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# A First Nations Province

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# PAPERS IN POLITICAL ECONOMY

**Paper No. 26**

**“A First Nations Province”**

**Thomas J. Courchene and  
Lisa M. Powell**

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**A  
FIRST NATIONS  
PROVINCE**

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## **I: Introduction**

In *Shaping Canada's Future Together: Proposals* (1991) the Government of Canada proposes, as recommendation 4 of its constitutional package, to entrench a justiciable right to aboriginal self-government within the Canadian constitution. In order to allow ample opportunity for the Government of Canada, the governments of the provinces and the territories, and aboriginal peoples to come to a common understanding of the content of this right, its enforceability would be delayed for a period of up to 10 years (1991, p. 52). During this period, negotiations can proceed and "agreements reached will receive constitutional protection as they are developed" (Ibid, p. 8).<sup>1</sup> A somewhat similar statement would be part of the preambular "Canada clause", namely that, among the characteristics of Canada would be a "recognition that the aboriginal peoples were historically self-governing and [a] recognition of their rights within Canada" (Ibid, p. 52). In addition, aboriginal peoples would be guaranteed some representation in a reformed Senate and, more generally, their participation in the constitutional deliberations would be ensured (initially, via a separate track of hearings). Paralleling all of this is the Royal Commission On Aboriginal Peoples, co-chaired by Georges Erasmus and Judge René Dussault.

More recently, the *Report of the Special Joint Committee on a Renewed Canada* (1992), henceforth referred to as the Beaudoin-Dobbie Report after its co-chairs, takes this further by recommending the recognition of an "inherent right of self-government within Canada". Moreover, this right would be justiciable immediately, as is implied by the reference to "inherent". And as this paper goes to press, the constitution negotiations have been opened to include four aboriginal nations - the AFN, the Native Council of Canada, Inuit and the Metis Nation. The enshrinement of inherent self-government, presumably somehow circumscribed,

now appears reasonably certain to be an integral part of any unity package.

Yet at the same time many Canadians are very leary of a largely open-ended constitutionalizing of an inherent right to aboriginal self-government. What powers are involved? Do the off-reserve Indians and Metis want the same powers as the land-based Innuit? What are the costs? Are Ottawa fiduciary commitments to Indians on reserves now to be extended to include the Metis Nation? What is a "third level of government" or a "parallel government" and how would it relate to the existing governments, whether federal, provincial, territorial or municipal? Quebecers are probably the most perplexed: on the one hand the distinct society clause, despite its refinement, continues to encounter resistance while, on the other, aboriginal self-government in spite of some genuine concerns appears to have general societal support.

The purpose of this paper is to address this issue head on, as it were, and to define, describe and tentatively evaluate one approach to aboriginal self-government, namely assigning provincial status to the First Nations. As the title of the paper indicates, we shall refer to this as a First Nations Province (FNP). The thrust of the analysis will be to focus on the implications of an FNP in terms of the range of powers, the relationships with existing governments and the likely financial implications. In a sense, the analysis is straightforward - it adopts the conceptual and legal/constitutional framework associated with being a province in the Canadian federation and then applies this framework to an FNP more or less without further concessions. In this sense the analysis is positive, not normative in nature. Thus, whether the model is acceptable in terms of addressing the self-government aspirations of the First Nations peoples or is acceptable to non-aboriginal Canadians is essentially for others to decide.

However, there is also a normative component to the analysis. The obvious aspect of this is that we believe the model has merit, with the result that on occasion we shall dwell more on its potential virtues than its potential defects. The second aspect is that an FNP is really quite an "expansive" conception of First Nations self-government. Yet it is, at the same time, fully understandable because it deals with the key issues of powers, intergovernmental relations and financial/fiscal viability in terms that are familiar to all Canadians. In this sense, it should serve to alleviate some of the concern associated with enshrining an undefined "inherent right to self-government". Thus, even if the FNP approach turns out to be unacceptable constitutionally or impractical operationally it should, nonetheless, provide a valuable benchmark against which other models can be assessed or addressed.

A few introductory comments are in order. First, the label "First Nations Province" is probably somewhat misleading. Perhaps "Indian Lands Province" would be more appropriate since the province would be land- or territory-based not citizenship based. Second, and relatedly, because of this territorial base the FNP addresses the self-government aspirations of the AFN and the Inuit moreso than those of the typically non-land-based Native Council of Canada and the Metis Nation. We shall address this issue later in the paper. Third, for practical rather than analytical reasons we are constraining the FNP to apply "south of 60°" or, more precisely, within the territory of the existing provinces.<sup>2</sup> Finally, for a variety of reasons, the First Nations tend to prefer terms like "third order of government" or "parallel government". Even if they were to adopt a variant of the FNP model, the preference might be for a different label (e.g. Confederacy of First Nations, Commonwealth of First Nations). While we are respectful of all of these concerns, we have opted, nonetheless, for the same First Nations

Province or FNP largely because of the information and substance that "province" brings to the analysis.

In more detail, Part II focuses on the conceptual underpinnings of an FNP. Included among the issues addressed are the land base, the powers, the intergovernmental relations and the potential internal political structure of a FNP. Taxation powers merit a detailed discussion in part because of the existence of the s.87 exemption under the Indian Act. Moreover, because the FNP is a "territorial" (i.e. "where you are") rather than a "citizenship" (i.e. "who you are") model, these implications are also explored. Finally, we discuss aspects of the recent Yukon Indians Agreement which combines aspects of a territorial and citizenship approach to self-government.

Part III is devoted to a profile of the First Nations people, dealing with characteristics such as population on- and off-Reserve, regional distribution of the First Nations population, age structure, labour-force structure and income status. Essentially, these two parts serve as backdrop to the remainder of the paper: Is an FNP fiscally and economically viable?

Part IV begins this quest by embarking on some exploratory quantification designed to assign a dollar figure to the program expenditures related to on-Reserve Indians. These data are then compared and contrasted with expenditures on all Canadians. Ideally, one should then focus on the revenue-raising capacity of an FNP relative to other provinces. This turns out to be an enormously difficult task, largely because on-Reserve revenue and income data are fragmentary at best, in turn in part because on-Reserve Indians are exempt from most taxes under s.87 of the Indian Act. Given that all of this would change dramatically under an FNP, since FNP residents like residents of other provinces would be subject to taxation (at least by



their own government if not by Ottawa), we relegate these exploratory revenue-raising capacities to an appendix.

The next question to be addressed is the following: Can the appropriate level of on-Reserve (or FNP) expenditure (or, more correctly, expenditure needs minus revenue means) be accommodated within the framework within which Canada typically finances its provinces? This is the purpose of Part V. To anticipate the analysis somewhat, it is probably the case that the Equalization/Established Programs Financing/Canada Assistance Plan combination will fall somewhat short of addressing the fiscal needs of an FNP. Part VI then focuses on the formula financing approach for the Yukon Territorial Government (henceforth YTG). This does represent a fiscal approach within which an FNP would be eminently viable. Part VII then addresses how the YTG model could be applied to an FNP.

The ideas in this paper have already had considerable airing in Canada, in part because the underlying model was outlined earlier in an op. ed. Globe and Mail article by Courchene (1990) and more recently by Maclean's Peter Newman (1992). Part of the response has been in the direction of embracing aspects of the conceptual framework but rejecting the model at the practical level. Part VIII addresses some of these "practical" issues as well as some more conceptual aspects of implementation such as the relationship between on and off-lands aboriginals and the likely consequences of a far more decentralized approach (.e.g, band by band) to self-government.

A brief assessment and conclusion completes the paper, part of the thrust of which is that an FNP should be viewed as an evolutionary rather than a revolutionary approach since the various building blocks for an FNP already exist. To emphasize this, Appendix A focuses on

the recent self-government agreement for the Yukon Indians which de facto, although not de jure, effectively creates a First Nations province in the Yukon.

We now begin our analysis by focussing on the conceptual underpinnings of an FNP.

## **II: FNP: Conceptual Underpinnings'**

Since a federal system is, by its very nature, designed to accommodate different levels of "sovereignty" and/or self-government, one obvious "Canadian" solution to aboriginal aspirations for self-government is to integrate the First Nations fully into the federal structure - that is, to grant provincial status to the First Nations.

What would this new province (or dominion or confederacy or commonwealth) be like?

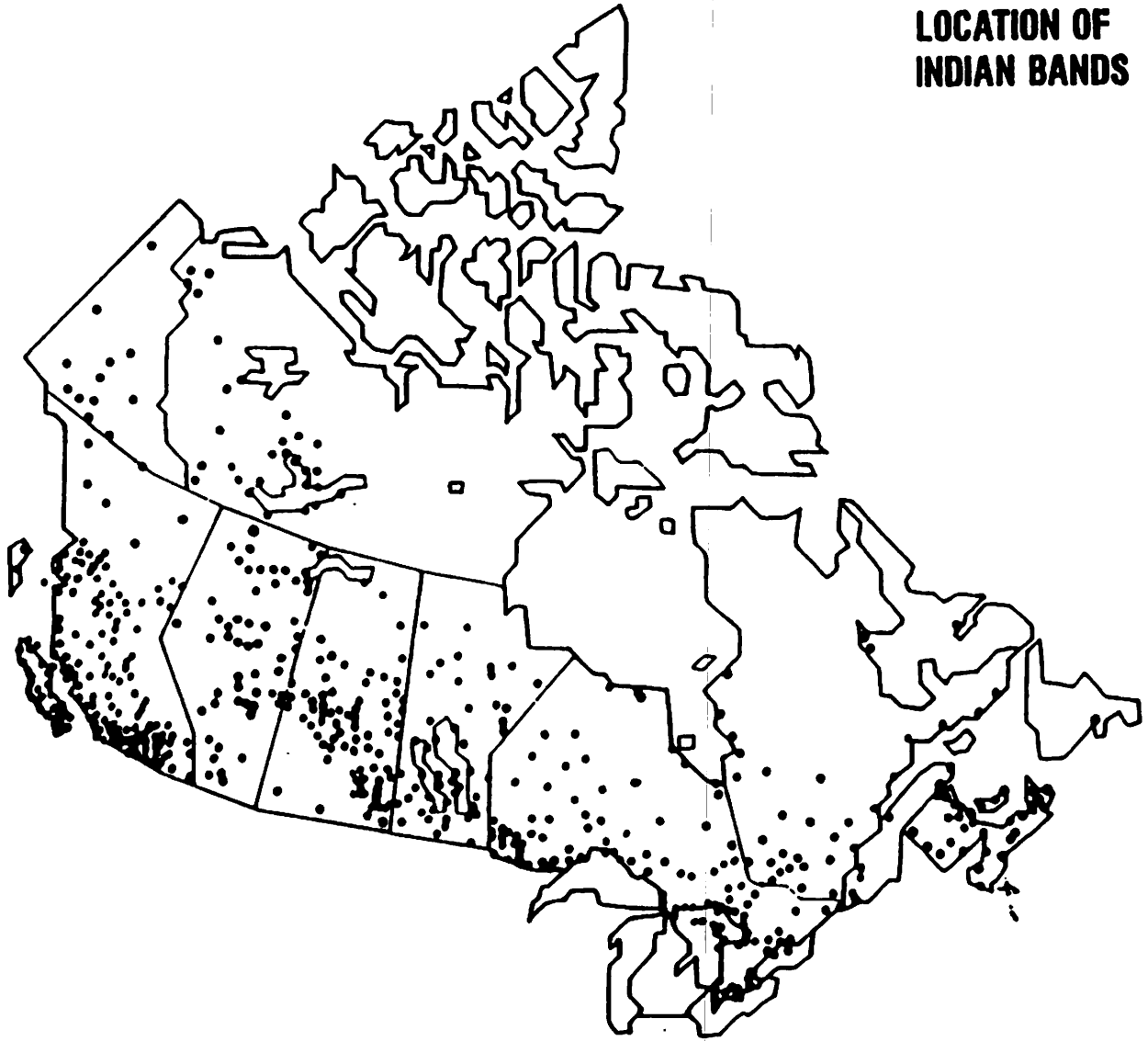
The purpose of this section is to elaborate on the various features of an FNP.

### **A: Territory**

Like other provinces, the FNP would be territorially based, i.e. the existing reserves, crown lands and settlements, as well as any other territory arising from land-claims settlements. However, unlike other provinces, the territory would be non-contiguous - the more than 2,250 reserves associated with 600 or so First Nations governments are scattered right across the country. See Chart 1. In this age of telecommunications and computers, a non-contiguous province may still appear awkward, but it should be eminently feasible. More to the point, this is largely how the reserves are currently administered - the Department of Indian Affairs and Northern Development (DIAND) as well as parts of Health and Welfare, Secretary of State, Justice, Employment and Immigration Canada, etc. effectively now serve as a "provincial" and even a "municipal" as well as a "federal" bureaucracy to the First Nations. That is, they oversee the delivery of federal/provincial/municipal services - education, health, welfare, housing, justice and the like. In this sense, DIAND et al are really closer to the funding and coordinating functions that, for other Canadians, are the responsibility of the provinces. From this vantage point, an FNP is not as much of a departure from the status quo as it might at first

CHART 1

**LOCATION OF  
INDIAN BANDS**



Indian and Northern Affairs Canada.

appear. The one difference, of course, is that federal ministers and departments like DIAND would be replaced by FNP ministers and bureaucrats. More on this later.

Part III will, as noted, focus on some of the characteristics of such an FNP. For present purposes, it is sufficient to note that of the half-million registered Indians (521,461 projected for 1991), over three hundred thousand reside on reserves, crown lands or settlement lands. And, excluding demands relating to land claims, the land area is about half of that of Nova Scotia. Hence, an FNP would not be an anomaly among provinces in terms either of population or land mass.

#### B: Powers

In terms of powers, the FNP would be identical to the other provinces. Thus it would have the full slate of section 92 powers, section 93 powers (education), control over lands and resources (section 109), and so on. These powers are elaborated in Appendix B. In somewhat more detail, FNP would have control over property and civil rights on its territory, direct taxation, borrowing, incorporation of companies, resource management, access to the notwithstanding clause and so on. It also means that an FNP could develop (à la Quebec in terms of its civil code) its own system (or more likely, systems, since these could vary across different First Nations) of aboriginal laws and justice, could develop its own credit unions or trust companies, could pass its own environmental protection laws, would have control over health, welfare, education etc. It would also imply some ability to enter into international agreements of various sorts, as some of the existing provinces have done. In short, an FNP could and probably would engage in the same range of activities as does Ontario.

Once the economies of scale of an FNP are realized, many other avenues become open.

We shall note only one. Every province has at least one provincial university. Now that Canada is scaling down its military establishment, it is probably the case that we do not need two military colleges in English Canada - Royal Military College in Kingston and Royal Roads on the west coast. FNP may be interested in acquiring one of these, although the number of First Nations post-secondary students is such that they would still have to rely substantially on the existing colleges and universities. This theme, namely that a coordinated or collective approach to self-government (e.g. an FNP), rather than a fragmented band-by band approach, may dramatically enhance the range of powers associated with aboriginal self-government. One has to be careful here, however. Inherent self-government attaches to the individual First Nation, not to the collectivity. Thus, as was the case in the Yukon, self-government agreements will have to be negotiated on a band-by-band basis, unless the bands wish to act in concert. What an FNP means in this context is an overall conceptual and institutional framework under which individual First Nations would negotiate with other governments.

Two key issues arise from the discussion thus far. The first has to do with the definition of an FNP resident and the second has to do with the taxation power.

