CANADA'S NORTH AND TOMORROW'S FEDERALISM

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I. Introduction

> **"*Before the government came it was like a calm day all the time…"***
> [Davidee, Rankin Inlet, 1985 personal communication with the author.]

Technically speaking governance in the territorial North has been, and continues to be, anomalous within the Canadian federal system when measured against the generally accepted notion that:

> In a federation, sovereignty is shared among two or more orders of government according to a stated division of powers. Within their own spheres of power, each order has the capacity to legislate rules that govern the relevant populace, without reference to the legislative regimes of other governments.[1]

As a result of these anomalies, papers on the North generally have to dedicate an inordinate amount of space to laying the foundations for any analysis. This paper is no different in that regard. This descriptive material will help illustrate why testing assumptions and assertions about federalism and democratic governance is particularly relevant in relation to the North.

The primary focus is on the post-Second World War period. Most recently, land claims and self-government agreements have added a level of variation and complexity for anyone attempting to discern exactly what theory of government is at play in the North. There are ongoing contests for legitimacy among governance models within the region with the consequent stability issues such contests engender.

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[1] Peach, Ian and Merrilee Rasmussen, "Federalism and the First Nations: Making space for First Nations' Self-determination in the Federal Inherent Right Policy", at 10.

In any discussion about emerging trends and issues in the territorial North a few preliminary points need to be stressed: First, each of the three northern territories presents a distinct set of issues and challenges, and the differences among each of the three territories must not be underestimated. Second, the trends and issues which are summarized below must be considered in the context of, and with careful attention to, important details in the relevant agreements and legislation. Third, the territorial North is in a state of flux. Institutions, processes and relationship are still evolving. Fourth, for the most part the changes in the North are on paper and have yet to be fully implemented. Implementation will be a complicated and potentially acrimonious field for intergovernmental relations in coming years.[2]

II. The Constitutional Context

The Preamble to the *Constitution Act, 1867* says that the provinces are "federally united" to form Canada. Our federal system is one in which each province has exclusive authority over most of the local affairs of the province and its residents. The national government, usually referred to as the federal government, is responsible for the country as a whole and generally for matters that cross provincial and territorial boundaries.

In 1864 and 1866 when the Fathers of Confederation were drafting resolutions that would lead to a union of British North American colonies, they included in Article 2 of the Resolutions a provision for the eventual admission of British Columbia, Prince Edward Island and the "North-Western" Territories (later called the "Northwest" Territories). There is some geographical uncertainty as to exactly what tracts of land the North-Western Territories comprised at the time. Section 146 of the *Constitution Act, 1867*, enacted by the United Kingdom Parliament in 1867, was the legal rendering of Article 2 of the Resolutions. It provided, among other things, that upon the request of the Canadian Parliament, the Queen could "admit Rupert's Land and the North-Western Territory, or either of them, into the Union by Order in Council".

Rupert's Land was a vast trading area comprising the drainage basin of Hudson Bay and James Bay which had been granted by Royal Charter to the Hudson Bay

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[2] See for example Chapters 8 & 9 of the Auditor Generals Report, February, 2004.

Company in 1670. Under this Royal Charter, the Company had held control and governance of these lands until they were sold back to the British Crown in 1869 for purposes of transfer to Canada. In 1870, the *Rupert's Land and North-Western Territory Order*[3] which is now part of the Constitution of Canada,[4] transferred these lands from Britain to Canada. In 1880, the remainder of British possessions and territories adjacent to Canada were transferred to Canada by a second Order in Council. The lands covered by this transfer[5] included the Arctic islands and parts of the Yukon. Therefore, by 1880 the territories of Canada comprised all lands and waters in present-day Northwest Territories, Nunavut, and Yukon, as well as Alberta, and Saskatchewan and most of the lands and waters in what are now Manitoba, Ontario and Quebec.[6]

In 1869, before the territories were transferred to Canada, the Canadian Parliament enacted the *Temporary Government of Rupert's Land Act*[7] to provide for a rudimentary form of government in this vast region. In 1870, immediately after the transfer, the Canadian Parliament created Manitoba[8], at that time a tiny province centred on the present-day city of Winnipeg. However, this enactment raised doubts as to the Canadian Parliament's constitutional authority for creating new provinces.

To dispel any further doubts the British Parliament passed the *British North America Act, 1871* (renamed the *Constitution Act, 1871*) to make it clear that the Canadian Parliament could create new provinces in the territories and had exclusive authority to provide for the "administration, peace, order and good government of any territory not for the time being included in any province".[9] In 1886, the British Parliament passed what is now called the *Constitution Act, 1886*, to empower the Canadian Parliament to provide for representation of the territories in the Senate and the House of Commons.

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3 Reproduced in B.W.Funston & E. Meehan eds. *Canada's Constitutional Documents Consolidated*, (Carswell, 1994) at 233.

4 See Item 3 of the Schedule to the *Constitution Act, 1982*.

5 See the *Adjacent Territories Order*, July 31, 1880 listed as Item 8 of the Schedule to the *Constitution Act, 1982*.

6 See Norman Nicholson, *The Boundaries of the Canadian Confederation* (MacMillan, 1979)

7 S.C. 1869, c. 3

8 *Manitoba Act*, 1870, (Can), 33 Vict., c.3

9 See ss. 2 and 4, respectively, *Constitution Act, 1871*, 34-35 Vict. c.28 (U.K.).

The *Constitution Act, 1871* is still the constitutional source of authority for the Acts which Parliament has passed to provide for government in the territories. Otherwise, the *Constitution Acts* say almost nothing about territorial government. The *Canadian Charter of Rights and Freedoms* guarantees certain democratic rights to Canadian citizens. Section 3 says that every citizen has a right to vote in an election of members of a "legislative assembly" and to be qualified for membership therein. Section 30 of the *Charter* makes it clear that the expression "legislative assembly" includes "the appropriate legislative authority" of the Yukon Territory and Northwest Territories. There is no reference to Nunavut (which did not exist in 1982) but the assumption is that the courts would read the new territory into the section.

At present, there are three distinct territories in Canada: the Northwest Territories (NWT), Yukon and Nunavut. The existing government models for the territories evolved from *The North-West Territories Act, 1875* [10] which was frequently amended as immigration to the west and north led to the creation of institutions of representative and responsible government. Yukon was carved out of the NWT and established as a separate territory by Parliament in 1898. Nunavut was established by Parliament as a result of a commitment by the federal government contained in Article 4 of the land claim agreement[11] signed with the Inuit of the Northwest Territories on May 25, 1993. On June 10, 1993, Parliament passed the *Nunavut Act* [12] to divide the NWT into two new territories effective April 1, 1999.

III. Federalism and the North during the Past 50 Years: Pragmaticism v. Rights

Canadian historian W.L Morton once wrote: "no scheme of Canadian historiography yet advanced is wholly satisfactory because none as yet takes account of the North"[13]. The same can be said for the role of northern territories in the study of Canadian federalism. The territorial North was largely ignored in the context of Canadian

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10 S.C. 1875, c.49; now called the *Northwest Territories Act*, R.S.C. 1985, c. N-27

11 Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, (Tungavik Federation of Nunavut and Canada, DIAND, 1993) at 23.

12 S.C. 1993, c.28

13 Morton, W.L. 1970. "The 'North' in Canadian Historiography" in Transactions of the Royal Society of Canada, vol. 4, no. 8, at p.31

federalism until well after the Second World War. For example, the "revised and enlarged" edition of J.A. Corry's *Democratic Government and Politics* [14], published in 1951 in the Canadian Government Series, does not even list the Northwest Territories or Yukon in the index, and makes no mention of them. George W. Brown's high school text entitled *Building the Canadian Nation,* first published in 1942 and completely revised in 1958, contains a section under the heading "The Problem of Governing the Northwest Territories", which takes the reader from 1869 to 1905. Yukon is not listed in the index.

