ABORIGINAL GOVERNANCE: AN ANNOTATED BIBLIOGRAPHY

Prepared for the First Nations Governance Centre

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INTRODUCTION

What follows is a select annotated bibliography of work on aboriginal governance. The bibliography is select and it is to be hoped that it will become more complete as time goes on, and readers are invited to help fill in whatever deficits the work may contain. I would like to make a few introductory comments in explanation.

There has been an explosion of work on governance in the world generally, and aboriginal governance particularly. The general work on governance seems to me to be spurred on by two not necessarily consistent impulses. The first impulse is the push for universal democracy and human rights, and the second is the push for universal laws for the encouragement of trade. The inconsistency occurs because democracy, which is the essence of self-determination, is generally envisaged only in the form in which it has developed in Western Liberal Democracies, and because there is great pressure for the laws a people chooses to enact conform to standards acceptable to global trade. This tension has not yet been resolved. It is important to place aboriginal governance specifically within this global enterprise which some have described as the contemporary version of colonialism. Some have said that this emphasis can be compared to the social Darwinist doctrines of the late 19th Century, and there is certainly a danger there. On the other hand it is difficult to argue that democracy and liberty which this project is supposed to promote is not a good. It is a good however fraught with perils.

There is an abundance of work on aboriginal governance, but there is room for more. There is perhaps too little drawn from direct experience and observation of what happens in aboriginal communities. If as some have held a constitution is best drawn from the actual experience of peoples this is a serious weakness.

Alfred, Taiaiake, "Sovereignty: Blackwell Companion to Native American History" (Paper presented to the Canadian Bar Association Aboriginal Law Conference, Victoria, 2002) [unpublished].

In this article, Alfred provides a critical history of the political relationships between aboriginal peoples and settler colonies in Canada and the United States. He is critical of how indigenous decolonization efforts have been captured and framed by colonial discourse, and of how they remain within the confines of the existing legal and political structures. For example, the European construct of sovereignty is now embedded in the political projects of aboriginal nations, but without an analysis of the potential implications of adopting European notions of power and governance. Alfred admits that use of the sovereignty paradigm has enabled aboriginal peoples to make significant legal and political gains, but contends that these are nonetheless insufficient because the serious social ills in aboriginal communities continue unabated. However, movements of aboriginal self-government, self-determination, and sovereignty are founded on an ideology of indigenous nationalism and a rejection of European government models.

According to Alfred, most of aboriginal peoples' energy thus far has been focused on escaping state control and securing legal and political recognition for indigenous governing authorities. He asks, "What will an indigenous government be like after self-government is achieved?" The hope is that indigenous governance structures will reflect indigenous cultural values, but the fear is that they will instead model current colonial structures by incorporating European concepts of sovereignty and power.

Archibald, Linda & Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project* (Ottawa: Research Directorate, Status of Women Canada, 1999).

The authors investigate how gender issues are hidden in policies relating to land claims and environmental assessment, and how the implementation of these policies impact Inuit women. Their extensive report provides a chronology of events, critical examinations of the relevant policies, the results of discussions with individual Inuit women and groups regarding impacts, and a comprehensive list of recommendations. Among other things, the recommendations include conducting a gender-based analysis of the federal land claims policy and self-government policy that would include the full participation of aboriginal women's organizations. Also, they recommend that gender-based analysis be conducted of all concluded land claims agreements and the Canadian Environmental Assessment Agency guidelines. Other recommendations focused on remedying the absence of aboriginal women in government and aboriginal organizations at all levels, and on supporting aboriginal women to conduct their own research.

Asch, Michael, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alberta Law Review 465.

According to Asch, current Canadian constitutional ideology devalues aboriginal peoples' inherent right to self-government because of an espoused adherence to universalism. Asch uses the concept of consociation, an ideology that allows states to identify citizens as individuals and as members of ethnonational communities and to protect equality for both individual and ethnonational collective rights. Asch differentiates between what he calls direct consociation and indirect consociation. With the former, the state expressly acknowledges the existence of ethnonational collectivities and extends protection accordingly. With the latter, the state ideology is explicitly universalistic, and any protection of ethnonational collectivities is incidental to other principles.

Within this conceptual framework, Quebec represents a compromise. From the Quebec perspective, Canada is "ideologically constructed to be a direct consociation between the French and the 'English'. …[F]rom an Anglophone point of view, Canada can be ideologically constructed to be a 'universalistic' state" organized under federalism". In recent years with the constitutional talks, this compromise has become unstable.

Asch argues that direct consociation is a better solution to the minority-majority problem than is universalism, which serves to mask assumptions about the moral legitimacy of the colonial occupation of Canada. To make his case, Asch provides a textual analysis of the Constitution Acts of 1867 and 1982, and an examination of the ideology underlying government assertions.

Awashish, Philip, "From Board to Nation Governance: Eeyou Tapay-Tah-Jeh-Souwin (Eeyou Governance) and Economic Development in Eeyou Istchee" (2002) (Paper presented to the Conference on "Reconfiguring Aboriginal-State Relations – Canada: the State of the Federation 2003", Institute of Intergovernmental Relations, School of Policy Studies, Queen's University, Kingston, Ontario) [unpublished].

Awashish discusses historic and current governance and economic development issues relating to the James Bay Cree nation, Eeyou Istchee.

The James Bay and Northern Quebec Agreement (1975) provided the Cree with an opportunity to establish institutions for education, health, social services, land, and governance. Awashish describes concerns including (i) the ever-increasing demand from government and industry for renewable and non-renewable resources, (ii) the failure on the part of both the Quebec and federal governments to properly include the Cree in economic development or adequately consider environmental protection, and (iii) the Quebec government's disregard of aboriginal rights under the agreement. The aboriginal peoples have not benefited from the extraction of resources from their territories. The agreement did not end the conflict. Instead, it was the beginning of continued confrontation with both levels of government.

According to Awashish, the *Cree-Naskapi (of Quebec) Act* (1984) set out procedures for the orderly and efficient establishment of Cree and Naskapi local government, including the management of community lands. The Act established the Cree-Naskapi Commission that has produced and submitted biannual reports to the Minister of Indian and Northern Affairs for submission to Parliament. To date, the federal government has consistently ignored the biannual report findings and recommendations. This has resulted in the Act remaining a rigid and unchanging eighteen-year-old document because it fails to evolve to meet changing circumstances. Practically, this has limited Eeyou Istchee from achieving its full potential as a local government.

In 2002, the Cree and the government of Quebec signed a New Relationship Agreement. Among other things, its purpose was to establish a nation-to-nation relationship and to strengthen the Cree position regarding social, economic, and political benefits. According to Awashish, the Cree are adopting a cautionary and alert stance as they observe the implementation of the New Relationship Agreement.

Bell, Catherine E., "Métis Self-Government: The Alberta Settlement Model" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 329.

Bell argues that the Métis settlement government should be recognized as a form of aboriginal governance and that such an understanding must be contextualized by the specific legal, social, and political goals of the Métis settlements in Alberta. In negotiating the settlements, Métis leaders chose a practical approach intended to achieve practical results with the provincial government over a constitutional rights-based strategy. This tactic allowed the provincial process to proceed without federal participation.

Bell provides a brief history of the Métis settlements and a discussion of how the Métis dealt with the uncertainties of identification, jurisdiction, and recognition of inherent rights. She outlines the structure and powers of the settlement governments, the appeals tribunal, Métis ownership of land and resources, questions of constitutional protection, economic development, and relationships with external governments. She concludes that the Métis were successful in achieving their autonomy and obtaining security for Métis lands, but they will continue to seek recognition and implementation of their inherent aboriginal rights. In the meantime, the Métis have established a model of governance within the confines of provincial jurisdiction.

Bell, Catherine E., "Comment on 'Partners in Confederation': A Report on Self-Government by the Royal Commission on Aboriginal Peoples" (1993) 27 U.B.C. Law Review 361.

Bell frames the main features of the political discussions that arose with the 1982 recognition of aboriginal and treaty rights. During the debates, one school of thought held that no further constitutional amendment was legally necessary because the *Constitution Act, 1982* recognized an inherent right to self-government. In practice however, the implementation of self-government is limited to allowing tiny steps toward aboriginal autonomy through *Indian Act* amendments. The other school of thought supported the unsuccessful Charlottetown Accord, which at the end of the day, would have recognized self-government only as a delegated right subject both to federal and provincial laws and to the *Canadian Charter of Rights and Freedoms.* Failure of the Charlottetown Accord caused some aboriginal leaders to advocate direct political actions designed to implement *de facto* self-government.

According to the Royal Commission on Aboriginal Peoples report, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, aboriginal peoples do not need an agreement with either the federal or provincial governments in order to bring a legally enforceable right of self-government to the courts. The proviso is that such an action must be within a core area of aboriginal jurisdiction and does not give rise to overriding national or regional areas of concern. Basically, aboriginal laws within core areas "could not be abolished by federal or provincial law unless infringement on Aboriginal authority could be justified" in accordance to the S.C.C.'s *Sparrow* decision.

Bell considers both the strengths and weaknesses of *Partners in Confederation*. Its strength is that it provides a domestic law framework within which the courts can enforce some aboriginal government powers without constitutional amendment. Its weaknesses are: (i) Its analysis of Canadian law does not recognize treaties, natural law, international law, or indigenous laws as sources of substantive and procedural law. (ii) It supports the Charlottetown Accord but fails to incorporate the aboriginal voices that were critical of the accord. (iii) It does not consider the inequality underlying the doctrine of Crown sovereignty. (iv) It does not address aboriginal concerns about the application of provincial law to aboriginal peoples.