### C: A Territorial vs. A Citizenship Conception

If the analogy of a province is carried to its fullest, a person subject to FNP laws and regulations will be defined as anyone (aboriginal or otherwise) residing on FNP territory. In this sense, this model embodies a territorial definition of an FNP resident. The opposite conception would be a citizenship model, where registered Indians or aboriginals would have identical rights wherever they reside. Unquestionably, the territorial definition is a limiting feature of the FNP model. Given that this is the case, it is important to be very clear about all

of this. The first point to make is that what follows is driven by the nature of provinces. As noted later, particularly in the context of the Yukon Indian Agreement, there can be modifications to the model. Second, registered Indians or, more generally, aboriginals will still be First Nations citizens, wherever they reside. The FNP model does not affect this, excepted as noted later in terms of some existing "rights" that will have to be somehow protected. Third, there is an important difference between Indian or aboriginal status on the one hand and "residency" in FNP on the other. The latter requires that all residents, aboriginal or non-aboriginal, of FNP will be subject to FNP laws, FNP taxation, FNP aboriginal justice, etc. In a similar vein, a registered Indian living off FNP will be subject to the laws, taxes and civil code of whatever province he/she is a resident. This is the essence of a "provincial" model.

With these caveats in mind, an example may be in order. Under an FNP model, if a Cree person leaves One Arrow or Beardy's reserve in Saskatchewan and moves to a nearby town such as Wakaw or Duck Lake, he/she would obviously not cease to be a Cree, but would cease to have the privileges and responsibilities of an FNP resident and would come under the laws of Saskatchewan. For some activities, this is essentially what happens now. Manitoba, for example, has a one-year residency period for welfare, i.e. if a status Indian leaves the reserve and ends up on welfare in Winnipeg, Manitoba will send Ottawa the bill for the first 12 months, after which Manitoba assumes the responsibility. Other provinces have much less in the way of residency requirements.<sup>4</sup> Since FNP would be eligible for the various federal shared-cost programs, henceforth these "residency requirements" for the transferability or portability of all services would follow provincial practice. In other words, the relationship between FNP and Saskatchewan (or any other province) would be no different than that between Saskatchewan and

Alberta.

What existing entitlements of registered (treaty and/or status) Indians or more generally all aboriginals might be surrendered by the adoption of an FNP model? Two immediately come to mind (although there are no doubt more). The first relates to taxation which will be dealt with separately in the next section. The second is that post-secondary-education and health-care benefits available to registered Indians, whether on- or off-Reserve, are somewhat more generous than those available to other provincial residents.<sup>5</sup> These latter entitlements presumably cannot be extinguished. For present purposes, the relevant point is that these entitlements could remain in place for all status Indians, even under an FNP, without significantly altering the underlying nature of the model.

#### D: Taxation and the Section 87 Exemption

The issue of Indian taxation is highly controversial. Section 87 of the Indian Act sets out the circumstances under which on-Reserve status Indians are exempt from paying tax.<sup>6</sup> However, many Indians believe that they are immune from taxation by non-Indian governments. Indian Act or no Indian Act, they believe that tax immunity is an inherent aboriginal right. Thus, in the context of immunity, there are no exemptions to "trade away", as it were. In what follows, we shall focus first on the requirements of the provincial model underpinning this paper. Next, we shall outline aspects of Finance Minister Don Mazankowski's Whistler Speech as it relates to s.87 and taxation in general. Finally, we will outline an approach that the potential for reconciling all of this.

#### 1. The Provincial Approach

Underlying the FNP conception of self-government and more specifically the financing



of the FNP government (to be detailed later) is the assumption that on-Reserve Indians would no longer be exempt from taxation under Section 87 of the Indian Act. This would obviously be a major concession on the part of FNP. (As an important aside, in the recent negotiations with respect to the Yukon Indians' land claims and self-government, Ottawa offered "up-front money" to buy out this exemption.) However, as we shall later argue the long-term benefits of abandoning this exemption may well exceed the costs, at least for FNP collectively - on an individual basis, it is undoubtedly the case that some individuals will be worse off. In order to understand what is at stake here, it is worth reviewing aspects of the status quo. Among the various exemptions resulting from Section 87 and related sections of the Indian Act, with no attempt to be exhaustive, are the following:

- Provinces with retail sales taxes generally exempt Indians from taxation because of Section 87 of the Indian Act. However, there is a general move in the provinces to ensure that exempt goods are designed for use or consumption on reserves, although some provinces like Saskatchewan exempt Indians irrespective of the place of delivery;
- Salary, wages, and other forms of employment income are personal property for the purposes of Section 87 (of the Indian Act) and are exempt from taxation if the employer is situated on-Reserve.
- Income earned on-reserve where the employer is off-Reserve is, in theory at least, subject to taxation. However, because of the Indian Remission Order (which is sponsored annually by the Minister in charge of DIAND) an exemption is granted.
- UI is generally taxable;
- "Scholarship" money (i.e. post-secondary education support) is considered to be paid pursuant to a treaty and is deemed to be located on a reserve and, hence, falling under the Section 87 exemption. As noted above, these monies are available to status Indians on- and off-Reserve;
- Interest earnings earned off-Reserve are taxable.

- Dividends and interest paid by a company with a head-office on-Reserve paid to an Indian on-Reserve, are exempt;
- Corporations, even when totally owned by Indians, do not benefit from the Indian exemption from taxation since corporations are not considered Indians for purposes of the Indian Act.
- Aspects of the GST are subject to the Indian Act.

In general, then, Section 87 confers some very significant "property rights" on on-Reserve Indians and it is not unreasonable, as in the Yukon Indian agreements to expect that Canada would have to compensate Indians for any "buy-out" of the Section 87 exemption.

In any event, the logic of an FNP is that residents would now become fully subject to "provincial" taxation rules. What does this mean? First of all, the FNP, rather than the Crown, would "own" Indian lands (and surface and subsurface rights) so that the FNP would be allowed to tax property and resources, to collect royalties, to assess stumpage fees, etc. Secondly, FNP would acquire the right to levy direct taxation. The approach to direct taxation is, following the provincial pattern, rather straightforward. If an Indian works off-FNP (e.g., works in Saskatchewan), but is a resident of FNP then the provincial portion of income taxes would go to FNP. Similarly, if a status Indian works on Beardy's Reserve but resides in Duck Lake, Saskatchewan, his/her provincial income taxes would go to the province of Saskatchewan. All of this follows the tax collection agreements in that the province of residence as of December 31, of the year in question, determines the allocation of the provincial component of the overall income tax for that tax year. Thus, a resident of Saskatchewan employed for the summer months in Alberta would pay his/her income taxes to the province of Saskatchewan.

Sales taxes constitute a more difficult problem. In principle, if an Alberta resident purchases an item in Saskatchewan for use in Alberta, he/she can apply for a rebate of the

Saskatchewan retail sales tax. In this sense, an exemption for FNP residents for sales taxes for purchases off-FNP but for use on FNP does not contradict provincial practice. And vice versa. In most of these cases, Canadians do not seek exemptions and do not "declare" these items as they cross provincial boundaries. Under the FNP model, FNP has the right to levy sales taxes. If retail outlets do not exist on FNP territory, then it might be the case that upon entering the reserve (FNP), a resident could submit the sales vouchers to FNP which would then attempt to collect them from the province in question. (Or the individual could do this on his/her own.) If the FNP sales tax was identical to that of the other province, then this is simply a transfer between "provinces". If the sales tax is lower on-Reserve, the purchaser will receive a rebate. If the on-Reserve sales tax is higher, the purchaser will be assessed a further levy. But if cross-border shopping is a guide, these latter cases will never be reported. The most likely scenario is that, for FNP lands that border urban areas, FNP will enter into negotiations with the relevant province to transfer sales-tax revenues to FNP. Indeed, FNP may wish to "contract out" the sales-tax-collection process to the relevant provincial government. If not, incentives will clearly exist for FNP to establish on-Reserve sales outlets.

The above observations follow directly from the application of the provincial model and from the assumption that the s.87 exemption would no longer apply. However, at the Whistler, B.C. conference on Indian Government and Tax (November 1991), Finance Minister Don Mazankowski, in what surely qualifies as a pathbreaking speech, upheld the principle of the s.87 exemption. Since this speech also focuses on issues that relate to the potential powers for aboriginals, it merits special attention.

## 2. The Mazankowski Intervention

The thrust of the Finance Minister's message was that the right to tax is an integral component of any conception of self-government. Accordingly, Mazankowski encouraged the Indians to think in much more ambitious terms when it comes to taxation and taxation vehicles. Moreover, the federal government would be willing to facilitate any initiatives in this direction.

The following three quotes are illustrative:

Up until now, the legislative regime has recognized only one type of tax power for Indian governments -- municipal-like property taxes. But the status quo is unacceptable. For strong self-government to be a reality, Indian communities must have access to a wider range of tax powers -- not just the authority to levy property taxes.

...

Several people we have talked to have asked whether the federal government is attempting to get Indians to tax themselves in order to avoid its funding obligations. Let me be clear, this process is not about replacing existing funding arrangements.

...

In many Indian communities, there may well be sufficient economic activity to form a tax base. We are willing to work with you to design tax systems that can ensure that Indian governments have the ability to tax this economic activity on Indian lands. Cooperation between the federal government and Indian governments can do more than simply define the parameters for the exercise of Indian government taxation. There are ways that the federal tax system can be used to facilitate taxation by Indian governments.

We are willing to examine how the administrative experience and capability of the federal government can potentially be harnessed to help in making Indian government taxation feasible even in relatively small communities.

These are significant overtures on the part of the federal government and lend support to a rather expensive approach to self-government, so much so that, from this base, access to the full range of provincial taxation powers would qualify more as an evolutionary than revolutionary change. However, as already noted, Finance Minister Mazankowski ensured the First Nations that these additional taxation powers would not affect the s.87 exemption:

Since before Confederation Indian individuals and bands have been subject to special statutory arrangements for tax purposes. The property of Indians and Indian bands has

been exempted from all-non-Indian taxation when situated on reserves. These arrangements reflect the unique position of Indian peoples within Canada. I want to state clearly that the government is committed to the basic principle of this tax exemption (p. 3).

The next section attempts to reconcile the "provincial model" and the "Mazankowski model".

Prior to taking leave of the Finance Minister's speech, however, there is one other aspect that must be highlighted, namely that any assumption of taxation authority should respect the need for tax coordination and harmonization:

Uncoordinated tax systems -- with the potential for overlapping application -- cause problems for everyone, including taxpayers, administrators and governments. Potential problems caused by overlapping tax jurisdictions, such as double taxation and tax avoidance, are dealt with through agreements and conventions between taxing authorities. We are willing to work with Indian governments to establish this type of relationship between Indian and other tax systems.

Mazankowski did not elaborate on this theme. Our personal view, not so much from reading-between-the-lines of the Mazankowski speech, but rather from the attitudes of federal and provincial governments generally, is that there is substantial concern that aboriginal self-government could lead to a series of tax havens and could create an internal version of cross-border shopping. Yet how will the playing field become "level" if the s.87 exemption remains in place?

### 3. An Alternative Approach to s.87

Since it would be prohibitively expensive for the First Nations to mount their own income tax system, the only alternative if they wish to tax income on their lands is to follow the lead of all provinces except Quebec and to join the Tax Collection Agreements. Under these arrangements, Ottawa will, without charge, collect the provincial portion of the personal income tax. The quid quo pro is that the provinces must accept the federal definition for what

constitutes income for tax purposes and are limited to applying a single tax rate to "basic federal tax". Should FNP want to establish any provincial tax credits, it then would have to buy into the requirements for these credits, including a commitment not to use tax credits to impede the functioning of the Canadian economic union. In part at least, this addresses the Mazankowski "uncoordinated-tax-system" message.

Now to the s.87 exemption. To address this we have to jump ahead a bit and recognize that there will be an equalization scheme to accompany an FNP. Suppose that Ottawa were to argue that, as long as FNP were to impose roughly equivalent rates of taxation, all federal taxes (e.g., income taxes, GST) were to become FNP "own revenue". Ottawa would still collect these taxes, but then turn them over to FNP. This would preserve the s.87 exemption in the sense that no other government would be taxing income or property within FNP. From Ottawa's vantage point, this would be a fiscally neutral initiative, since the additional FNP own revenues would be an offset under the equalization program. While there are a few aspects of such an approach that will be discussed under the fiscal federalism section of the paper, they may well provide a means by which FNP can gain full taxation powers consistent with the s.87 principle that the property of Indians on Indian lands are exempt from taxation by other governments.

#### E: Delivery of Services

One frequently heard criticism of the FNP model is that it is impractical because FNP could not possibly deliver the full range of provincial services to its citizens, particularly since some of the non-contiguous parts of FNP will have as few as 200-300 residents. It may well be the case that FNP control and coordination of areas such as welfare and other aspects of the social policy envelope when combined with enhanced cooperation among individual First Nations

will lead to the delivery of more "in-province" services. However, the likelihood is that for many areas there will continue to be a need for "contracting out" with out-of-province contractors whether private or public. The major difference in terms of the status quo is that FNP (or the individual First Nations) will replace DIAND or Health and Welfare Canada as the ultimate contractor. This is an important part of what self-determination and self-government is all about.

#### **F: Political Structure and Intergovernmental Relations**

The FNP model would provide one approach to the resolution of several long-standing issues on the institutional/political/constitutional front. First, the FNP Grand Chief or First Minister would automatically be at the First Ministers' table for all deliberations, constitutional or otherwise. Second, in terms of any reformed Senate, FNP would have the same rights as, say, Alberta. Moreover, if Quebec can insist on a "double majority" in the Senate to protect aspects of its distinct society, this same right, with even more force and logic, should apply to FNP. Third, although procedures for electing First Nations' MPs would be more cumbersome because the "constituencies" would be large and non-contiguous, the same overall principles would apply for electing FNP MPs as apply for the rest of the Canadian provinces.

In terms of the internal FNP political structure, this would be the prerogative of the First Nations. However, the likelihood is that the model would not be along the typical provincial lines. This is so because FNP would be composed of hundreds of First Nations and, if the Yukon Indians Agreements are a guide, any land-claim settlements and self-government agreements would likely be signed with individual First Nations. This suggests a European-Community-type superstructure government where the member states (individual First Nations)

are the independent entities, which would then delegate powers upward and where ultimate power would still rest with the individual First Nations. The internal units could be reserves, bands or nations (e.g. Six Nations, Micmacs) or even provincial groupings (e.g. the Federation of Saskatchewan Indian Nations, FSIN).

In other words, this approach would in a sense be the opposite of the Germany-EC relationship. Germany is a federation within an essentially confederal Europe. The First Nations would probably be a confederal system (confederacy) embedded in a federal system. Such a confederal system would have the additional advantage that individual First Nations would have flexibility to pursue their own priorities in many areas, in much the same way as Saskatchewan and Quebec have flexibility in the way they pursue various policies. The reason why we attempt to spell out this model is that we need some view of what the internal structure might look like for later aspects of the analysis. Specifically, we shall eventually argue for a two-tiered approach to fiscal equalization. Tier one would be the overall equalization grant to FNP and tier two would involve an internal FNP equalization scheme which could be driven by quite different principles. Thus, ensuring interprovincial fiscal equity would be Ottawa's role. Ensuring inter-reserve, inter band, or preferably in terms of scale economies, inter-First-Nation-grouping equity would be the responsibility of FNP. To repeat, however, the internal political/institutional structure of the FNP would be the prerogative of FNP. At one limit, they could opt for a system that, à la Switzerland, minimizes the role of the FNP leader (Does Switzerland have a Prime Minister or a President and, in any event, who is he or she?). At the other, the FNP could, if so wished, instil substantial power in their Grand Chief.