Yukon has been a separate geographical and political entity within Canada since 1898 - seven years longer than Alberta and Saskatchewan.[15] Initially the territory had a Commissioner and a federally-appointed, six-member legislative council. In 1902 Yukon elected its first federal member of Parliament. By 1903 the legislative council had expanded to 10 members, five of whom were locally elected. Since 1909, Yukon legislative councils have been comprised completely of elected members [16]. However, given declines in gold revenues and Yukon population, in 1918 Parliament enacted an amendment to the *Yukon Act* which authorized the federal government to abolish the Council. At the first decennial census in 1901 the population stood at 27,210, down from the peak of about 40,000 in 1899, and by 1918 had further declined to 4000. While not actually abolished, the Council was reduced to three members in 1919.[17]

By 1941 the Yukon population was 4,914.[18] The aboriginal population was estimated at between 1500 and 2000. Even today, despite the boom in activity following the Second World War, the Yukon population has still not returned to the levels of the Gold Rush in 1898.[19] However, in 1951, the *Yukon Act* was amended to increase the legislative council to five members. (There are now 18 elected members.) The following year, the capital city of the Yukon was moved from Dawson City to Whitehorse.[20]

By contrast according to the 1951 census the population of the Northwest Territories was 16,004. Aboriginal peoples accounted for 10,660. The non-Aboriginal

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14 Corry, J.A., *Democratic Government in Politics,* (U of T Press: Toronto, 1951) 2nd edition.
15 Source: http://www.gov.yk.ca/yukonglance/government.html
16 *Ibid.*
17 *Ibid.*
18 Zaslow, supra, at 143.
19 Zaslow, Morris, *The Opening of the Canadian North 1870-1914*, (McClelland & Stewart: Toronto, 1971) at 143.
20 *Ibid.*

population was 5,344. In that same year the *Northwest Territories Act* [21] was amended to provide for elective representation. The Council, as it was then called, was increased to eight members from five, but five of these "representatives" continued to be appointed by the federal cabinet. The remaining three represented the constituencies of Mackenzie South, Mackenzie North, and Mackenzie West. (There are now 19 elected members.) Ottawa was the seat of government. The total estimated land and water area of the NWT was then 1,304,903 square miles. Nunavut did not yet exist.

These arid statistics leave unstated the significant fact that a Canadian living anywhere in the vast area of the eastern NWT could not vote in any local, territorial or federal election. Not only was responsible government non-existent in the NWT at that time, representative government was only just beginning to get a toehold. In 1966 the Carrothers Commission[22] declared in its report on the development of government in the NWT that the form of government was:

> …in effect a colonial form of government, based…not on universal suffrage but on enfranchisement within regions where it is considered that the right to vote, could as a matter of practical reality, be exercised.

Maintenance and enforcement of law and order throughout the NWT was the responsibility of the Royal Canadian Mounted Police. Twenty-eight detachments were sprinkled at strategic locations throughout the Territories, the majority consisting of two regular members and one Aboriginal special constable.[23] The federal Minister of Justice acted as the Attorney General of the Northwest Territories, and headed up the department that administered the policy of the RCMP.[24]

The Supreme Court of the Northwest Territories, which had been "continued" by the *North-West Territories Act* of 1886, was dissolved in 1905 when Alberta and Saskatchewan became provinces. After 1905 commissioned officers of the RCMP had been *ex officio* justices of the peace and the RCMP Commissioner had the jurisdiction,

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21 R.S. C. 1952, c. 331, s. 8(1).

22 Canada, *Report of the Advisory Commission on the Development of Government in the Northwest Territories*. (Queen's Printer, 1966, vol. 1) p. 105.

23 Canada, Dep't of Resources and Development. Administration of the Northwest Territories. (Queen's Printer: 1953) at 18

24 *Ibid.*

powers and authority of a stipendiary magistrate.[25] In the 1950s the RCMP Commissioner was also a member of the Council, the legislative arm of government in the NWT.[26] The RCMP guardrooms were the gaols for the Territories and the commanding officers acted as the wardens.[27]

Such was the state of affairs in the NWT when Stuart Garson, the federal Minister of Justice, called Jack Sissons in Lethbridge Alberta in 1955 to see if he would sit as the first and only judge of a reconstituted superior court in Yellowknife to be known as the Territorial Court. Sissons recounts in his memoirs:

> The Territories were run with less democracy than the Canadian provinces in British colonial days…. It was a bureaucratic dream, and when the territorial court was established on July 1, 1955, the "bright boys" in Ottawa thought they would improve on the dream by having one of their civil service club appointed judge.[28]

Sissons' memoirs are littered with references to his battles with the "bright boys" in Ottawa. Sissons had heard rumours that the creation of the Territorial Court (after 1972 called the Supreme Court of the Northwest Territories) was seen as an opportunity to establish a precedent for the appointment of civil servants to the judiciary, and a list of seven civil service lawyers had been submitted from which a selection was to be made.[29] Mr. Justice Ernie Wilson in Edmonton encouraged Sissons to accept the appointment "to keep those civil service boys from usurping the job."[30]

Very quickly the Sissons' court became identified with Aboriginal rights.[31] This set the stage for a contest of wills between the Court and Ottawa which was to last into the 1970s and culminated in the remarkable events involving Mr. Justice Morrow during the hearing of the *Paulette* case[32] in 1973. In the 1950s and 1960s Aboriginal law was not a recognized area of practice or discourse. Most textbooks referred to *St Catharine's Milling Case* and not much else. The case law revolved mainly around the *Indian Act*,

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25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 *Ibid.* at 59.
29 *Ibid.* at 15.
30 *Ibid.* at 14.
31 See for example : *R. v. Sikyea* [1964] 43 DLR (2d) 150
32 *Re Paulette* (1973) 42 DLR (3d) 8 (N.W.T.S.C.)

section 91(24) of the *Constitution Act, 1867*, and the application of various hunting and fishing laws in the context of treaty promises.

However, the practical circumstances in the NWT during much of the Sissons court between 1955 and 1966 led to situations that, by today's standards, are almost unthinkable. For example, in 1963 an Inuit hunter, Koonungnak, was convicted and fined $200 by a justice of the peace for hunting musk ox contrary to the game ordinance. During this proceeding an RCMP constable, who was an ex-officio game warden, acted as both informant and prosecutor.[33] The Justice of the Peace who heard the case was a game warden and area administrator for the Department of Northern Affairs.[34] The accused was compelled to give evidence while also being deprived of the right to retain and instruct counsel. He had no independent interpreter and was forced to seek assistance from the Court's interpreter. He was not instructed as to his right to call witnesses, to present a defence or to appeal.[35]

Perhaps there is no better illustration of the subordinate nature of territories during these years than the conduct of the federal government in the *Paulette* case. At issue in the case, among other things, was whether the NWT Supreme Court had jurisdiction to hear a matter involving certain Aboriginal chiefs who, on behalf of their people, sought to file a caveat based on Aboriginal title on a vast tract of unpatented Crown lands in the NWT. Mr. Justice Morrow, who had succeeded Sissons on the bench in 1966, heard the case. In his memoirs Morrow revealed the deep personal and professional turmoil he felt during the *Paulette* case in 1973:

> On June 5th I heard a rumour that the government was considering applying to the Federal Court for a writ of prohibition against me. The following day I became convinced that this was the situation, and so I drafted a letter to the Honourable Otto Lang, the Attorney General of Canada .... I read my letter to him over the phone, suggesting that the contemplated step could easily have constitutional repercussions and that the native people would neither understand nor forgive

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33 Sissons, Jack. *Judge of the Far North.* (McClelland & Stewart: 1968) at 173.
34 *Ibid.* at 173.
35 *Ibid.* at 173.

> what was being done to them. Lang's reply was that he, Jean Chrétien, and others had discussed these aspects of the case and decided to proceed anyway.[36]

Morrow's letter to Minister Lang, dated 7 June 1973, was blunt:

> To most people it will appear as the act of the Federal Government using its 'own' court to pound down the superior court of the Territories because the department lawyers do not agree with what the local court is doing.
>
> This must surely be the first time in the history of Canadian jurisprudence when one court of equal rank will be appearing to 'snatch' a case from another court of equal rank."[37]

The federal Crown's application for a writ of prohibition was launched in the Federal Court that same day.

Mr. Justice Morrow's decision in *Paulette* was released on 6 September 1973 and on September 12th , a Yellowknife newspaper, the *News of the North,* reported:

> There is no need at all to hesitate in calling his decision 'historic' for that is what it is, no matter how the appeals will go. For the first time in Canadian legal history, a superior court justice was directly attacked by the federal government while the case was in progress, and that alone suffices to make the case 'historic', although in a negative way.
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> But in a more positive sense, Judge Morrow's decision is also historic. For it establishes, legally, that aboriginal rights of the N.W.T. native people did not die with Treaties 8 and 11, but still stand. The evidence to that effect was simply overwhelming, even though Judge Morrow put it more carefully.[38]

The Sissons and Morrow Courts had been at the forefront in recognizing Aboriginal rights in the 1960s and 1970s. It is undeniable that some of the momentum towards changes in federal policy was initiated by cases such as *Sikyea* and *Paulette*. In the result neither decision at the time was seen as a watershed, but each in its own way

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[36] Morrow, William G., (ed. W.H. Morrow) *Northern Justice The Memoirs of Mr. Justice William G. Morrow*. (Osgoode Society for Canadian Legal History and Legal Archives Society of Alberta: 1995) at 161.

[37] *Ibid*. at 162.

[38] Morrow. *Supra.* at 177.

signaled a new level of awareness of underlying weaknesses in law and policy as they pertained to Aboriginal peoples in Canada, and particularly in the territories.

How do these colourful legal battles in the territorial North relate to the challenge of constructing tomorrow's federalism? These very political battles between the early NWT courts and remote government officials in Ottawa engaged some of the difficult legal, political and governance issues that will continue to challenge Canadian governments and courts as the principles of Canadian federalism are applied and adapted in the North. New governance models in the North could be a source of pride, or frustration, for Canada, depending on our abilities to make practical sense of ambitious and theoretical approaches. The North has been a petri dish of experimentation and it is the courts that are increasingly at the nexus of theory and reality.