Bern, John & Susan Dodds, "On the Plurality of Interests: Aboriginal Self-Government and Land Rights" in Duncan Ivison, Paul Patten, & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge, U.K.: Cambridge University Press, 2000) 163.

The diversity of aboriginal peoples in Australia raises many questions regarding how self-governance and representation should be structured. State regulatory requirements may fail to recognize the diversity of indigenous interests and the plural bases for those interests.

Bern and Dodds argue that political theorists must appreciate the ways in which political and regulatory institutions actually shape the interests and boundaries of groups within the state. Questions must be asked about who is recognized and privileged as the legitimate authorities of aboriginal groups, and what the consequences of these practices are. The authors analyze the work of several contemporary political theorists – Iris Young, James Tully, and Will Kymlicka – on nations, negotiations, and representation. The authors also review contemporary land rights and governance issues in Australia, and recent conflicts arising out of the reification of descent groups for the purposes of establishing traditional owners.

Borrows, John J., "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155.

Borrows contends that, although the *Royal Proclamation of 1763* is a fundamental document for both aboriginal and non-aboriginal legal history, it is treated as if it were a unilateral declaration of the Crown's will over aboriginal peoples. Such ethnocentric treatment denies the active participation of aboriginal peoples in the formulation and ratification of the *Royal Proclamation*, thereby implying that aboriginal peoples were passive and powerless victims. According to Borrows, properly understood, the *Royal Proclamation* may be seen both as a guarantee of aboriginal self-government and as the basis for today's relationships between aboriginal peoples and the Crown. Since aboriginal rights are presumed to continue until the contrary is proven, disregarding them does not void them.

Carter, Truman and Fred H. Miller, "Uniform Laws and Tribal Legislation: One Tribe's Perspective" (2001-2002) 26 Am. Indian L. Rev. 89.

This paper surveys the drive for uniform legislation among the American states and looks at the possibility of extending such laws to the Tribes. The need for such uniformity increases as tribes begin to engage in economic development. However, the adoption of uniform laws must leave room for adaptation for tribal use. The authors say that the time has come for cooperative effort and the National Conference of Commissioners on Uniform State Laws to study this problem further.

Chartier, Clem, "Aboriginal Self-Government and the Métis Nation" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 112.

According to Chartier, the constitutional renewal during the 1980s and early 1990s provided an opportunity for the Métis to engage directly in self-government negotiations. This process enabled the Métis to organize nationally, distinguish their position as a distinct people (as opposed to "mixed blood"), and develop their political project generally. The obstacles the Métis face continue to be the lack of a land base (with the exception of the Alberta settlements), lack of access to lands and resources, internalized colonization, and continuing confusion over which level of government has the legislative jurisdiction to deal with the Métis nation. Furthermore, the federal government's position is that Métis rights to land were extinguished through the land grant and script processes implemented during the 1800s and early 1900s. Nonetheless, Chartier remains optimistic about Métis determination to overcome the obstacles.

Chartrand, Paul L.A.H., "Aboriginal Self-Government: The Two Sides of Legitimacy" in Susan D. Phillips, ed. *How Ottawa Spends: A More Democratic Canada..? 1993-1994* (Ottawa. Carleton University Press,1993) at 231-256.

In this essay, principles which would establish which legitimate and lasting Aboriginal self government are examined. Two factors which weigh heavily in the legitimation of the status quo are identified as false: that Aboriginal peoples are simply a disadvantaged racial minority who require the benevolence of the state; and that since Aboriginal people live in Canada, they are Canadians whose demands can be satisfied by equal treatment with other Canadians. Instead Aboriginal people must be viewed as political communities with collective political rights, and not merely as races. Their legitimate political aspirations must be recognized in a form which enables them to meet the needs of their communities. The paper also examines the mechanisms which are being developed to meet the political aspirations of Aboriginal peoples: participation in constitutional politics by Aboriginal peoples such as occurred in the Charlottetown Accord; possible political modifications such as the establishment of Aboriginal Electoral Districts; and the negotiation of self-government at the administrative level.

Clark, Bruce, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990).

Clark's basic argument is that an aboriginal right of self-government exists in Canada, and that it survived the imperial government's claim of British sovereignty. Self-government was confirmed both by constitutional (though not domestic) common law and by constitutional legislation enacted by the imperial government. He defines self-government as the legal right to govern civil affairs in unceded territory, including reserves, by making laws that have precedent over the laws of external governments. The prerogative legislation confirming the aboriginal right of self-government has never been repealed, and a substantial body of case law and the *Constitution Act, 1982* have explicitly recognized that the *Royal Proclamation of 1763* has neither been replaced nor rendered nugatory. Clark contends that since aboriginal self-government is already recognized in law as an open-ended residual jurisdiction, negotiations could reduce self-government from an inherent right to that of a truncated, delegated, municipal style form of government.

Christie, Gordon, "Challenges to Urban Aboriginal Governance" (2002) [unpublished] online: Institute of Intergovernmental Relations, Queen's University <www.iigr.ca/conferences/archive/pdfs3/Christie.pdf>.

Christie surveys the legal and constitutional challenges facing proponents of urban self-governance structures, and suggests several possible structures that might be instituted by urban aboriginal peoples. He also asks whether there is an aboriginal or treaty right to aboriginal governance in an urban setting, and he works through the problems that such a claim would have meeting the aboriginal rights test. The first major problem lies with the nature of the community that might try to claim a right to urban self-governance. Since urban aboriginal communities are more of an association of interests than either a cultural or political community, there are problems the legal requirements relating to the identity of the claimant group, continuity, and the evolution of aboriginal rights. Given this, it is unlikely that such a claim is supportable under s. 35.

The case law on the constitutional issues facing urban self-governance suggests that self-government will have to be focussed narrowly with particularized powers. Given this, perhaps the urban population could ground its claim in the source communities from which the urban peoples originated. From this basis, it could argue for the right to manage services for constituent members. Christie suggests that such particularized self-governing powers are vulnerable to arguments of sovereign incompatibility (assuming that constitutional space is recognized for aboriginal self-government).

Christie analyzes how the prevailing liberal democracy theories might respond to an urban self-governance claim, and concludes that since they focus primarily on culture, political support would be weak. In the end, He advises that urban aboriginal peoples begin their political project by determining the responsibilities of their members and community, and assume control of programs and services. Then self-government will

be as a consequence of the practical building of urban aboriginal groups that are responsible for one another.

Connolly, William E., "The Liberal Image of the Nation" in Duncan Ivison, Paul Patten, & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge, UK: Cambridge University Press, 2000) 183.

Connolly reviews Alexis de Tocqueville's and John Stuart Mill's models of nationhood and their contemporary revisions. The liberal concept of a nation is that it provides three collective goods: (i) belonging to something larger than the self, (ii) political communication, and (iii) enactment of general policies by democratic means. Connolly also discusses conceptions of pluralism and suggests that multi-dimensional pluralism must be accompanied by an ethos of engagement between diverse constituents who behave in a reciprocal manner. His discussion raises serious issues (for both aboriginal and non-aboriginal peoples) in the building of new relationships that allow aboriginal self-government.

Gina Cosentino and Paul L.A.H.Chartrand, "Dream-Catching Mulroney Style: Aboriginal Policy and Politics in the Mulroney Era", in *Examining the Legacy: Policy in the Era of Brian Mulroney,* (Toronto, University of Toronto Press, forthcoming fall 2004)

Cornet, Wendy, "First Nations Governance, the *Indian Act* and Women's Equality Rights" in *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: Research Directorate, Status of Women Canada, 2001) 117.

The author examines the "history and rationale for the s. 67 exemption of *Indian Act* matters from the *Canadian Human Rights Act* in the context of First Nations women's equality interests in governance". Governance issues arising from the *Indian Act* that impact women are gender, race, nationality, residence, family status, and marital status. Cornet reviews the *Canadian Human Rights Act*, *Indian Act*, and the *Charter*. The basic conclusion is that the original rationale for the exclusion of *Indian Act* matters is no longer valid and is now producing inconsistent results. Furthermore, under the *Indian Act* and with the application of the *Charter*, there are serious discriminatory problems affecting women and children that would not be addressed by removing the s. 67 exemption. Cornet makes recommendations intended to encourage dialogue within aboriginal communities about human rights and women's rights. Other recommendations include legislative reforms to the *Indian Act* and updating the inherent right-of-self-government policy to include jurisdiction over human rights.

Ekstedt, John W., "International Perspectives on Aboriginal Self-Government" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed (Saskatoon: Purich, 1999) 45.

According to Ekstedt, aboriginal peoples have experienced three stages of change: first contact with an occupying people, colonial assimilation or annihilation strategies,

and social and cultural renewal of aboriginal peoples. It is in this last category of change, that Ekstedt places aboriginal self-government. Eksedt takes a broad human rights approach to self-government, characterizing it as a response to colonial atrocities whereby "victimization" is a continuing political issue. He contends that self-government forms part of an international push to democratize international politics with fundamental human rights and equal opportunities. Basically, Eksedt is optimistic about how global discourse (e.g., expectations and standards) and economic trends will continue to influence support for aboriginal peoples' local self-government efforts. He concludes with a brief comparative survey of self-government developments in the United States, South Pacific, Canada, and Latin America.

Fiske, Jo-Anne, Melonie Newell, & Evelyn George, "First Nations Women and Governance: A Study of Custom and Innovation Among Lake Babine Women" in *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Papers* (Ottawa: Research Directorate, Status of Women Canada, 2001) 55.

