Federalism From Below?
The Emergence of Aboriginal Multilevel Governance in Canada:
A Comparison of The James Bay Crees and Kahnawá:ke Mohawks

by

Martin Papillon

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Department of Political Science
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Abstract

Using the language of rights and national self-determination, Aboriginal peoples have mounted a fundamental challenge to Canadian federalism in the past forty years. In order to move beyond the imposed structure of colonial governance, Aboriginal peoples have sought to establish their own form of federal relationship with contemporary Canadian governments and society. While much attention has been devoted to the constitutional and legal dimensions of Aboriginal challenges to state authority, this thesis argues that incremental yet fundamental changes are also taking place in the less visible but nonetheless important arena of policy-making. Aboriginal claims for greater political recognition, combined with the redefinition of the role of the state associated with neoliberal ideas, have led to the emergence of multilevel governance practices between Aboriginal governing authorities and their federal and provincial counterparts. While they do not alter the formal nature of state authority as defined in the constitution, multilevel policy exercises are characterized by growing interdependencies between Aboriginal and non-Aboriginal governing actors, leading to a partial displacement of formal rules of authoritative decision-making in favor of joint decision-making processes and negotiated solutions to policy disputes. Building on comparative analyses of the transformations in the governance regimes of the James Bay Crees and Kahnawa:ke Mohawks, this thesis argues that these multilevel exercises can become transformative spaces for Aboriginal peoples to reshape their relationship with the state and establish themselves as representatives of distinct political communities with their own sources of authority and legitimacy independent of federal and provincial parliaments. As a result, I argue a new form of federalism may well be emerging not through constitutional negotiations or treaty-making exercises, but from below, in everyday practices of governance.

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Abbreviations

AHRDS	Aboriginal Human Resources Development Strategy
CFA	Comprehensive Funding Agreement
CFNA	Canada-First Nation Funding Agreement
CNC	Cree-Naskapi Commission
CSB	Cree School Board
CRA	Cree Regional Authority
DGNQ	Direction générale du Nord du Québec
DIAND	Department of Indian Affairs and Northern Development
FNGA	First Nation Governance Act
FTA	Financial Transfer Agreement
GCC	Grand Council of the Crees
HRDC	Human Resources Development Canada
INAC	Indian and Northern Affairs Canada
IQA	Indians of Quebec Association
IRT	Intergovernmental Relations Team, Kahnawa:ke
JBNQA	James Bay and Northern Quebec Agreement
KCSC	Kahnawa:ke Combined School Committee
KEC	Kahnawa:ke Education Committee
MCK	Mohawk Council of Kahnawa:ke
MLG	Multilevel governance
MRN	Ministère des Ressources naturelles du Québec
OCC	Office of the Council of the Chiefs, Kahnawa:ke
PK	Peacekeepers, Kahnawa:ke
PQ	Parti québécois
RCAP	Royal Commission on Aboriginal Peoples
RCMP	Royal Canadian Mounted Police
SAA	Secrétariat aux Affaires autochtones du Québec

Chapter 1

Introduction

1.1 Understanding Changes in Aboriginal-State Relations

"Victories achieved in the high politics of constitutional negotiations and in legal battles are very important, but without progress in policy and programming, the constitutional victories will be hollow. Self-government is a *practice*, as much as a condition."

(Frances Abele and Katherine Graham, 1989:143)

This thesis is about the transformation of Aboriginal-federal-provincial governments relations in Canada, and more specifically in Quebec, in the last three decades of the 20th century and beyond. Since the early 1970s, Aboriginal peoples[1] have mounted a fundamental challenge to the institutions and practices of Canadian federalism. Like other minority movements in the postwar period, they have used the language of rights and recognition of difference as key vehicles for establishing the legitimacy of their claims.

But Aboriginal peoples' struggle is also tied to another great postwar movement: the political liberation struggle of colonized societies. Borrowing from the language and principles of decolonization, they have come to frame their claims in terms of national self-determination. Their struggle is not only, or simply, for recognition *within* existing constitutional boundaries, but also in many ways for a political space of their own *alongside* the sphere of authority of what they consider as colonizers' states.[2] Aboriginal

[1] Aboriginal peoples is the term generally used in Canada rather than Indigenous peoples, the term in use in the international literature. I use the two as synonymous as appropriate to the context.

[2] Ivison et al. (2000), Kymlicka (2001, 2007) and Niezen (2003) discuss, from various perspectives, the distinct character of Aboriginal struggles in relation to other minorities' claims. As I discuss further in chapter 2, the nature of Aboriginal claims in relation to state authority is far from uniform however, and one must be cautious not to generalize.

self-determination is thus challenging the established territorial boundaries of state authority and, in the Canadian context, questioning the legitimacy of the federal-provincial hold on the expression of sovereignty.

Canadian federal and provincial governments have responded to Aboriginal claims with new policy frameworks promoting the negotiation of self-government agreements and land claim settlements, and most significantly, with the recognition of Aboriginal and treaty rights in the *Constitution Act, 1982*. From the now infamous 1969 White Paper on Indian Policy that sought to abolish Indian status and make Aboriginal peoples "full citizens of the communities and provinces in which they live" (Canada, 1969: 4) to the negotiation of treaties and self-government agreements in Quebec, Yukon, British Columbia and elsewhere, the shift in discourse and policy is indeed remarkable.[3]

That being said, not everyone agrees on the significance of such changes. While some analysts see a "paradigm shift" in the very nature of Aboriginal-state relations, from a logic of assimilation to one of recognition of Aboriginal difference and political status in the federation (Howlett, 1994; Russell, 1996; Weaver, 1990), many take a more critical stand and suggest recent developments do not fundamentally alter the colonial foundation of the relationship between Aboriginal peoples and the state (Alfred, 1999, 2005; Ladner and Orsini 2005; Salée, 2005; Turner, 2006). According to the latter view, recent changes are more adequately depicted as a "readjustment" of the various mechanisms deployed by the state to maintain its hegemonic position and to constrain Aboriginal self-determination within the boundaries of existing constitutional norms established by the dominant society (Boldt 1993; Green, 2005; Neu and Therrien, 2003; Turner, 2006).

[3] A number of authors offer reviews of these policy developments. See for example Abele et al. (1999) and the volume edited by Murphy (2005).

Following Michael Murphy (2005: 8), it would be fair to say that the apparent dissonance between these two interpretations of current changes is at least partly the result of differences in the standard against which "change" is measured. If one starts from the standpoint of past policies, it is clear that things have changed. Measured against the standards of critical postcolonial theories and Aboriginal self-determination claims, the picture is obviously much less clear. But disagreements over the nature of current dynamics are also a symptom of a broader problem in the academic literature on Aboriginal-state relations.

As Frances Abele and Michael Prince (2002a: 229) suggest, Canadian perspectives on Aboriginal-State relations put much emphasis on the "high politics" of constitutional recognition, rights interpretation and treaty negotiations, perhaps to the detriment of empirical analysis of dynamics "on the ground", in what is increasingly understood as processes of *governance* -everyday interactions of multiple governmental and non-governmental actors in policy definition and implementation. For Murphy, who builds on Abele and Prince's remarks, analysis of self-government agreements need to be "supplemented by research into the actors, institutions and policy developments that are closer to the day-to-day functioning of Aboriginal-state relations" (2005: 8).

Transformations in Aboriginal-state relations are not taking place solely at the high level of constitution-making and rights claims. In addition to legal and constitutional changes, the last 35 years have seen the development of complex dynamics of governance, in which Aboriginal governing bodies and the two orders of governments recognized in the Canadian constitution interact on an increasing number of policy

questions.[4] Formal self-government agreements, but also significant sector-specific administrative devolution of program administration to Aboriginal governments and organizations, have paradoxically contributed to the development of more, rather than less, relations between federal, provincial and Aboriginal authorities in order to coordinate policy objectives and their implementation, negotiate fiscal transfer and develop mechanisms of accountability.

This is where this thesis seeks to contribute to the debate about the changing nature of Aboriginal-federal-provincial relations in Canada. To fully understand and explain current dynamics, I argue it is important to look at the transformation over time not only in formal constitutional and legal terms but also in what can be defined as the emerging *multilevel governance* dynamics between Aboriginal governing institutions and their federal and provincial counterparts in various processes of policy definition and implementation. Going beyond formal institutions is essential, as it is in everyday processes of governance that power relations are reproduced, but also progressively transformed through the questioning of established practices and boundaries of authority.

Most students of federalism recognize the importance of looking beyond formal structures when characterizing the nature of relations between governments. In the Canadian context, all agree there is an important gap between the federal-provincial division of powers and responsibilities as described in sections 91 and 92 of the *Constitution Act, 1867*, and the reality of policy-making in contemporary Canada. The institutions of Canadian federalism have progressively adapted to the changing

[4] Beyond relations between governmental authorities, the politics of Aboriginal-state relations are of course also being redefined in the social and cultural realm, as communities and individuals assert their own perspective and positions in relation to the settlers' society and state. The political implications of this social, cultural and spiritual liberation struggle is well illustrated in Alfred (2005). This thesis, however, is limited to transformations in the relations between governments, or governing bodies more broadly.

demographic, social and economic circumstances, even if only limited formal constitutional change has taken place since 1867 (Simeon and Robinson, 1990; Stevenson, 2004; Smiley, 1987). In other words, there is a profound difference between the *formal* and *practical* definitions of Canadian federalism, which again, calls for attention to intergovernmental relations and dynamics of governance (Smith, 2003).

This thesis is about the changes in such relations of governance between Aboriginal, federal and provincial governments. What is the nature of such relations? Have they evolved over time? If so, why and how? And to what extent do they provide spaces for transformative politics leading to a just and workable relationship between Aboriginal peoples and the Canadian federation? This study thus combines comparative empirical analysis of changes in Aboriginal, federal, provincial intergovernmental relations with a normative assessment of such changes in light of the theoretical literature on Aboriginal self-determination.

In order to develop a better understanding of changes in the role of Aboriginal governments in policy processes over time, I proceed through an historical analysis of what I define as the *governance regime* structuring the relationship between Aboriginal governing bodies and their federal and provincial counterparts. I use the concept of governance regime to capture the more or less formal rules, norms, representations and dynamics of the intergovernmental relations established over time between Aboriginal authorities and their federal and provincial counterparts. As I will discuss further in chapter three, this concept provides a bridge between the formal institutional mechanisms and rules organizing the relationship between a given Aboriginal nation and the federal and provincial governments and the more informal dynamics and practices established

over time in intergovernmental processes and negotiations over policy orientation and implementation.

In order to balance general theorizing with a more nuanced understanding of emerging forms of Aboriginal-federal-provincial intergovernmental relations, I focus my analysis on the transformation of the governance regime of two Aboriginal nations/communities: the James Bay Crees (Eeyou of Eeyou Istchee) and the Kahnawá:ke Mohawks (Kanien'kehá:ka). Both are territorially located within the jurisdictional boundaries of Quebec, and both have relatively strong governing structures and a long history of political engagement with the federal and provincial governments. As I discuss further below, they nonetheless have significant differences in their geographic situation, formal institutional relations to the federal and provincial governments as well as different strategic approaches and discursive representations of such relations, which allows for a comparative approach underlining both the common context that affects them as well as their institutional and political specificities.

1.2 Towards a Federal Relation?

This thesis builds on the growing understanding in the theoretical literature that Aboriginal self-determination should be defined in relational terms (Green, 2005; Murphy, 2005; Schouls, 2003; Young, 2000). From Aboriginal peoples' perspective, and in fact for a number of minority nations making similar claims, self-determination is not necessarily a process through which an independent state with the classic attributes of sovereignty is created. It is rather a process in which a political community gains the capacity to redefine, through collective choice-making and negotiations, the nature of its

relationship with the existing state (Harty and Murphy, 2005; Keating, 2001; Tully, 2001a). Aboriginal self-determination involves simultaneously the exercise of political autonomy through legitimate, community-defined, institutions of governance and the confirmation of a relationship with the Canadian federation based on mutually agreed upon terms.

A growing number of political and legal theorists argue that a just and workable "postcolonial" relationship between Aboriginal peoples and the Canadian state necessitates the development of some form of governance structure where Aboriginal nations are recognized as federal partners. Federalism allows for a redefinition of sovereignty as simultaneously exclusive and shared, without assuming the subordination of Aboriginal peoples to the existing Canadian state nor suggesting a complete dissociation from the latter.

As I discuss in chapter two, there are many understandings of what such a federal relation would entail, from the "third order" model advocated by the Royal Commission on Aboriginal Peoples (RCAP, 1996, vol.2) to treaty-based models more closely resembling confederal associations (Henderson, 1994; Ladner, 2003; Macklem, 2001; Tully, 1995). Despite significant differences between these models, they share a common attachment to the *federal principle* of shared and divided rule amongst equal, self-determining partners.

For a federal relationship to emerge I suggest in chapter 2, Aboriginal self-determining nations or communities must first be recognised as distinct political entities, whose existence does not depend on the particular institutional configuration of their relationship with the Canadian federation. Second, Aboriginal governmental structures,

whether they are integrated into the Canadian constitutional framework or defined entirely outside of it, must emanate from the community rather than be imposed 'from above'. In other words, their authority and legitimacy must stem from the community rather than the state. Third, and perhaps most importantly, for a federal relationship to be sustainable, such governing bodies must be considered on an equal level with federal and provincial governments in their interactions.