Presumably, there would be a need to situate the FNP bureaucracy and legislature



somewhere, but this could involve much more decentralization or deconcentration than currently exists in Canada or the provinces. The legislature could be bicameral, with the "upper house" composed of First Nations elders, for example, Our Queen's colleague, William Lederman, arguably the "dean emeritus" of the academic constitutional community, informs us that the consensus procedures of the First Nations would likely fall within the "democracy" requisites imposed by the constitution. If not, surely an amendment of some sort is in order to ensure that this is the case, since it is difficult to imagine a societal organization anywhere that respects the fundamental precepts of democracy as do the various First Nations approaches to governance.

Under the existing constitution, the internal structure of a province is wholly up to the province. They can organize themselves in terms of municipalities, regional governments or whatever, and usually some combination of several approaches. The same freedom would apply to the FNP. Reserves or bands could acquire the equivalent of municipality status. Or like-minded reserves or bands could link together to acquire "regional" authority which, in terms of powers, would be somewhere between a municipal or provincial government. And, at the limit, there could be groupings along language or provincial (e.g., FSIN) or traditional "nation" lines (Micmacs) that could acquire effective provincial status within the FNP. The combination of the Indian Act and the treaties have created an internal First Nation structure that may or may not be optimal. The FNP model would allow the freedom for the First Nations themselves to restructure their societies along the lines that they, not us, deem appropriate. This, too, is what self-government is and ought to be all about.

#### G: Land Claims

The conception of an FNP is intended to be fully neutral with respect to the on-going

land claims. These would proceed along their existing tracks and time-table. Obviously, generous land-claim settlements would at the same time expand the land base and enhance the economic viability of an FNP. For purposes of this analysis, however, these are quite separate issues.

By now the underlying thrust and logic of an FNP will be very clear. Readers will be able to elaborate on the above list of powers and roles of an FNP in terms of their own interests. Prior to focusing on background data relating to various characteristics of First Nations (and aboriginal) peoples in order to address the fiscal dimensions of an FNP, we now turn to a very brief discussion of the recent Yukon Indians self-government agreement. (A more detailed discussion of the Yukon Indians agreements appears as Appendix A). This discussion is intended to serve two general purposes. The first is that a variant of the FNP model already exists. The second is that, unlike the analysis thus far, the Yukon Indians model goes well beyond the confines of a "provincial model" in several key areas.

#### H: The Yukon Indians Agreement: Combining Territorial and Citizenship Approaches

As Appendix A makes clear, the Yukon Indians Agreement does not confer formal provincial status on the Yukon First Nations. In this sense, it is not a "provincial model". Nonetheless, on their own lands, the Yukon First Nations will exercise effective provincial powers. Indeed, the major missing provincial power is "property and civil rights". Thus, the First Nations have access to full provincial taxation powers (except that some of these powers are concurrent), full control over the social envelope, over administration of justice, management of lands etc. Moreover, given that they have control over firearms and fishing, their powers exceed those of other provinces (since the above two powers are federal or s.91 powers). And

as will be detailed later, the Yukon First Nations will be covered by an equalization program.

The Yukon Indians agreement is clearly precedent-setting. In terms of the present paper, it renders the FNP model at the same time much more acceptable and (unfortunately, from the authors' perspective) much less innovative.

However, where the Yukon Indians model differs from the FNP is that the First Nations will have substantial control for the social envelope (education, welfare, adoption etc.) beyond the Indian lands. In other words, the Yukon Indians model combines a territorial and a citizenship (extraterritorial) approach. Canadians are, of course, familiar with citizenship models which as noted earlier, depend on who you are, not where you are. Ontario's school system is organized on a citizenship model - public school and separate schools. Indeed, property taxation in support of Catholic schools in Ontario is also along citizenship lines (The Yukon Indians taxation power is limited to settlement lands). Adoption agencies are also organized on citizenship lines in some provinces.

The intriguing aspect of the Yukon Indians model is that it could have the potential for bridging the gap between on-Reserve and off-Reserve Indians or, in terms of the on-going constitutional debate, between the AFN and the Native Council of Canada. Is a citizenship approach to the social envelope as part of a FNP viable south of 60°? We do not know the answer to this, but we would suggest that it would likely end up being an administrative nightmare unless responsibility for, Indians in, say, Regina fell either to FNP itself or perhaps to the FSIN (as a component of FNP) rather than to the person's home First Nation which, continuing with the example, might be the Micmac nation.

We shall delay any further discussion of citizenship models to the penultimate section of

the paper. Raising the issue in this context does highlight the point that some version of a FNP could, with modification, be the basis for a "third order of government". We now return to our main goal of detailing the implications of creating a First Nations province. The following section presents statistically data relating to the geographical, age, income status and labour force characteristics of the First Nations. These data will then serve as background in addressing the overall fiscal and financial viability of an FNP.

### **III: A Profile of the First Nations People**

#### **A: The Land Base**

Table 1 presents an overview of the First Nations land base. These data relate to 1988 and are already a bit dated. (For example, Table 4 below lists the number of bands at 601 (rather than 592) and the number of reserves at 2,284 (rather than 2,231). Nonetheless, Table 1 is instructive because of the geographical breakdown both of reserves and territory. Of particular interest is that roughly  $\frac{1}{3}$  of all bands and nearly  $\frac{3}{4}$  of all reserves are in British Columbia, although less than 15% of the total land area of the reserves is in this province. (On the other hand, a large portion of total land claims are in British Columbia.) The aggregate land mass,  $2\frac{3}{4}$  million hectares, corresponds to roughly 10,300 square miles. For comparison purposes Nova Scotia has a land mass just under 21,500 square miles. (The reader may wish to refer back to Chart 1 which provides a geographic overview of the location of the Indian bands or, for purposes of this paper, a geographical overview of the First Nations Province.

However, these land-area data are really very substantial underestimates of what an FNP might eventually look like. This is so for two reasons. First, "reserves" are, by definition, federal "Crown lands" held in trust, as it were.<sup>7</sup> Thus, they ignore "own" lands under aboriginal control. For example, the James Bay Agreement in 1975 followed by the Naskapi Agreement of 1978 gave the Cree and Inuit title to about 65,000 square miles - over 6 times the total square miles in Table 1. And although not related to the "south of 60°" concept of an FNP adopted for purposes of this paper, the recent agreement with the Yukon Indians gave them control over 16,000 square miles, which in turn pales with the land settlement in Nunavut. Second, as of 1989, 519 specific land claims had been filed and this excludes the "comprehensive" claims

**TABLE 1**  
**First Nations Territory**

	Number of bands	Number of Reserves	Area of reserves (hectares)
<b>Canada</b>	592	2,231	2,666,139
<b>Atlantic Provinces</b>	31	68	30,282
<b>Quebec</b>	39	29	72,272
<b>Ontario</b>	126	191	710,114
<b>Manitoba</b>	60	105	215,431
<b>Saskatchewan</b>	68	145	627,587
<b>Alberta</b>	41	90	656,221
<b>British Columbia</b>	196	1,576	337,473
<b>Yukon</b>	14	25	3,197
<b>Northwest Territories</b>	17	2	13,562

Source: The Canadian World Almanac and Book of Facts (1990), p. 93.

which are not related to treaties (Canadian and World Almanac, 1990, p. 93). The essential point here is that once all these claims come to some conclusion or other, the likelihood is that an FNP would be, geographically, one of the larger Canadian provinces. As noted above, however, the analysis is largely independent of these land claims, except in the sense that accumulation of land and/or compensation will surely enhance the economic and fiscal viability of an FNP.

### **B: Registered Indian Population<sup>a</sup>**

Table 2 presents some overview data relating to the registered Indian population, both on- and off-Reserve. As of 1991 there are approximately 525,000 registered Indians, 60% of whom reside on reserves. As note 2) to Table 2 indicates, the rather dramatic growth rates for off-Reserve registered Indians, post-1985, relates to the impact of Bill C-31, an amendment to the Indian Act designed to restore Indian Status to those who lost status due to, or could not obtain status under, the operations of the Indian Act. Table 3 makes this more evident by focusing explicitly on the Bill C-31 population. DIAND's projections (the last two rows of each of these tables as well as the 1991 numbers since the data were compiled in 1990) indicate that not only is the C-31 bulge largely over by 1991 but, thereafter, the growth rate of registered Indians (excluding C-31) will exceed the growth rate of the C-31 population. Moreover, from Table 2, the growth rate of on-Reserve registered Indians is forecast to be considerably higher than that of off-Reserve Indians.

We hasten to note that these projections for 1996 and, particularly, 2001 are likely to be of little guidance in terms of the on/off Reserve population under the provincial-status scenario underpinning this paper. Rather, they represent a "best-efforts" attempt at forecasting under the

**TABLE 2**  
**Registered Indian Population and Average Annual Growth Rates (AAGR)**  
**On/Off Reserve**  
**Canada, 1966-2001**

Year	<u>On Reserve (1)</u>			<u>Off Reserve</u>			<u>Total</u>		
	No.	%	AAGR	No.	%	AAGR	No.	%	AAGR
1966	180,418	80.5		43,746	19.5		224,164	100	
			0.88			9.58			2.82
1971	188,513	73.2		69,106	26.8		257,619	100	
			2.15			2.79			2.32
1976	209,637	72.6		79,301	27.4		288,938	100	
			1.65			3.96			2.30
1981	227,492	70.3		96,290	29.7		323,782	100	
			3.04			5.13			3.68
1986 (2)	264,187	68.1		123,642	31.9		387,829	100	
			1.62			19.23			7.24
1987	268,474	64.6		147,424	35.4		415,898	100	
			1.97			15.39			6.73
1988	273,766	61.7		170,118	38.3		443,884	100	
			2.16			9.73			5.06
1989 (3)	279,671	60.0		186,666	40.0		466,337	100	
			6.34			4.84			5.75
1991	316,273	60.7		205,188	39.3		521,461	100	
			2.30			1.30			1.91
1996	354,379	61.8		218,890	38.2		573,269	100	
			1.70			1.64			1.67
2001	385,514	61.9		237,387	38.1		622,901	100	

**Notes:**

1. On reserve includes Crown lands and settlements.
2. In 1985, the Indian Act was amended to allow, through Bill C-31, the restoration of Indian status to those who had lost it due to discriminatory clauses in the Indian Act. The reinstatement process is expected to be largely completed in 1990/91.
3. The high annual growth rate between 1989 and 1991 is due in part to the upward adjustments of the Indian Register for the purposes of the projections and to the Department's estimate of 86,000 Bill C-31 registrants in 1990/91 plus the growth due to natural increase.

**Sources:**

1966-1989: Indian Register, DIAND  
 1991-2001: Population Projections of Registered Indians, 1986-2011, DIAND, 1990.



**TABLE 3**  
**Registered Indians and Indians Registered Under Bill C-31,**  
**Average Annual Growth Rates**  
**Canada, 1981-2001**

Registered Indians

Average Annual Growth (%)

Year	Excluding Bill C-31	Bill C-31 Population	Total	Excluding Bill C-31	Including Bill C-31
1981	323,782	0	323,782		
				2.59	0.00
1982	332,178	0	332,178		
				2.95	0.00
1983	341,968	0	341,968		
				2.00	0.00
1984	348,809	0	348,809		
				2.82	3.28
1985 (1)	358,636	1,605	360,241		
				3.16	7.66
1986	369,972	17,857	387,829		
				2.40	7.24
1987	378,842	37,056	415,898		
				2.71	6.73
1988	389,110	54,774	443,884		
				2.65	5.06
1989 (2)	399,433	66,904	466,337		
				3.66	5.75
1991	429,178	92,282	521,461		
				1.99	1.91
1996	473,559	99,710	573,269		
				1.78	1.67
2001	517,226	105,675	622,901		

Notes:

1. In 1985, the Indian Act was amended to allow, through Bill C-31, the restoration of Indian status to those who had lost it due to discriminatory clauses in the Indian Act. The reinstatement process is expected to be largely completed in 1990/91.
2. The high annual growth rate between 1989 and 1991 is due in part to the upward adjustments of the Indian Register for the purposes of the projections and to the Department's estimate of 86,000 Bill C-31 registrants in 1990/91 plus the growth due to natural increase.

Sources:

1981-1989: Indian Register, DIAND.

1985-1989: Membership and Entitlement Directorate, DIAND.

1991-2001: Population Projections of Registered Indians, 1986-2011, DIAND, 1990.

assumption that the status quo prevails.

### **C: Regional Profiles**

Composite Table 4 presents more detail on the geographical distribution of both registered Indians and aboriginals in general, while Table 5 recasts some of these Table 4 data in percentage terms. The task of interpreting these data is left largely to the reader. However, several items merit highlight.

First, from Table 4 the total number of reserves is 2,284, of which 842 are inhabited. Given that these figures are larger than the number of bands (601), it is obviously the case that many bands have more than one reserve. (This is particularly the case for British Columbia, as Table 1 indicates.)

Second, in terms of absolute numbers, the province of Ontario is the "residence" for the largest number of both on- and off-Reserve registered Indians as well as non-status Indians. The Métis are overwhelmingly concentrated in the three prairie provinces (67.1%), with the largest number in Alberta. Non-status Indians tend to reside in Quebec, Ontario, Alberta and British Columbia.

Third, while Ontario has the largest number of registered Indians, the population density is much higher in the four western provinces and particularly Manitoba (6.6%) and Saskatchewan (7.5%) - see column 6, Table 5. The same is true of the overall aboriginal population - they account for 10.3% of the Manitoba population and 10.6% of Saskatchewan (column 13 of Table 5).

What Tables 4 and 5 reveal, at least in a general way, is the likely distribution of population for an FNP. They also highlight some of the defects of a territorial approach (as

**TABLE 4**  
**Geographical Distribution of First Nations**  
**(Numbers, 1990)**

**Population Counts 1990**

**1. Registered Indians**

Area	Registered Indians Total	Registered Indians On-Reserve	Registered Indians On Crown Land	Total Registered Indians On-Reserve*	Registered Indians Off-Reserve
Atlantic	19319	12968	6	12974	6345
Quebec	48551	33802	942	34744	13807
Ontario	112826	58702	2071	60773	52053
Manitoba	72238	46708	1240	47948	24290
Saskatchewan	78441	39336	1179	40515	34926
Alberta	60303	37873	2139	40012	20291
British Columbia	83894	44064	291	44355	39539
Northwest Territories	11379	194	8818	9012	2367
Yukon	6227	345	2526	2871	3356
Canada	480178	273992	18212	292204	187974

Total Number of Bands	601
Total Number of Reserves	2284
Number of Inhabited Reserves	642

Source: The Indian Register by Sex and Residence 1990, LN.A.C., 1990

\*Note: Generally "on crown land" is grouped with on-reserve figures to give a "total on-reserve" count.

**2. Inuit**

Area	Total
Labrador	1809
Northern Quebec	6427
N.W.T.	20300
"Rest of Canada"	4083
Canada	32620

Source: Projections of the Inuit Population of Canada, LN.A.C., 1987

**3. Métis & Non-Status\***

Area	Métis	Non-Status
Newfoundland	1510	4115
Prince Edward Island	0	590
Nova Scotia	1160	6975
New Brunswick	755	3625
Quebec	11815	32035
Ontario	18990	88700
Manitoba	34365	5340
Saskatchewan	26500	5360
Alberta	41940	25115
British Columbia	15785	47480
Yukon	0	0
Northwest Territories	3695	570
Canada	158905	220310

Source: Prepared by Demography Division, Statistics Canada for Social Trends Analysis, Dept. of Secretary of State of Canada

\*Note: Non-status includes non-status and other aboriginal.