In this research project, the authors set out to explore whether the *Indian Act* should be amended to provide for more equitable governing powers for men and women, and how new regulations and policy might improve the political participation of aboriginal women. The authors discussed the questions with women from the small northern community of Lake Babine. The women's basic conclusion was that gender equity will not change with policy, but with broad social change and with specific changes made to education, healing programs, and cultural revitalization. The women attributed their situation with patriarchal colonialism and they recommended, among other things, female leaders taught traditional values, and developing male support for female leadership. The proposed list of twenty-two recommendations covers training for women as traditional leaders and decision-makers, improving election procedures and governing structures, employment policies, consultation, and funding. In the end, the women of Lake Babine did not seek to dismantle the *Indian Act*, but sought to find ways to incorporate aspects of their culture and traditional institutions within it.

Fox, Stephanie Irlbacher, "Self Government in the Circumpolar World" (2001), online: Scott Polar Research Institute, University of Cambridge, www.spri.cam.ac.uk.

Fox defines self-government as a "right conforming to and exercised within the institutional and constitutional arrangements of nation-states." As such, indigenous self-government arrangements vary according to internal legal, social, political, and economic regimes and interests of nations states, and in response to increasing international recognition of indigenous peoples' rights. In general, indigenous self-government encompasses many forms of increased control over lands, culture, resources, and economy. According to Fox, in the circumpolar world, self-government ranges from state agencies with limited advisory powers to constitutionally recognized public governments.

Fox also provides a brief history of the indigenous peoples of Alaska, Greenland, Norway, Sweden, Finland, Russia, and Canada (i.e., Yukon, Northwest Territories,

Nunavut, Nunavik). For each country, Fox outlines the legal and institutional frameworks for the economic and political participation of the indigenous peoples.

Freedman, Bob, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*" (1994) 28 University of British Columbia Law Review 49.

Freedman is concerned with how rights of self-government will be "worked out" in the political and legal landscape if they are given constitutional protection. He cautions that giving a right of self-government protection before deciding what it means could result in constitutionally protecting an empty shell that is devoid of meaning.

In Part I, Freedman reviews the B.C.S.C. trial decision by Chief Justice McEachern, who basically held the view that aboriginal rights of self-government were extinguished in B.C. either by the assertion of sovereignty in 1846 or by the legislative schemes that the colony established when the province entered confederation. In Part II, Freedman outlines the conclusions reached by the Court of Appeal as they relate to self-government. The majority (3:2) held that self-government had been extinguished, but agreed that the scope and content of any aboriginal right to self-government should be negotiated, or remitted to trial for their determination. In Part III, Freedman turns to The Royal Commission on Aboriginal People's (RCAP) treatment of self-government – the source of the right, its extent and scope, and its status in relation to other governments. RCAP took the position that an aboriginal right to self-government is an inherent right (as opposed to contingent) and that the powers and scope of self-government should be negotiated with aboriginal consent. However, according to the s. 35 justificatory test, this right will have to be worked out within the context of competing rights in Canada – and as such, they can be limited, infringed, and extinguished. Since aboriginal and treaty rights are protected by the constitution, they are rights, not interests, and so should be dealt with on a different plane. In Freedman's opinion, this catches aboriginal peoples in a contradiction. He writes, "The justificatory test should not be relied upon to give content and meaning to aboriginal rights of self-government absent any prior definition of those rights". Consequently, Freedman advocates negotiations as a preferred course of action to practically work out the scope, content, and meaning of aboriginal rights to self-government.

In the remainder of the paper, Freedman discusses the "space" for aboriginal self-government in the current constitutional arrangement and reviews the relevant constitutional case law concerning, among other things, the division of powers, the doctrine of exhaustion, and the interpretation of s. 91(24). According to Freedman, if one accepts that the legislative scheme and division of powers under the *Constitution Act, 1867* exhausted the distribution of powers, then a new head of power for self-government would have to be carved out of the existing heads of power in ss. 91 and 92. However, if the right of self-government is inherent, then it was never extinguished or abandoned, and a conflict is created. Alternatively, if s. 35 contains

the right of self-government, then it still has no meaning as an existing right unless room can be found for it in *Constitution Act, 1867*. Given his analysis, Freedman contends that it is nonsensical to suggest that the rights of self-government are immediately justiciable as a third head of government.

Frideres, James, "The Royal Commission on Aboriginal Peoples: The Route to Self-Government?" (1996) XVI:2 The Canadian Journal of Native Studies 247.

Frideres contends that in recent years aboriginal peoples have become more "pan-Indian", nationalistic, and militaristic. The failure of the federal government to design and enforce a self-government policy is the result of deliberate attempts to attenuate aboriginal rights and control aboriginal peoples. Frideres is critical of the Royal Commission on Aboriginal Peoples (RCAP) because it advances the federal government's agenda, and it is a closed process (e.g., submissions received and Commission activities). Frideres recounts the history of royal commissions and concludes that the basic strategy in establishing RCAP was to investigate a specific issue, allow for public discussion, and maintain its *ad hoc* nature. In other words, government did not intend RCAP to become an ongoing investigation; it was to be limited to a specific issue with a specific schedule. Also Frideres contends that RCAP failed to change the consciousness of the Canadian public regarding aboriginal peoples. However, he does concede that RCAP effectively engaged the imagination and interest of the aboriginal population.

For the first part of his project, Frideres conducted an extensive examination of how the Canadian media portrayed RCAP. Four themes emerged from the research: Inuit relocation, cost of RCAP, credibility of RCAP, and self-government. The second part of his research involved focussing his examination of the first round of 850 submissions made to RCAP on how they characterized self-government. Frideres noted that most of the presentations were from the prairie provinces (272), the Atlantic provinces were second (140), and B.C. was third (120), followed by Ontario and the Territories. Quebec had the lowest number of submissions (38). Surprisingly, Frideres found no gender differences in either the individual or organizational submissions. The specific issues identified in the submissions were justice, urbanization, health, treaties, land and resources, education, and language and culture.

Graham, John, "Aggregation and First Nation Governance: Literature Review and Conclusions" (2003) [unpublished], online: Institute on Governance www.iog.ca.

Graham defines aggregation as "a formal arrangement among governments to share or delegate services and powers through the creation of new public bodies or by shifting responsibilities from one level to another". Five models of aggregation are examined: (1) single tiered, (2) two-tiered, (3) power sharing agreements, (4) special purpose bodies without legislated powers, and (5) special purpose bodies with legislated powers. Graham provides extensive examples of each model, discusses the various implications for aboriginal groups, potential costs and benefits. and other observations. Graham's main conclusions are that aggregation facilitates "good governance"

practices, increases advocacy effectiveness, lowers costs through economies of scale, and avoids the tensions of small community politics. The report includes a set of common design principles for aggregation models and a critique of RCAP's advocated nation approach to self-government.

Graham, John and Jake Wilson, "Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change" March, 2004 (Institute on Governance). www.iog.ca.

This paper identifies some of the key governance challenges facing aboriginal communities, and proposes an agenda for change in the next decade. It identifies five principles of good governance: legitimacy and voice; fairness; accountability; direction and performance. It then looks at these principles in an aboriginal context to identify key challenges to aboriginal governance. These include: inappropriate electoral systems; membership, status and residency issues; issues pertaining to the role of women; lack of basic instruments of governance; inability in some cases to take control of their development agendas; the small size of communities relative to their burdens; public housing problems; weak accountability regimes and over-reliance on outside sources of funding. The authors' agenda for change includes: discussions between the federal government and Aboriginal leaders around what constitutes 'good' governance and what might be guiding principles on which to base future work together; crafting a new approach to housing, one which puts the emphasis on individual as opposed to public ownership; voluntary certification for financial management and related governance functions; aggregation of some responsibilities to a higher-tier of Aboriginal government; developing a strategy to fill regulatory gaps facing First Nations communities; developing principles for effective structuring of the relationship of politics and business in First Nation communities, and short term work on policies and by-laws and related enforcement concerns.

The authors also identified longer term issues including: alternatives to the 'first past the post' electoral systems; researching approaches to membership issues; enhancing the role of women; developing countervailing forces to the public sector in aboriginal communities; addressing taxation and accountability issues; exploring methods of building sustainable governance capacity; and the linkages between good governance and positive socio-economic outcomes.

Graham, Katherine A., "Urban Aboriginal Governance in Canada: Paradigms and Prospects" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 377.

According to Graham, about fifty percent of aboriginal peoples in Canada live in urban areas either permanently or temporarily. Despite efforts over the past few decades to develop urban networks and institutions, a number of outstanding issues remain including (1) the cultural diversity of the aboriginal population, (2) any governance initiative would necessarily have to encompass the diversity, (3) a stable funding base is necessary, and (4) effective relationships must be established between

urban aboriginal peoples and local/municipal governments. Graham argues that RCAP provides a potentially effective model for organizing governance with urban aboriginal peoples, but she is questions whether the RCAP recommendations will ever be acted on. Graham outlines the urbanization history of aboriginal peoples and discusses various (post-Oka) urban aboriginal initiatives.

Hopkins, James C., "Applying Context to Rights: Indigenous Peoples in a Global Society (2003) Presented at the Fall 2003 Conference, Indigenous Bar Association, Vancouver, Canada

Hopkins aims in this paper to indicate some of the promises and perils for indigenous people in globalization. He outlines some of the tensions in the globalization project, paying particular attention to the American Indian Trust Doctrine. He also indicates some of the problems inherent in legal discourse surrounding indigenous rights, making those rights what he describes as a poison pill which harm indigenous peoples at the same time they protect them. He encourages new ways of thinking about indigenous rights specific to the global context.

Hogg, Peter W. & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) 375.