This model of federal governance can be contrasted with the historical model of colonial governance, as it is reproduced today in the institutions of the *Indian Act*. The latter is a classic case of hierarchical governance where the state, and in this case mainly the federal government, imposes not only its own priorities, policies and programs, but also its worldviews and practices to Aboriginal governing authorities. In this colonial model, traditional Aboriginal governing structures have been displaced and replaced by institutions, such as band councils, which are themselves creatures of the state. The latter play essentially a role of "agent" with minimum leeway in setting priorities and establishing policies that correspond to the priorities of communities. Under a colonial regime of governance, the limited authority and legitimacy of Aboriginal governing authorities emanates not from their political roots in communities but from their legal existence in the institutional apparatus of the state.

Aboriginal mobilisations in the past thirty-five years can be understood as liberation struggles against this structure of colonial governance (Tully, 2000a). In political terms, claims of self-determination and for a federal-type relationship are largely about communities, large and small, regaining control over their own governing structures and territories, and redefining their relationship with the Canadian state and

society in a way that corresponds more closely to their own interests, histories and worldviews.

To be sure, this is one challenging task. Aboriginal peoples face not only powerful interests but also well-entrenched conceptions of state sovereignty that limit the possibility of a radical reconfiguration of the formal allocation of governmental authority in Canada. As I discuss in chapter four, the colonial structure of governance has historically displayed remarkable flexibility, allowing federal and provincial governments to adapt to changing circumstances while maintaining their dominant position in relations with Aboriginal peoples.

That being said, I argue in this thesis that the practice, if not the formal structure, of Aboriginal governance in Canada has considerably evolved in the past thirty five years towards a type of multilevel governance that lies somewhere between the colonial model of the past and a true federal relationship between equal partners. Building on the case of the James Bay Crees and Kahnawá:ke Mohawks, I argue we are currently witnessing the emergence of a unique model of multilevel governance. This model, I suggest, is characterized not so much by an absence of formal hierarchy but 1) by a redefinition of the source of authority and legitimacy of Aboriginal governments from the state to communities themselves, 2) by a *de facto* recognition, in negotiations over policy definition, of this new status of Aboriginal governments as legitimate representatives of distinct national political communities and, 3) by the development of patterns of *interdependence* between Aboriginal governing organizations and federal and provincial authorities in such policy exercises.

I conclude that the development of such dynamics of multilevel governance between Aboriginal and non-aboriginal governments, where the legitimacy and capacity of the former are increasingly recognised by the latter, have led to the development, in practice, of *quasi-federal governance regimes*, where Aboriginal governments are not, formally speaking, separate institutions, coequals with their federal and provincial counterparts, as a formal federal model would call for, but neither can they be considered simply as administrative arms of the state as the classic hierarchical/colonial model would suggest. While they are still subject to the legal power and authority of the state, they have gained, or to be more accurate, reasserted, a political authority and legitimacy of their own, defined by and within the communities independently of the Canadian state. In other words, a federal relationship may well be emerging not through the high politics of constitutional reforms and treaty-making, but rather "from below", in everyday governance relations.

This thesis identifies broadly similar patterns of multilevel governance emerging in the interactions between Cree and Kahnawá:ke institutions and their federal and provincial counterparts. To be sure, there are significant limits to these emerging patterns of multilevel governance from a strictly federalist perspective. As the cases studied here show, by embracing multilevel governance and its logic of interdependencies, Aboriginal governing structures have largely been forced to reproduce, in their development, the institutional patterns and operational logic of Euro-Canadian governments. In other words, Aboriginal governing institutions have gained legitimacy, autonomy and authority, but they are still, to a large extent, behaving like and mirroring the structures of Canadian governments.

Finally, while the two cases discussed here have converged towards a similar pattern of multilevel governance, there are nonetheless important differences in the specific political dynamics, institutional framework and normative foundation of their respective regime of multilevel governance. Explaining both the convergence towards a general model, as well as the variations in the specific articulation of this model across cases is a central objective of this thesis.

1.3 Explaining Patterns of Multilevel Governance: Recognition, State Restructuring and Strategies of Self-Determination

Much attention has been directed in recent years in comparative politics and policy analysis to the processes leading to the transformation of well-established institutionalized relations and policies (Baumgartner and Jones, 1993; Pierson, 1994; Streeck and Thelen, 2005). Most recent analysis of institutional and policy change, as well as governance dynamics, tend to converge towards the idea that it is necessary to take into account a variety of factors to fully understand the complex processes through which institutionalized patterns are transformed and new ones emerge (Streeck and Thelen, 2005: 4). This does not mean that causal analysis must be rejected but rather that attempts at reducing a complex phenomenon to simple causation may not be the most effective way to further our knowledge about the *process* and *direction* of change.

This thesis builds on such an integrated approach to institutional change, borrowing from the insights of historical institutionalism and political economy. I argue that to fully understand and explain changes in dynamics of Aboriginal governance, we must first take into account structural and ideational factors that have lead to shifts in the dominant logic guiding Aboriginal-state relations in the last thirty years, thus opening

opportunities for a redefinition of governing relations. Second, if macro-contextual elements are important to explain change, the specific direction of such transformations is not given, and therefore it is also important to analyse how agents are seizing opportunities created by such shifts in context to induce changes in institutionalized patterns of governance.

1.3.1. The Context of Change: Rights-Based Recognition and Neoliberal Governance

To be properly understood, the reconfiguration of Aboriginal governance over the past thirty years in Canada must be situated within the broader context of the ongoing process of political and economic liberalization that has traversed advanced industrialized societies in the same period. In political terms, liberalization is associated with the progressive expansion of human rights standards, including the recognition of political rights for populations under colonial domination and cultural protection rights for ethno-cultural and national minorities (Kymlicka, 2007: 56). In the Canadian context, this movement culminated with the *Constitution Act, 1982*, which entrenched individual rights through the *Canadian Charter of Rights and Freedom* but also recognized multiculturalism, bilingualism and Aboriginal and treaty rights as fundamental pillars of the Canadian "diversity model" (Jenson and Papillon, 2001).

As the existing literature demonstrates, Aboriginal peoples in Canada have successfully used the language of rights recognition to rearticulate their position in relation to the Canadian state in the past thirty-five years (Macklem, 2001; McNeil, 2001; Borrows, 2002). As I discuss in chapter four, however, the reconfiguration of Aboriginal governance along the line of differentiated rights, as it was deployed in Canada through

court decisions and government policies, has significant limits from the perspective of Aboriginal self-determination. Aboriginal rights remain very much constrained by existing structures of authority as they were established in successive Canadian constitutional documents. What I later define as the *contained recognition* paradigm, under which current court decisions and government policies regarding Aboriginal rights operate opens up opportunities for Aboriginal peoples to redefine their status and relation with governments, but within the clearly defined boundaries of state sovereignty.

The ongoing shifts in Aboriginal governance must also be located within a second broad ideological movement towards greater liberalization, this time more economic in nature. The decline of Keynesian economics and the rise of neoliberal understandings of the relation between state, market and society, have profoundly reshaped the structural landscape of Aboriginal politics and policies. As I suggest in chapter three, neoliberalism is no longer simply associated with a "retreat" of the state in favour of market-based forms of economic and social regulations. More nuanced analyses have emerged in recent years suggesting what we are witnessing is not the withering away of state structures and regulations activities but a reorientation of the latter towards new *goals*, which are more in line with the ideals of individual and community autonomy, free markets and global competition (Jessop, 2002; Tickell and Peck, 2003). The role of the state is thus changing, from one of active agent in social and economic engineering to one of "facilitator" fostering individual and local communities' autonomy in market-driven relations (Pierre and Peters, 2000).

In order to achieve these new objectives inspired by neoliberal ideas, governments have embraced new conceptions of governance, promoting decentralization, privatization

and new partnerships with communities in policy-making exercises. As political geographers have pointed out in recent years, a key impact of such transformation is the spatial reconfiguration of governance, from a model essentially organized at the national-state to one where multiple actors located at multiple levels, or scales, of governance interact in policy processes (Brenner, 2004; Peck, 2002).

I demonstrate in chapter four that federal government agencies, and provinces to a lesser extent, massively decentralized program administration to Aboriginal governments starting in the 1980's and later developed new approaches to governance fostering "partnerships" with Aboriginal communities in policy development and implementation. Consistent with neoliberal perspectives, the objective of such polices has been to reduce direct government involvement in costly programs and enhance local responsibility for development initiatives.

While such shifts in approaches to governance do not alter the constitutionally defined division of powers and do not necessarily increase the autonomy of Aboriginal governments in legal and fiscal terms, they nonetheless produce new spaces of decision-making at the community or regional levels, as well as new dynamics of governance between actors located at multiple levels, or scales, of governance. Aboriginal governing authorities, I argue, can use these new multilevel governance exercises to significantly reshape their relationship with the federal and provincial governments.

1.3.2. The Process of Change: Place-Specific Incrementalism and Strategic Action

While these changes are significant, practices of rights-based recognition and de-centred governance do not, in and of themselves, create a shift in power relations towards

some form of federal governance. In fact, as mentioned previously, a number of analysts do not consider the current reconfiguration of Aboriginal-state relations as a significant shift away from the colonial practices of the past (Alfred, 2005; Green, 2005; Salée, 2005; Turner, 2006). Governance regimes are, as suggested, institutionalized patterns of interaction in the policy process. Once established, such regimes tend to be relatively stable, as their configuration tends to reproduce the dominant understanding of the process as well as established power relations between governing agents, creating what the neo-institutional literature defines as a path-dependent logic (Pierson, 2000; Mahoney, 2000). Given the deeply entrenched interests at stake, breaking with long established patterns has proven exceedingly difficult in Aboriginal-state relations (Ladner and Orsini, 2005; Rodon, 2003).

What I suggest in this thesis, however, is that the processes of rights recognition and devolution have opened opportunities for *case-specific and place-specific* shifts in practices of governance that, in the long run, have considerably reshaped the established regime of colonial domination of the two Aboriginal nations on which this study focuses on. I build first on recent literature on institutional change that suggests we need to pay more attention to incremental, less visible, cumulative changes in institutionalized practices over time (Thelen, 2004; Hacker, 2005; Skogstad, 2005).

Given the apparent resistance to change in Aboriginal governance, I suggest in chapter three that the impact of broad structural and discursive shifts are better understood over a long period of time, through an incremental process of *institutional adaptation* (Thelen, 2002; Streeck and Thelen, 2005). In other words, recognition and de-centred governance may not radically transform the allocation of authority in Aboriginal

governance in the short term, but in the long term, they nonetheless open the possibility for less visible, smaller, adaptations in practices of governance that may cumulatively create significant shifts.

This process of adaptation largely depends on the capacity of key actors, in this case mainly the Aboriginal leadership, to take advantage of the openings created by structural shifts. The actions, resources and representation strategies of Aboriginal governments must be taken into account to explain the particular trajectories of change in the governance regime of the two nations that are the object of this study. The numerous studies of the Harvard Project on American Indian Economic Development have pointed to legitimate and effective internal institution building as a central precondition to economic success for American Indian Tribes (Cornell and Kalt, 1992 and 1998). I argue it is similarly essential in order to engage in transformative multilevel governance exercises. But institution-building is not in and of itself sufficient. Strategic discursive framing of the relationship, in order to challenge established assumptions about sources of legitimacy and authority as well as to seize opportunities opened by shift in governments policy perspectives, also play an important role in positioning Aboriginal nations in their interactions with federal and provincial governments. I discuss in chapters 5 and 6 how Cree and Mohawk leaders have adapted their representation strategy to the language of rights-based recognition and learned over time to take advantage of the logic of decentralisation and partnership-building advocated by governments in a number of policy sectors.

Despite significant variations in the formal structure of their relations with the federal and provincial governments as well as in their respective conceptions of such

relations, the leadership of the two Aboriginal groups has developed through the years what can be defined as a pragmatic approach to self-determination, seeking to engage governments at the policy level and gain as much control as possible on the definition and implementation of policies while at the same time maintaining the language of self-determination at the centre of such process.

I also suggest that this pragmatic approach to self-determination has particular resonance in Quebec, where the nature and boundaries of Canadian federalism are already contested. This particular situation has opened opportunities for Aboriginal peoples to significantly alter their relation to both the Canadian and Quebec governments by using the language of self-determination and playing the two governments against each other in negotiations over policy definition and implementation. This has lead to a greater *de facto* recognition of their status as governmental, rather than solely administrative, actors over the years.

To a certain extent, the argument defended in this thesis challenges conventional wisdom that changes in Aboriginal-state relationship are primarily driven by treaty-making, judicial politics or constitution-making. It suggests that the institutional configuration of governance regimes might be more flexible and permeable to actors' strategies than the existing literature assumes. To be sure, I do not reject the necessity to reform the existing processes of treaty-making and self-government negotiations. Improving these 'high politics' processes is fundamental to the reconfiguration of Aboriginal-state relations in federal terms. But I suggest we must also take into account more subtle changes in everyday governance that can also lead, in practice, to change "from below.''

1.4 Case Selection and Methodology

> Qualitative researchers are intrigued with the complexity of social interactions as expressed in daily practices and with the meanings the participants themselves attribute to these interactions. This interests takes qualitative researchers into natural settings rather than laboratories and foster pragmatism in using multiple methods for exploring the topic of interest (Marshall and Rossman, 1999: 2).

It is hard, if not impossible, to engage in a study of Aboriginal-state relations without taking a critical stand on our object of study. As postmodern theorists argue, this is perhaps true of all scientific endeavors involving social relations, but raising the "Aboriginal question" is, in and of itself, an acknowledgement that "something is wrong". For some, it is the "dominant orthodoxy" in the academic and policy discourse about Aboriginal rights (Flanagan, 2000). For others, Aboriginal and non-Aborignal scholars alike, what is wrong is the profound injustices of colonialism as they are reproduced in existing institutions, policies and social relations in Aboriginal communities and between Aboriginal peoples and non-Aboriginal Canadians (Alfred, 1999 and 2005; Borrows, 2002; Cairns, 2000; Macklem, 2001; Turner, 2006). As this introduction indicates, I stand firmly in the second group. It is important to state so as clearly and honestly as possible. This normative stand does motivate my research and, to a certain degree, influences my choices of questions, analytical framework and research methodology.