Source: DIAND.

**TABLE 5**  
**Geographical Distribution of the First Nations**  
**(Percentages, 1990)**

	REGISTERED INDIANS						NON-STATUS AND METIS				ALL ABORIGINALS		
	ON-RESERVE <sup>2)</sup>		OFF-RESERVE		TOTAL		METIS		NON-STATUS		% in Province (12)	% of Province (13)	
	% in Province (1)	% of Province (2)	% in Province (3)	% of Province (4)	% in Province (5)	% of Province (6)	% on Reserve <sup>4)</sup> (7)	% in Province (8)	% of Province (9)	% in Province (10)			% of Province (11)
ATLANTIC	5.1	.6	3.4	.3	4.4	.9	76.5	2.2	.1	7.0	.7	4.7	1.7
QUEBEC	14.2	.6	7.2	.2	11.4	.8	84.8	7.7	.2	14.6	.5	11.6	1.5
ONTARIO	21.0	.6	27.2	.5	25.5	1.2	53.8	12.4	.2	40.4	.9	25.9	2.3
MANITOBA	16.4	4.4	12.7	2.2	15.0	6.6	66.4	22.4	3.1	2.4	.5	13.1	10.3
SASKATCHEWAN	14.0	4.0	18.3	3.5	15.6	7.5	53.7	17.3	2.6	2.4	.5	12.6	10.6
ALBERTA	13.8	1.7	10.6	.8	12.5	2.5	66.4	27.4	1.7	11.4	1.0	14.9	5.3
B.C.	15.3	1.5	20.6	1.3	17.4	2.7	52.9	10.3	.5	21.6	1.6	17.3	4.8
total <sup>3)</sup>	100.0	N/A	100.0	N/A	100.0		60.0	100.0	N/A	100.0		100.0	

**Notes:**

- 1) For purposes of this table, the Table 3 data have been altered to exclude the Yukon and NWT. The Inuit of Labrador and Northern Quebec (from Panel 2 of Table 3) have been added to the on-Reserve registered Indians of the Atlantic and Quebec, respectively.
- 2) Column 4 of Row Panel 1 of Table 3.
- 3) Sum may not equal 100.0 because of rounding.
- 4) Percent of Registered Indians living on-Reserve, by province.

**Source:** Calculations from Table 4.

distinct from a citizenship approach) since, from column 7 of Table 5, only 60% of registered Indians live on Reserves and for some provinces the percentage is closer to 50%. Moreover, were one to include non-status Indians and Métis in the population base, only 36% of Canadian aboriginal peoples currently reside on Reserves. Thus, the FNP conception may well fall short in terms of coming to grips with the full range of demands for aboriginal self-government. To be sure, if land-claims settlements were part of the striking of an FNP (or if any monetary compensation allowed the purchase of additional lands), it might well be the case that Indians or aboriginals would move back to the Reserves (to FNP). But projections, or rather speculation, along these lines is well beyond the scope and intent of this paper.

#### D: Age Structure

The status Indian population is, and for the foreseeable future will continue to be, significantly younger than the general Canadian population (Table 6). In 1981, the median age of status Indians was 11 years less than that of the Canadian population - 19 years vs. 30 years. While both populations are aging, the difference remains essentially intact in 1991 - 23 years vs. 33 years. In terms of the "dependency ratio", defined as the proportion of dependents (ages 0-14 plus 65 and over) to the working-age (15-64 years) population, Table 6 reveals that this ratio will be largely unchanged for Canadians over the 1981-2001 period - roughly .48 or 33/68 for 2001. Essentially, the working-age proportion of the Canadian population remains unchanged over this 20 year period -the fall in the 0-14 age group is offset by the increase in golden-agers.

The dependency ratio is much higher for on-Reserve Indians - .77 in 1981, then declining to .56 in 2001. More to the point, even though the dependency ratios appear to be converging

**TABLE 6**  
**Age Structure: Status Indians and Canadians**

<u>Ages</u>	<u>Status Indians</u>		<u>Canada</u>	
	<u>1981</u>	<u>2001</u>	<u>1981</u>	<u>2001</u>
0-14	39%	31%	23%	19%
15-64	56%	64%	68%	68%
65+	4%	5%	9%	14%

<u>Ages</u>	<u>On-Reserve Indians</u>		<u>Off-Reserve Indians</u>	
	<u>1981</u>	<u>2001</u>	<u>1981</u>	<u>2001</u>
0-14	40%	34%	37%	27%
15-64	55%	62%	59%	68%
65+	5%	5%	4%	5%

Source: QASR, DIAND, 1989 Tables 5A, 5B, 5C, p. 9-13.

(indeed, for off-Reserve Indians the dependency ratio is, by 2001, at the Canadian average), the distribution of dependency remains strikingly different. By 2001, on-Reserve Indians will still have 34% of their population under 14 years of age compared to only 19% for all of Canada and only 5% in the 65+ bracket compared to the all-Canada percentage of 14%. This will come to the fore later in the paper when we focus on the fiscal implications of an FNP. Specifically, it is now generally agreed that Canada has gone a long way toward eliminating poverty among the elderly. Moreover, for those in this age group that do not have adequate personal income or independent means, it is largely federal programs (OAS, GIS and CPP) that come to their rescue. As a society, not only have we not made as much progress in terms of removing so-called "child poverty", but the level of government largely responsible here is the provincial level. As an intriguing aside, there were rumours earlier this year to the effect that the federal government was about to scrap the Canada Assistance Program and replace it with a \$3,300 refundable tax credit for children. (In the 1992 Federal Budget family allowances were converted to a refundable child tax credit, but the Canada Assistance Program has thus far been left intact.) It is obvious from Table 6 that such a policy shift would result in a substantial benefit for status Indians whether on- or off-Reserve. The general point is, however, that when we address the fiscal implications of a First Nations Province, the "needs" of an FNP are quite different than those of the typical Canadian province and perhaps nowhere moreso than in terms of the age structure of registered Indians.

#### E: Labour Force and Income Profiles

Table 7 presents "employment rates" for registered Indians (both on- and off-Reserve) as well as for the non-Indian populations of the respective province or region. An employment

TABLE 7

Employment Rates for the Registered Indian and General Populations, Canada,  
Provinces/Territories, 1985

Province/ Territory	Employment Rate <sup>2</sup>				
	Registered Indian Population			General Population <sup>3</sup>	Pop. Near Reserves <sup>4</sup>
	On Reserve	Off Reserve	Total		
Nova Scotia and Newfoundland	22.7	48.9	28.5	49.8	43.6
New Brunswick and P.E.I.	24.5	28.9	25.5	51.4	44.0
Quebec	25.2	41.1	28.4	54.7	43.1
Ontario	36.7	48.2	41.9	64.4	52.2
Manitoba	23.7	32.4	26.7	62.5	52.2
Saskatchewan	24.2	29.7	26.1	62.6	57.4
Alberta	28.1	35.6	31.0	65.9	61.4
British Columbia	30.4	31.2	30.8	57.5	55.3
Yukon	33.2	42.9	38.4	72.7	63.0
NWT	31.4	42.8	33.9	64.1	67.2
Canada	28.2	36.8	31.4	59.8	51.8

1. Caution: the reader should refer to the Methodology Section.
2. Employed as a percentage of populations 15 years of age and over. The reader should not consider the residual as a proxy of the unemployment rate.
3. Refers to the total population (15+) of the specified geographical area less registered Indians.
4. Refers to the total population (15+) of comparison communities near reserves within the specified geographical area.

Source: INAC customized data based on 1986 Census of Canada.

Prepared by Quantitative Analysis and Socio-demographic Research, Finance and Professional Services, INAC, 1989.  
Reproduced from Larocque and Gauvin (1989), Table 7.1



rate is defined as the ratio of employed persons to the labour-force-age population (15-65). Note that this differs from the more traditional "participation rate" which is the ratio of the employed and unemployed to the labour-force-age population. For every province, the on-Reserve employment rate is below the off-Reserve employment rate and often substantially lower. Overall, the on-Reserve employment rate is 28.2%, less than half the 59.8% employment rate for the general population.

Not surprisingly, income levels for Indians are also much lower than for the general Canadian population. Drawing again on 1986 Census data from Larocque and Gauvin (1989, Table 8.1), the average on-Reserve income was \$9,300 compared with \$11,000 for off-Reserve registered Indians and \$18,200 for the general population.

Finally, Table 8 focuses on the source of these incomes, namely employment income and government transfer payments. The residual in the table represents investment income and the like. Nearly ½ (48.4% to be precise) of on-Reserve income comes in the form of government transfers (family allowance, U.I. and cash transfers). For off-Reserve Indians the transfer share is also high - 40.9%. This compares with 19.4% for the general population and 28.2% for areas near, or contiguous to, the Reserves.

In terms of the thrust of this paper, this clearly implies that Indians, whether on- or off-Reserve, have a long way to go in economic terms vis-à-vis their fellow Canadians. It also means that making an FNP economically viable will be a daunting challenge.

One could devote more time and data to detailing the profile of on-Reserve Indians (Indeed, Appendix C will attempt to focus on the potential for on-Reserve revenues). However, the above profile suffices in terms of the backdrop for the remainder of the paper. We now turn

TABLE 8

Percentage of Registered Indian and General Populations With Income Whose Major Source of Income is from Employment or Government Transfer Payments, Canada, Provinces/Territories, 1985

Province/ Territory	Major Source of Income (2)									
	Employment (3)					Government Transfer Payments (4)				
	Registered Indian Population			General Population (5)	Population Near Reserves (6)	Registered Indian Population			General Population (5)	Population Near Reserves (6)
	On Reserve	Off Reserve	Total			On Reserve	Off Reserve	Total		
Nova Scotia and Nfld.	42.2	63.2	47.6	65.5	62.9	57.3	35.5	51.4	28.0	31.5
New Brunswick and P.E.I.	41.6	57.8	45.1	63.3	57.4	57.0	43.1	54.3	29.7	37.1
Quebec	42.0	56.9	45.1	67.1	56.8	53.9	37.2	50.4	24.2	36.6
Ontario	58.2	65.9	61.8	74.3	62.3	39.9	30.4	35.5	15.3	26.4
Manitoba	40.8	51.4	44.5	71.2	58.5	57.9	44.6	53.3	18.6	31.1
Saskatchewan	39.5	43.0	40.7	70.4	62.8	58.0	54.1	56.6	18.5	25.5
Alberta	46.3	56.4	50.1	77.6	70.5	40.3	38.8	39.7	14.1	19.6
B.C.	53.5	51.1	52.4	68.2	67.0	44.5	46.2	45.2	20.1	23.8
Yukon	63.8	70.2	67.1	85.4	74.7	34.2	28.7	30.8	10.4	21.3
NWT	69.5	78.1	71.4	87.4	87.7	29.6	22.5	27.8	10.7	10.6
Canada	48.1	55.6	50.9	71.0	62.7	48.4	40.9	45.6	19.4	28.2

1. Caution: the reader should refer to the Methodology Section.

2. That income component which constitutes the largest proportion of the total income of an individual. Investment income and other income are excluded from this table given they constitute a small proportion of total income.

3. Includes wages, salaries and self-employment.

4. Refers to income from all cash transfer payments from all levels of government e.g. Family Allowance, Unemployment Insurance and cash welfare payments.

5. Refers to the total population (15+) of the specified geographical area less registered Indians.

6. Refers to the total population (15+) of comparison communities near reserves within the specified geographical area.

Source: INAC customized data based on 1986 Census of Canada.

Prepared by Quantitative Analysis and Socio-demographic Research, Finance and Professional Services, INAC, 1989.

Reproduced from Larocque and Gauvin (1989), Table 8.2.

our attention to estimating the amounts of money spent by all government departments on on-Reserve programs. Later sections will attempt to assess whether this level of income transfer can be accommodated within the federal-provincial fiscal arrangements, i.e. whether an FNP is viable fiscally.

#### **IV: On-Reserve Expenditures: Some Exploratory Quantification**

##### **A: Per Capita Spending on Reserves**

The purpose of this section is to attempt to obtain some ballpark estimates of the dollar value of federal spending on and for registered Indians living on Reserves. We have sub-titled this section "Some Exploratory Quantification". But even this is probably too generous a label for what follows. The fact is that it is well-nigh impossible to get a firm handle on the total flow of spending on-Reserve (or for all Indians for that matter). What follows are our "best-efforts" estimates.

We recognize that the data in the following tables will probably take on a life of their own and become "hard numbers". To be sure, some of the entries are in the nature of hard numbers, but even more are not. Nonetheless, given the likelihood that Canadians will enshrine some version of the right of self-government, inherent or otherwise, the process of quantification must begin now. Thus, we offer these estimates in the hope that others will elaborate and improve upon them. The detail relating to data sources and methodology is relegated to Appendix D.

Table 9 presents data (in aggregate and per capita terms) classified by federal department for on-Reserve expenditures for fiscal year 1989/90. Wherever possible, these figures exclude spending on the North and exclude spending on registered Indians or aboriginals off-Reserve. Thus, some of the figures in Table 9 are less than DIAND estimates, for example, because we have in one way or another eliminated those components that go to the North or off-Reserve.

The bottom line from Table 9 is that the per-capita spending on programs for on-Reserve Indians is in the neighbourhood of \$9,300 per person for fiscal year 1989/90.