The rapid, parallel march of Aboriginal self-determination and territorial political evolution began in earnest in the 1970s in both the NWT and Yukon and continues to the present. A few highlights will suffice:

- In 1974 the federal government adopted a Comprehensive Land Claims Policy and began negotiations with Dene and Métis peoples in the Mackenzie Valley, the Inuvialuit in the Delta-Beaufort Sea region, the Inuit of Nunavut and the First Nations of Yukon.
- In 1975 the Legislative Assembly of the Northwest Territories became a fully elected body, although still dominated by the federally-appointed Commissioner, and devolution to the territorial government of provincial-type program and service responsibilities accelerated.
- In 1977 the Berger Inquiry reported on its historic Mackenzie Valley Pipeline Inquiry and recommended a moratorium on oil and gas development in order to give time to settle Aboriginal land claims.
- In 1979 the Honorable Jake Epp, Minister of Indian Affairs and Northern Development, wrote the "Epp Letter" which recognized a higher political status for Yukon and held out the prospect of development of Yukon towards provincehood. [39]

[39] See: Cameron, Kirk and Graham Gomme, *The Yukon's Constitutional Foundations vol. II, A Compendium of Documents relating to the Constitutional Development of the Yukon Territory* (Yukon:

- In 1980 Bud Drury, the Special Representative of the Prime Minister on Constitutional Development in the NWT, reported on options for responsible government in the territory.
- On the national stage the federal government, after seeking to unilaterally patriate the Constitution, acquiesced to the need to negotiate with the provinces (but not the territories) following the Supreme Court of Canada's opinion in the *Patriation Reference*.
- In 1982 the Canadian Constitution was patriated and s. 35 of the *Constitution Act, 1982* recognized and affirmed the Aboriginal and treaty rights of the Aboriginal peoples of Canada. Also included were new constitutional amending formulae that purported[40] to change the rules for creation of new provinces in the territories.
- In 1985 formal letters were issued by the federal Minister to the NWT Commissioner under the authority of the *NWT Act* to institute important changes towards full responsible government.
- By 1990 territorial governments had been admitted to most intergovernmental processes as independent actors (previously they had been members of federal delegations) and the Supreme Court of Canada had amended its rules of procedure to allow territorial Ministers of Justice to intervene as of right in constitutional cases.
- In 1992 the territorial governments participated in constitutional negotiations leading to the Charlottetown Agreement (the agreement was subsequently repudiated by referenda).
- By 1995, the Government of Canada had released its policy on negotiating the inherent right of Aboriginal self-government.[41] (Self-government agreements

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1991) at 159. A detailed chronology of Yukon's constitutional development is contained in Steven Smyth, *The Yukon's Constitutional Foundations vol. I, The Yukon Chronology (1897-1999)* (Claredge: Yukon, 1999).

[40] Interpretations of s. 42(1)(f) generally overlook the fact that the *Consitutution Act, 1982* reaffirms the *Constitution Act, 1871* which authorizes Parliament alone to establish new provinces in the territories. For a discussion of this point see: Hogg, Peter, *Constitutional Law of Canada*, 3rd. ed. Toronto: Carswell, 1992 at 80.

[41] Canada. ABORIGINAL SELF-GOVERNMENT: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government [Ottawa:1995] at pg. 3 states: "The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982."

have been concluded in a number of regions of Yukon and in the Tlicho region of the NWT. Negotiation processes initiated under this policy are ongoing in other regions of these territories.)

- In 1999 Nunavut was formally established as a political jurisdiction within the federation.
- In 2002 Yukon concluded a *Devolution Transfer Agreement*[42] in relation to natural resources and amendments were made to modernize the *Yukon Act* to reflect the institutions of responsible government which had been in place for many years.
- On April 1, 2003, the Yukon assumed responsibility for most public lands, waters, forests and mineral resources, as well as for environmental assessment.[43]

However, by far the most significant development in the territories has been the settlement of aboriginal land and self-government claims. There will surely be a range of fundamental new questions in relation to democratic, collective and individual rights, conflict of laws, intergovernmental relations and governance emerging from the settlement and implementation of Aboriginal land claims and self-government agreements in the North. These issues exist within the larger framework of Canadian federalism and engage such issues as national unity, equalization, asymmetrical federalism, health care, education, competitiveness and so on. However, extensive policy research and analysis of the North's significance in this context have yet to be undertaken. So despite the declaration contained in Government of Canada drafts of a new Northern Strategy that "Canada is a northern nation"[44], the significance of the North in tomorrow's federalism and the implications which new northern models of governance will hold for the federation, are not particularly clear.

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[42] Government of Canada and Yukon Government, *Yukon Northern Affairs Program Devolution Transfer Agreement*, (Canada, DIAND, 2001) [ISBN 0-662-31258-9]

[43] Source: http://www.gov.yk.ca/yukonglance/government.html

[44] Government of Canada, "Seizing Canada's Northern Advantage: The Northern Strategy" (unpublished draft).

IV. Federalism and the North Today

Territorial Constitutions

Today federal statutes (the *NWT Act*[45], *Yukon Act*[46] and *Nunavut Act*[47]) are the principal documents which establish the territorial constitutions. However, they are not part of the "Constitution of Canada" as that phrase is defined by section 52(2) of the *Constitution Act, 1982*. Therefore, the territorial constitutions are not entrenched and can be amended directly or indirectly by ordinary Acts of Parliament without invoking any of the formal amending formulae contained in the *Constitution Act, 1982*.

Furthermore, the constitutional fabric in the territories has been significantly altered since 1995 when the federal government released its policy for negotiating self-government arrangements with the Aboriginal peoples of Canada. As described later in this paper, existing land claims and self-government agreements in the Yukon, NWT and Nunavut, and other agreements currently being negotiated, will change the community, regional and territorial institutional and governance models in some interesting ways..

The *NWT Act*, *Yukon Act* and *Nunavut Act* establish legislative bodies for the territories and devolve to them a range of powers which closely follow provincial legislative powers assigned by s. 92 of the *Constitution Act, 1867*. Territorial legislatures, while patterned after provincial legislatures, do not have exclusive legislative powers. As a matter of constitutional law, Parliament has ultimate authority over all matters in the territorial North.

In form and content, the *NWT Act* now differs from the more modern *Yukon Act* and *Nunavut Act*. These latter Acts have eliminated some provisions which are unusual to find in a constitution, such as the provisions dealing with reindeer, intoxicants, mentally disordered persons and neglected children. Also eliminated from the *Yukon Act* and *Nunavut Act* are the provisions of the *NWT Act* which say that every person who contravenes the Act is guilty of an offence and liable to fine or imprisonment.[48]

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45 R.S.C. 1985, c. N-27 as am.
46 S.C. 2002, c.7 as am.
47 S.C. 1993, c. 28 as am.
48 See s. 60 of the *NWT Act.*

Parliament's power to amend or even repeal the territorial constitutions appears at first glance to be unfettered; however, s. 3 of the *Charter of Rights and Freedoms* guarantees the existence of a "legislative assembly" and s. 32(1)(a) indicates that Parliament and the Government of Canada are bound to apply *Charter* principles in respect of all their dealings in relation to the Yukon Territory and Northwest Territories (again, Nunavut is not mentioned because it did not exist in 1982).

In the case of Nunavut, some commentators argue that because the federal government's commitment to pass the *Nunavut Act* is contained in the Inuit land claims agreement, a modern treaty with constitutional protection under s. 35 of the *Constitution Act, 1982*, the existence of this territory may be protected as a treaty right. While s. 4.1.3 of Article 4 of the land claim provides that nothing in the actual legislation creating Nunavut is intended to be a treaty right, the linkage between the *Nunavut Act* and the Inuit land claim might afford a level of protection from unilateral or arbitrary repeal by Parliament.

Territorial Legislative Powers

While the *Constitution Act, 1871* gives Parliament exclusive authority over the administration, peace, order and good government of the territories, Parliament has devolved the day-to-day responsibility for governing the territories to the territorial legislatures and governments under the *NWT Act*, *Yukon Act* and *Nunavut Act*. Section 16 of the *NWT Act* says:

> 16. The Commissioner in Council may, ***subject to this Act and any other Act of Parliament***, make ordinances for the government of the Territory in relation to the following classes of subjects: [emphasis added; 22 enumerated heads of power follow]

The *Nunavut Act* imposes similar limitations on the legislature's law-making powers; however, by contrast the new *Yukon Act* uses the following construction:

> 18. (1) The Legislature may make laws in relation to the following classes of subjects in respect of Yukon: [enumerated heads of power follow]

> 26. In the event of a conflict between a law of the Legislature and a federal enactment, the federal enactment prevails to the extent of the conflict.

