

*Constructive and Co-operative Federalism?
A Series of Commentaries on the Council of the Federation*

**Counsel for Canadian Federalism:
Aboriginal Governments and the Council of the Federation**

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Foreword

Canada's Provincial and Territorial Premiers agreed in July 2003 to create a new Council of the Federation to better manage their relations and ultimately to build a more constructive and cooperative relationship with the federal government. The Council's first meeting takes place October 24, 2003 in Quebec hosted by Premier Jean Charest.

This initiative holds some significant promise of establishing a renewed basis for more extensive collaboration among governments in Canada, but many details have yet to be worked out and several important issues arise that merit wider attention.

The Institute of Intergovernmental Relations at Queen's University and the Institute for Research on Public Policy in Montreal are jointly publishing this series of commentaries to encourage wider knowledge and discussion of the proposed Council, and to provoke further thought about the general state of intergovernmental relations in Canada today.

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Harvey Lazar
Hugh Segal
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Aboriginal peoples anticipate and desire a process for continuing the historical work of Confederation. Their goal is not to undo the Canadian federation; their goal is to complete it.... The goal is the realization for everyone in Canada of the principles upon which the Constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate.¹

Introduction: Aboriginal Peoples as Political Collectivities

Aboriginal and treaty rights are pillars of Canada's constitutional order. Along with parliamentary government, federalism and the Charter of Rights and Freedoms, they are a permanent feature of Canadian history and democratic government. Canada's evolving Aboriginal governments are one expression of Aboriginal and treaty rights, and they must be taken into account in any new thinking about improving federalism through the formation of a Council of the Federation. In this short essay, we consider a few practical ways in which

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¹ Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, Volume 1 (Ottawa: Minister of Supply and Services, 1996), p. xxiv.

Aboriginal peoples might be included in the Council of the Federation.

Our analysis proceeds as follows: we first sketch the constitutional basis of Aboriginal peoples as political collectivities in contemporary Canada; we then raise some concerns about the Council of the Federation, as proposed so far, from the standpoint of Aboriginal self-determination and the inherent right to self-government; next, we briefly make the case for Aboriginal representation in Canadian executive federalism; after that we offer three reform options for strengthening the role of Aboriginal political organizations within Canada's network of intergovernmental relations; in short, counsel for building new relationships in Canadian federalism.

Aboriginal and treaty rights are recognized in the *Constitution Act, 1982* and are further elaborated in a series of Supreme Court of Canada decisions. Aboriginal peoples' constitutional rights underlie much of federal and provincial policy with respect to indigenous peoples. One expression of this is the grand commitment that has been made to the negotiation of modern treaties. Nearly thirty years of negotiation in Labrador, Quebec, Nunavut, Northwest Territories, Yukon and British Columbia has produced a series of agreements between indigenous collectivities and the Crown (in right both of federal and provincial governments). One of the consequences of these negotiations and other processes has been the establishment of a wonderfully varied range of Aboriginal governments. The new public governments being built in Nunavut and Nunavik are a consequence of Inuit activism, but they equally represent and serve all of the residents of those territories, regardless of ethnicity. In the Northwest Territories and Yukon, modern treaties are gradually reshaping territorial government, producing forms of democratic government more decentralized and arguably more complex than those in any other parts of Canada. Over six hundred mostly very small, ethnically exclusive governments represent First Nations in Canada. There is considerable evolution in these governments, as they assume more responsibilities and wrestle with finding institutional means to be accountable, effective and democratic. As modern treaty negotiations

continue, more new governments are being created, with varying institutional connections to other Canadian governments.²

At the same time as these essentially territorially based new governments are being created, Aboriginal people are also joining the general Canadian trend toward leaving the countryside to live in cities. In 1951, just seven per cent of Aboriginal people in Canada lived in cities; by 2001 over one-half of the people who responded to the census were urban dwellers. Many of the Aboriginal people living in cities are part of larger, territorially based nations or peoples, located elsewhere. But some, and we believe an increasing number, are truly urban, with distant or non-existent ties to a home reserve, community or territory. In principle at least, all of the Aboriginal people living in cities have the same right to self-government as Aboriginal people living anywhere else in Canada, though certainly some may choose not to exercise it. At the moment, it is quite unclear what forms of self-government may evolve in cities.³

The situation of Aboriginal peoples as collectivities in Canada is thus reasonably clear, constitutionally and legally, and enormously complex, fluid and variable in practice. Democratization of Canada's relations with the descendants of the collectivities who originally occupied what is now our common land has been a long time coming, and the process is nowhere complete.