**TABLE 9**  
**On-Reserve Federal Expenditures**  
**(Classified by Department)**  
**(1989/90)**

	<b><u>EXPENDITURES</u></b> (\$ 000's)	<b><u>PER CAPITA</u></b> <b><u>EXPENDITURES</u></b> (\$)
<b><u>Indian and Northern Affairs (DIAND)</u></b>		
Self-Government	14,471	43.60
Comprehensive Claims	44,557	134.30
Economic Development	87,137	262.70
Lands, Revenues & Trusts	64,601	194.80
Education	608,760	1835.20
Social Development	472,477	1424.40
Capital Facilities & Community Services	559,838	1687.70
Band Management	203,112	612.30
<b>DIAND TOTAL</b>	<b>2,054,953</b>	<b>6195.00</b>
<b><u>Health and Welfare Canada (HWC)</u></b>		
Indian & Northern Health Services	351,200	1058.80
Unemployment Insurance	114,657	382.40
Old Age Security	187,658	625.80
Family Allowance	89,735	299.20
<b><u>Canada Mortgage and Housing Corporation (CMHC)</u></b>		
Social Housing	74,400	224.30
<b><u>Employment and Immigration Canada (EIC)</u></b>		
Native Employment	93,000	280.40
<b><u>Industry, Science and Technology (ISTC)</u></b>		
Aboriginal Economic Programs	36,680	110.60
<b><u>Secretary of State (SS)</u></b>		
Transfer Payments to Aboriginal Groups	23,840	71.90
<b><u>Public Service Commission (PSC)</u></b>		
National Indigenous Program	1,700	5.10
<b><u>Justice</u></b>		
Native Court Workers Program	2,100	6.30
Legal Studies for Aboriginal People	200	.60
Aboriginal Self-Government Fund	300	.90
<b><u>Fisheries and Oceans (F and O)</u></b>		
	3,100	9.30
<b><u>National Defence (DND)</u></b>		
	600	1.80
<b>TOTAL</b>	<b>3,034,123</b>	<b>9272.40</b>

**TABLE II**  
**On-Reserve Per Capita Expenditures**  
**(Functional Classification)**  
**(1989/90)**

	Expenditures (\$)
HEALTH	1058.80
EDUCATION	1835.20
SOCIAL SECURITY	2731.80
HOUSING	224.30
CULTURE AND RECREATION	71.90
ECONOMIC DEVELOPMENT	653.70
SELF GOVERNMENT, BAND MANAGEMENT, CLAIMS	791.10
OTHER	1905.60
<b>Sub-total</b>	<b><u>\$ 9272.40</u></b>
 <b>ADMINISTRATION (DIAND):</b>	
	(\$ 000)
personnel	153,042
goods and services	104,752
capital	<u>7,714</u>
	265,508
<b>Expressed in per capita terms</b>	<b><u>800.00</u></b>
<b>Total</b>	<b><u>\$10,072.40</u></b>

**TABLE 12**  
**Total Government Spending Per Capita By Province, 1988**  
*(dollars)*

	Nfld	PEI	NS	NB	QUE	ONT	MAN	SASK	ALTA	BC	CANADA
CULTURE AND RECREATION	143.3	163.6	178.1	131.9	174.5	211.5	189.9	226.8	262.5	228.6	206.2
EDUCATION	1256.8	1071.1	1191.9	1119.7	1259.1	1184.8	1313.5	1170.9	1414.1	971.7	1207.9
GENERAL SERVICES	544.5	683.0	686.2	635.6	628.5	581.8	602.7	486.4	570.1	513.6	602.3
HEALTH	1082.3	1026.7	1401.9	1366.8	1183.8	1487.7	1423.7	1570.8	1779.5	1384.4	1411.0
HOUSING	69.9	75.4	113.2	78.7	124.0	80.0	154.1	282.2	186.2	81.4	113.7
INTEREST CHARGES	1379.4	1202.3	1781.3	1259.8	1672.7	2469.4	1935.7	1686.5	1336.7	1499.0	1907.0
LABOUR	114.1	160.6	181.6	114.8	160.1	151.3	135.5	100.3	143.6	94.3	145.3
NATURAL RESOURCES	403.4	287.6	392.2	275.3	355.7	342.4	294.6	369.2	1065.7	394.5	425.3
OIL AND GAS	212.7	1.0	62.2	1.1	0.4	0.9	6.8	155.7	496.2	13.2	67.8
OTHER	171.9	37.2	132.6	116.0	238.1	176.7	230.8	196.0	144.9	105.9	228.8
PROTECTION	515.2	1061.9	1877.6	940.9	562.4	796.1	812.0	496.3	713.1	697.7	835.2
RESEARCH ESTABLISHMENTS	33.5	25.1	85.0	51.9	37.5	47.4	41.3	54.4	55.8	39.7	51.9
SOCIAL SECURITY	2901.7	3141.7	2667.3	2685.7	2523.7	2186.8	2435.5	2145.4	2055.8	2415.6	2350.1
TRADE AND INDUSTRY	238.2	975.4	336.1	340.5	273.9	246.8	714.3	1899.3	664.6	281.9	392.9
TRANSPORTATION AND COMMUNICATION	628.3	768.7	595.8	612.5	527.4	454.6	510.6	651.2	738.9	420.8	527.6
<b>TOTAL</b>	<b>9695.2</b>	<b>10681.1</b>	<b>11683.2</b>	<b>9731.3</b>	<b>9721.8</b>	<b>10418.3</b>	<b>10801.0</b>	<b>11491.2</b>	<b>11627.6</b>	<b>9142.2</b>	<b>10473.1</b>

Sources: Horry and Walker (1991) Table 2.6.

Canada is \$10,473.10, with Saskatchewan and Nova Scotia spending about a thousand dollars more.

At first glance, these Table 12 figures appear to be in the same range as, or even higher than, the Table 11 figures. And the Table 12 figures should probably be indexed for inflation to make their 1988 calendar-year figures equivalent to the 1989-90 data in Table 11. However, the data are clearly not fully comparable. For example, included in Table 12 is the nearly \$2,000 per capita for the interest charges on federal debt (see the Canada column for this entry). Allocating a similar charge to on-Reserve Indians would put the Table 11 figures above those in Table 12. But should one allocate these interest charges to on-Reserve Indians? On the basis of what legacy of "benefits"? Likewise, the entire federal administrative/delivery/infrastructure system is "allocated" to Canadians in Table 12 whereas only the DIAND infrastructure (arguably the equivalent of a provincial government) is allocated to on-Reserve Indians in Table 11. Readers are free to make these adjustments to the data.

Our overall impression, at the outset of this exercise, was that spending on on-Reserve Indians would have been much higher relative to other Canadians than that revealed by a comparison of Tables 11 and 12.

In terms of a function-by-function comparison, the greater spending on education in Table 11 (as compared to the Canada column in Table 12) reflects, in part at least, the generous post-secondary-education allowances for Indians (Note that the number of status Indians pursuing post-secondary education has literally mushroomed from 60 students in 1960/61 to 18,535 students in 1989/90). This education entry in Table 11 may well be an overestimate of the on-Reserve benefits, since this program is available to all registered Indians and our correction



factor for on-Reserve may be inadequate because off-Reserve Indians can still be "sponsored" by their band and/or Reserve. Social security expenditures are roughly comparable, although larger for on-Reserve Indians. Health expenditures are considerably lower for Indians. It may well be that this is a significant underestimate for the Indians since provincial health systems may not, and in some cases do not, bill Ottawa for health services provided to on-Reserve Indians. On the other hand, the population-based EPF grants to the provinces include the on-Reserve Indians in the population base. And so on for the remaining functional categories.

### C: Net Benefits

If one can make a case that overall program spending is roughly similar for Canadians and on-Reserve Indians, the same claim cannot be made for "net" (after-tax) benefits. Table 13, again reproduced from Horry and Walker (1991), presents net spending benefits by province for 1988. Actually, line 3 of this table (labelled "gross current benefit") is really an estimate of net spending benefits by provinces excluding the financing of deficits. Line 5, "net current benefit", incorporates the deferred taxes to accommodate fiscal deficits. Prince Edward Island, has the highest gross benefit - just over \$5,000, from line 3. The net or gross benefits for the prairie provinces would presumably be much higher for 1990/91 than for 1988 because of the federal transfers relating to the collapsed grain economy.

However, the essential point is that if such a table were produced for on-Reserve Indians the net benefits (no matter how defined) would be substantially higher for on-Reserve Indians than for the rest of Canadians. This is so because in many provinces the reserves are largely "muskeg, rock and sand" (Courchene, 1971, p. 3) and because section 87 of the Indian Act exempts certain forms of on-Reserve income from taxation.

**TABLE 13**  
**Federal Net Spending Benefits By Province, 1988**  
*(nominal dollars per capita)*

NFLD    PEI    NS    NB    QUE    ONT    MAN    SASK    ALTA    BC

<b>FEDERAL GOVERNMENT SERVICES</b>	6020	7528	7680	6042	4220	5331	5667	5627	4031	4435
<b>LESS TAXES PAID</b>	2277	2502	3054	2738	3049	4798	3229	2938	4453	3955
<b>EQUALS GROSS CURRENT BENEFIT</b>	3743	5026	4626	3304	1171	532	2438	2689	-422	480
<b>LESS TAXES DEFERRED</b>	647	711	868	778	867	1364	918	835	1266	1124
<b>EQUALS NET CURRENT BENEFIT</b>	3095	4315	3758	2526	304	-831	1521	1854	-1688	-645

Source: Horry and Walker (1991), Table 3.7.

At this juncture in an earlier draft of the paper we presented some rough estimates of the current on-Reserve revenue-raising potential. However, these data are not only fragmentary and speculative but are not likely to be all that relevant to the actual revenue-raising potential of an FNP, so that they are relegated to Appendix C.

The inevitable conclusion is that while the aggregate monies spent on Indian lands may not differ much from that spent on other Canadians, net spending (expenditures minus revenues) on Indian lands does differ markedly.

In an important sense, this reality motivates the rest of the paper. While the concept of an FNP may well address major elements of aboriginal self-government, an associated theme is whether the combination of a) provincial powers, b) full taxation, c) potential restoration of private property, d) land-claim settlements and financial compensation, and e) fiscal federalism (equalization, CAP and EPF, etc.) might not at the same time eventually decrease the "transfer dependency" on the part of the First Nations and eventually be less costly from the perspective of the federal budget? We think that the answer is likely to be "yes". Toward this end, we now focus on the fiscal implications of an FNP.

### **V: Fiscal Viability Of An FNP: The Traditional Approach**

When reference is made to the fiscal viability of an FNP, attention focuses almost immediately on the combination of equalization, Established Programs Financing and the operations of the Canada Assistance Plan. In terms of the equalization program, the language of section 36(2) of the Constitution Act, 1982 requires Parliament and the Government of Canada to make equalization payments to ensure that "provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation." Canadian practice in this regard has been to focus on the revenue side and to bring all provinces revenues up to some agreed-upon per capita standard. Under the current program, this is the "five-province standard" (B.C., Saskatchewan, Manitoba, Ontario and Quebec). Specifically, all provinces will be guaranteed access to revenues equal to the per capita average from applying national-average tax rates to the representative tax bases in the five designated provinces. In dollar terms, the five-province standard is just under \$5,000 per capita for 1991/92. Provinces whose standardized revenues fall below this will receive the shortfall in terms of an equalization grant.<sup>10</sup>

Beyond this, all provinces receive about \$800 per capita under the provisions of Established Programs Financing. This comes in the form of varying combinations of tax-point transfers, cash transfers and equalization. In addition, the operations of the Canada Assistance Plan generate an average of nearly \$250 per capita. CAP is a 50-50 federal-provincial, shared-cost program. Over the 1980's, the growth in CAP transfers was more marked for the three "have" (non-equalization-receiving) provinces, perhaps because they found it easier to generate their own portion of the funding. In any event, Ottawa has now capped the growth of CAP for

these "have" provinces at 5% per annum.

Taken together, the impact of these three programs essentially guarantees something in the order of \$6,000 per capita to all provinces. (Richer provinces will have access to more than this).

To this figure one must add the operations of the federal transfer system - OAS, GIS as well as the various tax credits associated with the federal income tax. While these monies do not end up in provincial coffers, they nonetheless are a part of the \$9,272.00 per capita figure in Table 11 and of the Table 12 data as well. Finally, some of the Table 11 entries like "economic development" are also provided by the federal government to the other provinces. For example, the Atlantic Canada Opportunities Agency and the Western Economic Diversification agency are the rough equivalent, or at least partial substitutes, for the "economic development" entry in Table 11. Thus, the total financing package that would be available to FNP under the existing transfer system begins to come close to the figure in Table 11.

Is this package of funding adequate to sustain an FNP? Perhaps, but in our view not likely. The special needs of the First Nations on the one hand and the lack of existing infrastructure on the other, suggest that something more is likely to be needed, at least initially. Enter the formula financing agreement for the Yukon Territorial Government. Or not quite, since some attention needs to be directed to the interaction between the equalization program and some of the taxation issues raised earlier in the paper. Readers may wish to move directly to Chapter VI.

## A: Equalization and the Level Playing Field: A Technical Detour

### 1. Low Tax Rate Jurisdictions

In calculating equalization entitlements, the formula applies national average tax rates to the provinces own tax base for each of some 30-odd revenue categories. If that falls short, on a per capita basis, of the yield from applying these same national average tax rates to the average tax base in the five designated provinces, this shortfall is the equalization payment. What happens if a province decides not to tax certain activities. The most obvious example here is Alberta and the fact that it has no provincial sales tax. But it obviously has a sales tax base (i.e. total sales for those items that make up the common sales tax base). For purposes of the equalization program, Alberta is assumed to be applying the national average tax rate for provincial sales taxes to its calculated sales tax base. This is of no consequence to Alberta in terms of equalization because it is a "rich" or "have" province and receives no equalization. But the principle is important. Suppose, for example, that PEI would decrease its provincial tax rate on retail sales to zero. Obviously its own tax revenues would fall because it would lose these sales tax revenues. However, its equalization payment would not increase, because it is deemed to be taxing its sales tax base at the national average tax rate. Hence, PEI's overall revenues would fall.

We now apply this to FNP. If FNP, or areas of FNP, decide not to levy FNP sales taxes, the result will be an overall decrease in FNP revenues because equalization payments will remain the same whether FNP levies a zero tax rate or a 7% tax rate on retail sales. Under the provincial model, FNP is free to follow Alberta's example and not to tax retail sales, but it will bear the full fiscal cost of such a decision.

## **2. The s.87 Exemption**

Presumably, FNP is likewise free not to tax personal income earned by FNP residents. However, as in the above case, the equalization formula would assume that FNP is taxing income at the national average tax rates. Hence, FNP would bear the full fiscal consequence of not taxing personal income. Clearly, the incentives under the equalization program, from an FNP government vantage point, are in the direction of moving toward the all-province-average tax rates since the resulting increase in FNP own revenues would not decrease the equalization payment.

How might this apply to the s.87 exemption? Suppose Ottawa proposed the following:

1. Ottawa is willing to designate or define the GST and the federal share of personal income taxation as FNP own revenues. Ottawa would collect these revenues and then return them to FNP.
2. In calculating the equalization payment, Ottawa will assume that FNP has opted into such an arrangement.
3. Thus, FNP's equalization flow would be the same whether or not it subjected its citizens to the (FNP) GST and full (again FNP) income taxation.
4. FNP would be free to not buy into this arrangement, but it would bear the full fiscal cost of such a decision.

This, then, is an elaboration of how, via the equalization program, one might integrate the Mazankowski commitment to the principle of the s.87 exemption with the traditional manner in which Canada interacts fiscally with its provinces. We believe that this is more than a "cosmetic" or symbolic approach to the s.87 exemption. FNP would have the choice of either not subjecting its citizens to these taxes or, if it did accede, to classify them as FNP revenues.

If Don Mazankowski or the Department of Finance had something else in mind here, it seems incumbent on them to provide some elaboration since this is a critical issue whether or not one buys into the FNP model.

With this detour now behind us, return to the earlier analysis which, to recall, suggested that the existing equalization formula might fall short of the fiscal needs of an FNP and that the Yukon Territorial Government formula financing arrangement may be more appropriate.



## **VI: The YTG Formula Financing Agreement**

### **A: The Mechanics of the YTG Approach**

Essentially, the YTG (Yukon Territorial Government) formula financing also follows the general equalization principles of section 36(2) of the Constitution Act, 1982. The novel feature of YTG formula financing is that the definition of "reasonably comparable level of public services" is divorced from the strictures of the formal equalization-payments formula (i.e. it is not driven by the standardized revenue yields) and given a life of its own, as it were. Specifically, based on historical spending estimates, the YTG approach focuses on what is referred to as the "Gross Expenditure Base" (GEB, for short). In effect, this historically-based GEB, escalated annually by factors that relate to population growth and inflation, becomes the embodiment of the cost of providing "reasonably comparable levels of public services" for the Yukon Territory. For 1991, the value of GEB is in the order of \$13,000 per capita, where this per capita figure is calculated on the basis of the total population of the Yukon Territory, i.e. roughly 30,000 citizens of whom about  $\frac{1}{4}$  qualify as First Nations citizens. Since the YTG supplies many, but clearly not all, of the services to the First Nations in the Yukon, this figure is likely a substantial underestimate of the overall per-capita funding for the non-Indian population of the Yukon Territory. The precise per-capita value need not concern us here (except that it is considerably larger than the equalization standard for the other provinces). This GEB provides the overall financial ceiling as it were. All other revenues, whether own revenues or federal cost-sharing revenues are then deducted from this GEB. The difference between these two total is the unconditional equalization payment for YTG or, in the relevant terminology, the "formula financing transfer payment".