The classes of subjects devolved to the territories are patterned on the provincial powers set out in section 92 of the *Constitution Act, 1867*. However, four omissions from the territorial list of powers are noteworthy:

- Provinces have power to amend their own constitutions. Territorial legislatures have no such power.
- Sections 109 and 92(5) of the *Constitution Act, 1867* give provinces ownership and legislative authority, respectively, in relation to provincial public lands and the natural resources associated with them. By comparison, most public lands in all three territories are still owned by the federal Crown[49] and are ultimately under exclusive federal legislative authority. In the NWT and Nunavut a relatively small percentage of the surface of public lands are under the administration and legislative control of the territorial governments, and they have the beneficial use and revenues from these lands. As a result of the *Devolution Transfer Agreement*[50] between the Yukon government and the federal government, and the enactment of a new, modernized *Yukon Act* in 2002, Yukon is the first territory to have received a substantive devolution of administration and control in respect of surface and subsurface natural resources in relation to public lands in the territory. However, this control is still subject to a range of "take back" provisions set out in the *Yukon Act* that allow Ottawa to take back lands and resources in certain specified circumstances.
- Provincial jurisdiction in respect of natural resources in the province, including electricity, non-renewable and forest resources, were clarified and augmented in 1982 by a constitutional amendment. No similar legislative powers have yet been fully devolved to Nunavut. The Northwest Territories received some jurisdiction for forestry resources by federal Order in Council in 1986. The new *Yukon Act* (2002) contains some law-making powers analogous to these provincial powers.

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[49] See for example s. 44(1) of the *NWT Act.*

[50] Government of Canada and Yukon Government, *Yukon Northern Affairs Program Devolution Transfer Agreement*, (Canada, DIAND, 2001) [ISBN 0-662-31258-9]

- Under s. 92(3) of the *Constitution Act, 1867* provinces can legislate for "the borrowing of money on the sole credit of the province". The comparable provisions in the territorial constitutions only empower the territories to legislate for borrowing or lending or investing surplus territorial monies and stipulate that no money may be borrowed without the approval of the federal cabinet.

One notable addition to the territorial constitutions not found in provincial constitutions are provisions which "entrench" territorial legislation providing for official languages in the territory. While language legislation was originally passed by the territorial legislatures, amendments to the *Yukon Act* and *NWT Act* by the Parliament of Canada prevent these legislatures from amending their own legislation unless they first obtain approval through a resolution of Parliament. Territorial amendments which *enhance* the rights or services relating to official territorial languages are an exception to the requirement. In the case of the Northwest Territories, for example, English and French and six aboriginal languages are the official languages of the territory.

Aboriginal Land Claims and Self-government Agreements

As stated earlier, Aboriginal land claims and self-government agreements have added a level of variation and complexity for anyone attempting to discern exactly what theory of government is at play in the North. The expression "land claims agreements" is really a misnomer because these agreements transcend mere land issues. Also there is a tendency to refer to land claims and self-government agreements as "final agreements". This perhaps reflects a vain hope that Aboriginal issues are finally resolved once an agreement is reached. More appropriately they should be called beginning agreements, because these documents are intended to initiate new relationships, new institutions, and new dynamics within the federation.

Modern aboriginal land claims agreements and self-government agreements can be seen to be evolving, integral parts of the territorial (and Canadian) constitutions. The land claims agreements, for example, recognize and affirm a wide range of rights in relation to lands and resources, including management of these matters. The agreements create "institutions of public government" and various administrative bodies which

appear to have protection under the Constitution of Canada, given the status of these agreements as treaties under s. 35 of the *Constitution Act, 1982*. The provisions of these modern–day treaties, in many cases, are paramount in situations where a federal or territorial law is in conflict with an aboriginal land claims agreement. More recently, self-government agreements have been negotiated and these agreements contain a range of governance models and processes intended to implement aboriginal self-government rights.

Therefore, one cannot examine territorial government in Canada without taking into account the aboriginal and treaty rights protected by s. 35 of the *Constitution Act, 1982*. Most of the geographical area of the territories is or has been under claim by aboriginal peoples. Constitutionally-protected land claims agreements within the meaning of s. 35(3) of the *Constitution Act, 1982* have been concluded with the Inuit in Nunavut), and the Inuvialuit, Gwich'in, Sahtu Dene and Métis, and Dogrib (Tlicho) in the NWT, and are in progress with other aboriginal peoples in the western Northwest Territories. The *Tlicho Agreement* (2003) is the first combined land claims and self-government agreement in the NWT. In addition, some treaty peoples are negotiating the fulfilment of Treaties 8 and 11 which were signed in 1899 and 1921 respectively. In Yukon, fourteen Aboriginal First Nations concluded an *Umbrella Final Agreement*[51] in May 1993 to resolve land claims and protect certain aboriginal rights. A majority of Yukon First Nations (8 of 14)[52] have also concluded self-government agreements that are now being implemented.[53]

The details of the relevant agreements are too complex to examine here, but it is clear that these modern treaties will have significant implications for the institutional, administrative, political and constitutional future of the territories, and potentially Canada. Already land claims and self-government agreements have created institutions and governance arrangements which appear to have a constitutional status independent of

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[51] *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, May 29, 1993* (Canada, DIAND, 1993).

[52] Vuntut Gwitchin First Nation (1993); First Nation of the Nacho Nyak Dun (1993); Champagne and Aishihik First Nations (1993); Teslin Tlingit Council (1993); Selkirk First Nation (1997); Little Salmon/Carmacks First Nation (1997); Trondëk Hwëchin First Nation (formerly Dawson First Nation) (1998); Ta'an Kwäch'än Council (2002).

[53] Source: http://www.gov.yk.ca/yukonglance/government.html

either federal or territorial governments, and which also appear to have a higher constitutional status than the institutions created by or under the *NWT Act*, *Yukon Act* and *Nunavut Act*. These "institutions of public government" are noteworthy: they guarantee aboriginal participation in decision-making on a wide range of resource management and environmental bodies.

However, in the NWT in particular, the distinctions between "aboriginal self-government" and "public government" are blurring. As the NWT Legislative Assembly's Special Committee on Implementation of Self Government points out:

> These phrases suggest clear distinctions that will not likely be reflected in practice. In our view, this terminology tends to imply separate realities or watertight compartments. From our work to date, we have concluded that governments in the NWT will not be easily categorized as "Aboriginal" or "public". The governance systems that will be established as a result of self-government agreements will probably not fit neatly into one box or the other. For example, the territorial government in Nunavut is sometimes called an expression of Aboriginal self-government, but in the NWT the territorial government is usually referred to as the public government. The draft *Gwich'in and Inuvialuit Self-government Agreement in Principle*, and the *Tlicho Agreement* are products of self-government negotiations but will provide mechanisms to deliver programs and services to all residents in many situations. The *Deh Cho First Nations Framework Agreement* states that a Deh Cho government will be a "public government" based upon Deh Cho First Nations laws and customs and other Canadian laws and customs.[54]

In summary, territorial government in Canada has recently been undergoing rapid and fundamental change, particularly since the late 1970s. The new Nunavut territorial government will evolve in the context of implementation of the Inuit comprehensive land claims agreement ratified in 1993. In the Northwest Territories, significant land claims and self-government agreements are still under negotiation, while others are currently being implemented. In Yukon, as in Nunavut and the Northwest Territories, implementing the inherent right of Aboriginal self-government will be a challenging aspect of territorial development in the years ahead.

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[54] Legislative Assembly of the Northwest Territories, Special Committee On Implementation of Self-Government and the Sunset Clause. *The Circle of Self-Government: Report of the Special Committee on The Implementation of Self-Government and the Sunset Clause*. (Tabled June 06, 2003), p. 1-2.

Protecting self-government agreements as treaties under s. 35 of the *Constitution Act, 1982* has been the expectation over the years. The primary question is: precisely what is being protected and how will Aboriginal governments inter-relate with existing governmental systems?

In the North, the field of intergovernmental relations is becoming increasingly crowded. The matrix of interrelationships likely to generate issues looks something like this:

Aboriginal governments	⟺	Aboriginal governments
Aboriginal governments		Aboriginal individuals
Aboriginal governments	⟺	Aboriginal NGOs (non-governmental organization)
Aboriginal governments	⟺	"Institutions of public government" under claims
Aboriginal governments	⟺	Non-Aboriginal individuals
Aboriginal governments	⟺	Federal government
Aboriginal individuals		Federal government
Aboriginal NGOs	⟺	Federal government
Aboriginal governments	⟺	Territorial governments
Aboriginal individuals		Territorial governments
Aboriginal NGOs	⟺	Territorial governments
Aboriginal governments	⟺	Regional/community governments
Aboriginal individuals		Regional/community governments
Aboriginal NGOs	⟺	Regional/community governments
Aboriginal governments	⟺	Provincial governments
Aboriginal governments		International bodies
Aboriginal NGOs	⟺	International bodies

Furthermore, the issues themselves extend well beyond hunting, trapping and fishing. The courts will be called upon to navigate the fine balances between law and politics, culture and context, federalism and colonialism, rights and responsibilities. (It is noteworthy, however, that agreements such as the *Tlicho Agreement*, recently ratified by federal legislation, also contain provisions that deal with the "Jurisdiction of Courts".)