Hogg and Turpel prefer constitutional amendments to prevent the possible subjugation of an aboriginal order of government. However, they also discuss how the inherent right of self-government may be implemented within the current constitutional framework – without the proposed Charlottetown Accord amendments. The authors begin by recognizing self-government as an inherent "pre-existing" right deriving from prior occupation and established aboriginal governments in Canada. They advocate political negotiations, rather than reliance on the necessarily constrained powers of the courts, to determine the scope of self-government. They provide an analysis of aboriginal jurisdictions in light of existing federal and provincial laws of general application, self-government financing, the constitutional status of self-government agreements, the resolution of disputes over inconsistent laws (i.e., federal, provincial, or aboriginal), and the application of the *Canadian Charter of Rights and Freedoms* to aboriginal governments.

Hutchins, P. W. et al. "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine." (1995) 29 *U. B. C. L. Rev* 251.

This paper argues that the inherent right of self government exists independently of the Canadian Constitution, drawing first of all upon the model in international law where one nation may transfer external sovereignty to another and yet maintain internal sovereignty. The paper states that under international law the right to self determination is inherent and permanent, and (1995) inextinguishable by any state. Where a right of self determination exists for a people within the borders of an

established state, this means that a people has a right to take measures to ensure one's political, economic, social and cultural future, including self government.

The paper also argues that the right of self government is part of the Canadian Constitution. The elements of this include Imperial constitutional law which was embodied by the Royal Proclamation of 1763, and as part of the imperial constitution was incorporated into the preamble of the *Constitution Act, 1867*, which gave to Canada "a constitution similar in principle to that of the United Kingdom". The process of treaty making envisaged in imperial constitutional law was further established by the enactment of s. 35 of the *Constitution Act, 1982*, which specifically refers to treaties. The right was not affected by the distribution of powers between the federal and provincial governments or by the enactment of the *Indian Act*. Indeed the author argues that the right is not capable of extinguishment.

Indian and Northern Affairs Canada, *Beyond Corbiere: New Institutions and Structures for Good Governance* by B. Morse & Associates (2001) [unpublished].

The authors examine the need for new institutions to support aboriginal governance under a new legislative regime and present governance options that reflect recent S.C.C. judgments and proposals from aboriginal peoples. They consider five areas: (i) governance institutions, (ii) elections and consent systems, (iii) legal authorities and relationships, (iv) substantive and procedural rights protection, and (v) accountability measures. In the first part of the paper, the authors describe the functions and structures of existing federal institutions including Elections Canada, Office of the Privacy Commissioner, Office of the Information Commissioner, Auditor General, Office of the Comptroller General, Commissioner of the Environment and Sustainable Development, the Canadian Human Rights Commission, and Ethics Counsellor.

On the basis of their analysis of existing federal structures, the authors consider a number of potential structures that might be useful for establishing aboriginal governments under new legislation. The objectives for the potential institutions are to provide independent management and supervision of elections and referenda, independent ombudsman services, independent audit and financial management assessment, specialized investigatory and compliance audits, individual and minority rights advocacy and arbitration, and ethics and conflict of interest monitoring. The proposed structures that would be responsible for meeting the aforementioned objectives include aboriginal ombudsman, election appeal board, elections support centre/commission, "custom" transition body, human rights commission, information access, and privacy protections.

Indian and Northern Affairs Canada, *Corbiere and the Supreme Court's Vision of Governance* by B. Morse & Associates (2001) [unpublished].

The authors extensively analyse the S.C.C.'s *Corbiere* decision and other case law relating to issues of aboriginal governance. Their basic conclusions are that the S.C.C. (i) will apply s. 15 to challenge legislation, policies, and programs that differentiate

between categories of aboriginal peoples, (ii) will apply s. 15 broadly to scrutinize distinctions between *Indian Act* bands and non-band aboriginal communities, (iii) will require aboriginal governments to address the interests of all members, (iv) might question whether a reserve-based band model of governance is adequate to address with aboriginal or s. 35 rights, and (v) will determine that any aboriginal government must comply with minimal principles of natural justice. However, the authors contend that it remains unclear whether aboriginal governments will be required to comply with *Corbiere* when regulating an aboriginal or treaty right. In this situation, a s. 25 shield will not prevent a s. 15 review if the right itself is not derogated.

Isaac, Thomas, "The Concept of the Crown and Aboriginal Self-Government" (1994) 14:2 Canadian Journal of Native Studies 221.

Isaac discusses the 1992 Charlottetown Accord in light of the concept of "the Crown" in Canadian law and politics. He traces the history of the Crown to Lord Durham in 1922, who developed the Crown as a conduit for responsible and representative government answerable to the majority of the people. While the role of the Crown has diminished, it is still formally part of the legislative branch of government and as such, serves as a safeguard for democracy and acts to check and balance the exercise of federal and provincial government powers. The remaining prerogative powers of the Crown are to appoint and dismiss the Prime Minister, dissolve Parliament, and appoint senators and judges.

Isaac reviews the Crown's fiduciary responsibility for aboriginal people and the related aboriginal rights case law. He is critical of the Charlottetown Accord for, among other things, the absence of clauses regarding fiscal responsibility, fiscal rights, and transfer agreements. However, he concedes that the Accord made significant progress in generating recognition for aboriginal rights and self-government. Isaac argues that the construct of the Crown might be useful for aboriginal peoples by making the inherent right of self-government more concrete (e.g., adapting concepts such as the divisibility of the Crown, natural person and immunity, etc.). Isaac contends that before the concept of the Crown can be helpful to aboriginal self-government, it must be accepted as a useful construct to check and balance branches of government. Second, aboriginal equivalents and definitions of the Crown concept could be developed. Third, the federal and provincial governments must be willing to change the existing order and replace it with a system that recognizes aboriginal self-government. The final consideration is whether the Crown's fiduciary responsibility for aboriginal peoples will change as aboriginal self-government is established.

Kulchyski, Peter, "First Peoples and the Struggle for Semocratic Sovereignties" (2003) 37 Canadian Dimension No. 1
http://www.canadiandimension.mb.ca/v37/v37_1pk.htm

This article argues that sovereignty is necessary in order that aboriginal peoples maintain their distance from global homogenization which threatens their distinct

identities. However a sovereignty which merely institutes Western structures will serve to impose on aboriginal peoples a western and capitalist agenda.

Lawrence, Bonita, "Gender, Race, and Regulation of Native Identity in Canada And the United States: an Overview" (2003) *Hypatia: A Journal of Feminist Philosophy,* Vol. 18, No.2, page 3.

This article looks at the regulation of aboriginal identitiy in Canada and the U.S. as a central feature of colonialism, and posits that decolonization must involve reshaping our understanding of aboriginal identity.

Lemont, Eric, "Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navoajo Nation, and Northern Cheyenne Tribe (2001-2002) 26 Am. Indian L. Rev. 147

This article looks at constitutional and gopvernmental reformin the Cherokee, Hialapai, Navajo and Cheyenne Nations. It begins with a history of reform efforts, provides a summary of reform effors in the four named nations and sees coomonalities among them as an indicia for reform in other nations. It then provides an "on the ground" look at the challenges involved in reform, from getting started, choosing a reform body, obtaining participation of members, and resolving conflict. Two areas of particular importance in overcoming conflict are highlighted: the use of tribal institutions, and education.

Macklem, Patrick, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

Macklem argues that the concept of difference should be expanded to denote an "indigenous difference" that reflects of the social facts exclusive to aboriginal people, namely cultural difference, prior occupation, prior sovereignty, and participation in a treaty process. The concept of indigenous difference is useful in promoting the constitutional protection of four sets of rights: (i) rights to engage in practices, customs, and traditions, (ii) rights relating to territorial interests including aboriginal title, (iii) rights related to interests of aboriginal sovereignty and self-government, and (iv) treaty rights.

In his chapter on state obligations, Macklem contends that the constitutional recognition and affirmation of an existing self-government right is rendered illusionary when federal, provincial, and territorial governments fail to take steps to recognize and implement the right within the constitutional order. He cautions that such an absence is likely to trigger extensive litigation that would severely strain already limited community resources. To this end, he advocates a s. 35 federal treaty-negotiation process capable of identifying and reconciling competing interests in light of a just distribution of legislative authority.

Macklem, Patrick, "Normative Dimensions of the Right of Aboriginal Self-Government" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) 1.

In this commissioned chapter, Macklem contends that both positivist law and normative arguments are inadequate to effectively support aboriginal self-government, and cautions against relying solely on either. Instead, he contends that a plurality of arguments, founded on principles of normative equality (i.e., as relating to peoples rather than individuals), should be developed to advance self-government claims and recommendations. To make his case, Macklem critically reviews the strengths and weaknesses of five intersecting perspectives that support self-government: prior occupancy, prior sovereignty, treaties, self-determination, and preservation of minority culture. Each argument supports a different dimension of the nature of the right of self-government. Combining them avoids the weaker position of grounding self-government in a single normative principle.

Manitoba, Aboriginal Justice Implementation Commission, *Final Report of the Aboriginal Justice Implementation Commission*, (Winnipeg, Manitoba, Canada. June 2001)

Marecic, Charles J., "Nunavut Territory: Aboriginal Governing in the Canadian Regime of Governance" (1999-2000) 24 Am. Indian L. Rev. 275.

This article reviews the creation of Nunavut, its makeup and character in terms of population, demographics and resource wealth. It then looks at the political definition of Nunavut provided in the Nunavut Land Claims Agreement, the Nunavut Land Claims agreement Act, and the Nunavut act, noting the discrepancy between the direction of the government of Canada and the Canadian Courts with respect to the definition and retention of aboriginal rights and their extinguishment. Thirdly it looks at the intersection between aboriginal and Canadian rights and the areas of potential conflict in that intersection. These are first the question of whether Nunavut will embody an aboriginal sovereignty or whether it will westernize aboriginal self government in adopting a public government model sesigned to accommodate the Canadian political system; and second the question of maintaining traditional values or upholding Canadian Law.