Table 14 presents both the operational framework for YTG financing as well as preliminary estimates for the 1990/91 fiscal year. Row A of the table is the Gross Expenditure Base for fiscal 1990/91. The \$359,599,000 value is, as noted, an all-inclusive or global financing figure. Phrased differently, any other revenue sources for YTG represent offsets against this overall GEB.

Row 2 contains the first of these offsets, namely the federal transfers arising from the operations of the Established Programs (EPF). Row panel 3 presents a series of "expenditure recoveries". These range from the operations of shared-cost programs (e.g., the Canada Assistance Plan), the participation in various federal programs (e.g. language and culture entries) and direct recoveries for services rendered to First Nations citizens in the Yukon (e.g. the DIAND entries). These recoveries are also offset fully against the GEB.

Row panel 4 contains the offsets for "own revenues". Note that the list of revenues is not as comprehensive as that associated with the formal equalization program. In large measure this is because the YTG does not have the full taxing powers of a province and, in particular, does not "own" the resources in the Yukon.

The Formula Financing Transfer Payment (essentially the equalization payment) for the YTG appears in Row 5. This \$213,356,000 figure is the difference between the GEB and the various sources of YTG revenues. As noted earlier, this is a variant of Canada's formal equalization program - a variant which allows the concept of "reasonably comparable levels of public services" to reflect the special costs and/or needs associated with delivering these services in the Yukon. This equalization payment accounts for nearly 60% of the assumed expenditure needs (GEB) of the Yukon Territory, a percentage that is much higher than the proportion of

**TABLE 14**  
**YTG Formula Financing**  
**(1990/91, \$ 000)**

		<u>Amount</u>	<u>Percent</u>
1.	Gross Expenditure Base	\$ 359,999	100%
	<u>Less:</u>		
2.	Established Programs Financing (EPF)	10,111	3%
3.	Expenditure Recoveries		
	- French and Aboriginal Languages	\$ 1,108	
	- Alaska Highway Maintenance	12,000	
	- Ministry of Transport Airports	2,215	
	- National Safety Code	500	
	- Rural Electrification and Telephone	518	
	- Economic Development Agreement	1,674	
	- French Language Education	1,199	
	- Yukon Arts Centre	500	
	- Canada Assistance Plan/Vocational Rehab.	7,594	
	- DIAND - Family and Children's Services	1,233	
	- DIAND - Native Hospital and Medical Care	2,970	
	- Young Offenders Act	1,266	
	- Legal Aid	435	
	- Inuvialuit Final Agreement	624	
	- Yukon Housing Corporation Borrowing	17,346	
	- Expenditures to Inventories and Receivables	12,104	
	- Other	<u>11,016</u>	
		74,302	12%
4.	YTG "Own" Revenues		
	- Income Tax	\$ 31,685	
	- School and Property Tax	3,838	
	- Fuel Oil Taxes	4,095	
	- Tobacco Tax	2,450	
	- Insurance Premium Tax	550	
	- Liquor Tax and Profit	7,774	
	- Investment Income	5,715	
	- Licences, Fees, Permits etc.	4,865	
	- Public Utilities Income Tax Transfer	500	
	- Fines	317	
	- Miscellaneous	<u>41</u>	
		61,830	17%
	<u>Equals:</u>		
5.	Formula Financing Transfer Payment	\$ 213,356	59%

equalization in the financing of say Newfoundland or PEI.

While the formula financing arrangements of the YTG are intriguing in their own right, they take on added interest in the context of this paper because they provide an alternative option as well as a conceptual framework for approaching the fiscal side of a First Nations province.

#### **B: The Advantages of the YTG Approach for an FNP**

Among the potential vantages of the YTG formula financing over the formal equalization program are that it is more flexible in terms of accommodating both the special needs of the First Nations and the uncertain time path in terms of the development of First Nations tax bases. With regard to the former, we have already highlighted the fact that the First Nations population is much younger than the population of the rest of Canada. This should be reflected in the calculation of the GEB. It is also the case that there is obvious need for some "catch-up" in order that First Nations achieve the same degree of economic opportunity enjoyed by the rest of us. If the Yukon Indian agreements are a guide, it is likely the case that special funding over some initial period is needed in order to get FNPs institutions off and running, as it were, where this would include some provision for training. All of these factors could easily be incorporated in the GEB (including some pre-determined phase-out period for those aspects that are transitional). This appears much preferable to having a series of special funding relationships attached to the formal equalization scheme.

As important here is that the FNP may take some time to implement its set of "own" taxes. And for tax bases like the property tax it is not evident that all First Nations will opt for fee simple as an approach to property taxes. Likewise, it may take some time before FNP is able to get its institutions in order (e.g. income taxation) so that it can become a full participant

in arrangements like Established Programs Financing. The YTG formulation is very flexible in this regard because it would treat these arrangements, when developed, as full deductions (for the federal transfer component). This would allow FNP to proceed on its own appropriate time path in terms of these intergovernmental fiscal arrangements rather than being pressured prematurely to opt into the existing and pre-determined framework. Finally, but not exhaustively, the option proffered above in terms of accommodating the s.87 exemption is more easily integrated into the YTG formula financing approach than the formal equalization program (where it would represent "special" treatment). Again, this seems to favour the YTG approach.

Beyond these considerations, there is yet another factor that ought to be taken into account: an FNP would not be exactly the same as the other provinces because of the special relationship - treaty or fiduciary trust - that they have with the federal Crown. It appears, if the recent Supreme Court decision is a guide, that many components of fiscal arrangements can be altered at Ottawa's whim and fancy. An FNP would not likely be too willing to embrace the existing fiscal arrangements only to expose itself to the possibility that self-government could lead to an effective unwinding of the long-standing fiduciary relationship between the federal Crown and the First Nations. Nor should it. While it is probably impossible to detail a specific equalization formula that would become constitutionalized under s.35 of the Constitution, the next best approach is to develop a set of financial arrangements that, like the Yukon Indian Agreement, are subject to either or both of mediation and arbitration. This, too, argues for a fiscal financing approach that is somewhat different than that applicable to the other provinces.

Finally, the YTG approach is probably best as an appropriate financing approach for a territory that is "en route", as it were, to provincehood. This is clearly the case for the Yukon

**Territory. For example, the Yukon Territory does not have control over lands and resources (although the Yukon Indians now do - see Appendix A). In a sense, therefore, the YTG formula financing can be viewed as an appropriate transitional approach as the Yukon Territory evolves toward full provincial powers and status. The same argument applies, and with even more force, to the creation of an FNP because it will take decades rather than years before it develops the institutions, laws, tax bases, internal governance structures, etc. that would put it on par with the other provinces. The YTG formula financing approach offers to a degree of flexibility that can bring this to fruition.**

**In any event, the central message is that there are existing models and arrangements within which an FNP would be fiscally viable.**

### **VIII: Intra-FNP Equity**

We now turn to a different, but related, set of issues relating to taxation and equalization. To this point, the assumption, implicit if not explicit, is that the taxes levied by the First Nations would accrue to the administrative core (bureaucracy) of the FNP. Presumably, this would be the case for income taxation, both personal and corporate. But for some of the other taxes (property taxes) and for resource royalties, etc., the more appropriate assumption is that they will accrue to the individual First Nations. This is so because the most likely internal political structure of an FNP will be a confederation or at most a federation. Moreover, any land-claims settlements or compensation payments will be made with individual First Nations, not with FNP. In this sense, FNP will resemble the operations of the Canadian federation (and in the sense will be a parallel government!).

This is the Yukon Indians approach - 14 separate agreements, one for each of the Yukon First Nations. The taxation powers reside with these 14 First Nations. The underlying assumption is that these 14 First Nations (or perhaps the six language groups) will delegate powers upward in some manner to an internal First Nations superstructure, perhaps modelled along European Community lines. The degree of centralization or decentralization in terms of taxation and delivery of services will be determined by the Yukon Indians themselves. However, there will exist substantial incentives for reaping some economies of scale because the overall fiscal transfer will be fixed. (Note that if the Yukon First Nations do not delegate powers upward, there is no way that they will be able to exercise the extensive powers that they have acquired.)

Conceptually, therefore, the overall fiscal (equalization or formula financing) transfer can

be viewed as a two-tiered process. The first tier represents the overall fiscal transfer from Ottawa to the Yukon First Nations. The second tier represents an internal divvying up of these funds by the Yukon Indians in order to ensure "inter-band" equity. While this example has proceeded in terms of the Yukon Indians agreement, it applies to an FNP as well.

The underlying challenge can be stated in another way: Are the First Nations willing to "share" revenues among their various nations? These individual First Nations will in all likelihood have quite different economic bases and, therefore, quite different abilities to levy "own" taxes or royalty structures. The implicit assumption of the FNP model is that Ottawa would make one overall fiscal transfer to FNP (although some of this transfer could be earmarked for individual First Nations). The further assumption is that FNP itself would then look after inter-band or inter-First-Nation or intra-FNP equalization according to some formula designed by the First Nations themselves. Obviously, this presumes that the resource-rich First Nations, for example, would receive less in terms of this inter-band equalization than would resource-poor or economic-base-poor First Nations. Moreover, it probably implies that "have" or "rich" First Nations would be willing to transfer funds to "poor" or "have not" First Nations. As is the case with the operations of the Canadian federation, this transfer between "haves" and "have-nots" need not be direct but could result from the operations of the revenue (e.g. income tax) and expenditure systems.

At one level, this appears to be a daunting political and economic challenge. Indeed, in the context of the Canadian unity debate one often hears the proposition that if Quebec were to separate, Westerners, for example, might be willing to share revenues across their region but perhaps not with Maritimers (or at least not to the extent of the current transfers). Are the First



Nations one "nation" sea to sea to sea in this regard? We do not know the answer to this question. Yet, at another level this is the wrong way to pose the question. In the absence of an FNP framework, any global approach by Ottawa to embark on self-government agreements with individual First Nations surely would adjust fiscal compensation to the resource or economic base of the First Nation in question. Thus, if the ultimate fiscal transfer will engage in ensuring some version of inter-First-Nation equity, why not do this in the context of an FNP, where the First Nations can themselves determine the appropriate principles of distribution or redistribution? In other words, the assumption of a pan-First-Nations polity is not really critical to the viability of an FNP.

### **IX: FNP - A Win-Win Proposition?**

Is an FNP likely to be a drain on the federal treasury? Is this, from a fiscal standpoint, just another of our "magnificent obsessions" with regional development schemes, the result of which has been to create transfer dependency in some of our regions and reduce several provinces to "wards of the state" status? Perhaps, but this is where we now are in terms of our aboriginal compatriots. However, we do not think so. One cannot but be impressed by the manner in which the various First Nations groups have advanced their position and interests in the on-going constitutional round. The time for self-determination and self-government is clearly at hand. The old ways have not worked. An FNP would clearly be a quantum leap, for both aboriginals and non-aboriginal Canadians. There are no guarantees in this game but there are signposts along the way that cannot be ignored. We are at such an intersection and we have no choice but to vere boldly in a new direction. An FNP is such a new direction. In this section, our intention is to address the issue of whether, from an economic and fiscal standpoint, both FNP and the First Nations on the one hand and non-aboriginal Canada on the other, can emerge as winners. We believe that the answer is "yes".

First of all, it is likely to be the case that, not too far down the road, the revenue potential for an FNP may be quite substantial. This is especially the case if one factors in the likelihood that, post-land-claims, the resource and economic base of an FNP will likely be considerably enhanced. Indeed, it should eventually be possible to achieve a "positive sum" fiscal game - net federal transfers to FNP will be less in real terms than what is now expended and the overall fiscal position of FNP will be enhanced.

This being the case, it follows that it becomes in Ottawa's interest to encourage the

development of FNP tax bases and taxation. This encouragement can come in the form of providing full start-up costs, providing expertise or allowing new FNP taxes a "tax-free" period prior to becoming eligible for offsets from overall formula financing. The Mazankowski speech is obviously a welcome initiative in this context. Failure to provide such incentives will mean that FNP will, rationally, opt to maximize federal transfers. In our view this will inhibit First Nations progress toward the development of a sustainable economic base and in the process exacerbate Ottawa's overall fiscal position.

However, it is possible to paint a far more rosy fiscal and economic picture. The Economic Development Sector of DIAND prepared a working document (1990) designed to underpin the Canadian Aboriginal Economic Development Strategy (CAEDS). Specifically, the question addressed is the nature of the broad macroeconomic impact of gradually closing the wage gap of currently employed aboriginals and as well as gradually employing those currently unemployed. The year 2000 is the benchmark for the "long run", i.e. when the adjustment is deemed to be complete. The results are very dramatic - GNP would be 2.25% higher in year 2000, fiscal balances would be significantly improved as would Canada's current account balance. One need not place too much faith in macro models to recognize the tremendous economic potential resulting from a viable First Nations economy. Thus, the earlier assertion that self-government could be a positive-sum fiscal and economic game for all concerned is fully warranted. Moreover, the likelihood for success is surely enhanced within the context of an FNP model as compared to the DIAND assumptions which are predicated largely on economic development initiatives with only limited increases in aboriginal self-government.

**This is good economic policy. And it is even better social policy!**

**X: Further Issues**

While this paper is in the nature of advancing a proposal or model for public discussion and, therefore, makes no attempt to cross all t's and dot all i's, there are a few areas where some elaboration is probably warranted. This is one of the purposes of this section. The other is to reveal aspects of our motivation for advancing the FNP model. This is dealt with in the section entitled "In Defense of An FNP".

**A: The Non-Homogeneity of the First Nations**

One of the frequently heard criticisms of the FNP model is that it assumes a degree of homogeneity of interest or organizational ability among First Nations that simply does not exist. We agree that it does not exist. However, it need not exist. An analogy may be appropriate here. Consider Quebec and Prince Edward Island. Quebec has its own Quebec Pension Plan, its own separate personal income tax system, its own stock exchange, its own deposit insurance corporation, its own provincial police and on and on. PEI has none of these. But it could (and still can) have them all, if it so wished. Instead, it allows Ottawa's legislation to hold sway or, for policing for example, it simply "rents" the RCMP.

In a sense, this is the situation that the First Nations find themselves in. Different First Nations are in different stages of readiness in terms of taking down various self-government powers. Moreover, some because of their size among other things, cannot aspire to much more than municipal-type powers. Hence, without an overarching FNP-type umbrella agreement, the result may be a veritable patchwork quilt across the First Nations in terms of powers, taxation vehicles and fiscal arrangements. While anything is, of course, possible we deem it to be unlikely that individual First Nations can negotiate certain powers in, say, 1995, and then re-

open negotiations at points in the future when they feel that they need or can manage greater power.

Here is where the Yukon Indians Agreement provides a valuable example. The self-government agreement is really an umbrella or framework agreement which each of the 14 First Nations will sign. While it provides for the "administration of justice", it is clear that the Old Crow First Nation cannot realistically aspire to exercising this power. Nor is it likely that any other Yukon First Nation could. Collectively, however, they may be able to do so. This is the most likely way of approaching an FNP. Each First Nation will take down those powers that are administratively feasible and that it is capable of exercising. The rest will be delegated upward to a regional or national FNP bureaucracy. If a particular First Nation or a group of First Nations later wants to exercise greater powers, this will be an internal FNP negotiations - the federal government will (largely) be out of the game, as it were.