Although the issues will not fall into watertight compartments, some categories might include:

1) *Legislative jurisdiction* and *conflict of laws*: Law-making authority is recognized in Aboriginal self-government agreements, but the structural, procedural and operational dimensions will require additional practical efforts to work out. For example, sections 14(76) and 14(77) of *The Inuvialuit Final Agreement* (1984) provide an early illustration of the sorts of issues that can arise. Section 14(76) empowers Inuvialuit Hunters and Trappers committees to "make by-laws, subject to the laws of general application, governing the exercise of the Inuvialuit rights to harvest..." However, the Agreement contains no clear process for how these by-laws should be prepared and published. Given that such bylaws could affect Inuvialuit rights, this was something of an oversight. To complicate matters further, s. 14(77) of the Agreement provides that:

> By-laws made under paragraph 76(f) shall be enforceable under the *Wildlife Ordinance* of the Northwest Territories. [55]

The Act of Parliament ratifying the Inuvialuit Agreement, the *Western Arctic (Inuvialuit) Claims Settlement Act,* provides in section 4 that "Where there is any inconsistency or conflict between this Act or the Agreement and the provisions of any other law applying to the Territory, this Act or the Agreement prevails to the extent of the inconsistency or conflict." So these bylaw provisions cannot simply be ignored.

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[55] *The Western Arctic (Inuvialuit) Final Agreement* (1984) s. 14. (77).

The mechanics of this leap, from by-law creation to enforcement under a statute of the Legislative Assembly, created some quandaries for game officers. How would they know when a bylaw was made? What if the language was Inuvialuit rather than English and French? If the bylaw had never been published how was a defendant to be deemed to know the law? Matters were eventually worked out after the fact through some practical arrangements, thankfully before any person charged with violating such a by-law appeared before the courts. Provisions of self-government agreements signal a fundamental change in the relationships between the law-makers in the Legislative Assembly and those in communities and regions.[56]

2) *Status* issues: As the number of self-government agreements increases the contest for legitimacy, which has always been a significant element in the evolution of territorial government, can be expected to move in new directions. (For example, the status of the Legislative Assembly and the Government of the Northwest Territories still arises from time to time in cases before the Court as it did in the *Morin* and *Roberts* cases.[57]) Most land claims agreements and self-government agreements contain some provision to link them to s.35 of the *Constitution Act, 1982*.[58] At some point the courts will be asked to determine what these sorts of provisions mean. More to the point, what do they mean in relation to the status of institutions and governments they establish? Self-government is arguably a *system* carrying out a governing *process* through an identifiable set of *institutions*. Without getting into the intricacies of any particular agreement, does it muddy the issues to protect self-government agreements as land claims agreements under a rights-based provision of the *Constitution*? For example, what do we make of constitutionally protected self-government agreements that might create hybrid

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[56] See: Legislative Assembly of the NWT. *The Circle of Self-Government: Report of the Special Committee on the Implementation of Self-Government and the Sunset Clause*. (June 2003) at 16. [B. Funston was the writer/facilitator to this Committee.]

[57] See for example : *Roberts v. Commissioner of the NWT et al,* 2002 NWTSC 68; *R.* v. *Northwest Territories*, [1995] 1 W.W.R. 17; *Morin* v. *Crawford* (1999), 14 Admin.L.R. (3d) 287

[58] See *Sahtu Dene and Métis Comprehensive Land Claim Agreement (1993). vol. 1,* s. 3.1.1; and Tlicho Agreement (2003) s. 2.1.1.

self-government arrangements that have so-called "public government" elements? The *Deh Cho First Nations Framework Agreement* states that a Deh Cho government will be a "public government" based upon Deh Cho First Nations laws and customs and other Canadian laws and customs. What are the implications of giving constitutional protection to a form of public government through s. 35 which only refers to Aboriginal peoples and Aboriginal and treaty rights?

3) *Interpretative* issues: Land claims and some self-government agreements are modern-day treaties. Among the objectives of these documents is the establishment of practical systems of government to fulfil the needs and aspirations of Aboriginal people in communities and regions. They have to be taken seriously. Some provisions will raise interpretative challenges for any court. For example, agreements usually contain provisions pertaining to the management of socio-economic impacts of development in the relevant settlement area. The *Gwich'in Comprehensive Land Claim Agreement* requires "Government"[59] economic development programs in the settlement area to "take such measures as it considers reasonable, in light of its fiscal responsibility and economic objectives" to maintain and strengthen the traditional Gwich'in economy, and promote economic self-sufficiency. The Agreement further defines "impact on the environment" to include: "…effects on air, land and water quality, on wildlife and wildlife harvesting, on *the social and cultural environment and on heritage resources*.[60] For purposes of land use planning "special attention shall be devoted to…protecting and promoting *the existing and future social, cultural and economic well-being of the Gwich'in*" [61] Any environmental impact reviews dealing with development "shall have regard to…the protection of *the existing and future economic, social and cultural well-being of the residents and communities in the GSA* [62] [emphasis added]. In the context of the current debates

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59 This is a defined term in the agreement.
60 *Gwich'in Comprehensive Land Claim Agreement.* volume 1, s. 2.
61 Ibid. Vol 1, s. 24 (4).
62 *Ibid.* Vol 1, s. 24 (3).

about judicial activism, some commentators have observed that Courts are in a difficult spot when faced with, for example, the ambiguities of the *Charter of Rights and Freedoms*:

> In short, despite the critic's yearning for a simpler and more professional age, there is no purely technical and non-political way to engage in a principled mode of adjudication. This is especially true of the *Charter*. Not only is what amounts to "freedom" and "equality" the stuff of fierce ideological debate (and how one relates to the other), but how such values are to be enforced within section 1's "such reasonable limits as can be demonstrably justified in a free and democratic society" merely invites judges to wade even deeper into the political waters. Adjudication necessarily involves political choice.[63]

In the field of Aboriginal rights, land claims agreements and self-government agreements this is doubly true. Equally challenging is the possible expectation, raised by the *Doucet* case[64], that the Court will play a supervisory role when dealing with the sorts of provisions described above.

4) *Rights* issues arising from the competition among rights-holders who have relationships with multiple governments: Today the courts in Canada regularly deal with determinations as to whether or not there is a right protected or recognized by the *Charter* or s. 35, and if so, whether it has been unduly infringed by legislation or various forms of government action. However, in years to come the rights cases in the North promise to be more complex. Multiple levels of government will be making laws in concurrent fields of jurisdiction or in situations where there is a displacement of existing laws. The pith and substance of such laws might not always fall into clearly discernible Aboriginal and non-Aboriginal compartments.

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[63] See Allan C. Hutchinson. *Judges and Politics: An Essay from Canada*. (2004) 25 SCLR (2d) 269 at 274-275.

[64] *Doucet-Boudreau v. Nova Scotia (Min of Education)* [2003] 3 SCR 3. The Supreme Court of Canada upheld the judgement of the trial judge wherein he retained jurisdiction to hear reports on the governments conduct of his finding that they had to supply "best efforts" to provide French language school facilities and programs.

An illustration of the overlying legal and constitutional ambiguities can be found in the interplay of the *Charter of Rights and Freedoms* and the *Rights of the Aboriginal Peoples of Canada* in s. 35 of the *Constitution Act, 1982.* The first point to be recognized is that most self-government agreements will likely contain a provision similar to the one in the *Tlicho Agreement* which states:

> The *Canadian Charter of Rights and Freedoms* applies to the Tlicho Government in respect of all matters within its authority.[65]

As noted above the Agreement is a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982* which provides, *inter alia*:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

At first blush, the application of the *Charter* to an Aboriginal government (constituted under a treaty that is recognized and affirmed by s.35) is probably intended to provide Aboriginal individuals with recourse against their Aboriginal governments in the event of an infringement of a *Charter* right by that Aboriginal government. Or perhaps it is to protect non-Aboriginals who might fall under the jurisdiction of an Aboriginal government. Or perhaps it is both. But what is the impact of s.25 of the *Charter* where the issue involves an Aboriginal government or a contest between alleged *Charter* rights and Aboriginal rights? Section 25 provides:

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[65] *Tlicho Agreement*, s. 2.15.1

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

If an Aboriginal person claims infringement of a *Charter* right by an Aboriginal government, can s. 25 operate as an override where the Aboriginal government is exercising its authority under a self-government agreement that is protected by s. 35? How will the s.1 justification operate in the context of Aboriginal government actions? Is there a class of Aboriginal governmental actions which might be sanctioned by s. 25 even if they do not meet the test of a reasonable limit in "a free and democratic society"? How should the courts interpret the democratic rights guarantees in s. 3 in relation to an Aboriginal government, particularly in situations where Aboriginal governments are carrying out "public" functions? The essential question might be "What is 'a right to self-government' and how does it differ from the guarantee of democratic rights under s.3"?