That being said, my objective is not merely to criticize or denounce existing policies or institutions. It is instead to engage in a rigorous analysis of a limited number of case studies to take stock of certain aspects of recent developments in Aboriginal-state relations that have, in my view, been overlooked by critical analysis. I try to make sense

of these emerging dynamics, and explain their evolution over time and their possible variations. This research thus bridges traditional causal analysis in political science with a more evaluative approach to the dynamics of Aboriginal-state relations.

In a sense, the questions tackled in this thesis are about the "what and how", but also the "why" of aboriginal governance today. This, I believe, requires in-depth qualitative research, for which conclusions can then be later tested against a larger number of cases (Peters, 1998: 57).[5] This is why I have chosen to limit myself, for the purpose of this thesis, to a cross-time comparative analysis of two cases, both situated in the same province. This choice allows me to control for some exogenous variations (federal and provincial policies) and focus instead on the possible endogenous factors, specific to the cases, such as the institutional configuration of their relationship with the Canadian state and their respective representation strategies.[6] The objective is to extrapolate from the recent history of fairly distinct Aboriginal nations, the James Bay Crees and Kahnawá:ke Mohawks, some general patterns in Aboriginal governance as it has been restructured in the past thrity-five years.[7]

1.4.1. Why Quebec?

[5] For Peters (1998: 11), cross-time comparisons based on a single case or a small number of cases can provide cumulative knowledge, testing the key findings of one study against another, eventually leading to more comprehensive theorizing. For a similar argument about cumulative, or "serial" case studies, see Rhodes (1997: 81).

[6] Comparisons between various cases within a single state often follow the same logic. Unlike more traditional cross-country comparative analysis, one must pay attention to variations across levels of governance (especially in federations) as well as variations across cases. Comparative urban analyses face a similar challenge, as DiGaetano and Strom (2003: 364) note.

[7] Despite the fact that both cases are located in the same federal-provincial institutional and political context, the research design here is closer to the most different system design, as defined by Przeworski and Teune (1970). The objective here is to underline a convergence in patterns of governance across cases.

Selecting cases located in the same province controls for the variations in provincial policies and approaches to Aboriginal relations. But there are a number of other reasons to focus on Quebec rather than on another province. For one thing, it is perhaps in the Ottawa-Quebec relations that federalism is defined most traditionally in Canada as a strict separation of powers between two orders of government. This dynamic opens the door to a sharper distinction between the respective roles of each government, allowing for a greater contrast between a classical model of federalism and emerging governance dynamics between Aboriginal peoples and the two orders of governments.

Secondly, the conception of the federation as a compact between two peoples, still the dominant view in Quebec, is very much in line with the multinational conception of federalism promoted in the theoretical literature on Aboriginal self-determination and federalism. It is in Quebec, perhaps more than anywhere else, that the notion of a tri-lateral relationship of embedded nations could develop to its full potential. The Quebec National Assembly was the first parliament in Canada to formally, if only symbolically, recognize Aboriginal peoples as 'nations' (Québec, Assemblée Nationale, 1985).

As I discuss in the fourth chapter, after a number of years of tense relations, the Quebec government has adopted a relatively innovative approach in its relationship with Aboriginal peoples in the 1980s and 1990s. Under successive Parti Quebecois governments, the province sought to strengthen its relationship with Aboriginal nations rather than leaving the field to Ottawa, as was the case until recently in most provinces. This creates a situation where Aboriginal, federal and provincial authorities interact in multiple areas of public policy, making the province an ideal location for a study of changing Aboriginal governance regimes.

1.4.2. The James Bay Crees and Kahnawá:ke Mohawks: A Brief Introduction

The Crees of Northern Quebec, who self-identify as the Eeyouch nation of Eeyou Istchee, are dispersed in nine communities with a total population slightly over 14 000.[8] Pursuant to the *James Bay and Northern Quebec Agreement* (JBNQA) of 1975 and the *Cree-Naskapi Act* of 1984, they were the first Indian bands in Canada to be formally recognized with a limited form of autonomy outside the framework of the *Indian Act*. Since the JBNQA is considered a land claim settlement under section 35(3) of the Constitution Act, 1982, the governing institutions created under the agreement are constitutionally protected. Despite its imperfections, the JBNQA has thus progressively become a central instrument for the Crees in asserting their rights-based and treaty-based relationship with the federal and provincial governments.

Since 1975, the Grand Council of the Crees (GCC), the main political organization uniting the communities, has progressively transformed the legal-administrative framework created under the JBNQA into an instrument of nation-building and political self-determination for the Eeyou people. Through ongoing court challenges related to the implementation of the JBNQA and international political campaigns challenging the legitimacy of unilateral federal and especially provincial action in the territory of Eeyou Istchee, the Crees were able to firmly establish the legitimacy of their

[8] Population statistics in this section are from Indian and Northern Affairs Canada's Community Profiles databank. See http://sdiprod2.inac.gc.ca/FNProfiles/ (accessed April 10, 2006).

claim as a territorially defined self-determining nation with a constitutionally recognised treaty-based relation with the Canadian and Quebec governments.

In more recent years, the GCC has sought to consolidate this treaty-based governance regime through the negotiation of administrative and political agreements with the federal and provincial governments over the definition and implementation of policies in Eeyou Istchee. Taking advantage of decentralization and partnership-based governance approaches promoted by governments in the 1980s and 1990s, the GCC consolidated its resources and capacity in order to match its self-determination claims with substantial claims in policy negotiations. As I discuss in chapter 5, the result has been a progressive reconfiguration of the James Bay Crees' governance regime from a structure of delegated administrative authority under the initial JBNQA model to a much more complex regime of multilevel governance characterized by joint policy-making exercises between what are, in practice, equal partners. The negotiation of the *Paix des Braves* with Quebec in 2001 will serve to illustrate the particular dynamics of this emerging regime.

Kahnawá:ke on the other hand is a community of approximately 9 000 people located in the suburban south shore of Montreal. It is thus a fairly urbanized community whose economy largely depends on services and small commercial enterprises. Unlike the James Bay Crees who have until recently been relatively isolated from the political and economic structures of the settlers' society, Kahnawá:ke is historically and geographically at the core of colonial conflicts and imperial wars between the English

and French. The Kahnawakehró:non[9] have a long history of resistance and struggle to maintain their cultural and political identity and have as a result long asserted their status as a self-determining community.

Unlike the Crees, the peoples of Kahnawá:ke have never signed a land claim settlement or self-government agreement with the federal and provincial governments. They have also never recognized the authority of the federal and provincial governments on their territory and still largely consider themselves as an independent community, politically and culturally part of the Kanien'kehá:ka (Mohawk) nation and the pre-colonial Rotinohshoni (Iroquois) Confederacy.

Their main governing body, the Mohawk Council of Kahnawá:ke (MCK) is in formal terms a band council under the *Indian Act*. Echoing a powerful traditionalist movement in the community, however, the Council has been engaged in a profound redefinition of its own status as a creature of the federal government since the 1970s and has progressively reinvented itself as the main vehicle of Kahnawá:ke self-determination.

Today, the MCK does not formally recognize federal and provincial laws on the territory of Kahnawá:ke. And, unlike the Grand Council of the Crees, the MCK has not used Canadian courts to assert its constitutional rights, as it considers the Canadian constitution as a foreign institution. Instead, the MCK has engaged in what can be defined as unilateral institution-building, seeking to reinforce the de facto independence of the community from Canadian governments through the development of its own

[9] Throughout this thesis, I use the terms preferred by the community to define itself in its own language. I thus use *Kahnawá:ke* (still spelled Kahnawake in government documents) to refer to the community. *Kahnien'kehá:ka* (meaning people of the flint) is used here interchangeably with the more commonly used "Mohawk" as the later term is still commonly used in Kahnien'kehá:ka communities. The Kahnien'kehá:ka of Kahnawá:ke are *Kahnawakehró:non*. For a discussion on terminology used in Kahnawá:ke, see Alfred (1995: 18) and Reid (2004: 198, note 1).

structures of governance in various policy areas, such as education, heath, the administration of justice, the regulation of commercial activities or citizenship policies.

This strong nationalist stance has lead to many conflicts in recent years over issues of territorial jurisdiction and law enforcement. The Mercier bridge blockade during the Oka crisis and the tensions around the cigarette trade, gambling and the administration of justice more broadly have brought the Kahnawá:ke Mohawks to the forefront of Quebec's political agenda more than once in recent decades.

Beyond such confrontations however, the MCK has also more pragmatically sought to engage in negotiations with Quebec and Canada over the recognition of its institutions and policies. Taking advantage again of the changing approach to Aboriginal governance at the federal and provincial levels, the MCK has negotiated a series of sector-specific governance agreements with Quebec and Ottawa since 1984 which have led to the progressive emergence of a unique model of multilevel governance based on what I define as practices of *mutual institutional adaptation*. Under this still emerging and fluctuating regime, the MCK and the federal and provincial governments have come to establish a process to harmonise their respective policies and norms without formally recognizing the sovereignty of the other. Through carefully worded agreements, the MCK has thus progressively forced governments to acknowledge the existence and legitimacy of Kahnawá:ke's unilaterally created institutions without having to concede on the delicate terrain of constitutional supremacy.

Beyond the fact that they are both located in Quebec, the two Aboriginal nations chosen for this study thus have in common a relatively strong nationalist discourse and a recent history of confrontation with the federal and provincial governments, as they both

challenged the authority of the state on their respective territory. This political stand makes them ideal cases to study "strong" examples of Aboriginal political assertion in the current context of state restructuring as I discuss below.

It is, however, the contrast between the two that makes them especially interesting for a comparative analysis of convergence in regime change. The Crees have signed a treaty and have by and large accepted to operate within the existing Canadian constitutional framework. They seek to carve out of this constitutional framework their own political and legal space as an autonomous entity, or what the Royal Commission on Aboriginal Peoples defined as a treaty-based order of government. The Kahnawá:ke Mohawks by contrast have articulated their claims largely outside the Canadian legal framework, as an independent entity with a relationship with Canadian authorities based on ancient peace and friendship treaties with the French and British Crowns. The comparison between the two cases underlines how these different representations of the relationship with the Canadian state influence the dynamics of multilevel governance.

Geographic differences are also significant, as the Cree communities are dispersed in the resource-rich but sparsely populated North, while Kahnawá:ke is essentially an urban community with a limited land-base and significant demographic pressures. This results in different policy priorities and different sources of tensions between the two groups and governments. Natural resources extraction and environmental policies play a central role in Cree governance, especially in their relations with the provincial government. By contrast, Kahnawá:ke's geographic situation makes commercial and taxation issues, as well as control over access to the territory and issues of residency the objects of major political contention. Again, these variations in policy

priorities, largely driven by geographic differences, affect the nature of their respective multilevel governance regime as governments can be more or less flexible in their control over certain policy sectors, depending on their own priorities. As we will see, Quebec has been far more reluctant to share its authority in natural resource development than in social policy sectors for example.

1.4.3 Data Gathering

In order to trace a detailed portrait of each of my cases, I relied mostly on non-structured interviews with key actors involved in negotiations from the federal and provincial governments as well as Aboriginal representatives. In order to limit the number of interviews, I identified for each of my cases the main negotiators and key persons who could provide informed perspectives on the evolution of the governance regime in the past thirty five years. I conducted 53 interviews in total with federal, provincial, Cree and Mohawk officials, both elected and non-elected. The interviews focused on the interviewees' conception of Aboriginal governance and intergovernmental relations, the key moments when decisions were made and who was involved. My objective was to gather information about the formal and informal practices established over time, the general climate of exchanges and interactions between Aboriginal and non-Aboriginal participants, the perception of actors involved regarding the nature of the process they are engaged in, and the possibilities and constraints for more Aboriginal autonomy.

Archival research for published and unpublished position papers and policy documents formed the basis necessary in order to trace the discursive map of each case.

Access to the archives of Aboriginal organizations was essential in order to trace the evolution of their position over time. For each case selected, a number of secondary sources were also used to document the specific institutional context (treaties, self-government agreements, Aboriginal government structures), policy outcomes (impact on communities, changes in approaches to some problems, new initiatives, etc), the dynamics of negotiation and the general context within Aboriginal and governmental policy communities.

1.6 Chapter Description

In the next chapter, I situate my study in the theoretical literature on Aboriginal self-determination and federalism, and suggest a number of key principles against which current developments can be assessed. Given the diversity of realities in Aboriginal-state relations, the objective is not to define a specific federal model or institutional framework but to outline the principles upon which a *federal relation* should ideally rest and how such a relation can be developed. I argue that a federal relation should minimally be based on mutual recognition, equality and consent. I further argue that while we generally conceive of federalism as a political system developed top-down, that is in constitutional arrangements or formal treaties, a federal relation can also emerge "from below", that is in practices of governance that become formalized through time.

The third chapter focuses on the analytical framework guiding the empirical case studies. I first elaborate on the concept of governance regime and the key elements that will serve to evaluate changes in dynamics of policy-making and policy implementation. I then discuss the various approaches in political science to explain institutional

transformations and propose a framework to explain the process of incremental change I observe in the governance regime of the three Aboriginal nations as well as the variations between them. This framework is largely inspired by recent discussions in the historical institutional literature that merges structural, ideational and agency-driven factors to explain the process of change in the nature of governance regimes.