McDonnell, Roger & Robert Depew, "Aboriginal Self-Government and Self-Determination in Canada: A Critical Commentary" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 352.

The authors argue that aboriginal self-government negotiations in Canada are primarily focussed on the legislative, territorial, and administrative points of contact between aboriginal peoples and the state – as perceived from the vantage point of the state. The ability of aboriginal peoples to substantively self-determine priorities,

direction, and sustainable development is limited by unilateral self-government negotiations. To demonstrate their case, the authors describe how federal policy and legislation effectively flattened aboriginal cultural diversity into a single label – "aboriginal". They assess the negative state of self-government negotiations and program development in a number of aboriginal groups, and emphasize the weaknesses of various restorative justice programs. Unfortunately, the ethnography used to bolster some of their criticisms is highly questionable, as is their interpretation of international politics regarding the origin of self-determination.

McNeil, Kent, "Aboriginal Governments and the Charter: Lessons from the United States" (Paper presented to the Canadian Bar Association Aboriginal Law Conference, Victoria, 2002) [unpublished].

McNeil identifies three types of aboriginal governments: (i) traditional governments defined as Métis, Inuit, and Indian that do not have a statutory or explicit constitutional base but could be expressions of the inherent right to self-government, (ii) *Indian Act* bands, and (iii) other forms of aboriginal government arising out of land claims agreements or statutory provisions (e.g., Nisga'a, Nunavut, etc.). His article focuses on the normative issues relating to the application of the *Charter* to traditional aboriginal governments.

McNeil also reviews the treatment of Indian sovereignty in the U.S. starting with the classic Marshall decisions and legislative history. Basically, tribal governments are outside the scope of the American Constitution and are not subject to the Bill of Rights Amendments to the Constitution. However, the 1968 *Indian Civil Rights Act* replicates most of the American *Bill of Rights* as well as the Fourteenth Amendment's equal protection and due process provisions. Congress made important omissions relating to religion, bearing of arms, and jury trials in an effort to account for the unique circumstances of the tribes. Despite these efforts, many tribal groups opposed the *Indian Civil Rights Act*, arguing that it undermined their tribal traditions. The U.S. Supreme Court has upheld the jurisdiction of the tribal groups over matters of self-government against impositions of the *Indian Civil Rights Act*.

McNeil takes the position that the *Charter* does not apply to traditional aboriginal governments that are exercising inherent powers because preservation of the distinctive cultures of aboriginal nations is a constitutional principle. However, the situation of Canada differs from that of the U.S. and the debate about the *Charter* applications should more accurately reflect these differences. For example, in the U.S., the debate has been whether the federal courts have jurisdiction over *Indian Civil Rights Act* violations by Indian tribes. In other words, the main protection that the U.S. Supreme Court has provided for Indian traditions and tribal sovereignty is recognition of the tribal courts' jurisdiction (except *habeas corpus* writs). In Canada, if the *Charter* were to apply to aboriginal governments, aboriginal nations would be entirely dependent on the cultural sensitivity of Canadian judges in Canadian courts to protect their cultures against the potentially negative effects of the *Charter*. In the U.S., this

situation would be recognized as a substantial interference with the tribe's ability to maintain itself as a culturally and politically distinct entity.

McNeil, Kent, "Self-Government and the Inalienability of Aboriginal Title" (2001-2002) 47 McGill Law Journal 473.

McNeil critically examines the premises underlying the inalienability of aboriginal title other than by surrender to the Crown. Such inalienability is commonly attributed either to a paternalistic protection policy of aboriginal peoples against unscrupulous settlers, or to the incapacity of settlers to obtain title to land other than by Crown grant. McNeil contends that the incapacity-of-the-settlers rationale actually supports the status of aboriginal nations as self-governing political entities with control over communally owned lands and resources. In other words, inalienability is sourced in the communal, and therefore self-governing, nature of aboriginal title. Communally owned lands require decision-making authority to be vested in the aboriginal nation that holds them.

While McNeil is not arguing that aboriginal title should be freely alienable, he does write that aboriginal nations should be able to economically develop their lands without surrendering them to the Crown. Basically, since aboriginal title is both proprietary and jurisdictional, the two should be severable in the same way that the Crown's proprietary element of title can be separated from the Crown's sovereignty over those same lands. Such an arrangement would allow aboriginal nations to alienate land without losing jurisdiction over it. McNeil contends that precedent for this approach as already been established because the courts (i.e., *Mabo*) have recognized that aboriginal peoples can create interests in land within their territory without alienating their title.

McNeil, Kent, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001).

While the S.C.C. has not dealt directly with the question of whether aboriginal peoples have an inherent right to self-government, the lower courts have taken a negative stand when faced with the issue. Nonetheless, the S.C.C.'s ruling in *R. v. Pamajewon*, [1996] 2 S.C.R. 821 is an indication of the Court's willingness to assume that a self-government right exists even though it characterized the right narrowly. McNeil suggests that *Pamajewon* may be distinguished from a claim that is made to a right of self-government over aboriginal lands, and a distinction between direct and indirect land use may be a way to limit the impact of *Pamajewon*. Further, the communal nature of aboriginal title necessitates a self-governing rule-making process for distributing and regulating aboriginal peoples' lands.

McNeil discusses the critical self-government question about the continuity of aboriginal laws. That is, while aboriginal laws may have continued since contact, the reality is that there has been no internal legal authority for changing, administering, or enforcing them, and so, on a practical level, no one has to abide by them. As with title,

aboriginal rights are communal, and therefore require rules and mechanisms for their distribution and regulation. In other words, it can be argued that the constitutionalization of aboriginal rights requires the establishment of aboriginal self-government.

McNeil explores the promise of the Charlottetown Accord, constitutional space for self-government in s. 35, and application of the *Canadian Charter of Rights and Freedoms* to aboriginal governments. He takes the position that self-government is already inherent in s. 35, flowing from the original sovereignty of aboriginal nations. Further, while s. 35 expresses the right, it does not specify the manner in which it may be exercised.

Meidinger, Errol E., "Reconstituting Haudenosaunee Law, Sovereignty and Governance" (1998) 46 Buff. L.Rev. 799.

This article was written as and introduction to a "Symposium on Law, Sovereignty, and Tribal Governance: the Iroguois Confederacy." The author notes that sovereignty was the central them of the symposium and the symposium contained a number of lessons about aboriginal sovereignty. These include that:

1. the purpose of tribal sovereignty is cultural survival;
2. tribal sovereignty is a type of relationship which allows the tribal sovereign groups enough autonomy to choose and pursue a distinct cultural path;
3. a land base is crucial to tribal sovereignty;
4. tribal governance must be reconstituted and strengthened as a necessary part of survival as a distinct people;
5. Sovereignty includes not only the concept that a cultural group makes its own decisions, but that those decisions are sound. Traditional norms provide a base for sound decision making, but may require new strategies for gaining and assessing information, including developing relations with modern institutions without being dominated by them.
6. Sovereignty is a continuing creation, not an end but a work in progress which requires continuing devotion of a people.

Merry, Sally Engle, "From Law and Colonialism to Law and Globalization: A Review Essay on Martin Chanock, *Law, Custom, and* Social *Order: The Colonial Experience in Malawi and Zambia*." (2003) 28 *Law and Social Inquiry* 269.

The author takes the opportunity on the reissue of Martin Chanock's study, to draw some comparisons between the effects of colonialism in an earlier age on indigenous peoples in Africa, and globalization today. She notes the legitimating discourses of both colonialism and globalization are not dissimilar. Both incorporate ideas of civilization, evolution and race. While however colonialism emphasized Christianity and the moral value of labour, globalization speaks of democratization and human rights. The comparison between the two movements. She says, underscores that legal

reforms cannot be separated from the power relations and inequalities within which they occur.

M'Gonigle, Michael, "Models for Sustainable Land Use Planning" (Paper presented to the Canadian Bar Association Aboriginal Law Conference, Victoria, 2002) [unpublished].

M'Gonigle contends that one of the goals of aboriginal self-government should be the development of sustainable land-use planning models. He lays out what he calls the fundamentals that any model must contend with including the reconceptualization of the state and the industrial-resource economy. M'Gonigle proposes the use of trust law in the form of a community ecosystem trust as one possible means of structuring sustainable land management. The instrument of the trust would (i) provide a framework for communities to develop institutions to ecosystem sustainability, (ii) reconcile Crown sovereignty and aboriginal title, (iii) enable participatory community control, and (iv) reform the regulatory system.

Monture-Angus, Patricia, *Journeying Forward: Dreaming First Nations Independence* (Halifax: Fernwood Publishers, 1999).

Monture-Angus makes the argument that (1) Canadian courts are fundamentally colonial instruments that cannot justly decide aboriginal claims, and (2) current aboriginal political institutions are defined by the *Indian Act* so cannot eradicate the oppression of aboriginal peoples. Monture-Angus contends that the notion of self-government is too narrow because it is imagined within colonial meanings—only allowing a limited form of self-management over aboriginal poverty, misery, and oppression. She advocates for the articulation and development of aboriginal self-determination and sovereignty—defined and informed by aboriginal peoples according to their values, experiences, and histories.

Morse, Bradford, "The Inherent Right of Aboriginal Governance" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 16.

Morse's stated purpose is to discuss aboriginal self-government from a legal and public policy perspective. He briefly reviews the *Royal Proclamation of 1763* and case law relating to self-government, moving on to detail the constitutional amendment negotiations (e.g., Charlottetown Accord, various reports and committees, Meech Lake, and the Royal Commission on Aboriginal Peoples).