² Consider the relatively recent self-government and economic development agreements negotiated in Quebec and the Nisga'a treaty in British Columbia, to which the province is a signatory.

³ See, for example, Canada, Royal Commission on Aboriginal Peoples. Final Report of the Royal Commission on Aboriginal Peoples. Volume 4, Chapter 7: Urban Perspectives. (Ottawa: Ministry of Supply and Services, 1996); F. Laurie Barron and Joseph Garcea, Eds. *Urban Land Reserves: Forging New Relationships in Saskatchewan* (Saskatoon: Purich Publishing, 1999); and John H. Hylton, Ed. *Aboriginal Self-Government in Canada: Current Trends and Issues, Second Edition* (Saskatoon: Purich Publishing, 1999).

Concerns about the Council of the Federation

What does the proposed Council of the Federation mean for Aboriginal peoples and their relations to federal, provincial and territorial governments? Will the Council help or hinder the pathways toward Aboriginal and treaty rights and the realization of self-determination?

From the perspective of Aboriginal rights and self-government, a number of concerns can be made about the proposed Council of the Federation.

- ❑ The exclusive focus of the Council is to be on interactions among the provinces and territories and, in turn, with the federal government. To date, there is no mention of working together with Aboriginal governments and peoples.
- ❑ The issues identified by the Premiers as crucial to the country and requiring leadership are health care, internal trade, the role of the provinces in international trade, and the fiscal imbalance between the federal government and the provinces and territories. Land claims, self-government and the situation of Aboriginal peoples in urban Canada are absent.
- ❑ The model of federalism underpinning the Council is a mixture of cooperative and classical federalism: interdependence between the two distinct orders of government, “while respecting the Canadian Constitution.”

Together, these points convey a model of what Aboriginal-Canadian state relations are, and what they might be and might not be in the future. Our assessment is that the proposed Council of the Federation implies a view of Aboriginal self-determination as mini-municipalities. This is in contrast to other models that view Aboriginal self-determination as a third order of government or as sovereign communities with nation-to-nation relations with the Canadian federation. As it stands, the logic behind the proposed Council offers few, if any, intergovernmental spaces for

the exercise of self-government in Canadian federalism.⁴

Buttressed by the *Constitution Act, 1982*, various court decisions are challenging the vision of Indigenous communities as merely modified municipal institutions. The accumulating jurisprudence is giving significant support to the notion of Aboriginal governance as an inherent right that must be institutionalized as a third order of government within the Canadian federation.⁵

The case for Aboriginal representation in Canadian executive federalism

Given this situation, we believe, and have argued this elsewhere, that there should be an effort to entrench some form of representation of Aboriginal peoples in the institutions of executive federalism.⁶ First, we think that ignoring Aboriginal governments in the reform of federal

⁴ See the introduction in Harold Cardinal, *The Unjust Society, revised edition* (Toronto: Douglas and McIntyre, 1999) for one critique of First Nations being treated as no more than slightly glorified municipalities.

⁵ See, for example, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

⁶ Michael J. Prince and Frances Abele, “Paying for Self-Determination: Aboriginal Peoples, Self-Government and Fiscal Relations in Canada.” In Michael Murphy, ed. *Reconfiguring Aboriginal-State Relations, Canada: The State of the Federation 2003*. Institute of Intergovernmental Relations, School of Policy Studies, Queen’s University, forthcoming, 2004; Frances Abele and Michael J. Prince, “Aboriginal Governance and Canadian Federalism: A To-Do List for Canada.” in Francois Rocher and Miriam Smith, eds. *New Trends in Canadian Federalism*. 2nd ed. Peterborough: Broadview Press, 2003; Frances Abele and Michael J. Prince, “Alternative Futures: Aboriginal Peoples and Canadian Federalism” In Herman Bakvis and Grace Skogstad, Eds. *Canadian Federalism in the Millennium: Performance, Effectiveness and Legitimacy* Toronto: Oxford University Press, 2002.

institutions is contrary to the spirit of the treaties, the constitution and much federal, provincial and territorial policy. In short, it would be wrong – undemocratic and unfair-- to do this.