The fourth chapter analyzes what I define as the double process of liberalization that has reconfigured the discursive and institutional horizon of Aboriginal-state relations in the last thirty years in Canada and Quebec. Central to this reconfiguration is the combination of the institutionalization of the Aboriginal rights paradigm with the rise to prominence of neoliberal conceptions of governance that greatly shaped government policies on Aboriginal self-government from the late 80's onwards. This double liberalization, I suggest, opened opportunities for the development of new governance dynamics between Aboriginal governing authorities and their federal and provincial counterparts.

The following two chapters focus of the specific trajectories of changes in the governance regimes of James Bay Crees and Kahnawá:ke Mohawks. Through the analysis of key negotiations over policy definition and implementation with the federal and provincial governments, I underline how the various governing bodies involved have used opportunities created by the coupling of rights and new governance discourses. I focus on the capacity-building and representation strategies that have facilitated such positioning and the progressive shift from a classical model of hierarchical governance to patterns of interdependent multilevel governance dynamics through an analysis of a series of key policy negotiation episodes.

In the last chapter, I review and compare the changes that have occurred in the last thirty-five years in the respective governance regime of the Crees and Mohawks, underlining similarities and differences between each case and linking the historical analysis to the theoretical framework proposed in chapters two and three. I review the factors that explain what I suggest is a convergence towards a model of quasi-federal governance, as well as the elements that explain the variations between the the two cases. Finally, I discuss the limits of this emerging governance regime in relation to the ideal-typical federal model presented in chapter two.

Chapter 2

Federalism and Aboriginal Self-Determination

> "Federalism has to do with the need of peoples and polities to unite for common purposes yet remain separate to preserve their respective integrities and identities"
>
> - Daniel Elazar (1987: 5)

Aboriginal peoples are questioning the conditions and legitimacy of their inclusion in the Canadian state and citizenship regime. For the most part, they have never renounced their historical status as distinct political communities. Borrowing from other societies or communities seeking political recognition, Aboriginal peoples have successfully framed their claims in the language of national self-determination.

What do Aboriginal claims to self-determination entail? Can such claims be reconciled with the existing institutions of Canadian federalism? Despite the difficult colonial heritage that separates them, Aboriginal and non-Aboriginal communities share not only a territory but also a common history that has created complex and overlapping identities and interactions. What are the foundations of a relationship that would recognize the colonial legacy and simultaneously ensure the coexistence of small, self-determining, political communities with a modern state on a shared territory?

In this chapter, I discuss the normative foundations of Aboriginal claims for self-determination and how such claims can be reconciled with the continued presence of the Canadian state and society through various forms of federal association. While Aboriginal self-determination is first and foremost about the (re)constitution of distinct and autonomous political communities, I suggest it should also be understood in

relational terms, as it involves simultaneously the exercise of political freedom and the confirmation of a relationship with the dominant society.

The institutions of Canadian federalism have not been particularly receptive to the idea of shared and overlapping sovereignty with Aboriginal peoples. The federal principle of self-rule and shared-rule nonetheless offers a theoretical framework in order to rethink the relationship between Aboriginal nations and the Canadian state beyond the structures inherited from the colonial past. Given the diversity of Aboriginal realities, my objective is not to define a specific model or set of institutions that would respond to the claims of all Aboriginal communities, but to outline certain principles upon which a federal relation that recognises Aboriginal peoples as self-determining communities should ideally rests.[10]

After a discussion of the various models of federalism proposed in the existing literature, I conclude the chapter with a discussion of the different routes through which a federal relation could emerge in the historical context of Aboriginal-state relations in Canada. With some notable exceptions, the existing work on federalism in the context of Aboriginal-state relations starts from the premise that a federal relation is built from the top down; that is from the definition, in a formal constitutional arrangement or through treaties, of the rules guiding the relations between the coexisting communities.

While federalism is indeed a formal institutional arrangement negotiated between mutually consenting partners, the history of federal polities suggests that the development of federal arrangements is also very much an ongoing social and political *process*. The American federal tradition insists on the importance of a foundational moment through

[10] I focus first and foremost on territorially-based communities, although the federal principle may also be conceived outside the classic territorial community model. See for example Elkins (1994) and Otis (2006).

which formal arrangements of divided authority are defined. But ancient European and indeed Aboriginal federal traditions offer a more organic conception through which federalism emerges at least as much in everyday social and political practices than through a formal contract between peoples. Implied in this "societal" conception of federalism (Erk, 2003; Livingston, 1956), is the notion that federalism is also built "bottom up", through the progressive institutionalisation of *practices of governance* that embrace the federal idea. I thus argue we need to pay more attention to the transformative potential of everyday practices of governance as political spaces where federal-type relations, if not a formal federal relation, can emerge.

2.1 Aboriginal Self-Determination as a Challenge to State Sovereignty

Aboriginal claims for greater recognition and control over their lands, resources and governing institutions are part of a broader movement characterizing the late twentieth century of territorially-based cultural and linguistic minorities that are challenging the foundations of their inclusion in modern nation-states. Like other such movements, Aboriginal peoples have increasingly come to frame their claims in the language of national self-determination. Adding a powerful normative argument to Aboriginal claims for self-determination is the fact that they never consented, explicitly or not, to their incorporation into modern states like Canada (Ivison, 2002; Niezen, 2003; Tully, 2000a, 2000b). While some continue to challenge the moral and historical value of Aboriginal claims for greater recognition of their political status in the name of liberal principles of individual rights and citizenship equality (Flanagan, 2000), the theoretical

debate today evolves more around what constitutes and adequate response, in political and legal terms, to Aboriginal claims than around their legitimacy *per se*.

For a number of political theorists coming from a liberal tradition, Aboriginal claims can be accommodated within the existing framework of the Canadian state, through the recognition of a differentiated, culture-based, citizenship status and a limited right to self-government. For Will Kymlicka, certainly one of the most influential theorists arguing for minority rights from a liberal perspective, Aboriginal peoples, like other national minorities, should be granted political autonomy in order to protect and maintain their distinct "societal culture" (1995: 75). From such a perspective, self-government is a right granted by the state to protect cultural difference of previously autonomous societies incorporated, voluntarily or not, into modern liberal states. [11]

This conception of self-determination as a right to some political autonomy "from within" is challenged, however by a growing number of scholars and activists engaged in re-interpreting colonization, and unveiling its profound ongoing impact on Aboriginal societies. For scholars adopting this critical perspective, accommodationist models based on cultural protection and minority rights do not answer the fundamental challenge indigenous peoples pose to the legitimacy of existing states and constitutional orders (Alfred, 1999; Ivison, 2002; Macklem, 2001; Tully, 1995; Turner, 2006).

Like all colonized societies, Aboriginal peoples are facing a state that was imposed upon them by external powers. The dominant society in North America, as in Australia, New Zealand and elsewhere simply imposed its conception of sovereignty and claimed exclusive jurisdiction over the territory, integrating in the process Aboriginal

[11] In later work, Kymlicka does veer towards an understanding of Aboriginal self-determination that goes beyond the protection of "societal cultures". See especially his discussion of indigenous rights in *Politics in the Vernacular* (2001: 120-132).

societies to the dominant political order without their consent. This process of domination, or "internal colonization" (Tully, 2000a: 37) of Aboriginal societies is now well documented, from the initial stage of diplomatic alliances to the process through which the settlers' states progressively took control over the land, resources and jurisdiction of Aboriginal peoples, and dismantled traditional forms of government.[12] As a result, Indigenous societies became "domesticated" and "dependent", as Chief Justice John Marshall of the US Supreme Court famously stated.[13]

In light of this colonial legacy, critical analysts argue that unmediated state sovereignty not only has doubtful moral foundations in the North American context, it is also democratically problematic as it reduces Aboriginal communities to a perpetual status of minorities within the boundaries of the hegemonic state, a status they have never consented to (Alfred, 1999; Boldt, 1993; Turner, 2006). In this perspective, self-determination is conceived as a process through which Aboriginal peoples seek to regain control over their communities' political, cultural and economic life. It calls for a fundamental reconfiguration of the authority of the state that goes beyond the recognition of differentiated right and some limited form of internal political autonomy. It rather calls for the recognition of the status of Aboriginal peoples as coexisting, for the most part territorially-based, and historically constituted, political communities with the right to freely decide their political destiny (Harty and Murphy, 2005: 4).

[12] Form a Canadian perspective, see the reading of the colonial history proposed by the Royal Commission on Aboriginal Peoples (RCAP, vol.1, 1996: 36-40). From a legal perspective, a similar and perhaps more detailed account is developed by Grammond (2002: 29-141). Robert A Williams (1990; 1997) offers a detailed account of the American process of internal colonization. I discuss the evolution of colonial governance in greater details in chapter four.

[13] *Cherokee Nation v. Georgia*, 30 US (5 Pet.) 1, 1831.

2.1.1 A Relational Conception of Self-Determination

The concept of self-determination, as it was developed in modern liberal political and legal though is generally associated with the accession of a political community to the status of territorially based sovereign nation-state, recognized by the international community. A significant distinction is often made in International Law between the right to "external" self-determination, that is the exercise, by a colonized society, of its political agency though the creation of a sovereign state, and "internal" self-determination, associated with the right for national minorities to some form of political autonomy though self-government within the existing boundaries of the state in which they live in (Anaya, 1996).[14] From such a perspective, self-determination is conceived as a right to be exercised in continuity with the well-established principle of national-territorial state sovereignty.

A number of Aboriginal legal and political theorists reject this strict conception and conceive of self-determination instead as a social, cultural and political process of internal reconstruction and re-empowerment of Aboriginal nations and communities "from within" (Alfred, 1999; Monture-Angus, 1999; Turner 2006). From a more practical standpoint, the Harvard Project on American Indian Economic Development also focuses on internal elements reinforcing tribes' sovereignty as the core of self-determination (Cornell and Kalt, 1998). While diverging form Cornell and Kalt on many points, Alfred (2005) also sees self-determination first and foremost as an internal process. For him, it is a political and spiritual movement of individual and collective liberation from the colonial mindset that has penetrated Aboriginal communities and perpetuates to this day

[14] This distinction, and the conditions leading to one or the other, is discussed by the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paragraph 126.

the disconnect between individuals and their culture and identity as Indigenous peoples (2005: 12). As they articulate their claims in the language of self-government rights, Alfred argues, Aboriginal leaders are merely reproducing the structures of the Euro-Canadian sovereign state and perpetuating the colonization of Aboriginal societies, minds and bodies. For Alfred, self-determination is about transcending colonialism in all its forms, towards the recovering of Indigenous social, cultural and political practices and forms of democracy.

Between these two perspectives, a critical yet realist approach to Aboriginal self-determination would suggest the social, cultural and political liberation of Aboriginal societies is a historical process that takes place in concrete situations infused with institutionalized power relations and interactions between Aboriginal and non-Aboriginal societies. In Canada, as in other settlers states, the society inherited from the colonial period is "here to stay", to use the words of former Chief Justice Lamer, with its political and economic institutions.[15] Perhaps more fundamentally, as John Borrows (2000) suggests, settlers and Aboriginal societies now share not only a common territory and its resources but also a long history of conflicts, alliances, intertwined identities and cultural practices that make a complete separation of the two into parallel universes not only practically impossible but also morally undesirable.

This is why Aboriginal self-determination should be conceived in relational terms, as it involves simultaneously the exercise of political freedom and the confirmation of a relationship with the dominant society and the colonial state, albeit based on new, mutually agreed upon, terms (Borrows, 2000; Green, 2005; Ivison, 2002; Tully, 1999; Young 2000). According to Michael Murphy:

[15] In *Delgamuukw v. British Columbia* [1997] 3 SCR 1010, paragraph 186

> Relational self-determination encompasses a sphere of autonomy for self-determining groups, but also recognizes that relations of complex interdependence place both practical and ethical limitations to autonomy, creating the need for shared or co-operative forms of governance to manage this interdependence in a manner which is both effective and democratic (2005: 10).

Iris Marion Young (2000; 2005) also makes a useful distinction between self-determination conceived in the classic sense of unmediated political autonomy, and self-determination as non-domination, which nuances the principle of sovereignty to take into account the need for cooperative action between equally, and often overlapping, self-determining nations. She summarizes the basic principles of self-determination as non-domination as follows:

> "The self-determining entity should be able to *set its own ends and be able to act toward their realization*, within the limits of respect for, and cooperation with, other agents with whom one stands in relation. (…) To the extent that self-determining units dwell together in a common environment, they are liable to face some common problems and (…) need to *agree on common institutions* to address them. Within such institutions, self-determining entities ought to have *equal status*" (2005: 146, my emphasis).

A conception of self-determination as a relationship based on equality and consent calls for the development of some structure of shared governance, as Young argues, especially in cases where the entity claiming self-determination is territorially overlapping with, and has developed relatively dense social and economic interactions with, the broader entity (2005: 147).

Also implied in a relational conception is the notion that there is no "end point" to self-determination; it is a political activity traversed by shifts in circumstances and in dynamics of power relations. To be self-determining is to engage in collective political choice on a specific policy, on allocation of resources or on the structure of shared governance. In other words, *communities are self-determining when they engage voluntarily (by choice), collectively or through representatives, in activities that shape,*

progressively or radically, the rules, norms and practices that govern themselves and their relations with other communities.