And finally there is the evolving issue of Métis rights. The *Powley* case[66] sets the stage for some interesting issues in the North. The Court transposed "the test for addressing Indian assertions of Aboriginal rights laid out in *R. v Van der Peet* [67] to the determination of Métis Aboriginal rights by modifying the timing requirement from a time prior to contact with Europeans to a time preceding the establishment of effective European control."[68] One commentator has noted that: "The Court left open the possibility that … First Nation members may be able to assert Métis Aboriginal rights in addition to or instead of treaty rights." [69]

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66 *R. v Powley* (2003) SCC 43

67 [1996] 2 SCR 507

68 Sterling, Lori and Lemmond Peter. *R. v Powley: Building a Foundation for the Constitutional Recognition of Metis Aboriginal Rights*. (2004) 24 SCLR (2d) 243 at 244.

69 *Ibid*. at 246.

The imagination can generate other questions and issues, some of which might be far more relevant than the ones posed above. The balancing of all the various rights will not be resolved by a Jesuitical reading of the constitutional texts and the detailed self-government agreements. It will be an on-going process that can be expected to impose limits on some rights so that other rights can co-exist.

5) *Federalism* and *intergovernmental issues*, including lines of responsibility and accountability and representation at federal-provincial-territorial meetings: Some examples from the NWT might help illustrate some of the emerging complexities in this area. Local and regional government bodies in the NWT have historically been created by, and have powers delegated to them, by legislation enacted in the Legislative Assembly. (Bands may exercise by-law making powers under the federal *Indian Act*.) Not only are local or regional laws subject to territorial legislation, courts in Canada have generally taken a restrictive interpretation to the scope of powers delegated to local or regional governments.[70] Under some self-government agreements community governments will now be established by territorial legislation based on a framework set out in the self-government agreement. This is the case in the *Tlicho Agreement*:

> 8.1.1 The Tlicho community governments of Behchoko, Whati, Gameti and Wekweeti must be established by territorial legislation. [a framework for the legislation is then set out in the Agreement]

But there are restrictions on the ability of the Government of the NWT to amend this legislation in the future.

> 8.1.6 The Government of the Northwest Territories shall obtain the consent of the Tlicho Government before introducing any bill to amend the legislation referred to in 8.1.1.

The process for obtaining and validating the "consent" are not spelled out in the Agreement.

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70 *The Circle of Self-Government*. Supra. at 16.

Alternatively, the status and existence of community governments might flow directly from the self-government agreement itself in some situations. This appears to be the approach taken in the Beaufort-Delta self-government process with the Inuvialuit and Gwich'in; however, negotiations have not yet produced a final agreement. Once such a self-government agreement comes into effect, the Assembly may have limited legislative authority over the structure and powers of such communities. In order to make way for the new community structures and powers some existing communities established under laws of the Legislative Assembly would be dissolved.[71] This would create a unique situation within the federation: the NWT would be the only jurisdiction where some community governments were not, for practical purposes, creatures of the legislature.

Another interesting trend in the NWT is the negotiation of self-government agreements that recognize "concurrent" law-making powers. This means that the community and regional governments established by self-government agreements might have overlapping jurisdiction with the legislatures on a number of matters.[72] (By comparison, self-government agreements with Yukon First Nations employ a displacement model that is described in more detail later in this paper.) Again this creates interesting precedents within the federation: the NWT and Yukon are the first places in Canada where some community governments have concurrent and paramount jurisdiction in relation to the legislature in respect of certain matters.

The purpose of the above examples is not to raise "boogey men" in relation to Aboriginal self-government or Aboriginal rights. Choices were made to recognize Aboriginal rights as far back as the *Royal Proclamation of 1763* and Canada will need practical and rational approaches to live up to the values that have been established.

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71 *Ibid.* at 17.
72 *Ibid*. at 18.

V. Searching For Norms And Mechanisms To Secure Legitimacy And Stability

Although territorial status is an unusual state of purgatory in a federal system, by the 1980s provincehood appeared to have become a somewhat passé objective. Already mentioned is the fact that the *Constitution Act 1982* radically changed the legal landscape for provincehood on two fronts. On the one hand the provinces appear to have become formal and active players in the process of creating new provinces. Gordon Robertson in his monograph entitled *Northern Provinces: a mistaken goal*,[73] concludes:

> Sections 42(1)(f) and 38(1) of the *Constitution Act 1982*, provide "black ball" rules as effective as any club could want. They will be used with a hard eye in the interest of the present members.

On the other hand the aboriginal rights provisions in s. 35 of the *Constitution Act 1982* prepared the ground for a concerted drive towards a political rights agenda for aboriginal residents of the territories. Since the advent of the federal government's aboriginal self-government policy in 1995, aboriginal peoples in the three territories have moved the processes of governance in new directions. Even if provincehood were still possible, would the typical provincial model equally suit Yukon, the Northwest Territories and Nunavut? In Yukon and NWT, the self-government arrangements negotiated to date, and others still ongoing, would seem to preclude this.

Perhaps the most poignant question emerging from the territorial North today is "What are the next logical steps in territorial political and constitutional evolution ?" If not provincehood, then what? This question is difficult to answer. What do territorial residents want? Do Ottawa and the existing provinces look forward to, or support, provincehood for the three territories? If so, how are we to account for the emerging systems of Aboriginal self-government in the Yukon and NWT? In addition, the new amending formulae established by the *Constitution Act, 1982* appear to leave it up to Ottawa and the provinces to make the final decisions regardless of what the territorial population might think. A "traditional", but not necessarily valid, demand of Quebec has been that it should have a veto in relation to the creation of any new provinces.

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[73] Robertson, Gordon. 1985. *Northern Provinces a Mistaken Goal*. Institute For Research on Public Policy: Montreal, at p. 37

The Situation in the Northwest Territories

In 2003 a Special Committee of the Legislative Assembly of the Northwest Territories tabled a report on the implications which self-government negotiations and agreements could have for so-called "public government" in the NWT.[74] The Committee identified five broad trends and issues which are of particular interest in the context of constructing tomorrow's federalism. The three trends the Committee considered to be major drivers of change were: 1) the new status and powers of communities; 2) concurrency of law-making powers between the Legislative Assembly and Aboriginal self-government institutions; and 3) formal consultation requirements imposed on all levels of governments. These trends in turn were expected to generate two important ongoing issues, namely the practical need for close co-ordination among governments, and the premium that will be placed on good-relations among governments in order to foster cooperation**.**

The Committee called these trends and issues "the Five C's", but in fact there was a sixth overarching consideration which was also identified, namely "capacity". The Report contains a clear recognition that all levels of government in the NWT will need to address questions of fiscal and human capacity in order to meet the expectations and requirements emerging from land claims and self-government agreements.

The report states:

> These trends and issues signal fundamental changes to many aspects of the way the Legislative Assembly and GNWT now do things, including:
>
> • law-making
> • policy-making
> • government decision-making
> • government operations, including program and service delivery
> • human resources management
> • land and resources management
> • financial management including budgeting and appropriations
> • raising revenues through taxation and other means
> • spending on capital spending for facilities and other assets
> • lines of accountability, and

[74] Mr. Funston was the principal author/facilitator for this committee.

• intergovernmental relations.

> Responsibilities for law-making and for the delivery of several programs and services will change. Self government agreements often involve systems for delivery of programs and services to all residents. The people we will hold accountable will consequently change. Governments will be required to consult more with each other and to coordinate and cooperate in their activities. Therefore, there will be fundamental changes in the relationships among the community, regional and territorial levels of government.[75]

The Committee reached the conclusion that, in the NWT, it will be necessary to reconsider the distinctions that are often made between "Aboriginal self-government" and "public government". The NWT is comprised of small, close-knit communities and regions. The self-government negotiations are leading to agreements where all residents are likely to be affected, one way or the other.

It is difficult to judge at this stage whether such innovations are a positive or negative development. However, it seems clear that unlike any other jurisdiction in Canada, except perhaps the Yukon, the NWT might have many community governments which are in effect constitutionally entrenched, or at least shielded from the legislative jurisdiction of the territorial legislature. Elsewhere in Canada municipalities have for some time been claiming recognition in the Constitution of Canada as a separate level of government. In the NWT and Yukon this actually appears to be well on its way.

The Committee also examined the law-making powers of these new forms of community government. In general, self-government negotiations and agreements in the NWT contemplate concurrent law-making powers. Therefore, community and regional governments established by self-government agreements could have overlapping jurisdiction with the Legislative Assembly on a significant range of matters. The fields of jurisdiction open for negotiation cover most of the typical provincial/territorial type powers.