According to Morse, federal policy shifted in 1993 with the Liberal Party's "Red Book", which included a chapter on aboriginal peoples. The main features of the new federal position included recognizing an inherent right of self-government as an existing right in s. 35 of the *Constitution Act, 1982*, an increased range of potential jurisdictional areas for negotiation, constitutional protection of other aspects of

negotiated agreements, and inclusion of landless Métis and Indian people in self-government negotiations. The resulting federal self-government policy contains guiding principles, constraints (e.g., the requirement for self-government negotiations to take place within the confines of the constitutional framework), and proposed jurisdictional areas and self-government powers.

Morse concludes with a summary review of the mixed experiences aboriginal peoples have had negotiating and implementing self-government initiatives across Canada. Despite aboriginal peoples' efforts over the past two decades, significant doubt remains as to whether Canadian law acknowledges the inherent right of self-government.

Moss, Wendy, "Inuit Perspectives on Treaty Rights and Governance" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) 55.

In this detailed two-part commissioned chapter, Moss (i) reviews statements and publications by Inuit organizations on self-government and treaties rights, and (ii) summaries a series of interviews she conducted with Inuit leaders on issues relating to self-government and treaty rights. She begins with a brief historical overview of the Inuit, contrasting the political and legal experiences of the Inuit with those of aboriginal peoples.

The Inuit are deliberatively pragmatic in their self-government for non-racially based, regional governments across the north. In other words, the vehicle for achieving self-government is less important than the end itself – the reassertion of Inuit control over Inuit life. While explicitly recognizing that the "tools" of human rights and aboriginal rights are not of Inuit making, Inuit self-government claims have been advanced within these existing frameworks. Given their strategy, the Inuit intend to exercise self-government within Canadian federalism with constitutionally protected negotiated agreements.

Newhouse, David R. & Yale D. Belanger, "Aboriginal Self-Government in Canada, A Review of Literature Since 1960" (2001) Native Studies, Trent University [unpublished].

Newhouse and Belanger comprehensively review self-government literature written mainly by aboriginal authors since 1960. Over a four-decade period, the authors trace historical shifts and identity patterns that have shaped the current self-government landscape. Prior to 1960, aboriginal peoples were invisible to the Canadian politicians and the concept of self-government was non-existent. During the 1960s, the Hawthorn Report caused the appalling conditions of aboriginal peoples to become visible, and in 1969, the White Paper served as a catalyst for the aboriginal political movement. During the 1970s, aboriginal groups formed with a flurry of political activities. Repatriation of the *Constitution Act, 1982* and recognition of aboriginal and treaty rights dominated the 1980s. According to Newhouse and Belanger, it was during the

1980s that the federal government effectively appropriated the self-government agenda and began to control how it evolved. In other words, the federal government defined self-government and then placed it "before Aboriginal leaders to either accept or refuse." During the 1990s, the federal government asserted that self-government was an inherent right, academics began to explore the political and legal aspects of self-government, and the Royal Commission on Aboriginal Peoples was launched.

One of the problems Newhouse and Belanger identify is that the voices of "grassroots" aboriginal peoples are now absent from the self-government discourse. Another problem is the lack of consistent and systemic examination of what "indigenous ideas of political thought" are, and instead, the focussing of attention on the structures and processes of government. The authors offer a number of interesting observations. For example: (i) "[M]ost significant episodes in the history of self-government in Canada have taken place at the negotiating table." (ii) The majority of writers focus on the philosophical possibilities of self-government, rather than developing more practical models and strategies for its implementation. (iii) Academics pay little attention to what is happening at the negotiating table. (iv) The universal concept of self-government fails to respect the complexity and cultural diversity of aboriginal communities and peoples. (5) The key issues identified in the literature include financing self-government, the rights of aboriginal women, policy, health and healing, and justice. (vi) Additional concerns are how self-government will impact federal and provincial jurisdictions and local communities.

The authors also discuss the self-government issues relating to urban aboriginal peoples, recent case law, the general aboriginal political climate, and the lack of Canadian public awareness. The report provides an extensive bibliography of government/aboriginal reports, aboriginal authors, non-aboriginal authors, and case studies.

Northwest Tribal Treaty Nations, "Governance Project: Best Practices and Standards and Regulations with Respect to Law Making" (April 2004) (unpublished)

This paper attempts to identify the elements of traditional aboriginal governance in Canada and reconcile them with the objectives of Canadian democracy. It looks at contemporary and traditional models of aboriginal governance and compare s them with models of western governance and the principles of legitimacy and the rule of law, the separation of powers and subsidiary. The paper's objective is to demonstrate that traditional governance adhered to the principles of good governance in making rules for the Nations based upon careful observation of what was needed, achieving consensual decision making, and not behaving in an arbitrary or despotic way. Traditional Governance models and principles cannot be ignored in the creation of contemporary institutions for First Nations. First Nations' traditions must be recognized as an integral part of future reform of governance

Olynyk, John M., "Approaches to Sorting Out Jurisdiction in a Self-Government Context" (1995) 53 University of Toronto Faculty of Law Review 235.

In this admittedly conjectural article, Olynyk explores how current approaches to distinguishing between federal and provincial legislative jurisdiction might be applied to aboriginal self-government jurisdiction. Olynyk's assumptions are that (ii) self-government is inevitable, (ii) self-government powers are likely be negotiated through agreements, and (iii) self-government will create a third order of government within the constitutional framework. He also assumes that the negotiated powers of aboriginal self-government will be derived from the existing division of powers – within the existing legal framework (i.e., not delegated). His premise is that the courts will apply current practices to resolving jurisdictional and divisional powers disputes between aboriginal governments and other orders of government. To test his theory, Olynyk describes the exclusive powers – powers applying to settlement lands and powers applying to citizens that are set out in the self-government agreements of the Sechelt Indian Band and the Champagne and Aishihik First Nations. Finally, he applies the various constitutional doctrinal tests used by the courts to possible jurisdictional disputes based on the two self-government agreement models to assess their effectiveness. He concludes that more creativity must be employed in order to properly accommodate an aboriginal order of government.

It should be noted that Olynyk wrote his article before *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123, 4 C.N.L.R. 1 (QL), wherein Williamson J. rejected the doctrine of exhaustiveness argument. Instead, he held that s. 91 and s. 92 of the *Constitution Act, 1867* did not exhaustively distribute all the legislative powers between Parliament and the provincial legislative assemblies, and further, that aboriginal self-government continued, albeit in a diminished form, after the Crown's assertion of sovereignty.

O'Neil, John *et al.,* "Community Healing and Aboriginal Self-Government" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 130.

Because the authors link the prevailing poor health of aboriginal peoples to poverty, they argue that aboriginal peoples' health of will be generally improved by the negotiation of self-government agreements. Such agreements would result in an improved economic status for aboriginal communities, increased employment opportunities, better living conditions, decreased addictions and incidents of violence, and a more positive sense of self-esteem and empowerment among aboriginal peoples. To make their case, the authors discuss the health conditions of aboriginals, the history of health services in Canada, major aboriginal initiatives, traditional health programs, and the impediments to effective health-care services to aboriginal peoples.

Paquet, Gilles, "Tectonic Changes in Canadian Governance" in Leslie A. Pal, ed., *How Ottawa Spends, 1999/2000: Shape Shifting – Canadian Governance Toward the 21st Century* (Oxford, U.K.: Oxford University Press, 2000) 75.

Paquet makes the observation that the pattern of governance has shifted dramatically over the past few decades. He attributes this shift to major transnational and

technological forces and to the culture of diversity that has undermined social cohesion. Paquet distinguishes government from governance and defines governing as "the use of certain instruments to steer a system that has some autonomous existence". However, with increased diversity, complexity, interdependencies, and turbulence, unrealistic expectations and other factors can cause governance to fail. Paquet outlines five models of governance: hierarchical, autonomous, negotiated, responsive, and self-governing. Each contains roles for the governors and the governed, normative bases, and various forms of control. In a globalized and pluralistic world, hierarchical structures are less effective, so the pattern of governance must become decentralized and flexible –a form of distributed governance.

Paquet describes the changes and trends in Canadian governance regimes, including social limits to growth, fiscal crisis, over-government and government overload, and a legitimation deficit. Two design principles that allow the necessary flexibility and restructuring are emerging: subsidiarity and citizen-based evaluation. Paquet describes the various resistances from the public sector, bureaucracies, and institutions. However, Paquet is optimistic about how aboriginal self-governing relations might serve as an important catalyst for the rest of Canada.

Peeling, Albert C. and Paul L.A.H. Chartrand, I.P.C. "Sovereignty, Liberty, and the Legal Order *of* the 'Freemen': Towards a Constitutional Theory of Métis Self-Government" (2004) 67 Sask. L.R. 339

The authors of this article put forward two possible historical scenarios which would support an argument in favour of Métis Self-Government. The first argument is that after the fall of New France. The French ancestors of the Métis did not become British subjects but rather headed out into the hinterland and established self governing communities which were well established by the time the British gained effective control over the Canadian West. The second argument is that even if at the time of the fall of New France the French ancestors of the Métis became British subjects, when they established communities beyond the area of effective control of the British, they were under a common law duty to maintain public order, and the rules they created for the maintenance of public order could be protected as customary law once effective control was asserted. Those customs could ground a right of self government for the Métis.

Peters, Evelyn J., "Geographies of Aboriginal Self-Government" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 411.