#### B: On-Lands and Off-Lands Aboriginals

There exists an uneasy tension between the various aboriginal groups. This was abundantly clear in the recent round of constitutional conferences. As already noted, the needs and aspirations of First Nations citizens in Canada's urban areas in relation to powers and taxation for example, are quite different from those of the land-based First Nations. And the sources of funding are likely to be different as well - an FNP would automatically qualify for some version of equalization whereas exercising control over schooling or adoption with a city is more likely to involve provincial financing.

While not attempting to downplay these differences among the aboriginal community of nations, our view is that one can easily underestimate the longer run commonality of interest.

If an FNP was in place with control over schooling, adoption, education, welfare, administration of justice, etc., this is bound to provide substantial complementarities to citizenship-based models of self-government in the urban centres. For example, perhaps it is the weakness of our training in western philosophy, but we find it difficult to conceive of two neighbours in Calgary, one aboriginal, one not, subject to different civil justice codes. What is much less difficult to imagine is that province-to-province arrangements (in this case FNP-Alberta) can be put in place whereby aspects of native justice or sentencing may apply. And all of this is quite apart from the fact that there will likely be a close relationship between on- and off-lands aboriginals, particularly since FNP will be "open" in the same way as it any other province.

#### C: Flexibility

Thus far, the analysis of FNP has not strayed very far from a pure provincial model. Where there was some variance - formula financing for example - the reference was to another existing model, namely the Yukon Territorial Government model. Yet, there is obviously room for even greater flexibility in the application of an FNP model. For example, there could be more than one FNP - but not too many because the diseconomies of scope and scale would set in quickly. Second FNP could be cast in terms of a third order of government - the powers would be somewhat different than those in s.92, there could be concurrency with federal paramountcy for some of the s.91 areas (e.g. internal fishing) and the powers could be placed in, say, section 192 rather than 92. Less obvious, but perhaps possible, is that the Yukon Indians model combining a territorial and citizenship approach may be an option.

#### D: In Defence of An FNP

After enunciating the basic conception of an FNP, much of the above analysis has been

in the nature of defending the FNP against some genuine concerns. Here, we take the opposite approach and articulate aspects of the motivation that led us to advance the FNP concept. Basically, we are motivated by three perspectives.

The first of these is in the nature of a maxim, attributable to University of Western Ontario political scientist John McDougall, namely "land is to the aboriginals what language is to the Québécois". Intriguingly, from our experience this phrase resonates well with non-aboriginal Canadians in terms of providing a fresh perspective of the relationship between aboriginals and the land. However, this expression tends to play rather poorly, even insultingly, with Indians who maintain that their relationship with the land goes beyond this - it not only informs their various languages, but it is at the core of their spirituality and culture.

Second, a land base appears, to us at least, to be necessary for self-governance to be meaningful. For example, it is relatively easy to conceive of First Nations having their own equivalent to Quebec's civil law on their own territory. It is much more difficult, as noted earlier, to conceive of self-government in terms of a citizenship model because this would ultimately mean that two neighbours in Calgary (one aboriginal, one non-aboriginal) would be subject to different civil codes and different civil justice systems.

Finally, for self-government to succeed, it has to be accompanied by a viable and sustainable economic base. It seems to us that this can only come from a land base replete with full taxation powers and a fiscal equalization scheme.

Admittedly, these precepts are consistent with a variety of models. However, an FNP is surely in the solution set.

## **XI: Conclusion**

In the above analysis we have attempted to approach aboriginal self-government in terms of three key principles - addressing the self-government aspirations of the First Nations, addressing the economic base and the longer-term viability of the aboriginal peoples, and designing a methodology for ensuring the fiscal viability of self-government. The approach we offered to encompass these principles is to create a First Nations Province or an FNP.

Rather than re-iterate the features of an FNP, we shall utilize the conclusion to argue not only that an FNP is eminently feasible but that essential building blocks are already in place.

First, provincial status does carry with it a very substantial degree of self-government and, indeed, "sovereignty". Elsewhere, one of us has argued that as we approach the millennium sovereignty will come more and more to mean how a society "lives and works and plays" (Courchene, 1992, Chapter 5). But in Canada at least these relate to provincial powers. More to the point, the parameters of this approach to self-government are "known" with a degree of precision that is simply not possible under virtually any other conception of self-government. These include all court decisions over the years as well as the myriad of federal-provincial and interprovincial administrative procedures and practices. In other words, when one talks about an FNP, Canadians already know what this means in terms of powers, in terms of intergovernmental relations and in terms of formula financing. Phrased differently, "inherent self-government" is reduced to a fully understandable and familiar concept.

The second requirement for an FNP is that the First Nations have in place some internal political organization that could eventually serve as the overarching governance and bureaucratic structure. They already have this in the Assembly of First Nations. To be sure, the AFN may



have to be modified in order to take on these responsibilities, but the key aspects of this required infrastructure are clearly in place. Moreover, nothing in the FNP model dictates the nature of this political organization, although for explanatory purposes above we assumed it to be confederal in nature.

The third requirement for an FNP is for it to be viable fiscally. Here, the equalization formula, or, preferably, the financing approach for the Yukon Territorial Government provides the model.

These, then, are the essential building blocks for an FNP and, as noted and demonstrated, they are already in place. What this implies is that an FNP is more in the nature of an evolutionary rather than a revolutionary concept. Moreover, the reserves are in effect already being operated as a province, albeit currently run out of DIAND and other federal bureaucracies.

Finally, the creation of a new province requires the consent of Ottawa, seven provinces with 50% of the population and, of course, the First Nations themselves. This may indeed be challenging but, from our reading of the polls, aboriginal self-government is one of the few "winners" in the constitutional package.

In conclusion, therefore, while an FNP model may well turn out to be unacceptable for a variety of important reasons, feasibility, viability and reducing inherent self-government to fully understandable terms are not among these reasons.

### **Endnotes**

- \* We wish to acknowledge our appreciation to DIAND (and especially Paul Kischuk and Mike Sims) for their cooperation, encouragement and comments in the preparation of this paper. Bob Young also provided valuable comment and insight. However, responsibility for what follows rests entirely with the authors.
1. Any such agreements will receive constitutional protection under s.35 of the Constitution Act, 1982, as elaborated in endnote 11 below.
  2. The situation "north of 60" or in the Territories is quite different. The creation of Nunavut gives territorial status to the aboriginals in the eastern half of the former North-West Territories. A few weeks earlier the Governments of Canada and the Yukon Territory signed a self-government agreement with the Yukon Indians which will give these 14 Yukon First Nations effective provincial status in everything but name and intergovernmental relations. The Yukon Indian agreement will be elaborated in an Appendix to this paper. The situation within the existing provincial boundaries is quite different, for a variety of reasons among which is the fact that any potential land transfers will have to come from land that is currently under private or provincial control, not federal control as is the case in the Yukon and the NWT.
  3. This section draws heavily upon Courchene (1990).
  4. With the recent EPF freezes and the capping (for the three "have" provinces) of the Canada Assistance Plan, frictions have been growing in terms of whether the provincial or federal governments are responsible for services delivered to off-Reserve status Indians. This is a most complex area, in part because the population base for a province's entitlements with respect to equalization, EPF and the Canada Assistance Plan includes all residents, i.e., includes status Indians. Sorting out which level of government gains or loses by all of this is well beyond the present paper. What is clear, however, is that the losers are the aboriginals who find themselves caught in this fiscal and jurisdictional crossfire.
  5. For example, registered Indians currently have access to free dental care and eyeglasses and they are eligible for tuition and a living allowance if they attend post-secondary-education institutions.
  6. Section 87 of the Indian Act reads as follows:

87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:

- (a) the interest of an Indian or a band in reserve on surrendered lands; and  
 (b) the personal property of an Indian or band situated on a reserve;
- and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, on or in respect of other property passing to an Indian.
7. Some elaboration is warranted. Following Hogg (1985, pp. 554-5) we note that all lands "reserved" for Indians come within federal competence by virtue of the legislative power over "lands reserved for Indians" (section 91(24)). Note, however, that if the Indians surrender their rights over particular lands, then full title is assumed by the relevant province, not the Dominion (*Ibid*).
8. The data in this section were, with some noted exceptions, obtained from:
- (a) "Basic Departmental Data - 1990", Quantitative Analysis and Socio-demographic Research Unit (QASR), DIAND, December 1990.  
 (b) "Highlights of Aboriginal Conditions 1981-2001: Part 1 Demographic Trends", QASR, DIAND, 1989.  
 (c) "1986 Census Highlights on Registered Indians: Annotated Tables", by Gilles Y. Larocque and R. Pierre Gauvin, QASR, DIAND, 1989.
9. CPP (the Canada Pension Plan) might be viewed as a "provincial" program. But since there has been no attempt as yet to have the provinces "pay back" the very substantial "assets" they have accumulated while CPP beneficiary payments fell way short of contributions, the CPP is best viewed as a federal program or perhaps a "pay as one goes" program.
10. Actually, this is not quite the case since there is a provision for an equalization ceiling, which is currently binding.
11. Section 35 of the Constitution Act, 1982 reads:
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.  
 (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.  
 (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.**

Commenting on s.35, Hogg (1985, pp. 564-66) notes that the most plausible interpretation is that it "constitutionalizes" aboriginal and treaty rights prospectively. In particular, s.35(3) expressly recognizes that rights acquired under future land claims will be "treaty rights" and effectively entrenched in the Constitution. Thus, they could only be extinguished by a constitutional amendment.

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## Appendix A:

### The Yukon Indians Agreement

An Appendix of this nature is clearly not the appropriate venue to do justice to the recent precedent-setting agreements among the Government of Canada, the Yukon Territorial Government and the Yukon First Nations. What follows is a brief summary of those aspects of the agreements that appear to be most relevant to the above analysis relating to an FNP.

The agreements, in negotiation for 20 years, encompass land-claim settlements, compensation settlements, self-government provisions (including powers in terms of legislation, regulation and taxation), and formula financing. Because the Yukon First Nations do not acquire the formal status of a province these agreements must of necessity be very detailed in order to set out precisely what powers the Yukon First Nations shall have. For example, the Umbrella Final Agreement, which paved the way for the final self-government agreement runs to 275 pages. Among the chapter headings are the following: eligibility and enrolment (for Yukon Indian membership); several dealing with land (e.g. management, access, expropriation, surface rights, land use planning); water management; boundaries; fish and wildlife management; forest resource management; non-renewable resource management; financial compensation; taxation; resource royalty sharing; Yukon Indian self-government; economic development; and dispute-resolution mechanisms. Some of these latter chapters (e.g. taxation, self-government) are more in the way of enabling provisions that anticipated the self-government agreement.

For present purposes, we shall focus on only three provisions from the Umbrella Final Agreement. The first is that in addition to the existing Indian lands, the land claim settlement provides the Yukon Indians with up to 41,439.81 square kilometres (16,000 square miles) of settlement land. Second, the once-and-for-all financial compensation amounts to roughly \$235 million (in 1988 dollars), which includes a \$26 million "buy-out" of the section 87 tax exemption under the Indian Act. This may seem anomalous, given Finance Minister Mazankowski's speech. However, it is not evident that the s.87 exemption formally applied in the Yukon, since there were no reserves, as such. Note also that on a per capita basis (Yukon Indians comprise about 7,000 of the 30,000 people in the Yukon) this is more generous than the highly-publicized Nunavut compensation. Moreover, this excludes not only the formula financing, dealt with below, but also the cost of implementing the land claim settlement which will probably cost Ottawa upwards of \$50 million. Third, the Yukon First Nations have a generic approach to citizenship - essentially 25% or more Indian ancestry as of a target date, irrespective of whether the person was heretofore a status Indian.

Prior to focussing on selected aspects of the Self-Government Agreement, it is appropriate to note that the various preambles to the Umbrella Final Agreement (and to the Self-Government Agreement as well) are fully respectful of the Yukon First Nations culture, heritage and aspirations. For example, included under the composite "Whereas" of the Umbrella Final Agreement are the following:

- the parties to the Umbrella Final Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between the Yukon Indian People and the land;
- the parties to the Umbrella Final Agreement wish to encourage and protect the cultural distinctiveness and social well-being of the Yukon Indian People;

Similarly, the "objectives" of the economic development chapter are:

- to provide Yukon Indian People with opportunities to participate in the Yukon economy;
- to develop economic self-reliance for Yukon Indian People; and
- to ensure that Yukon Indian People obtain economic benefits that flow directly from the Settlement Agreements.

Finally, from among the "Principles" of the Self-Government Agreement:

- The First Nation has traditional decision making structures and desires to maintain these traditional structures integrated with contemporary forms of government.

Note the use of the singular, namely First Nation, not First Nations. This is because, even though Self-Government Agreement is intended as an umbrella agreement, separate agreements must be signed with each of the 14 Yukon First Nations. This process may take some time. In order not to penalize those that sign first, the negotiators took a page from GATT, as it were, and included what has become known as the "most favoured First-Nation clause", i.e. should the last agreement embody a better deal it can, subject to negotiation, be incorporated in all the previous deals.

## A: The Self-Government Agreement (SGA)

### 1. Legislative Powers

The Yukon First Nations will have most, but not all, of the powers of a province. They can enter into contracts, acquire and hold property, form a corporation or other legal entities, and raise, invest, expend and borrow money. Among their exclusive powers is the right to enact laws in relation to the administration of First Nations affairs and the operation and internal management of the First Nations. On their own lands, the First Nations have very broad powers - over resources, environmental protection, chartering financial institutions, administration of justice, etc., and generally "other matters coming within the good government of First Nations Citizens on Settlement Lands".

In terms of legislative powers not restricted to Settlement Land (i.e. extraterritorial powers), the First Nations can enact laws in relation to programs and services for citizens (language, social services, health care, adoption) except the licensing and regulation of facilities



to deliver these services. (Note that the presumed assumption here is that the YFN has the ability to contract out for the delivery of these services from the YTG.

In somewhat more detail in terms of how this relates to section 92 powers, the most notable deficiency is a clause equivalent to s.92(13), namely "property and civil rights". Among other things this implies that the Yukon Indians do not have the same authority over commercial law as the other provinces.

On the other hand, there are a few areas where the Yukon First Nations have more powers than a province. For example, they have control over firearms and over important aspects of fishing (both of which are s.91 or federal powers under the constitution).

## 2. Taxation

The Yukon Indians will no longer be exempt from taxation, via s.87 of the Indian Act. However, they will obtain the (concurrent) power to levy direct taxation and will have the authority to levy property taxes, to license various activities and to control resource development in all its aspects.

Thus, as noted in the text, these powers represent a combination of a territorial and citizenship model. For example, taxation powers are largely, perhaps wholly, territorial whereas the YFN can legislate extraterritorially (but within the Yukon) for aspects of the generalized social policy envelope.

## 3. Formula Financing (Equalization)

One of the "Principles" of the Self-Government Agreement is the following:

The Parties are committed to promoting opportunities for the well-being of First Nations Citizens equal to those of other Canadians and to providing essential public services of reasonable quality to all First Nations citizens.

This tracks reasonably closely the language of section 36(1) and 36(2) of the Constitution Act 1982. The specific provisions relating to equalization are basically lifted from s.36(2):

the Government of Canada and the First Nations shall enter into financial agreements to provide resources sufficient to:

- a) provide reasonably comparable levels of public services at reasonably comparable levels of taxation, where the First Nation has assumed this [taxation] responsibility, to those existing elsewhere in the Yukon;
- b) provide for the operations of First Nations government institutions ...