The Committee noted that once self-government agreements are in effect, there could potentially be overlapping jurisdiction and responsibilities among institutions at the community, regional and territorial levels. As to which law would be paramount in any given situation, the Committee explained:

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[75] Committee, *supra*. p. 11

> Self-government agreements contain provisions that set out a range of such rules. There is no single rule that will cover every circumstance.[76]

The NWT has never really been a typical provincial-type jurisdiction; nevertheless, it would appear from this analysis that the implications for legislators and policy-makers in all levels of government in the NWT could be considerable. According to the Committee, among the significant changes that can be fairly anticipated from this trend are:

- New responsibilities for programs and services at the community and regional levels
- New lines of accountability for these programs and services
- New mandatory consultations and interactions among governments
- New structures and processes for the GNWT and Legislative Assembly
- New procedures and processes for conducting intergovernmental relations
- New expectations among citizens.[77]

In addition, financial capacity is almost certainly to be a critical factor in the exercise of law-making powers by all levels of government. While a devolution agreement on lands and natural resources is being implemented in the Yukon, no such agreement has yet been concluded in the NWT or Nunavut. Devolution talks are ongoing among the federal government, the Government of NWT and Aboriginal peoples; however, since the early 1990s, perhaps a compelling reason for Ottawa politicians and officials to "go slow" is the prospect of large revenue flows to federal coffers as a result of diamond mines and oil and gas development in the NWT. Although the language today would be couched in gentler terms, the Carrothers Commission Report in 1966 gave voice to a view that continues to prevail in some quarters:

> …it is not conceivable that the central government would convey title to the minerals and petroleum reserves of one-third of the land mass of Canada to a government of less that 0.2% of the total Canadian population, three fifths of

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[76] Committee, *supra*. p. 19-20

[77] Committee, supra. p. 21

> whom are indigenous peoples, who…are at the present time politically unsophisticated and economically depressed.[78]

Indeed, media reports confirm that federal officials are well aware of the potential revenue flows from the NWT:

> Providing the infrastructure to ensure prosperous diamond and oil ventures will also boost Canada's Gross Domestic Product by $53-billion and bring in $10-billion in taxes and royalties in the next 15 to 20 years, according to documents obtained by the National Post under the Access to Information Act. "With proper investments ... the North could become an economic powerhouse," according to the Department of Indian and Northern Affairs Canada.[79]

By contrast, self-government agreements, and devolution to the territorial governments, have been devolving greater powers and responsibilities to northern governments in relation to some or all of the so-called "social envelope" programs. These include such matters as health, education, social services, and social housing. These programs tend to be very expensive, particularly in the North. In most Canadian provinces it is the social envelope programs that account for the lion's share of provincial spending. Surely this is a compelling argument for transferring the levers of economic development to northern governments rather than retaining them in Ottawa.

Given capacity issues alone, the success of any new institutions and systems in the NWT will be dependent on the formal and informal relationships that exist between and among the various levels of governments. However, there is another factor which places a premium on cooperation: numerous formal consultation requirements are being imposed on northern governments at the territorial, regional and community levels.

The range of matters requiring consultation is quite extensive and this will likely necessitate formal and informal intergovernmental mechanisms to ensure compliance. Indeed, land-claim and self-government agreements have begun to define the term "consultation". A typical definition sets out formal requirements such as the following:

> "consultation" means

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78 Carrothers, supra. p. 148

79 Allan Woods, *National Post.* March 17, 2004

> (a) the provision, to the person or group to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that person or group to prepare its views on the matter;
> (b) the provision of a reasonable period of time in which the person or group to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the person or group obliged to consult; and
> (c) full and fair consideration by the person or group obliged to consult of any views presented.[80]

The NWT Special Committee observed in its report that:

> Obligations to consult that are imposed on both the GNWT and self-governments carry with them formal requirements for notification, information exchange and dialogue. In practice, these obligations will likely require governments to find formal and informal mechanisms to coordinate a range of activities including planning, policy-making, law-making, programs and service delivery, and enforcement….
>
> The mechanisms, time and resources to manage all these formal consultation processes could be considerable once all self-government agreements are in force. Unlike many current consultation processes which are discretionary on the part of the GNWT, the consultation provisions of self-government agreements will potentially have more political and legal force. A failure to meet the requirements could be a breach of a constitutionally-protected agreement.[81]

Recalling that there might eventually be seven or more separate self-government agreements in the NWT covering virtually the whole territory, the Committee observed that all governments will need to determine what levels of time and resources should be dedicated to consultations; how multiple or overlapping consultation processes should be managed, how conflicting input can be reconciled; and how, ultimately, the input from consultations should be integrated into each government's policy-making and law-making:

> …Responsibility for planning and preparing for the implementation of self-government does not fall upon the GNWT and the Legislative Assembly alone. The federal government and Aboriginal governments are partners in this process and we encourage early attention to enhancing existing forums, and to promoting

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[80] Definition of "consultation" in Article 1.1.1 of the *Land Claims and Self-government Agreement among the Tlicho First Nation as trepresented by the Dogrib Treaty 11 Council and the Government of the Northwest Territories and the Government of Canada* (initialled on 04 September 2002 and given effect by the Tlicho Land Claims and Self-Government Act, S.C. 2005, c. 1 (Assented to February 15, 2005))

[81] Committee, *supra*, p. 23-24.

> and establishing new forums, where appropriate, to ensure ongoing dialogue on implementation issues.[82]

In summary, coordination and cooperation among governments will be essential to ensure efficient and effective governance, to reduce overlap and duplication, to achieve the best program and service delivery for all NWT residents, and to ensure that lines of accountability are clear. Such coordination and cooperation will need to be orchestrated in a political environment where several governments may be "competing" for human and financial resources, as well as for legitimacy. In this environment of concurrent jurisdiction, northerners will likely hold a range of views as to which northern government is the proper decision-maker on any given issue of the day.

Yukon

The situation in Yukon is equally complex but distinctly different from the NWT. As described above, most Yukon First Nations have now settled their land claims and also have self-government agreements in place. However, an important element of the self-government agreements in Yukon, which distinguishes them from the agreements in the NWT, is the adoption of what some commentators call a "displacement model" in relation to certain legislative fields. Rather than a concurrency model, First Nation governments may occupy certain legislative fields and displace the Yukon Legislature's laws. The federal *Yukon First Nation Self-government Act* states:

> 19. (1) To the extent that a Yukon enactment and a law enacted by a first nation make provision for the same matter, the Yukon enactment does not apply to the first nation, to its citizens or in respect of its settlement land.
>
> (2) Subsection (1) does not affect the application of any Yukon enactment relating to taxation.
>
> (3) Where, in the opinion of the Yukon Government, subsection (1) renders a Yukon enactment partially inapplicable and thereby unreasonably alters the character of the Yukon law, or makes it unduly difficult to administer the Yukon enactment in relation to a first nation named in Schedule II, its citizens or its settlement land, the Yukon Government may order that the Yukon enactment ceases to apply in whole or in part to the first nation, to its citizens or in respect of its settlement land.

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[82] Legislative Assembly of the NWT. *The Circle of Self Government: Report of the Special Committee on the Implementation of Self-government and the Sunset Clause*. Yellowknife: 2003, at p. 31

In our federal system, where the courts now seem consistently to reject a water-tight compartment approach to legislative jurisdiction[83], this is a significant variation which will need to be taken into account in coming years in the context of intergovernmental relations relating to the Yukon. It is noteworthy that a displacement model is also being explored in negotiations with the Federation of Saskatchewan Indians and the merits of this approach have been described in a paper by Ian Peach and Merrilee Rasmussen [84].

Nunavut

Nunavut was established in 1999 as a requirement of the Inuit land claim agreement. An important dynamic in the future of Nunavut will be the relationship between the primary Inuit land claim authority, Nunavut Tunngavik Incorporated, and the Nunavut government.

In terms of governance models, Nunavut has scattered its ministries and departments throughout numerous small communities across its vast territory. In a territory where transportation and communication infrastructure is limited and expensive, this strategy places some serious practical challenges on the Nunavut government. However, Nunavut is one of the first governments in the world to be building its institutions from the ground up around a backbone of new information and communication technologies, which could potentially make it a leader in e-governance.

The creation of Nunavut initially captured public imagination in Canada and abroad, but the focus has gradually shifted back to issues of cost and capacity. Nunavut's dependence on transfers from Ottawa is well known. In a column in the *Globe and Mail* in February, 2004, James Eetoolook, president of Nunavut Tunngavik Inc., a land-claim body established to oversee implementation of the Inuit Land Claim Agreement, urged that "those charged with turning the government's good intentions on relations with

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[83] In *The Labour Conventions Reference*, [1937] A.C. 326, Lord Atkin referred to « watertight compartments which are essential part of the original structure. » However, the constitution is now more generally seen, in the words of Lord Sankey, as « a living tree capable of growth and expansion within its natural limits. » Lord Sankey's view has been quoted with approval in several recent cases : see Hogg, Peter, Constitutional Law of Canada (3rd ed. Carswell, 1992, at 414, f.n. 210.