2.2 Federalism as a Framework for Relational Self-Determination

Despite the ongoing instability of multinational federations, we have witnessed a resurgence of federalism as a mechanism for managing the coexistence of multiple national groups over a shared territory in recent decades. Belgium, South Africa and Spain have all adopted federal arrangements as a response to the demands of minorities. In fact, as Alfred Stepan (1999) points out, all existing democratic multinational political communities have some degree of federal arrangement to allow national minorities a relative degree of autonomy. The late Daniel Elazar, a long time advocate of federalism, also suggested in one of his last essays that federalism was likely to replace the nation-state as the dominant paradigm of political organization in the 21st century, as it responds better to the reality of a world where boundaries of communities are constantly changing, overlapping, and where multiple identities and cultural metissage are likely to be the rule rather than the exception (1998: 23).

The Canadian literature has provided strong practical and normative justifications for federalism in multinational, or plurinational, societies.[16] For Kymlicka, "federalism respects the desire of national groups to remain autonomous, and to retain their cultural distinctiveness, while nonetheless acknowledging the fact that these groups are not self-

[16] A multinational society is characterized by the presence of groups, usually territorially concentrated, with a distinct sense of national identity and a resulting desire for self-government (Tully 2001). Some authors prefer the term "plurinational" as it reflects the overlapping character of the distinct political communities (Keating, 2001: *x*).

contained and isolated, but rather are increasingly and inexorably bound to each other in relations of economic and political interdependence" (2001: 92).

One could easily conclude that such a model of divided sovereignty is a natural "fit" for the reconfiguration of Aboriginal-state relations. Long before the arrival of Europeans, Aboriginal nations in the Americas formed their own federal or confederal political associations. The Mi'kmaq in the Maritimes, the Haudenasaunee (Iroquois) in the lower Great Lakes basin and the Blackfoot in the West, for example, all had confederal-type political structures uniting otherwise distinct and independent nations or communities.[17] That being said, as Kymlicka also points out, contemporary federalism, based on the American model, is no panacea for minorities seeking greater autonomy, especially for small groups such as Aboriginal nations (2001: 95).

2.2.1 The Limits of Contemporary Forms of Federalism

Following the American example, modern federations are a particular articulation of the nation-state model where state sovereignty is divided between a central government representing the whole and provinces representing specific constituents. But there is still only one sovereign body politic, it being "the Crown" in a federal monarchy like Canada and "We the People" in the U.S. republican model. In other words, sovereignty is territorially divided but there is still only one national community, whose boundaries correspond to that of the federation as a whole. Even in sociologically multinational federations, where national minorities form a majority in specific provinces

[17] Robert Williams (1997) offers a captivating overview of the history and diversity of political associations between Aboriginal nations prior to and during the colonial period. See also Alfred (1995) and Iris Marion Young (2000) for a discussion of the Iroquois Great Law of Peace.

or states, the principle of multiple demos is rejected (India) or hotly contested (Canada) and rarely reflected in institutional terms.[18]

Modern federations also generally function on the basis of written constitutions dividing in relatively strict terms the respective jurisdictions of the central and federated units in an exhaustive manner, leaving no space outside the two state orders for the expression of some form of political authority.[19] In the Canadian context, federalism has become a form of "power grid" against which Aboriginal claims clash. As J. Anthony Long puts it, "as Indians became politically salient and sought to redefine their position within the Canadian federation, they have encountered the institutionalized interests of the existing constituent governments. These institutionalized interests have functioned to limit the range of responses available to accommodate their demands" (1991: 29).

Finally, federations are generally based on a symmetrical division of powers amongst constituent units. Each federated unit being equal in status, they should all have the same powers and jurisdictions, as well as a relatively equal weight in shared institutions.[20] While there are significant exceptions to this principle of symmetry, including in Canada,[21] jurisdictional or political asymmetries are often contested as a

[18] Belgium might be a rare example here, but even there the idea of one demos prevail. Canada is often considered a multinational federation as it was created specifically to accommodate the presence of a large French-speaking population in Quebec. The presence of Quebec may support claims that Canada's sociological multinationalism is reflected in its federal institutions. But to this "multinational" conception of Canada was always opposed a more territorial conception of as a "nation constituted of equal territorially-based subunits" (Cairns, 1977).

[19] According to an oft-repeated doctrine established by the Judicial Committee of the Privy Council, "whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act" (*A.G. Ont. v. A.G. Can*. [1912] A.C. 571).

[20] Although following the American model, the federal state is generally a composite of representation by population and by States, or provinces. The Canadian federation on the other hand, has relatively weak "intra-state" representation mechanisms for provinces, given the limited legitimacy of the unelected Senate (Watts, 1999: 88).

[21] The example of section 93(2) of the *Constitution Act, 1867*, on denominational education, of section 133 on language and civil law in Quebec and more importantly of section 94 on the uniformity of laws in

violation of the principle of equality amongst individual citizens of the federation (Kymlicka, 2001: 111).

Given the reality of Aboriginal peoples, as small, territorially dispersed groups, a federal response to Aboriginal self-determination requires a certain departure from this dominant conception of federalism. With a few exceptions, Aboriginal nations could not form provinces in the contemporary sense.[22] Moreover, given the diversity in Aboriginal realities, a federal arrangement would require a high degree of flexibility in the division of powers and conditions of membership in the shared polity, calling for a kind of asymmetry difficult to sustain in a modern federation (Cairns, 2005). Finally, the very foundation of relational self-determination, as discussed, lies in the recognition of *coexisting and overlapping* national communities, a principle that stands at odds with the mononational perspective of most contemporary federations.

2.2.2 The Federal Principle Beyond Federations

Perhaps the greatest misunderstanding in the current literature about federalism is a tendency to reduce it to one specific form, that of the modern federation as exemplified by Canada, the United States or India. This conception of federalism as a specific configuration of the nation-state is a relatively recent one in the history of the concept. In fact, the history of federalism starts much before the creation of the first modern federation in revolutionary America. Daniel Elazar (1987: 117) provides examples as far

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certain provinces, which specifically excludes Quebec, are often used. See Watts (1999) and Milne (2005) for a detailed discussion.

[22] One exception here is Nunavut, where Inuit form the majority. Some analysts have suggested the creation of non-territorial Aboriginal provinces, gathering a number of Aboriginal nations (Elkins, 1994). This proposal underestimates the diversity of Aboriginal nations, but also the importance of a territorial basis for Aboriginal traditions and identity as well as for economic purposes.

back as the covenanted association of Hebrew tribes, starting around 1300 A.D. and traces a long lineage of federal experiments in the western world, from the league of ancient Greek cities to the Helvetic confederation of 1291. As already mentioned, western societies do not have the monopoly on the idea, as it was well developed in other societies, notably pre-colonial America.[23]

Building on this diverse history, Daniel Elazar suggests that "the essence of federalism is not to be found in a particular set if institutions but in the institutionalization of particular relationships among the participants in political life" (1987: 12). In other words, federalism is an idea that translates into various systems of government. In Elazar's view:

> "At the very heart of the principle of federalism lies the idea that free peoples can freely enter into lasting yet limited political associations to achieve common ends and protect certain rights while preserving their respective integrities. (…) Federalism is a matrix of decision centers combining elements of self-rule and shared rule" (1987: 33).

This dialectical relationship of *autonomy* (self-rule) and *interdependence* (shared rule) between *equal* and mutually *consenting* self-determining partners engaged in a *lasting and mutually beneficial relationship* is the normative foundation of federalism, from which various systems of governance can be derived. There are, as Watts points out in reference to Elazar's work, a number of possible alternatives as to how the federal idea can be articulated, form classic federations to confederations, federacies and associated statehood.[24]

A number of authors have recently revisited ancient models of multilayered sovereignties, especially, but not solely, in light of recent developments in the European

[23] Although it is a debated topic, there are convincing accounts of the influence the Iroquois Confederacy had on the thought of the founders of the American federation. See for example Grinde and Johansen (1991) as discussed in Young (2000).
[24] For a complete discussion of various federal systems, see Watts (1999: 8-9).

Union (Bellamy and Castiglione 1997; Burgess, 2000; Hueglin, 2003; Karmis and Maclure, 2001; Keating, 2001; MacCormick, 1999; Requejo, 2005). Ancient models have also inspired alternative conceptions of federalism as a framework for Aboriginal self-determination (Macklem, 2001; Williams, 1997; Tully, 1995). Following the federal principle, a common stand of these authors is a departure from a definition of sovereignty in absolute terms, vested exclusively in the state. Building on ancient models of federal association, they also argue for a pluralist conception of federalism in which 1) sovereignty is shared and divided amongst orders of governments or federated partners; and 2) multiple self-determining political communities coexist, each representing its own source of legitimate political and legal authority (Karmis and Norman, 2005:8; Keating, 2001:*VII*). For Hugelin, who refers to the federal model emerging in the European context, "in the classic model of federalism, the constituent parts came to be firmly nested in the polity as a whole. In the new model, their relationship resembles more a pattern of interconnectedness, interdependencies and multilayered identities" (2000: 141).

2.3 Models of Aboriginal-Canadian Federalism

There are numerous discussions of federalism as a mechanism through which Aboriginal peoples could redefine their relationship with existing states and there is no space here to review them in detail.[25] Instead, I will insist on some characteristics of the most prominent models discussed in the Canadian context as they relate to the principle of relational self-determination and pluralist conceptions of federalism.

[25] For a discussion of the various configuration of Aboriginal *self-government* in relation to the Canadian federation, see Abele and Prince (2006).

2.3.1 The "Third Order" Model

In Canadian debates, the idea of Aboriginal governments forming a "third order of government" within the existing federation has been suggested more than once. The constitutional amendment package contained in the Charlottetown Accord, rejected in a pan-Canadian referendum in 1992, contained an explicit recognition of Aboriginal self-government as "one of the three orders of government in Canada."[26] The agreement remained vague however as to how exactly this recognition would affect the established dual structure of Canadian federalism (Turpel, 1993).

Perhaps the clearest articulation of the "third order" thesis comes from the final report of the Royal Commission on Aboriginal Peoples (RCAP, 1996, vol.2). The RCAP proposed the negotiation of new treaties between the federal government, the provinces and Aboriginal nations in order to create a constitutionally-protected third order of government that would reassert Aboriginal nations' status as "full and equal" partners in the federation:

> Aboriginal peoples constitute one of three orders of government in Canada. Each (order) exercises its authority within distinct but overlapping spheres. The Aboriginal sphere of jurisdiction includes all matters relating to the good government and welfare of Aboriginal peoples and their territories (RCAP, 1996 vol.2: 215).

Under this third order model, according to the RCAP report, Aboriginal peoples would have the right to exercise their inherent right to self-government "by self-starting initiatives, without the need for agreements with the federal and provincial governments" in a number of areas forming the "core" of Aboriginal jurisdiction. This core comprises areas of "vital concern to their life and welfare, culture and identity (…) that do not have

[26] *Consensus Report on the Constitution, August 28, 1992* (Charlottetown Accord). The interpretative statement was contained in the "Canada Clause" (Section 1). The Agreement also proposed the recognition of the "inherent" nature of the Aboriginal right to self-government (Section 41). For a discussion, see and Long and Chiste (1993) and Turpel (1993).

a major impact on adjacent jurisdiction and are not otherwise the object of transcendent federal or provincial concern" (ibid).

Some critiques suggest the RCAP proposal does not allow for real self-determination since it leads to a situation where the two existing orders of government determine what is and what is not negotiable for the "self-governing" third order that "joins in" (Ladner, 2001). Going back to the our discussion of different conceptions of self-determination discussed previously, the process leading to the creation of a third order is assumed to take place *within* the existing federation, without questioning the legitimacy of the existing order.

From an opposite viewpoint, the Report was also criticized for its emphasis on asserting the elements separating Aboriginal communities from the rest of the Canadian society while paying little attention to the elements constitutive of a common political community. For Alan Cairns, the RCAP model does not provide a clear picture of how a nation-based third order of government would "fit in" the existing institutions of Canadian federalism, nor how Aboriginal individuals would be integrated into the Canadian citizenship regime (2000: 141). For Cairns, who rejects pluralist conceptions of federalism as an association of overlapping communities, if there is no sense of shared citizenship, it may well affect the willingness of Canadians to transfer the significant resources needed to sustain highly dependent Aboriginal communities (2000: 45-46) [27]

[27] Aboriginal scholars and leaders tend to respond to preoccupations about redistribution that fiscal transfer to Aboriginal nations and communities are not solely based on a principle of redistributive justice and shared citizenship, but should be understood instead as part of the compensation the Crown should pay for land loss and past abuses. The objective here is not to solve all theoretical and practical problems raised by such models but more simply to illustrate the potential of federalism as a framework to rethink Aboriginal-state relations. For a comprehensive critique of RCAP's and other models based on the idea of coexisting nations, see Cairns (2000) and for a response to such critique, see Hanvelt and Papillon (2004) amongst others.

Even if one starts with a pluralist premise, one can safely assume that the negotiation process leading to the recognition of the various Aboriginal governments pertaining to this third order within the existing federation would result in deeply asymmetrical arrangements from one nation to the other, depending on their respective (and diverse) reality. It would also involve a constant renegotiation of such arrangements, as this reality is bound to change rapidly. As discussed, such flexibility may not be possible in a traditional federation such as Canada, where the division of powers is based on the principle of equality amongst partners (symmetry) and entrenched in a relatively rigid written constitution. A number of analysts thus suggest that Aboriginal aspirations may best be achieved through "political institutions which operate outside the federal system (…) rather than by controlling a standard federal subunit" (Kymlicka, 2001: 112).

2.3.2 The Treaty-Based "Federacy" Model

What is increasingly known as "treaty federalism" offers an alternative approach to a renewed Aboriginal-state relations. The idea of a treaty-based federal association is perhaps best articulated by Sakej Henderson (1994). In his view, the original treaties between imperial powers and the original inhabitants created more than simple diplomatic alliance or land cessions in exchange for protection, as they are currently interpreted by the courts. They constituted a *sui generis* federal relationship that was gradually undermined as the settlers' society came to dominate the land. For the existing regime to gain legitimacy, this relationship must be reinstated: "A coherent and authentic Canada can be created by understanding the necessity of uniting the original treaty-based

federalism and provincial federalism into a new federalism based on the right of free association and self-determination" (Henderson, 1994: 312).