Second, ignoring Aboriginal governments in the reform of federal institutions is not prudent in the long run. Aboriginal political activism over the last thirty years has proven effective in influencing the high politics of Canada, whether one thinks of the successful lobby for constitutional recognition of Aboriginal and treaty rights, the formation of the new territory of Nunavut, or the initiative of the very long process of modern treaty negotiation to resolve outstanding land rights in over half of Canada.

Third, directly engaging national Aboriginal organizations and leaders in structures such as the Council of the Federation is an important step, along with other institutional and constitutional measures, toward equalizing the power imbalances that prevail between Aboriginal communities and their governments, and federal, provincial and, to some extent, territorial governments. Such shared structures, while striving to bridge differences – always a challenging task - can be a place for respectful dialogue, accommodation, and the coexistence of peoples in Canada.⁷

Fourth, and perhaps most importantly of all, ignoring Aboriginal governments in the reform of federal institutions is monumentally unrealistic. The new governments being formed require the same degree of policy discussion, policy and program negotiation and fiscal stability, as do other Canadian governments. They will gain access to these things only after some practical way has been found to integrate them into the

great governing system of the country, known as federalism. Until Aboriginal governments have access to federalism and can operate on the same basis as other governments, they will be handicapped in fulfilling their mission *as Canadian governments*.

How might Aboriginal governments participate in a new Council of the Federation?

A number of considerations must be noted as we develop an answer to this question:

1. Aboriginal governments exist now and will exist in the future in a variety of forms. They vary much more than do provincial and territorial governments.
2. Some Aboriginal people are served by governments that cover a particular territory (a reserve, a territory defined by treaty, a Metis settlement) while others (over half) live among the general Canadian population.
3. We must deal with the reality that some governments representing Aboriginal people (such as the government of Nunavut) are already incorporated into federalism, while others (such as Band governments across Canada) are not.
4. Aboriginal governments are both numerous (there are over 600 First Nations governments) and very small.
5. With some important exceptions, Aboriginal governments represent people who are in the majority poor, relative to the rest of Canadian society.
6. Aboriginal governments are not symmetrical in their powers or responsibilities with provincial governments, especially as regards such key matters as taxing power and institutional development.
7. The field of Aboriginal governance is rapidly evolving, and in some cases, the future is still quite unclear. In the last thirty years, six modern treaties have been negotiated, and Aboriginal governments have been created or significantly reformed in every part of Canada. These changes are part of a process

⁷ See Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: University of British Columbia Press, 2000); Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000); Tim Schouls, *Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: University of British Columbia Press, 2003); and Jonathon Malloy, *Between Colliding Worlds: The Ambiguous Existence of Government Agencies for Aboriginal and Women's Policy* (Toronto: University of Toronto Press, 2003).

that is still gaining momentum. It is important to avoid institutionalizing practices that will prove to be obstacles to future democratization and development.

While these considerations might appear to argue for a postponement of any consideration of the question of how Aboriginal governments might be represented in Canadian federalism, we do not draw this conclusion. Leaving Aboriginal governments out of reforms to executive federalism and to the reform of fiscal federalism that might follow risks stalling and at worst undermining positive developmental processes now underway. Existing Aboriginal governments require participation in executive federalism for the same reasons other governments do: they need an opportunity for policy coordination, development of a sense of common understanding and common cause. And they require now the other benefits of federalism, especially fiscal stability and shared risk.

Truly revitalizing Canada's Federation

Rather than avoidance or deferral, we argue for an experimental approach to finding a means to represent Aboriginal governments in the Council of the Federation. This spirit of experimentation would match the empirical reality. New forms of Aboriginal government and new Aboriginal-Canada institutional relationships are being developed with imagination and vitality, as we speak. Consideration of any potential role for Aboriginal governments in the federation might also have a salutary effect on the entire process of federal institution reform, which does tend to become mired in old battles, resentments and dilemmas.