[84] The Saskatchewan negotiations are discussed in: Peach, Ian and Merrilee Rasmussen, "Federalism and the First Nations: Making space for First Nations' Self-determination in the Federal Inherent Right Policy".

aboriginal people into reality should pay close attention to today's Auditor General's report." [85]

However, the Auditor General Report to which he referred unleashed the sponsorship scandal involving hundreds of millions of dollars funnelled into Quebec advertising firms. Few commentators paid much attention to the chapters of the Report that were critical of land claims implementation processes. Eetoolook expresses the Inuit hope that the Department of Indian Affairs and Northern Development "be given new marching orders to begin applying modern economic and social planning to the land-claims process---or that the job…at last be given to an agency that can." [86]

The Circumpolar Affairs and the International Dimension

Aside from the internal dynamics of the emerging governments in the three territories, there is abundant evidence that other nations (e.g. USA and China) are increasingly paying closer attention to circumpolar and related international affairs. There is certainly a record of Canadian achievement which includes leadership in the formation of the Arctic Council, ratification of international instruments to control transboundary contaminants, ocean and wildlife research programs, and more recently, bringing greater international focus on the human dimensions of the circumpolar Arctic. However, Canada needs to become more serious about maintaining its momentum as a leader in these fields.

A glance at media reports and commentary suggests that Arctic research and science is adrift. Sovereignty and security responses appear to be *ad hoc*.[87] Canada's atrophied defence capacity and limited coast guard capacity makes coherent Arctic operations difficult. The prospect of a relatively ice-free Arctic, which is predicted in some global warming scenarios within the next 50 years, ushers in a host of changes for Canada on its northern flank.[88] How should Canada prepare, for example, to deal with

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85 James Eetoolook, *Globe and Mail*, "The lost promise of Nunavut", February 10, 2004, p. A21

86 *Ibid.*

87 See for example: Mandel-Campbell, Andrea. "Who Controls the Arctic" in *The Walrus* (December 2004) pp. 54-61.

88 See: Arctic Climate Impact Assessment. *Impacts of a Warming Arctic* (Cambridge Univ. Press: 2004)

regulation and monitoring of Arctic shipping[89]; defence and security issues; environmental regulation and enforcement; Arctic coast guard and search and rescue capacity; Arctic fishing and other ocean issues; offshore oil and gas and mining; changes to habitats which threaten wildlife; the potential collapse of traditional northern economies; climate change impacts on land and sea infrastructure; threats to coastal communities from rising sea levels; new health issues caused by pest-borne infectious diseases; possible pressures for fresh water exports; and so on?

There are occasional signs that Canada is beginning to take the North more seriously. In the Speech from the Throne in October 2004 the Martin government declared:

> A region of particular challenge and opportunity is Canada's North—a vast area of unique cultural and ecological significance. The Government will develop, in cooperation with its territorial partners, Aboriginal people and other northern residents, the first-ever comprehensive strategy for the North. This northern strategy will foster sustainable economic and human development; protect the northern environment and Canada's sovereignty and security; and promote cooperation with the international circumpolar community.[90]

The federal government conducted a series of consultative sessions with northern stakeholders and began the process of developing a strategy paper that would outline a range of priorities and actions relating to the North. The federal government also recently conducted an evaluation of its policy statement released in 2000 entitled *The Northern Dimension of Canada's Foreign Policy* (NDFP).[91] This policy statement recognized that "A sense of northernness has long been central to the Canadian identity, but the North has historically played a relatively small and episodic part in Canadian foreign policy."[92] However it also recognized that "…our future security and prosperity are closely linked with our ability to manage complex northern issues."[93] For now the federal government has decided to maintain the basic objectives set out in the NDFP.

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89 See for example: Institute of the North et al. *Arctic Marine Transport Workshop* 28-30 Sept. 2004. (Northern Printing: Alaska, 2004)

90 Canada. *Speech from the Throne to open the First Session of the Thirty-Eighth Parliament of Canada* (Queen's Printer: Ottawa, October 5, 2004)

91 Canada, Foreign Affairs. *The Northern Dimension of Canada's Foreign Policy.* (DFAIT Communications Branch: Ottawa, 2000)

92 *Ibid.* at 2.

93 *Ibid*. at 2.

VI. The Next 50 Years: Constructing Tomorrow's Federalism

Fifty years from now the impacts of climate change could make the North a very different place than it is today. The recent *Arctic Climate Impact Assessment: Impacts of a Warming Arctic*[94] considers that a relatively ice-free Northwest passage is possible within the next few decades. International interest in the circumpolar North is growing. The North is already perceived as more accessible. An influx of population and the opening of northern sea routes are realistic possibilities.

Canada is at a turning point in relation to the North. Canada thinks of itself as a leader in northern and Arctic affairs, but like so many areas of endeavor, a perceptible atmosphere of drift seems to have characterized our efforts over the past few years. Other Arctic states appear to have clearer goals and better-defined interests in the circumpolar arena. Tiny Iceland, for example, managed to achieve and perhaps surpass its ambitious agenda during its chairmanship of the Arctic Council (2002-2004). By comparison, Canada seems to have fewer and fewer significant deliverables.

To suggest that the Government of Canada and northern governments are doing nothing in the North would, of course, be a serious mistake. In fact, there are numerous laudable and forward-thinking programs and initiatives that have been put in place; however, activities tend to be *ad hoc* and disassociated from any clear strategy or vision. As one federal official candidly quipped in a private conversation: "we know where we've been in the North, but we haven't a clue where we are going". Consequently, there is little or no sense of accumulated achievements based on clear long-term goals and objectives. As mentioned earlier a major northern strategic initiative was launched in December, 2004 by the minority Liberal government of Paul Martin. However, the initiative seemed to lose momentum and no final product was made public before the Martin government was eventually replaced by a minority Conservative government in January, 2006.

There are a number of pressing issues that require a re-thinking of our national interest in the North and more focussed policy development, strategic planning and substantive actions to respond to what is happening in the Canadian and circumpolar

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94 *Arctic Climate Impact Assessment: Impacts of a Warming Arctic.* (Cambridge Univ Press: 2004)

North. At the local level a burgeoning and youthful population in the North is placing high demands on local economies in terms of health care, housing, child care, education and employment opportunities. Climate change, energy security, sovereignty, resource development, ecosystem conservation, air and ocean transport ---- these are only some of the issues challenging the North and they are also main stream issues for Canada in our national and international relations:

- How will the new governance models being negotiated in the North affect federal-provincial-territorial relations, and governance structures throughout Canada?
- Where does an increasingly accessible North fit in Canada's thinking about the circumpolar and larger international affairs?
- Is there a coherent and integrated plan or strategy for carrying out on-going responsibilities for core federal functions such as upholding Canadian sovereignty and security?
- Is there a comprehensive and cogent plan for the Government of Canada to meet its on-going obligations and responsibilities for Aboriginal peoples in the North, in keeping with fiduciary relationships, legal and constitutional responsibilities, and where applicable, land claims and self-government agreements?
- Is Canada prepared to dedicate the necessary resources to play a decisive leadership role in circumpolar and international relations which directly affect the North, and more particularly, integrate the North into a broader foreign policy that takes into account Canada's place in the world in the 21st century?
- Is the Government of Canada, in concert with the relevant territorial, provincial and Aboriginal governments, willing to do its part to build and enhance the capacities of northern individuals, institutions and infrastructure so that to the greatest extent possible, economic, political and social decisions affecting the North are made in the North?
- Is the Government of Canada prepared to exert the discipline necessary to avoid *ad hoc* initiatives and to make strategic investments so as to get better value for Canada and for Northerners, and to better integrate the region into Canada's national policies and programs?

- How will Ottawa respond to changing circumstances that cry out for new federal-territorial political and financial relations?

The territories are currently high-cost regions that are net beneficiaries of federal transfers, but the NWT at least stands a good chance of becoming a "have" jurisdiction in the very near future. Diamond mines and oil and gas development could have this result. Natural resource developments in Nunavut and Yukon also have some potential to significantly reduce dependence on Ottawa. In order for the Government of Canada to integrate northern perspectives and issues into the development of our national and international policies and strategies it must be committed to work with northern governments, Aboriginal, territorial and provincial, to begin to appreciate the role the North could have in defining Canada, and Canada's place in the world, in the 21st century.

In 1965-66 when the Carrothers Commission was examining the development of government in the NWT, the prevailing assumption was that territories would, by incremental steps, arrive at provincehood. The new amending formulae in the *Constitution Act, 1982,* and the advent of Aboriginal self-government agreements, appear to have side-tracked, if not foreclosed, that option. A future for Yukon, NWT and Nunavut as perpetual territories administered in accordance with federal priorities flies in the face of Canada's international pride in its Aboriginal policies and the Canadian brand of federalism. However, the question still remains: What's next for the North?