Peters considers some of the practical geography and spatial arrangements relating to the implementation of self-government agreements. She defines the term "geography of self-government" as the spatial configuration and responsibility that aboriginal governing bodies have over their citizens. In other words, self-government is implemented in particular locals and over particular territories, and these geographies have implications for the representation, preservation, and construction of aboriginal

cultures, and for issues relating to equity and access. Peters describes the geographies of a number of legislated self-government agreements – James Bay Cree, Sechelt, Yukon, James Bay Inuit, and Nunavut. She also provides recommendations for future work in this area and for developing governing options for urban aboriginal peoples.

Peters, Evelyn J., "Self-Government for Aboriginal People in Urban Areas: A Literature Review and Suggestions for Research" (1992) 12:1 Canadian Journal of Native Studies 51, online: Brandon University <www.brandonu.ca/library/CJNS/12.1/ peters.pdf>.

Peters organizes her paper into two parts – self-government arrangements in urban areas and demographic characteristics – and provides a summary of research areas for each part. Peters writes that, by focussing primarily on land-based self-government issues, the literature to date gives inadequate treatment to self-government as it relates to urban challenges and possibilities. In part, this situation has been created by government policy and by an assumption that urbanization of aboriginal peoples can be equated with their assimilation into non-aboriginal society. Rather than attempt to propose how urban self-government issues might be addressed, Peters recommends further research and an analysis that recognizes the urban-rural dichotomy that must be unravelled. While dated, this document still may provide a useful reference for future research into urban self-government issues.

Prince, Michael J. & Frances Abele, "Paying for Self-Determination: Aboriginal Peoples, Self-Government, and Fiscal Relations in Canada" (Paper presented to the conference "Reconfiguring Aboriginal-State Relations, Canada: The State of the Federation 2003", Institute of Intergovernmental Relations, School of Policy Studies, Queen's University, November 2002) [unpublished].

According to Prince and Abele, aboriginal activism, jurisprudence, and political negotiations since the Second World War have brought Canadian federalism to a new juncture. The authors set out to examine the fiscal relations between aboriginal organizations and both the federal and provincial governments, and to compare aboriginal fiscal relations with other systems. The differences they found are in areas of jurisdiction, taxation, equalization payments, fiscal capacity, and political/governance structures.

The mainstream narrative describes Confederation, in part, as a financial settlement of the Dominion and the provinces. The reality of this early period is that the provinces were caught in a "financial straitjacket" with the federal government holding the power. Much of the continuing debate has been focused on dealing with the imbalance between scarce provincial revenues and burgeoning expenditures. The resulting myriad of fiscal arrangements include income taxation, specific-purpose cost-shared transfers, wartime tax rental agreements, tax collection agreements equalization agreements, tax point transfers, unconditional transfers, cutbacks, and various reforms. The relationship between the federal and provincial governments is one of

constitutional flexibility, adjustments, accommodations, agitations, and re-adjustments.

In contrast, aboriginal fiscal relationships have remained stable despite the greater imbalance of power dynamics from the 1860s to the 1970s. The 1983 Penner Report helped to add aboriginal issues to the national narrative. However, instead of self-determination, negative trends still shape the aboriginal fiscal relationship – fiscal transfers as political weapons, fiscal and policy centralization, limited federal leadership and responsibility, imposition of non-aboriginal forms of governance, and service delegation. Recently, the federal government has made several efforts to at least partially address the aboriginal fiscal relationships, but these have mainly been controversial and fall short of the more empowering block funding recommendations made in the Penner Report. The authors conclude with a recommendation that aboriginal peoples join federalism in a regularized, stable way, but caution that appropriate institutions have yet to be designed.

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples,* 5 vols. (Ottawa. Minister of Supply and Services, 1996) ISBN 0-660-16413-2. I was one of seven commissioners appointed by federal Order-in-Council.

Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa, Minister of Supply and Services 1993) ISBN 0-0660-15187-1

Royal Commission on Aboriginal Peoples, *Sharing the Harvest: The Road to Self-Reliance: Report of the National Round Table on Aboriginal Economic Development and Resources* (Ottawa, Minister of Supply and Services, 1993) ISBN 0-0660-15367-X

Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa, Royal Commission on Aboriginal Peoples, February 13, 1992)

Rudin, Jonathan, "Aboriginal Self-Government and Justice" in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues,* 2nd ed. (Saskatoon: Purich, 1999) 205.

Rudin argues that the extraordinarily high over-representation of aboriginal people in Canadian prisons is evidence of the western legal system's fundamental failure to provide justice for aboriginal communities. Rudin analyzes three theories commonly used to explain the disproportionate incarceration of aboriginal people: cultural clash, socio economic factors, and colonialism. Of these, he concludes that over-representation is ultimately attributable to colonialism, and argues that any aboriginal justice initiative must necessarily go beyond mere indigenization of justice programs work to repairing the damage of colonialism.

Aboriginal justice programs have been confined to operating within the discretionary spaces at the margins of the western justice system – sentencing and diversion. Unrealistic expectations, inadequate resources, lack of community support, and the highly demanding, complex nature of the work have resulted in the failure of many justice projects.

Rudin concurs with the conclusions of the Royal Commission on Aboriginal Peoples' *Bridging the Cultural Divide*, although he is critical of the lack of clarity about core and peripheral rights relating to criminal law-making powers. Since all societies organize ways of maintaining order, it follows that responsibility for justice must be an integral aspect of aboriginal self-government. In his opinion, many of the justice problems could be solved if both the provincial and federal governments would recognize the inherent right of aboriginal peoples to develop their own justice systems. He is pessimistic as to how soon this might actually take place.

Ryder, Bruce, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1990-1991) 36 McGill Law Journal 308.

According to Ryder, "the classical and modern paradigms in Canadian federalism represent different judicial approaches to defining 'exclusivity' of federal and provincial powers, and thus of preserving provincial autonomy." The classical paradigm represents a strict "sealed box" understanding of federalism wherein there is no overlap between federal and provincial heads of power. In contrast, the modern paradigm is premised on a looser understanding of exclusivity based on a "pith and substance" approach to jurisdiction. In other words, the modern paradigm only prohibits each level of government from enacting laws whose dominant characteristic is within the jurisdiction of the other level of government. Both paradigms have problems because the world does not confine itself to sealed boxes, and it is easy to undermine provincial autonomy.

Ryder provides a detailed discussion of the history of British and Canadian federalism and sovereignty, and an extensive analysis of case law relating to the division of powers and constitutional interpretation. Based on his review, his opinion is that, while s. 35 is a constitutional advance to protecting aboriginal and treaty rights, a constitutional amendment and a new constitutional arrangement are necessary to secure a place for aboriginal self-government. Ryder argues that the courts should take an autonomous approach to the interpretation of federal jurisdiction under s. 91(24). Such an autonomous conception would recognize the difference between original and founding cultural groups in Canada, and provide constitutional space accordingly. Essentially, Ryder posits that a proper understanding of the value and operation of provincial autonomy could be applied to aboriginal peoples — basically using the doctrinal techniques of the classical paradigm. Until the required constitutional amendments can be made, aboriginal peoples can be provided with a measure of autonomy through autonomist interpretations of s. 91(24) within the existing federalist structure. These are (ii) interjurisdictional immunity to limit application of provincial

laws, (ii) classical paramountcy to prevent provincial laws from applying to areas where either federal or aboriginal already apply, and (iii) federal inter-delegation to prevent federal delegation over Indian lands to the provinces. Such interpretations would necessarily entail restrictions on the type of laws that the federal government could pass without the consent of aboriginal peoples. Ryder argues that existing law already follows these autonomous prescriptions in some areas (e.g.., employment), so it is a matter of expanding existing practices.

Ryser, Rudolf C., "Indian Self-Government Process Evaluation Project: Preliminary Findings" (1995), online: Centre for World Indigenous Studies http://www.cwis.org.

From 1990 to 1995, thirty-three Indian governments negotiated self-government compacts with the U.S. government. Principles guiding the negotiations emphasized a government-to-government framework for each Indian tribe. Two studies were completed to assess Indian and U.S. government compliance with the agreements, and effectiveness of accounting and budgeting procedures. Ryser describes the most recent study to measure the increase or decrease of self-governing powers in Indian governments, and the effectiveness of negotiations, and to develop future recommendations.

Ryser lists the preliminary findings based on a review of historic and contemporary documents. These include the following: (i) The U.S. government is not seriously participating in the self-government initiative. (ii) The agreements have resulted in agency-by-agency relationships rather than government-to-government relationships (iii) The U.S. government has failed to comply with the 1975 Helsinki Accord regarding the social, economic, and political development of Indian nations. (iv) Indian governments have made major progress toward social, political, and economic development with the compacts. (v) Indian governments are emphasizing social and economic development over political development, and this suggests a weakening of Indian governments and increased dependence on the U.S. government. Copies of the final report may be purchased from usaoffice@cwis.org.

Sayers, Judith & Kelly A. MacDonald, "A Strong and Meaningful Role for First Nations Women in Governance" in *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Papers* (Ottawa: Research Directorate, Status of Women Canada, 2001) 1.

Sayers and MacDonald make the case that aboriginal governments must restore women to their place of honour and respect in governance. They describe how colonization has affected the aboriginal women and resulted in them being placed in a subservient position. This colonial history continues to be reflected in today's treaty and self-government negotiations by the too few numbers of aboriginal women involved politically and at the negotiating table. Among other things, the authors challenge the notion that women's rights are individual and must be subservient to the collective rights of the nation. They contend that women's rights are in fact collective and beneficial to the entire nation. Equal treatment of women and men does not

support the assimilation of aboriginal peoples into non-aboriginal society, nor does it render aboriginal cultures somehow inauthentic. Key to their report is a section on aboriginal women's perspectives about good governance, which includes a comprehensive survey of options for legislation and policy development. An extensive list of recommendations is included as well as a very useful bibliography.