James Tully (1995, 2000b) adopts a similar pluralist perspective when referring to what he calls "treaty constitutionalism." In his view, Canada should be defined as a two-tier confederation in order to reconcile the competing constitutional narratives of Aboriginal peoples and the majority population in Canada:

> There are two practical advantages to this arrangement. First most Canadians wish to affirm the Aboriginal presence *in* Canada and most Aboriginal peoples wish to affirm their status as equal, coexisting and self-governing peoples *and* their attachment to Canada. The only way these reasonable demands can be reconciled is to expand our postcolonial horizons and think of Canada in a broad, two confederations, sense. Second, Aboriginal peoples would no longer be erroneously assimilated to some sort of minority or unrealistic province-like status (…). Their relationship *with* rather than *within* the federal-provincial confederation, as well as their place in Canada would be seen as what it is: *sui generis*." (2000b: 53).

Henderson's treaty federalism and Tully's treaty constitutionalism have in common a re-definition of Canada as a political community based on two federalisms: the original federal relation between Aboriginal peoples and the Crown and the newer but now hegemonic federal-provincial order. As opposed to the third order of government model, they suggest a treaty-based association between a state and a number of independent polities sharing a common territory.

Both Henderson and Tully, and the RCAP to a certain extent, also place treaty making at the centre of a federal relation. They adopt a conception of treaties between the Crown and Aboriginal nations as ongoing alliances that is closer to the Burkean model of constitutionalism than to the contractual view of treaties dominant in positivist legal theory.[28] Their vision of treaties is vested in a tradition that sees the definition of political

[28] Canadian tribunals have generally interpreted existing Aboriginal treaties as contractual engagements, where the two parties have mutual but finite obligations. For example, see the discussion in *R v. Sioui*, [1990] 1 S.C.R. 1025, page 1044.

communities and their constitutive elements as an ongoing activity rather than as a single event, or founding moment, as is the case in the Lockean tradition of contractual constitutionalism (Chambers, 1998; Russell, 2004; Tully, 1995).

It is also largely inspired by traditional Aboriginal conceptions of treaties. Robert Williams (1997) reminds us that long before contact with Europeans, Aboriginal peoples had their own, well-established treaty practices. Treaties were then conceived as the prolongation of family and clans ties of solidarity. They created a compact, or an alliance between parties. Such treaties were expected to guide the relationship established between the parties in the future and were regularly renewed through symbolic exchanges or rituals. The *Kaswentha*, or two-row wampum, the founding principle of the ancient Haudenausonee Confederacy, is often used as an illustration for such a treaty-based federal relationship (Alfred, 1999; Borrrows, 1997; Tully, 1995).[29]

In this perspective, formal treaties are one part of a broader ensemble of events, symbols, accepted practices and less formal rules and understandings that constitute the ongoing activity of renewing the federal association. This is consistent with Elazar's covenanted model of federalism, but also with the conception of relational self-determination as an ongoing process rather than a specific structure of government discussed in the first part of this chapter.

[29] As I discuss in chapter four, the two-row wampum is a ceremonial belt that served to reaffirm the continuation of the relationship between partners in the Confederacy. It was also used in relations with European powers as symbols of mutual recognition and peaceful coexistence. It consisted of two purple rows on a white background, symbolising "two paths or two vessels traveling the same river" united in a relationship along the principles of peace, friendship and respect, symbolised by three rows of beads surrounding the purple rows. The two vessels, representing the confederacy partners, travel the river together, side by side, but "neither of them try to steer the other's vessel" (Robert A. Williams, as quoted in Borrows, 1997: 164). As Melissa Williams (2003) points out, while most authors focus on the autonomy, or "parallelism" of the two vessels, the river bed, symbolising the "shared faith" of the partners, and the three rows of beads symbolising the norms guiding their relationship, are as important in the allegory of the two-row wampum.

This theoretical model also clearly challenges the principle of sovereignty in the modern liberal sense as a constitutionally defined authority resting with a sole body politic, federal or not. In this pluralist alternative, sovereignty is not simply divided between two orders of government coexisting within a same polity, but more pointedly reconstructed in a deeply asymmetrical way, between multiple, co-existing and overlapping political communities.

As Will Kymlicka (2001: 111) suggests, such asymmetrical association is much closer to the notion of "federacy" as developed by Elazar (1987: 55) than to contemporary federations or even confederations. Federacies are small, territorially-based, political units associated with a larger state which are subject to the jurisdiction of this state in a certain number of mutually agreed upon domains without being completely subject to the sovereignty of the latter. Puerto Rico's association with the United States, or Greenland's with Denmark can be defined in such terms (Watts, 1999: 12).

The advantage of the federacy model is that it offers much flexibility as to the type of arrangements that can be worked out. A federacy can be more or less closely associated to the state, in terms of shared jurisdictional elements, common or separate citizenship, redistributive measures, taxation, representation in state democratic institutions, etc. The other advantage is that there can be as many models of federacies as there are associated nations. As opposed to classic federalism where the requirement of shared citizenship calls for some degree of symmetry between provinces or states, a collection of federacies associated to a state can be as asymmetrical as it is deemed necessary. Asymmetry is based on a functional, rather than principled criteria in such arrangements.

2.4 Common Grounds

Despite their diverse realities, Aboriginal peoples share a common desire to move away from the model of governance inherited from colonialism towards some form of association based on the recognition of their legitimacy as self-determining political communities. The federal principle of self-rule and shared rule, organized around the principles of equality, consent and continuity, offers such possibility. As the discussion of the representation strategies of the James Bay Cree and Kahnawá:ke Mohawks in upcoming chapters will show, Aboriginal peoples have different conceptions of their position in relation to the Canadian federation, more or less close to the RCAP or treaty federalism models. For example, the Inuit of Nunavik (in Northern Quebec) are currently negotiating what can be defined as a model of 'nested' federalism (Wilson, 2005), in which they will exercise significant political autonomy, but through a public regional government hierarchically located within the jurisdictional boundary of the province, something unacceptable for Kahnawá:ke, as it will become obvious in chapter 6. Other communities, especially in urban areas, are less attached to the territorial model largely assumed by both the RCAP and the federacy models discussed above, as Alan Cairns points out (2000: 144).

We must be careful not to limit the possibilities as to how the federal idea could or should be implemented. That being said, there are core elements to a federal relation that distinguishes it clearly from what I define in chapter four as the model of contained recognition that inspires current federal policies on Aboriginal self-government.

2.4.1 Elements of Self-Rule and Shared Rule

In its most basic sense, self-determination refers to self-rule, or the capacity to govern oneself without interference or external domination. As Michael Murphy suggests (2005: 15), a key element of relational self-determination is the capacity to set the *boundaries* of, and conditions for, political membership in the community. Designing freely, without pre-established external conditions, the *institutions of collective choice-making* (be it legislative, executive or judicial) as well as the mechanisms for choosing one's representative (electoral system, subgroup representation) are also central to the exercise of self-rule. In the case of Aboriginal peoples, control over boundaries of membership and governing structures are essential elements in order to break the colonial heritage of imposed status and imposed governing bodies such as band councils. Both the RCAP model of third order of government and treaty federalism imply the capacity for Aboriginal nations to (re)design their institutions without interference from the state.

Self-rule also refers to the capacity to make collective choices about the priorities of the community in terms of economic, social and cultural development. It thus supposes a policy-making capacity in areas considered relevant to the community. This however should not be interpreted to suggest systematic exclusivity over jurisdictions. There is, in fact, nothing in the federal principle itself that calls for a mutually exclusive division of powers (Watts, 1999: 40). What is essential is the respect by the federal partners of their respective authority and policy-making capacity. Equality in status and recognition of jurisdictional legitimacy and authority are thus essential for a functioning federal association.

If self-rule is the core of self-determination, shared rule is the articulation of its relational dimension. Shared rule in modern federations is associated with citizens' representation in the central, or federal government. Direct participation in federal institutions, however, is often seen as mechanism for cooptation or submission by national minorities, including Aboriginal peoples (Alfred, 1999: 112; Cairns, 2000: 17). This is reflected in the little attention given to this aspect of shared rule in most of the literature on federalism and Aboriginal self-determination. The RCAP suggested the establishment of aboriginal ridings at the federal level -a reform also proposed by the Royal Commission on Electoral Reform and Party Financing (1991)- as well as the creation of a third "aboriginal" chamber in the federal Parliament (RCAP, 1996, vol.2). Treaty federalism, as discussed, is more closely associated with confederal or federacy models, an alliance where there is no "central body" but rather a shared legal and political order defined in treaties, conventions or through practices.

Shared rule in a federal arrangement with self-determining Aboriginal nations is likely to be mostly taking place through mechanisms of "executive federalism." While they are a common feature of all federal systems, intergovernmental relations are more or less important depending on the nature of the federal arrangement (Hueglin and Fenna, 2006: 215). A federation with perfectly separated orders of government could in theory have only minimal intergovernmental relations.[30] In federations with much overlapping jurisdictions between the central state and the constituent units, intergovernmental relations tend to play a more central role in policy-making. "Multilevel governance" plays a dominant role in the European Union for example. It is through such multilevel

[30] It is interesting to note that intergovernmental relations in the Canadian federation, with its "watertight" division of powers and weak senate, have only recently developed into a significant space for policy coordination and, to a certain degree, policy-making. See Dupre (1985) and Simeon and Papillon (2005).

exercises that common policies, but also the institutional dynamics of the system are created and transformed (Hooghe and Marks, 2003).

Multilevel governance, although not discussed explicitly in such terms, is central to both the RCAP and the Treaty federalism models. Given the relatively small size of Aboriginal governments, a federal association, whatever its form, suggests complex but flexible arrangements, where Aboriginal and federal-provincial jurisdictions are overlapping and most of the policy-making is based on negotiations and joint processes. In the Canadian context, such multilevel governance exercises are likely to develop bilaterally, between Aboriginal and federal and provincial governments, as well as trilaterally in cases where jurisdictions and interests of all three parties are at stake.

In a federal relation, and this is a key element for our purpose, multilevel governance should be characterized first and foremost by *the recognition of the legitimacy and independent authority of Aboriginal governing bodies, as agents of distinct self-determining communities*. Negotiations over the coordination of policies should start from a position of *equality* between the participants. As the RCAP suggests, the relation should be defined on a government-to-government, or nation-to-nation, basis rather than hierarchically, between a government and an agent of governance. Mutual recognition and equality of status do not imply equality in resources, but they suggest, again, that no party can unilaterally impose its views, or position, on the other. As I discuss in chapter three, a key characteristic of multilevel governance is the development of relations of interdependency between the governing partners.

2.4.2 Building a Federal Relation Through Practices of Governance

> "A federal system may be built along either (or both) of two tracks. It may be constructed from the top down, through a process of discussion based upon general principles and constitutional negotiations. Or it may create itself from the bottom up, emerging from growing acceptance of practical mechanisms and structure for decision-making – that is through practice" (Dobell, 1988: 2).

How might a federal relation, based on the principles defined above, come about? The creation of modern federations is generally assumed to take place through the negotiation of some form of formal agreement between the parties. This agreement, a constitutional text, a convention or a treaty, generally establishes the respective authority of the parties, defines the institutional structure of shared rule and provides for dispute resolution mechanisms (Watts, 1999: 8). This contractual view is reflected in the classic literature on federalism, which focused largely on the formal legal structures of various federal systems and, until recently, paid only scant attention to political dynamics and relations between constituent units (Watts, 1999: 16). Even today, federalism is studied first and foremost as a formal institutional structure. For Jennifer Smith, federal systems are essentially a legal construct "always rooted in a constitution or a treaty" (2004: 14).

This formalistic approach also means that much attention is traditionally paid in studies of federalism to the "founding moment", when the parties come together and agree to the creation of the federated polity by signing or endorsing the "contract" that binds the members of the new nation together. Again, this is largely the result of the influence of the American tradition of federalism. As Tully (1995) shows, this focus on a Lockean moment plays a central role in modern constitutionalism, especially in the American imaginary, as it represents the starting point from which the American people became a sovereign body.

While formal constitutive "moments" are important, federalism, in its various articulations, is also a product of history, of social and political relations between communities "coming apart" or "coming together" (Simeon and Conway, 2001:341; Stepan, 1999: 257). There is in fact a long tradition of studies looking at federalism from as societal perspective (Erk, 2003; Hueglin, 2000; Livingston, 1956; Stevenson, 2004). For Livingston, "the essence of federalism lies not in the constitutional or institutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected" (1956:2). As Erk (2003) argues, a society-centered approach to federalism suggests we pay more attention to the history and social characteristics of the polity, but also to the *political process* through which the federal principle is articulated in everyday policy-making.

Federal relations, as Ron Dobell suggests, are also built "bottom up", through the progressive institutionalisation of interactions, informal conventions and practices of governance that embrace the federal idea. This is not to suggest that formal treaties or constitutional arrangements are not a fundamental part of a federal relation, but rather than they should not be conceived either as a starting point or an end point. Instead, they are part of a larger process of institutionalisation of interactions that emerge though time, as a result of power struggles, negotiations, representation strategies and mobilisations.

As Peter Russell (2004) argues in relation to Canada's "constitutional odyssey," our federal system is constantly renewed, redefined and adapted to the circumstances of the time through the more or less formal mechanisms of intergovernmental relations and decision-making. The *content* of political agreements negotiated between federal

partners, but also the *practices* of negotiations, how they are conducted, under what logic and circumstances, do shape the nature of the federation.