Here are three options that are practical and non-constitutional reforms, offered for general consideration:

1. Consultation with the existing Aboriginal peak associations

One product of the massive mobilization of Aboriginal people in Canada in the period since the Second World War has been the creation of entrenched, articulate organizations to represent their interests on a Canada-wide basis. The Assembly of First Nations (AFN) represents

status Indians mainly on reserve; Inuit Tapirisat of Canada represent the Inuit on Nunavut, Nunavik and Labrador; the Métis National Council; the Congress of Aboriginal Peoples representing non-status Indians; the Native Women's Association of Canada, whose members include status and non-status First Nations women; and, quite recently, the Pauktuutit Inuit Women's Association representing Inuit women. Only the AFN explicitly represents Aboriginal governments: it is a federation of band governments. The other peak associations are federations of regional political organizations.

This model is basically a continuation of past practice, which has seen the peak associations drawn into federal-provincial-territorial conferences dating from those that preceded the constitutional patriation in 1982, whenever issues warranted. The practice has often been honoured in the breach (the peak Aboriginal associations were left out of Meech Lake, with disastrous consequences, and left out of the creation of the Social Union Framework Agreement although involved in some of its implementation).

The Council of the Federation presents a new opportunity in which to formally engage these peak Aboriginal associations with the provincial and territorial leaders and governments. The Council could meet with the leaders of the six peak Aboriginal associations annually. The Council could also establish a secretariat to support meetings between federal/provincial/territorial ministers responsible for Aboriginal affairs and the national Aboriginal leaders.

2. Representation of a Council of Aboriginal Peoples on the Council of the Federation

This model envisions the creation of a new institution, a Council of Aboriginal Peoples, comprised of members elected from the general population of Aboriginal people. This idea is comparable to somewhat different proposals in the Charlottetown Accord and in the final report of Royal Commission on Aboriginal Peoples.⁸

⁸ Canada, Royal Commission on Aboriginal Peoples. Final Report of the Royal Commission on Aboriginal

Electing individuals from across Canada to such a body would be quite a radical step, and would undercut the Aboriginal organizations. One variant of this option could be a mixed Council, with some representation from existing organizations and some directly elected people. Either model sets up a separate Aboriginal Council that would have to be then written into the Council of the Federation. It would be an aggregating device.

3. Protocols between Canadian and Aboriginal governments, associations or councils

Along with forming the Council of the Federation, the Premiers plan to establish protocols for interacting with the federal government. This proposal for a code of intergovernmental conduct could easily be enlarged, and should be, to address protocols with Aboriginal governments, organizations or any new council if established. The basis for such a protocol can be found in the 1997 consensus statement among national Aboriginal leaders of a framework for discussion on relationships between federal, provincial and territorial governments and Aboriginal governments and peoples. In addition, over the last five to ten years, emergent practices are apparent on the place of national Aboriginal organizations within intergovernmental relations.⁹ These protocols and practices represent an avenue for strengthening the role of Aboriginal political organizations within Canada's network of intergovernmental relations, in other words, government-to-government-to-government working relationships.

Conclusion

Peoples. Volume 5: *Renewal: A Twenty-Year Commitment*. Pp. 10-12 and 128-9.

⁹ This statement is outlined and discussed in Michael J. Prince, "Ready or Not? Hide-and-Seek Politics of Canadian Federalism, the Social Union Framework Agreement, and the Role of National Aboriginal Political Organizations," in Tom McIntosh, Ed., *Building the Social Union: Perspectives, Directions and Challenges* (Regina: University of Regina, 2002), pp. 99-111.

Discussion of the Council of the Federation provides an occasion to offer counsel on Canadian federalism. To recognizing that Aboriginal peoples have an inherent right to self-determination is to restructure the jurisdictional nature of Canadian federalism as well as the institutional nature of intergovernmental relations. In that spirit, we have suggested some directions for strengthening the participatory and democratic nature of the federation for Aboriginal peoples in this country. A truly fulsome approach to cooperative federalism needs to recognize the reality of Aboriginal and treaty rights in Canada and to promote a meaningful and respectful dialogue between and among federal, provincial, territorial and Aboriginal governments. The Council of the Federation can be one way, among many others, to advance the dialogue and work with Aboriginal governments toward improving the well-being of communities and achieving self-determination.