Schuurman, Hedda, "The Concept of Community and the Challenge for Self-Government" in Colin H. Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 379.

Schuurman suggests that the current conception of "community" does not derive from Innu language or culture, and the experience of living within a fixed settlement is entirely foreign. Historically, Innu lived in small mobile social units with a dynamic pattern of social organization and coherent identities, but with shifting social and geographic boundaries. One of the consequences of 1960s settlements has been a social stratification of subgroups that were created by contact – external privileging according to the degree of acculturation or isolation of the subgroups. This hierarchy now determines status, social positions, and political leadership. According to Schuurman, settlement has also meant individual households, a cash economy and dependence, changes to Innu economic and social practices, breakdown of social relationships, centralized schools, increased conflict, and an anti-community consciousness that raises particular difficulties for leadership and the implementation of self-government.

Slattery, Brian, "National Self-Determination and State Sovereignty: Striking the Balance" (Paper presented at the Canadian Bar Association Aboriginal Law Conference, Victoria, 2002). Published in an earlier version as "The Paradoxes of National Self-Determination" (1994) 32:4 Osgoode Hall Law Journal 703.

Slattery sets out to identify the moral dimensions of the right of national self-determination and to evaluate the arguments relating to the value of liberty and group solidarity. Slattery's working definition of self-determination is "the power of a group to determine its own international status – whether to become, remain, or cease to be an independent state, or to alter its international status in some other way". Self-determination may also vest in sub-state groups that exist in a tension with the self-determination of the state of which they are a part. In this article, Slattery focuses on the issues of the sub-state groups.

Slattery begins with a discussion of the complicated self-determination issues of Quebec and of the aboriginal peoples in Quebec. According to his analysis, this debate is really about the legitimacy of authority, rather than either of the usually espoused liberty or group solidarity. This raises difficult questions about when authority is legitimate and how it might be measured. Furthermore, when secession from an existing state is proposed, it means that a claim of exclusive (as against the state) territorial title is involved – not just political autonomy. In sum, the right of national

self-determination includes a claim of authority, a claim of territory, and group legitimacy.

In his assessment of the communal theory of self-determination, Slattery distinguishes between three types of self-government: (i) democratic governments resulting from an electoral system, (ii) non-colonial governments in former colonies that are based on indigenous institutions and are not necessarily democratic, and (iii) national governments resulting from national groups within a state. He argues that the value of self-government for national groups does not justify a universal right to self-determination. He contends furthermore that the communal theory of self-determination is seriously flawed because it is one-dimensional and does not account for the complex factors in rivalling self-determination claims (i.e., stability vs. widespread disorder). Other flaws include inadequate consideration of territory and title, and underestimating the need to safeguard the welfare of mixed and multi-national communities. Slattery concludes by advocating the consideration of human bonds and relationships, rather than focusing on self-determination rights talk or issues of authority.

Tanner, Adrian, "The Double Bind of Aboriginal Self-Government" in Colin H. Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 396.

Tanner sets out to discuss the progress and barriers in the way of the Innu's achievement of modern day self-government. Since settlement, the Innu have experienced an epidemic of social breakdown and dysfunction generally. The former practice of dealing with disputes was primarily that of avoidance – when a dispute occurred, hunting groups split up. However, once people were in sedentary villages, this conflict avoidance was not longer possible. According to Tanner, while self-government offers the Innu a way to address their problems, a new conception of community must be developed that is based on Innu values – and that is acceptable to the larger Canadian society.

Turner, Dale, "Perceiving the World Differently" in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 57.

According to Turner, the legal and political relationship between the state and indigenous peoples is constrained and impaired because indigenous peoples are forced to use western intellectual traditions to argue for their rights in the political and legal institutions of the dominant culture. Turner argues that indigenous intellectual traditions must be used to inform and direct the indigenous political project and must include the work of redefining rights, sovereignty, nationalism, government, and cultural survival, and advancing the recognition of the ongoing, dialogic politic and legal relationship between indigenous peoples and the state.

Widdowson, Frances, "Separate but Unequal: The Political Economy of Aboriginal Dependency" (Paper presented to the Annual Conference of the Canadian Political Sciences Association, 2003) [unpublished].

Widdowson takes the view that aboriginal cultures and communities are of an "unproductive character" that has led to continuing aboriginal dependency in Canada. He contends that unless this cultural deficiency is addressed, self-government initiatives will simply perpetuate the unhealthy state of aboriginal dependency by promoting the continued practice of traditional values and activities in isolated and unviable areas.

Widdowson is very critical of the Royal Commission on Aboriginal Peoples' final report because the Commission abstracted aboriginal dependency from its historical and material foundations. He dismisses what he calls the Commission's acceptance of idealized and unsystematic histories advanced by aboriginal peoples and Commission academics. Consequently, he disagrees with the Commission's conclusions regarding the restoration of homelands and self-government agreements. Instead, Widdowson argues that "aboriginal cultures had not developed sufficiently to facilitate their becoming successful independent farmers, craft producers or labourers", and aboriginal dependence simply stems from having been left behind by capitalism. From Widdowson's racist evolutionary perspective, the rhythms of hunting and gathering societies could not adapt to the abstract conceptions of time necessary to coordinate production – hence aboriginal dependency.

Williams, George, "Race and the Australian Constitution: From Federation to Reconciliation (2000) 38 Osgoode Hall Law Journal 643

The author examines the pattern of racism in Australia against indigenous peoples there which excluded them from the political and cultural life of Australia. This pattern was only broken in 1967 when certain racist clauses in the Australian Constitution were deleted, but no new vision has emerged which identifies the place of indigenous peoples within Australia. The author identifies strong public support for Australia to embrace its indigenous peoples and examines the prospects for the recognition of indigenous peoples in the preamble to the constitution, and the prospects for a treaty which could set out the legal status of indigenous peoples within Australia.

Zaluski, Stephen P., "Variations on a Secession Theme: Building an Argument for First Nations Self-Government from the *Quebec Secession Reference*" (Paper presented at the Canadian Bar Association Aboriginal Law Conference, Victoria, 2002).

Zaluski's main thesis is that, in the contexts of both international and domestic law, the Quebec secession case gives rise to a number of principles that may be extrapolated to support a claim of aboriginal self-government as a constitutionally protected right. The federal government sought to limit extraneous questions from arising in the reference process by arguing that they were hypothetical, speculative,

and beyond the scope of the referendum. Despite these deflective efforts, there were three obvious extraneous issues that relate directly to aboriginal peoples: (ii) The northern portion of Quebec is heavily populated by aboriginal peoples. (ii) Did the aboriginal peoples in Quebec have a right to remain in Canada? (iii) Who qualifies as peoples? Four aboriginal groups intervened on these and other issues (three groups from Quebec and one from Ontario).

In the *Secession Reference,* the S.C.C. set out four unwritten rules to support its answer to the first referenda question: federalism, democracy, constitutionalism and rule of law, and protection of minorities. The S.C.C. noted that aboriginal peoples are protected by the Constitution and would be impacted by Quebec's secession. Zaluski suggests that the Court's comment could be interpreted as a recognition of the importance of aboriginal peoples insofar as the secession issue, and perhaps could even be parlayed into political support for aboriginal peoples' claims.

According to Zaluski, the Court's discussion of the above four principles not only provides the foundation for an inherent s. 35 aboriginal right to self-government, but also demonstrates that this right flows from the Constitution's own founding principles. The discussion included the following: (i) Federalism supports diversity. (ii) Federalism facilitates democracy by allocating powers to different levels of government. (iii) Democracy promotes self-government. (iv) Democracy and self-government underlie the Constitution. (v) The Constitution protects minorities against assimilation. (vi) Sections 25 and 35 reflect the constitutional recognition of aboriginal peoples' historic occupation of Canada. (vii) Aboriginal peoples look to the Constitution for protection. Zaluski also finds support for an aboriginal right to self-government in the Court's discussion of international law about "peoples" and self-determination.

He concludes with statements about how the Court's decision forms a bridge for the future application of international law to aboriginal self-government issues.

APPENDIX

Although the following three works do not deal specifically with aboriginal governance, they deal with governance more generally in the context of Canadian and British parliamentary democracy and with ideas concerning the concern surrounding governance as part of the birth of a new form of state in the last years of the 20th Century: the market state. They are included because they form part of the wider context in which issues of aboriginal governance in Canada operates.

Bobbit, Philip, *The Shield of Achiles: War Peace and the Course of History.* New York: Knopf, 2003.

Bobbit is a constitutional law professor and historian and he uses both these disciplines in this work which is a history of the different modes of governance which have arisen in the West from the late middle ages to the present time: princes; princely states; kingly states; territorial states; state nations and nation states. He notes the strategic reasons why these states came into being and the legitimating discourse which surrounded each. He postulates that the cold war and its end has brought a new form of state into being, which he calls the market state. Although the book partakes perhaps too much of the ideology of American Manifest Destiny, it is important to put the global discourse on governance in the context of the evolution of states.

Franks, C.E.S., *The Parliament of Canada.* Toronto: U of Toronto Press, 1987.

This book is perhaps the leading text on the Canadian Parliamentary system, including the reforms which occurred in the last part of the last century, and proposals for its reform in the future.

Adam Tomkins, *Public Law.* Oxford: Oxford UP, 2003.

This book *provides* a fascinating interpretation of British governance based upon a separation of powers not between the three branches of government but between the Crown and Parliament. Its approach is historical and it is particularly good on understanding the functions of parliament: Supply, Representation; and Legislation. The historical and ongoing importance of parliamentary control over fiscal matters is emphasized.