the International Covenant on Economic, Social, and Cultural Rights (Art 1(3)), and the UN Charter have all recognized the human right of self-determination for all peoples. The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007 by the UN General Assembly, has recast this well-established right slightly to apply to this context in Article 3: Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.
- 80 The Supreme Court of Canada has only addressed Aboriginal self-government on one occasion (*Regina v. Pamajewon*, [1996] 2 S.C.R. 821), in which it declared that the standard test for Aboriginal rights (the so-called “Van der Peet Test” from *Regina v. Van der Peet*, [1996] 2 S.C.R. 507, rendered one day earlier than *Pamajewon*) should be applied to determine if a particular Aboriginal nation, community, or group possessed a right of self-government in relation to a specific head of law-making power. Only the B.C. Supreme Court, in *Campbell v. British Columbia (A.G.)*, [2000] B.C.J. No. 1524, has directly confronted the issue and upheld a pre-existing or inherent right of self-government as a reflection of original sovereignty that has continued to survive colonization so as to be protected by s. 35(1) of the *Constitution Act, 1982*. This decision, however, was in the context of a challenge to the validity of the Nisga’a Nation-Canada-British Columbia Treaty such that one cannot readily apply its reasoning to significantly different factual circumstances.
- 81 See e.g., Canada, *Royal Commission on Aboriginal Peoples Final Report, Restructuring the Relationship*, volume II, Part 1, (Ottawa: Canada Communications Group, 1996), pp. 202–13; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); Ghislain Otis, “L’autonomie personnelle au Coeur des droits ancestraux: sub qua lege vivis?” *McGill Law Journal* 52 (2007) 657, as well as another superb article by him in “Territorialité, personnalité et gouvernance autochtone,” (2006) 47 *Cahiers de Droit* 781; amongst many others.
- 82 For an introduction to this system see, Augie Fleras, “From Social Control towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand,” (1985) 18 *Canadian Journal of Political Science / Revue canadienne de science politique* 551; and Catherine J. Iorns, “Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination” (2003) Murdoch E-Law No. 4 at <www.murdoch.edu.au/elaw/issues/v10n4/iorns104nf.html>.
- 83 See, for example, the Supreme Court of Canada’s views in *Regina v. Sparrow*, *supra*, note 18; *Regina v. Van der Peet*, [1996] S.C.J. No.77; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; and others.
- 84 An on-reserve variation of this idea has been operating for a number of years and was confirmed by the *First Nations Goods and Services Tax Act*, S.C. 2003, c. 15.
- 85 INAC initiated the Alternative Financing Arrangements to support multi-year funding commitments many years ago for those tribal councils and First Nations with a history of successfully meeting INAC expectations for balanced budgets.
- 86 For a brief elaboration of this idea, see Robert K. Groves, “An Aboriginal Equalization Formula” (Unpublished paper, August 2008, in author’s possession).
- 87 *Municipal Statute Law Amendment Act*, 2006 (Bill 130).
- 88 *Municipal Act*, S.O. 2001, c. 25, s. 239.
- 89 *Municipal Act*, S.O. 2001, c. 25, ss. 239.1 and 239.2 as introduced by *Municipal Statute Law Amendment Act*, 2006 (Bill 130).
- 90 R.S.O. 1990, c. M.56.

- 91 See *Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters* (Ottawa, March 15–16, 1983), online: Canadian Intergovernmental Conference Secretariat <www.scics.gc.ca/pubs/fmp_e.pdf> at pp. 76–77.
- 92 The Native Women’s Association of Canada was denied equivalent status to the other four organizations.
- 93 Canada, *Consensus Report on the Constitution* (Charlottetown: Government of Canada, 1992), online: Government of Canada, Privy Council <www.pco-bcp.gc.ca/aia/default.asp?Language=E&page=consfile&sub=thehistoryofconstitution&doc=charlottetown_e.htm>.
- 94 The Native Women’s Association of Canada was again unsuccessful in obtaining equivalent funding or ability to directly participate in these negotiations. It sued the Government of Canada for violating the freedom of expression (s. 2(b) of the *Canadian Charter of Rights and Freedoms*) of its members, breaching their equality rights (s. 15(1) of the *Charter*), and argued that their exclusion was contrary to the constitutional protection of Aboriginal and treaty rights (s. 35(1)). NWAC was unsuccessful before the Federal Court Trial Division, but did obtain partial success before the Court of Appeal; however, the Supreme Court of Canada unanimously rejected all of its arguments in *Native Women’s Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627. For a discussion on the background to this dispute, see Katherine Beaty Chiste, “Aboriginal Women and Self-Government: Challenging Leviathan” (1994) 18 *American Indian Culture and Research* 19.
- 95 See Kenneth McRoberts and Patrick Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993).
- 96 See, RCAP, *National Round Table on Aboriginal Urban Issues* (Ottawa: Canada Communications Group, 1993).
- 97 It should be noted that there was a Bill in the Senate in 2008 that died on the Order Paper; however, it is still possible that this Accord is not entirely dead, as it retains support from all opposition parties in Parliament.