This societal perspective evokes to a certain extent the Burkean tradition of constitutionalism evoked earlier. As discussed, the RCAP, Henderson and Tully all adopt a conception of treaties that sees the definition of political communities and their constitutive elements as an ongoing activity rather than as a founding moment as is the case in the Lockean contractual tradition (Chambers, 1998; Russell, 2004; Tully, 1995). This process-oriented view is also consistent with the conception of relational self-determination as an ongoing process. Communities are self-determining when they engage in activities that shape, progressively or radically, the rules, norms and practices that govern themselves and their relations with other communities.

I discussed in the previous section the centrality of intergovernmental relations as a "site" of shared rule in federal arrangements. Following a conception of a federal relation as an ongoing activity and a process, and Dobell's insight that a federal relation can emerge "from below", through practices of governance, as well as in formal agreements, one can argue that dynamics of formally hierarchical governance relations can change over time and take a federal form even if the relation between the parties is not formally defined in federal terms. In other words, *multilevel governance exercises can constitute transformative spaces through which relations can, in practice, embrace the federal principle of self-rule and shared rule based on mutual recognition, equality and consent even if the relation is not constructed legally in federal terms*.

Aboriginal governments are already engaged in intergovernmental negotiations and policy-making with the federal and provincial governments. In fact, as I demonstrate

in coming chapters, Aboriginal governance is increasingly becoming multilevel as the federal and provincial governments devolve responsibilities for the implementation of programs and policies to their Aboriginal counterparts. To be sure, these are not processes of federalization in the formal sense. I nonetheless argue that Aboriginal-state relations in Canada are being transformed incrementally, as a result of 1) ideational and structural shifts affecting the conception of the role of the state in relation with Aboriginal peoples -what I define as the liberalization of Aboriginal governance, and 2) the strategic action of Aboriginal governing bodies engaged in multilevel governance exercises and building on the opportunities created by this liberalization process to assert their authority and legitimacy and redefine in practice, if not in form, the nature of their relationship with their federal and provincial counterparts. As a result, we are witnessing the progressive institutionalisation of quasi-federal governance regimes where Aboriginal, federal and provincial governments interact in a manner that is increasingly consistent with the federal principle.

2.5 Conclusion

In this chapter, I proposed an alternative to the existing model of Aboriginal-state relations in Canada based on the federal principle of self-rule and shared rule. Aboriginal self-determination, I argue, should be conceived in relational terms, as a process of self-definition of a community's boundaries and institutions of governance as well a process of shared governance with existing sate structures. Building on the work of Elazar, I suggested this relational conception of self-determination meshed particularly well with a

pluralist understanding of federalism as a freely and mutually agreed upon association between autonomous and distinct entities based on equality, consent and continuity.

A federal relation suggests a lasting association combining spheres of autonomy and of shared governance between autonomous Aboriginal governments and the existing government orders based on the principle of consent, recognition and equality. This theoretical construct offers a normative template against which current developments in Aboriginal, federal, provincial relations can be assessed.

In assessing such developments, it is important to pay attention not only to formal constitutional changes, treaties or self-government agreements, but also to everyday practices of governance. While we generally conceive of federalism as a system of government obeying to institutional rules and procedures established in a formal constitution or treaty, a societal perspective on federalism suggests we also need to pay attention to shifts in power relations and representation of the relationship in everyday practices of governance. Federalism, I argue, can also emerge "from below". In the next chapter, I propose a framework to explain how Aboriginal governing bodies are redefining the dynamics of multilevel governance exercises with their federal and provincial counterparts, leading to the emergence of quasi-federal governance regimes.

Chapter 3

Theorizing Aboriginal Governance

One of the central arguments of this thesis is that in order to understand the changing dynamics of Aboriginal-state relations, we must go beyond the formal-legal perspective that has dominated the field in recent decades in Canada and pay more attention to changes in relations of governance; that is at the level of the policy process itself. In this chapter, I propose an analytical framework to read and assess the transformations in Aboriginal-federal-provincial relations that I document empirically in coming chapters.

To do so, I first introduce the concept of *governance regime*, as relatively stable institutional arrangements structuring interactions between actors in policy processes. The concept of governance regime allows us to emphasize the dialectical nature between structure and agency responsible for both the reproduction and the transformation of governance dynamics in Aboriginal-state relations.

In the second part of the chapter, I propose a theoretical approach to understand the ongoing changes in Aboriginal governance and assess their impact on broader dynamics of Aboriginal-state relations. To do so, I first locate current transformations in Aboriginal governance into the broader processes of political and economic liberalization that have traversed industrialized societies in the second half of the twentieth century. The rise to prominence of the rights-based *recognition* discourse that characterizes Aboriginal politics in Canada is one element of this liberalization. But ongoing shifts in Aboriginal governance must also be located within the context of economic liberalization

and the rise to prominence of neoliberal understandings of the relation between state, market and society. Recognition politics and neoliberal ideas are closely associated with the ongoing spatial reconfiguration of governance, from a model essentially organized hierarchically around the national-territorial state to one where multiple actors located at multiple levels of governance interact in the policy process.

While these changes are significant for Aboriginal-state relations, practices of rights-based recognition and multilevel governance do not, in and of themselves, create a shift in power relations towards some form of federal governance. Given the deeply entrenched patterns of colonial governance, I argue in the third section of the chapter that the impact of such changes can only be properly understood over a long period of time, as an incremental process of governance regime *adaptation*. The outcomes of such incremental transformation, I suggest, will vary according to the capacity, both institutional and political, of Aboriginal governing authorities to take advantage of this changing context to assert their own space for self-determination.

3.1. Aboriginal Governance Regimes

Conceptualizing the dynamics of Aboriginal policy and politics is a more complex task than it may appear at first. The traditional dichotomies of political science, between state and society, governmental and non-governmental actors, and local and national governments, do not give justice to the reality of Aboriginal communities and the nature of their claims for a greater recognition of their status as self-determining *political communities*. This either/or division between state and society tends to dissolve the political status of Aboriginal peoples into one amongst many minority groups

struggling for recognition within the state-bounded polity rather than as a polity of their own, albeit incorporated within the geographical and political boundaries of a modern state. As discussed in the previous chapter, it is precisely this process of "internalization" that Aboriginal peoples are challenging though the language of self-determination.

Aboriginal governing institutions are no easier to categorize. Band councils established under the *Indian Act* are, in legal terms, an administrative branch of the Canadian state (Boldt, 1993: 134; Simard, 2003: 21). Governing structures created through self-government agreements certainly have a different status, as they are the product of negotiated agreements, some of them constitutionally protected in treaties. But their status in relation to the state still remains highly contested both in relations with federal and provincial authorities and within communities, where traditional modes of governance and sources of authority often have survived the process of state incorporation (Lajoie et al. 1998).[31] Beyond their contested origins, governing institutions in Aboriginal communities created by federal (or in some cases provincial and territorial) laws do have a life of their own and as I discuss in the coming chapters, are increasingly becoming vehicles for political mobilization in communities. They thus sit somewhat on the fence between the institutional apparatus of the state and an alternative, community-based, source of authority outside the traditional scope of the state.

In addition to such formally recognized governing institutions, which are the focus of this thesis, more traditional interest-group organizations, such as the Assembly of First Nations, also play a growing role as representatives of Aboriginal constituencies in policy processes, either through lobbying, consultation or more direct partnerships in policy development at the federal and provincial levels (Papillon, 2007: 302).

[31] This is notably the case in Kahanawake as I discuss in chapter 6.

Conceptualizing the growing interactions between the federal and provincial governments, the two "heads" of the rational-legal state (in Weberian terms) in Canada, and the more fuzzy and contested forms of Aboriginal authority thus requires us to broaden our horizons with regard to sources of authority, legitimacy and power.

3.1.1. Governance as a Conceptual Lens

This is why the notion of governance is useful when referring to the process and various actors involved in policy-making in the arena of Aboriginal policies and politics. The language of governance questions the conceptual boundaries between state, civil society and market that still dominate the social sciences. But perhaps more importantly for our purposes, it also challenges the traditional focus on formal state institutions and rules as the sole source of authority and legitimacy in politics. It allows for a more fine-grained analysis of power dynamics and complex relations between governments in a context where the very status, legitimacy and boundaries of the polity are the object of debates and struggles (Pierre and Peters, 2000:77).

While a governance perspective may expand our horizons, the latter is also a notoriously vague concept. As Pierre and Peters (2000: 14) suggest, not only has governance become an umbrella for a wide variety of phenomena, but a significant normative component is also attached to it. Talks of "good governance" are often implicitly or explicitly associated with a critique of the state, questioning its legitimacy and capacity to regulate economic and social relations in advanced industrialized societies.[32] In postructuralist analyses associated with the work of Michel Foucault by

[32] In the Canadian context, see for example Paquet (1999).

contrast, governance is often considered a specific 'technology of government', or strategy of control though which the state manages, organise and regulates society without recourse to traditional means of direct coercion (Rose, 2000: 323).

A number of authors also oppose governance to government, suggesting the former is a specific process of decision-making taking place *outside* the traditional confines of the former (Rhodes, 1997). For others, governance suggests a form of self-regulation, or autopoesis, within systems with no specific centre, or formal sources of authority (Kooiman, 1993; Paquet, 1999). Pierre and Peters (2000) are somewhat critical of this perspective, as it tends to assume a level playing field for all actors involved in a given policy process, which clearly is not the case in an environment where governmental actors control the institutional resources of the state. They suggest a conceptual precision: governance doesn't imply the absence of institutionalized state authority but rather that the role of governments, as with other actors, is a *variable* that needs to be problematized and contextualized (Ibid, 29). Analytically then, the term governance invites us to distinguish the narrower concept of government, as a set of institutional actors, from the actual process of decision-making, which can involve various actors, including governmental actors (Cornell *et al*, 2004: 5; Plumptre and Graham, 2000: 3).

In the context of Aboriginal-state relations, the concept of governance focuses our analysis on the fundamental question of "who does what and how" in the policy process, and on power relations between Aboriginal, federal and provincial actors. It thus offers a more process-oriented approach that helps us make sense of the shifts in power relations between competing sources of governing authority and legitimacy.

3.1.2. Defining Governance Regimes

Practices of governance are located in an institutional framework and a historical context, which leads to the establishment of relatively stable patterns of relations over time. Such stable patterns can be defined as *governance regimes*. The concept of regime, often associated with neo-institutional perspectives in political science, is useful as it underlines both formal and informal patterns that confer stability to governance arrangements but also the role actors themselves play in reproducing or transforming these arrangements (Streek and Thelen, 2005: 9).

In an early use of the term, David Easton (1965: 182) suggested that regimes corresponded to "values, norms and processes as well as formal and informal structures guiding the behavior and defining the rights and obligations of actors engaged in politics." For Easton, a regime refers to the broadly defined institutional context that shapes actors relations in a political system. The classic definition of international regimes also refers to "principles, norms, rules and decision-making procedures around which actors' expectations converge in a given issue-area" (Krasner, 1983: 2). In the Canadian context, Jane Jenson has adapted the concept to analysis of state restructuring by referring to "citizenship regimes" as the "institutional arrangements, rules, norms and understandings that guide concurrent policy decisions and problem definition by states and non-state political actors" (1997: 631).

Building on these insights, we can define Aboriginal governance regimes as *relatively stable institutional arrangements consisting of rules, norms and understandings that guide the actions and shape the relations between Aboriginal,*

federal and/or provincial actors involved in the policy process. A governance regime is first and foremost about the structural and ideational elements that shape the role and level of influence of various actors in a given process of decision-making.

Regimes are thus more than ad-hoc coalitions or networks of actors. They are institutionalized relations – organized around formal and informal rules and norms- that tend to be relatively stable and change-resistant. Building on this definition, we can operationalize the concept of governance regime around three fundamental dimensions that, taken together, produce specific patterns of interactions. First is the *formal allocation of authority* as defined in constitutional and legal terms. In the case of Aboriginal governance, federal and provincial legislation, treaties, self-government agreements, but also court decisions interpreting such texts, as well as various administrative agreements in specific policy sectors establish in formal terms "who is responsible for what."

Second is the *logic of governance,* as developed in day-to-day practices and processes. While the governance logic can mirror the formal allocation of authority, it can also evolve on its own as actors adapt to a changing context, seek to facilitate otherwise complex procedures or simply reflect, in their course of action, the distribution of resources, knowledge and expertise amongst those involved (Streek and Thelen, 2005: 16). To put it simply, the process of governance can be more or less flexible in terms of who does what and how. The policy process may be tightly controlled by a single set of actors, or by a government. But as analyses of multilevel governance suggest, it can also be more diffused -or flexible- in practice, leaving a certain degree of leverage as to who has influence in the process and at what point (Benz, 2002).

For example, the policy process can be more or less permeable to policy networks composed of interest groups, experts and governmental actors. In addition to such *horizontal diffusion*, a policy process can also be *vertically diffused*, or "loosely coupled" as the different stages of the process can take place at multiple levels of governments and be more or less tightly integrated into one another (Benz, 2002; Saint-Martin, 2004:6).

Aboriginal governing authorities may have more or less *de facto* influence on policy outputs and outcomes as a result of informal agreements, political compromise, or simply because they are taking advantage of greater flexibility in the "coupling" of the policy process. The logic of Aboriginal governance can also be influenced by the distribution of resources, the knowledge and expertise of various Aboriginal agents who seek to have voice in the process.