It should be noted that the Agreement is still subject to some fiscal drafting. Indeed, although signed it still has to be ratified by the Federal and Yukon Governments. These quotations are

from the existing text. While what results from this provision will be the subject of future negotiations, one might note that the presence of the word "shall" makes this provision more binding (even though the Self-Government Agreement is not likely to be constitutionalized) than the equalization formulation in s.36(2). The clear intent is to point the negotiators toward a variant of the Yukon Territorial Government formula financing arrangement (elaborated in the text). For good measure, along with some specific factors to be taken into account (e.g. demographic features of the First Nations as per Table 6 of the text), the negotiations are explicitly instructed to

**"consider, without prejudice, the methodology for calculating the Formula Financing Grant under the Yukon Formula Financing Agreement.**

Two other features of the overall equalization or formula financing package are noteworthy. The first is that capital and interest on the financial compensation payment will not only be exempt from taxation, but if and when the proceeds are brought into general YFN revenues, they will be exempt from offset under formula financing. This is very significant since the elders of the YFN have ensured that the bulk of this compensation fund will be placed in an YFN version of a "Heritage Fund" for at least seven years and perhaps longer.

The second feature will be even more intriguing to the cadre of fiscal-federalism scholars. Although the precise legal language must, as noted, be finalized, it is instructive to quote the existing text:

If the First Nation accesses a new tax base, net revenues generated from that tax base may be considered in determining the level of funding pursuant to the First Nation's Self Government Financing Agreement, provided that:

- the net revenues will be subject to offset at a ratio less than 1:1;
- any such net revenues generated during the term of the first Self-Government Financing Agreement shall be excluded from such consideration; and
- any such net revenues shall not affect the level of funding received by the First Nations during the then current self-government financial transfer agreement.

This is very generous. But the better way to look at it perhaps is that it provides significant incentives for the YFN to collect the full range of taxes from their own citizens. In this sense, it is consistent with the thrust of the Mazankowski speech.

#### 4. The YTG Contribution

Some of the formula financing for the YFN will presumably come out of existing transfers to the YTG. The Agreement contains some provisions under which this can and will occur. However, there is a comfort clause of sorts, namely that as a result of this agreement there "in no case shall be a reduction in the level or quality of services offered to Yukon residents". Given the enormity of the task of assuming all of the powers over the near term, the likely impact will be that the Yukon Indians will contract out for some of these services from

the Yukon Government. What this means is that the Yukon Government will, for these services, now be receiving funding from the YFN instead of the Federal Government.

#### **5. Dispute Resolution**

The Agreements establish a comprehensive dispute resolution process. The process includes a Dispute Resolution Board as well as criteria which allow dispute to end up in mediation or even arbitration.

#### **6. Internal Structure**

The Yukon First Nations will develop a constitution to address issues such as the First Nations Citizenship code, the establishment of internal governance including financial accountability and a process whereby the constitution of the First Nations can be amended.

The document is silent on the internal governance structure. However, it is probably safe to claim that, unless the individual First Nations delegate some powers up to a version of a YFN bureaucracy, there is little likelihood that they would meaningfully exercise the broad range of powers contained in their agreements.

#### **B: Conclusion**

As noted, this is a very abridged summary of the YFN land claims and self-government agreements. Moreover, it may be somewhat misleading since on occasion we have proffered editorial comments which may well be inappropriate. Nonetheless, this is an agreement of historic proportion and, hopefully, some energetic scholars will soon give it the analytical respect that it obviously merits. And in the context of the present paper, it clearly demonstrates that an FNP is more evolutionary than revolutionary as a model for First Nations self-government.

**Appendix B:**  
**Provincial Powers**

In the text of the paper we present a non-exhaustive list of provincial powers. The purpose of this Appendix is to outline provincial powers in somewhat greater detail and formality. However, the listing will also be non-exhaustive. Specifically, the listing includes Section 92, Section 92(A), Section 93, Section 109 and Section 125.

*Exclusive Powers of Provincial Legislatures.*

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,-

1. Repealed. (48)
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:-
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

**(b) Lines of Steam Ships between the Province and any British or Foreign Country;**

**(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.**

11. **The Incorporation of Companies with Provincial Objects.**
12. **The Solemnization of Marriage in the Province.**
13. **Property and Civil Rights in the Province.**
14. **The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.**
15. **The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.**
16. **Generally all Matters of a merely local or private Nature in the Province.**

***Non-Renewable Natural Resources, Forestry Resources and  
Electrical Energy.***

**92A. (1) In each province, the legislature may exclusively make laws in relation to**

**(a) exploration for non-renewable natural resources in the province;**

**(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and**

**(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.**

**(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.**

**(3) Noting in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.**

**(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of**

**(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and**

**(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,**

**whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.**

**(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.**

**(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.(49)**

### ***Education***

**93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions [these Provisions are not reproduced here].**

**109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.(56)**

**125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.**

## Appendix C:

### Revenue Raising Sources: The Status Quo

#### 1. Taxation

##### a) Income Tax Revenue

On the basis of existing on-Reserve income data by deciles it is estimated that the FNP could raise 102,097,000 dollars, or 331 dollars per capita.<sup>1</sup> These low figures should not be surprising given that the average income for on-Reserve status Indians is only \$9,300 per annum and 48% of this income consists of government transfer payments.

##### b) Sales Tax Revenue

A second taxation power that would accrue to the First Nations Province is the right to tax commodities. Due to the paucity of data in this field we are unable to provide an estimate of potential sales tax revenue. Indeed, at present a considerable number of on-Reserve residents purchase the majority of their consumption goods off-Reserve. No doubt, this revenue raising capacity will create an incentive for the FNP to encourage on-Reserve outlets.

#### 2. Resource Revenues

The following paragraphs will outline the economic resource potential for on-Reserve lands in terms of renewable resources such as agriculture, forestry, and wildlife, and non-renewable resources such as minerals. We will point to the fact that while most of these resources remain untapped, their existence should have important implications for future potential economic development in an FNP. However, we will also highlight the regional variation in terms of these resource endowments. Finally, we will focus on existing data on current resource revenues accruing to bands, the majority of which take the form of royalties from oil and gas.

##### a) Agriculture<sup>2</sup>

Of the more than 2.7 million hectares of reserve land in Canada, there are an estimated ¾ million hectares of land with good to excellent soil capability for agriculture. However, this on-Reserve amount varies considerably across the country - from a low of 0.1 hectares per capita in Quebec to a high of 5.8 hectares per capita in Alberta.

##### b) Forestry<sup>3</sup>

In total, there are almost 1.3 million hectares of forest land on Indian Reserves available for harvesting. However, the proportion of Reserve lands with excellent capability for forestry

is less than 0.5% compared to 1% for Canada as a whole. The proportion of Reserve lands and Canadian lands with good capability for forestry is identical at 12%. In terms of regional distribution, Ontario accounted for 29% of all stocked productive forest land on-Reserve, Quebec accounted for 29%, and the three western-most provinces combined accounted for 42%.

With respect to forestry production, activity does currently take place on reserve lands. Estimates based on 1985-89 data reveal that the average yearly harvest of forest products on Reserve lands totalled 623,000 cubic metres, of which 33% came from B.C., 17% from the three prairie provinces, and another 45% from Ontario and Quebec.

#### c) Wildlife'

With respect to the ability for supporting ungulate wildlife (hoofed animals such as antelope, caribou, deer, elk, mountain goat, moose and mountain sheep), reserve lands compare favourably to Canadian lands in general. Approximately 2% of Reserve lands and Canadian lands have excellent capability for supporting ungulate wildlife, while 50% of Reserve lands have good capability compared to 40% for Canada as a whole. In total, this comprises just over 1 million hectares of Reserve lands.

#### d) Minerals'

An inventory on 2267 Reserves regarding the mineral resource potential of Indian Reserve lands has revealed that 30% of Reserves have moderate/good to excellent potential for mineral production. Approximately 300 Reserves (14%) are rated as having good to excellent potential made up from 596 mineral occurrences. Of these occurrences 44% are metallic minerals and 56% are non-metallic, aggregate, or other mineral types.

The Indian Lands Registry has recorded a total of 564 mineral related permits, leases and/or agreements to date. At present there are 16 current or outstanding Permits or Leases for the exploration or sale and removal of mineral products from Indian Reserves in Canada. Fifteen of these identify aggregate or non-metallic minerals and one identifies a metallic mineral.

The royalties paid to Indian bands by companies providing financial statements for these 16 Permits and Leases over their entire terms to date (September 1991) is \$2,592,331.40. A further \$1,236,599.00 has been estimated for which financial statements were not available, for a total of \$3,834,910.40.

The analysis of this inventory suggests that there are substantial potential benefits to be derived from the economic development opportunities resulting from the exploration and development of mineral resources on Reserve lands.

#### e) Indian Band Funds - Capital and Revenue Accounts

The Indian Act defines two types of band monies, capital and revenue. These funds are



collected by the Department of Indian and Northern Affairs and are held for the use and benefit of Indian bands in interest-bearing accounts in the Consolidated Revenue Fund (CRF). Capital monies are derived from non-renewable resource transactions or the sale of lands or other band capital assets. These funds are expended on the authorization of the Minister with the consent of the band council. Revenue monies are generated primarily through land leasing transactions or interest earned on CRF deposits. These monies are, in most cases, managed and expended by the bands under the provisions of the Indian Act.

Table C1 displays the receipts and disbursements for Indian Band Funds held in the capital and revenue accounts. The opening balance in 1989-90, of the capital and revenue accounts was 743.7 million dollars and 101.6 million dollars, respectively.

In the capital account in 1989-90, 88% of total receipts were comprised of oil and gas revenues. Of the 70.7 million dollars in receipts 62.7 million dollars were expended leaving a balance at the end of the fiscal year of 751.7 million dollars.

The majority (75%) of funds which accrued to the Revenue account took the form of interest. The net accrual (receipts-payments) to this account in 1989-90 was approximately 2 million dollars.

Thus, at the end of the 1989-90 fiscal year the balance of the capital and revenue accounts totalled 855.4 million dollars or \$2770 per capita.

**Footnotes to Appendix C**

1.
  - (a) Income data are based on customized data prepared for the Quantitative Analysis and Socio-Demograph Research Unit by Statistics data, Table 10, File Revenue No. P03184, May 11, 1989. (Based on 1986 Census Data).
  - (b) The Consumer Price Index, Table H10, p. S110, Bank of Canada Review, August 1991, was used to convert the income figures to 1990 dollars.
  - (c) Ontario Tax Rates from the 1990 Tax Return were used to calculate potential provincial income tax revenue on-Reserve.
  - (d) The Indian population on-Reserve in 1990 of 308,727 was found in Table 1A in "Highlights of Aboriginal Conditions 1981-2001: Part 1 Demographic Trends", QASR, 1989.
2. Data figures for agriculture are based on the Canada Land Inventory, Environment Canada, 1984 as laid out in the publication by J. Phillip Nicholson and Paul Macmillan, An Overview of Economic Circumstances of Registered Indians in Canada, prepared for DIAND, January 1986.
3. Forestry Data was provided upon request from Ray Hirvonen, Forestry Canada.
4. Data on ungulate wildlife are based on the Canada Land Inventory, Environment Canada, 1984 as laid out in the publication noted above by Nicholson and Macmillan.
5. Data on mineral resources were obtained from "A National Summary of the Mineral Resource Potential of Indian Reserve Lands Mineral Inventory Report", Resource Development Directorate, Economic Development Sector, September 20, 1991.

TABLE C1

INDIAN BAND FUNDS—CAPITAL ACCOUNTS

	1989-90	1988-89
	\$	\$
Opening balance .....	743,791,232	738,057,907
<b>RECEIPTS AND OTHER CREDITS—</b>		
Oil royalties .....	24,851,407	26,464,783
Gas royalties .....	37,118,895	40,975,231
British Columbia agreement .....	289,018	323,040
Land and other claim settlements .....	3,028,400	3,844,749
Sundries .....	5,414,120	7,876,247
	<u>70,701,840</u>	<u>79,484,050</u>
	814,493,072	817,541,957
<b>PAYMENTS AND OTHER CHARGES—</b>		
Per capita cash distribution .....	12,010,916	19,255,134
Transfer pursuant to Section 64 of the Indian Act .....	46,236,509	52,593,676
Sundries .....	4,513,049	1,901,915
	<u>62,760,474</u>	<u>73,750,725</u>
Closing balance .....	751,732,598	743,791,232

INDIAN BAND FUNDS—REVENUE ACCOUNTS

	1989-90	1988-89
	\$	\$
Opening balance .....	101,656,724	109,900,957
<b>RECEIPTS AND OTHER CREDITS—</b>		
Government interest .....	78,240,649	83,166,307
Land and other claim settlements .....	8,994,401	2,366,000
Sundries .....	17,241,356	13,227,665
	<u>104,476,406</u>	<u>98,759,972</u>
	206,133,130	208,660,929
<b>PAYMENTS AND OTHER CHARGES—</b>		
Per capita cash distribution .....	2,922,827	1,336,394
Transfer pursuant to Section 69 of the Indian Act .....	91,860,639	104,093,599
Sundries .....	7,721,398	1,574,212
	<u>102,504,864</u>	<u>107,004,205</u>
Closing balance .....	103,628,266	101,656,724

Source:

Public Accounts of Canada, Prepared by the Receiver General, Government of Canada, 1990, Volume I, Tables 7.11 and 7.12.

## Appendix D:

### Data Sources for Expenditures

- 1. Federal Expenditures (excluding unemployment insurance, old age security, and family allowance) directed to Indians and Inuit living on Reserve and Crown land are based on the Part III Expenditure Plans for each respective federal department and DIAND Finance Branch data. This data included expenditures to all aboriginals in Canada. Therefore, two types of adjustments were required. First, to remove the data pertaining to the North (i.e. north of the 60th parallel) and second, to present expenditures made to Indians on-Reserve only. With respect to the first requirement all federal programs directed to the North were excluded. These included programs such as Northern Affairs (DIAND), Northern Careers Program (PSC) and parts of the Transfer Payments to Aboriginal Groups (Sec. State). Regarding the task of excluding spending on registered Indians or aboriginals off-Reserve, the DIAND Finance Branch provided estimates of the percentage of federal program expenditures going on-Reserve. In terms of the DIAND programs it is estimated that for all programs except education and social development 100% of expenditures are on-Reserve. Estimates were also provided for the other federal departments with an average of 60-70% of total program expenditures directed to Reserves. However, for the Aboriginal Economic Programs (ISTC) the DIAND Economic Development Branch estimates that only 40% of expenditures are made on-Reserve. Given that the on-Reserve expenditures are defined as on Reserve and Crown lands and thereby included the Inuit, to obtain per capita figures the expenditures were divided by a population total including both Registered Indians living on Reserve and Inuit. The source for these population data is given in note 3.**
- 2. Federal expenditures on unemployment insurance, old age security, and family allowance are based on customized data prepared for the Quantitative Analysis and Social-Demograph Research Unit, INAC by Statistics Canada, Table 21, File Reference Number P03184, May 11, 1989. (Based on 1986 Census Data). The Consumer Price Index, Table H10, p. S110, Bank of Canada Review, August 1991, was used to convert these figures to 1989 dollars.**
- 3. The Indian and Inuit populations were found in Tables 1A and 1B in "Highlights of Aboriginal Conditions 1981-2001: Part 1 Demographic Trends", QASR, 1989.**