Third, dynamics between governing agents can also be influenced by norms and conventions established through practices over time. Governance regimes have an "organic" nature that can only be fully disclosed through analysis of patterns of interactions and discursive representation of the relationship by those involved. Central to this analytical perspective is thus an attention to the development of cognitive frames, or paradigms (Hall, 1993), guiding actors' behavior and conception of their relative position in the process of governance. As cognitive and post-structural approaches to politics and policy suggest, "ideas and norms are internalized by actors, (…) eventually shaping the very definition of their interests and preferences, and defining the range of what is possible and acceptable, or not, in achieving their goals" (Lecours, 2005: 10).

The now abundant literature on the role of ideas in policy processes suggests that the cognitive representation of a governance exercise -that is the norms and

understandings of what the process is about, who are legitimate participants and under what circumstances- can have a powerful structuring influence not only on the specific outcomes of the process but also on the influence various actors have in that process (Hall, 1993; Hay, 2002; Stone, 2002).

The *conception of the relationship,* and its *meaning* for actors involved are thus important constitutive elements of Aboriginal governance regimes. The representation of the relationship is important as it positions actors in relation to each other and establishes their *legitimacy* in the process. Beyond its symbolism, a "nation to nation" relationship implies a different form of political legitimacy for Aboriginal representatives, and thus a different position in relation to the policies, laws and regulations of the federal or provincial governments. Conversely, the rules of a relationship conceived in colonial terms, as was the case of Aboriginal governance for much of the past century, more easily justifies practices of direct state control.

It is also through such discursive representation of the relationship that the *source of authority* of the various actors involved is recognized. The position and role of Aboriginal governing bodies in a policy process will be significantly different whether they are considered "creatures of the state", as traditional band councils are, or governmental authorities representing distinct political communities. In the later case, the source of authority and legitimacy of Aboriginal representatives stems not from their formal status in law but from the democratic will of the community. As I discuss in chapters 5 and 6, the shift in the representation of the source of legitimacy of Cree and Mohawk governing authority transformed the very nature of their relationship with

government representatives even if formal rules of allocation of authority remained unchanged.

Table 3.1. Aboriginal Governance Regimes: Key Elements

Formal allocation of authority
-Constitution, laws, regulations, treaties
-Political and administrative agreements
Logic of governance
-Informal practices established through time
-Degree of flexibility in policy process
- Allocation of resources, knowledge, expertise
Paradigmatic representation of the relationship
-What the process is about
-The status of actors
-Sources of authority and legitimacy

3.2. The Actors of Aboriginal Governance

Governance regimes reflect more or less stable patterns of interaction between actors engaged in an ongoing relation. It is thus important to discuss briefly who are the key actors in Aboriginal governance. While Aboriginal governance is not strictly a state affair, it cannot be understood in isolation from modern governments either. The rules and logic of the governance process, even in the most fiercely autonomous Aboriginal communities, are deeply influenced by federal and provincial governments' actions. Adding to an already complex interplay *across* governments, Aboriginal governing institutions are also highly diverse in their shapes, functions and degree of legitimacy in the communities. For the purpose of the present exercise, I focus on nation-specific, or community specific, *governing institutions* that run programs and offer services to their

population. I thus set aside the nonetheless important institutions of Aboriginal representation at the provincial or federal levels as well as the numerous non-governmental Aboriginal organizations involved at various levels of the governance process, especially in service delivery. I discuss in greater detail the particular structure of the James Bay Crees and Kahnawake Mohawks governing bodies in coming chapters, but there are nonetheless common patterns to most Aboriginal governing structures worth noting briefly here.

Aboriginal governmental authorities are generally dependent on federal and provincial fiscal transfers. While their legitimacy in the communities is variable, few of them are uncontested. It is a constant challenge for such organizations to balance their role of service providers accountable to the federal and provincial governments with their status as political structures emanating from their communities.[33] The key actors in such organizations are the elected representatives who have the power to engage the organization in a policy direction and commit to specific expenditures.

As they are playing a growing role in the delivery of various programs, band councils and other Aboriginal governments have significantly increased their administrative capacity. As a result, unelected professional civil servants, and sometimes external consultants, now play an important role not only in the daily management of programs but also in the political negotiations and interactions with the federal and provincial governments. They provide the institutional memory and often the expertise required to engage in complex negotiations with federal and provincial governments. While this bureaucratization of Aboriginal governments is often criticized as an indirect process of "westernization"' of Aboriginal political culture (Boldt, 1993), as I suggest in

[33] This important dynamic will be discussed in greater detail in the empirical chapters.

the coming chapters, the development of informal networks among Aboriginal, federal or provincial civil servants is a key element in opening up opportunities for Aboriginal governments to exercise an influence in the policy process.

Looking at the federal government, Aboriginal policy has historically been dominated by a powerful bureaucracy in the Department of Indian Affairs, today known as Indian and Northern Affairs Canada (INAC). As I discuss in the next chapter, the role of the department has shifted with time from a highly paternalistic logic of "control" and service delivery in local Indian and Inuit communities to one of "funding agency promoting the development of autonomous communities" (Canada, DIAND, 1993a: 3). But the core structure and logic of operation of the department have largely remained unchanged, creating ongoing tensions and contradictions in daily operations and leaving officials with much uncertainty regarding what exactly their mandate is.[34] INAC also combines a highly integrated hierarchical structure of decision-making with a decentralized structure (to regional offices) for the management of services. As a result, most interactions between Aboriginal governments and the department are through regionally-based civil servants responsible for the implementation of policies, but with only limited leverage in engaging their governments in unforeseen scenarios breaking the relatively homogenous mold established at the centre (Patton, 1981; Weaver, 1991).[35]

The influence of the Minister of Indian Affairs will vary according to his/her position in Cabinet and relationship with the Prime Minister. Given the relatively strong bureaucracy of the department, ministerial interventions have traditionally been limited to crisis management (Patton, 1981; Weaver, 1991). Obviously, if the Prime Minister

[34] Interview notes, G02-03.
[35] This pattern has been observed in a number of government agencies. See Carroll and Siegel (1999).

considers Aboriginal issues a priority, influence on policy directions tends to move to the Prime Minister's Office (Abele et al., 1999). The Minister does however exercise significant discretionary power under the *Indian Act* and Aboriginal governments seeking to bypass the heavy bureaucratic structure of INAC often try to negotiate directly with the Minister or a representative. "Politicizing" negotiations is a key strategy often used by Aboriginal leaders to move beyond the rigid regulatory framework of the *Indian Act* and other federal policies.

While Aboriginal governance has historically been centralized in INAC, as I discuss in chapter four, other departments are playing an increasingly important role today. Most significantly, central agencies such as the Privy Council Office and Treasury Board are increasingly involved in negotiations over self-government and land claims as well as in the definition of conditions for the allocation of fiscal transfers (Shepherd, 2006). Central agencies, in addition to the Prime Minister's Office, tend to take ownership of any issues that involve a shift in the definition of ministerial responsibilities or allocation of authorities. Other departments, such as Health Canada or Social Development Canada are also now involved in the management of programs for Aboriginal peoples, thus considerably diversifying and increasing the number of federal representatives with which Aboriginal governments interact (Abele, 2004: 21).

Provincial governments' involvement in Aboriginal policy has been relatively limited until the mid-1980s. In the case of Quebec however, the government developed a political and administrative structure dedicated to relations with Aboriginal peoples in the early 1960s (Gourdeau, 1994). I discuss in greater detail the changing role of the *Secrétariat aux affaires autochtones* (SAA) later on, but for now, it is important to

mention its current status as both a transmission belt for Aboriginal peoples to voice their concerns regarding Quebec policy orientations as well as a coordinator of governmental action in Aboriginal communities.[36] The SAA is a relatively small structure attached to the *Secrétariat du Conseil Exécutif*, the equivalent of the Privy Council Office, in the Quebec government. While the SAA has a certain influence on government policy directions and play a central role in negotiating agreements with Aboriginal nations, it plays a limited role in the implementation of such agreements since it does not administer specific programs. It is first and foremost civil servants in line departments, such as natural Resources, Education or Public Security that implement agreements with Aboriginal governments. This administrative division between negotiation and implementation agencies goes a long way in explaining Quebec's relatively poor records in translating the spirit and intent of political and administrative agreements with Aboriginal nations into practice. The SAA has nonetheless developed a significant expertise about the complexities and subtleties of relations with the various Aboriginal nations in the province. Civil servants who have worked in the SAA for many years have developed strong ties and trust relationship with Aboriginal leaders, often playing a mediation role in negotiations with line departments less familiar with Aboriginal issues and with a more traditional understanding of state authority.[37]

As with the federal government, the role of elected officials in Quebec will vary according to the issues and the context and tend to be focused on crisis management. The portfolio of Aboriginal Affairs in Quebec is not a high profile position in Cabinet, and is generally a secondary responsibility for a senior Minister or an entry position for a less

[36] Québec, Secrétariat aux Affaires Autochtones, *Mission et orientations du Secrétariat,* http://www.saa.gouv.qc.ca/secretariat/mission_secretariat.htm#doc-admin. (accessed June 21, 2007).
[37] This point was made in a number of interviews with SAA officials as well as Aboriginal negotiators.

experienced minister. As in their relationship with the federal government, Aboriginal leaders will often seek to negotiate directly with ministers responsible for the relevant portfolio in line departments and bypass the bureaucracy. Despite much resistance in line departments, the practice of engaging in "political" relations is increasingly accepted as part of the specific dynamics of Aboriginal governance in Quebec. Moreover, in times of crisis or for major policy development, the locus of key decision-making will generally shift to the Premier's office and a small group of close advisors, such as the *Secrétaire Général*, the highest civil servant in the government structure.

Finally, a number of non-governmental actors within the broader society can have an influence in Aboriginal governance. This is especially true in policy areas where the logic of governance is more permeable to the influence of policy networks involving economic actors or local non-Aboriginal constituencies. The case of the forestry industry is notable in this respect as I discuss in chapter five.

3.3. Understanding Changes in Aboriginal Governance

Governance regimes do not change easily. As I noted in the previous section, they embody relatively well-entrenched norms and rules, not only in formal institutional settings such as constitutional and legal frameworks, but also in the cognitive frames, or paradigms, that guide actors and define the range of what is acceptable and feasible.

Indeed, the structures of state control that characterize Aboriginal governance are quite resistant, despite ongoing Aboriginal mobilization. It is, after all, a deeply unequal relationship entrenched in the very foundation of the Canadian federal system. More subtle but nonetheless powerful dynamics are also at play in reinforcing the regime

inherited from colonial governance. Despite near unanimity with respect to the inadequacies of the *Indian Act*, it has so far resisted any significant reforms and continues today to form the backbone of Aboriginal governance.[38] Not only federal officials, but also Aboriginal leaders familiar with the rules and processes of governance under this regime are often reluctant to abandon them for practices that may create new burdens or responsibilities, or challenge their position of influence. This self-reproducing, or 'path dependent' character of the *Indian Act* regime has been noted by a number of analysts (Alfred, 1999; Boldt, 1993; Ladner and Orsini, 2005; Ponting, 1986).

While I do not fundamentally disagree with these authors, one of the central arguments of this thesis is that things *are* in fact changing, albeit slowly, in dynamics of Aboriginal governance. In this section, I build on the literature on the spatial reconfiguration of governance under liberalizing pressures to propose an analytical framework to understand the emergence and potential impact of new forms of *multilevel* governance in Aboriginal-state relations.

I argue that to fully understand and explain changes in dynamics of Aboriginal governance, we must first take into account structural and ideational factors that have lead to shifts in the role of the state in the last thirty years, thus opening opportunities for a redefinition of governing relations. Second, if macro-contextual elements are important to explain change, the specific direction of such transformations is not given, and therefore it is also important to analyse how agents are seizing opportunities created by such shifts in context to induce changes in institutionalized patterns of governance.

[38] This is true not only for First Nations directly governed under its legislative framework but also for other Aboriginal peoples, whose relationship with the federal and provincial governments often indirectly reproduces the patterns established under the Indian Act governance regime.

3.3.1. From State Centered to Multilevel Governance

As numerous authors have demonstrated, the historical process leading to the dominance of the national-territorial state starts much before the twentieth century (Giddens, 1985; Tilly, 1975), but it is in the postwar era, with the expansion of the welfare state and the consolidation of Keynesian modes of economic regulation, that the national-territorial state reached its apogee (Brenner, 2004; Jessop, 1993; Jenson, 1989). This is not to say that local and regional communities and governments had no relevance, but rather that the "postwar compromise included a spatial project of attempting to integrate local communities and institutions into coherent and relatively homogenous national systems of regulation, redistribution and administration" (Graefe, 2006: 5). The proper "scale" of governance, in other words, was assumed to be the national-territorial state.

To be sure, there are many variants of the national/territorial Keynesian state and the specific institutional context and history of each polity must be taken into account in order to properly understand dynamics of governance. For example, in the Canadian context, the nature and dynamics of the federal system certainly shaped the nature of the postwar governance regime. But without making any overarching generalization one can safely suggest, following Pierre and Peters (2000: 79), that a general pattern of *state-centered,* relatively *hierarchical* governance, characterized by the predominance of *formal structures of authority and accountability*, dominated the political landscape of most industrialized countries in the postwar period. In this classic, state-centered, model:

- Governance is primarily conducted through a vertically integrated structure of decision-making associated with the Weberian state. Laws and regulations are the primary tools through which the state implements priorities and "steers" society.

- Policies in this conception of the state are also premised upon a homogenizing and integrationist logic. A national/territorial perspective thus permeates state practices through the enhancement of universal, uniform, pan-national programs.
- Decentralization is not necessarily rejected but rather conceived on a *symmetrical* basis and local or regional authorities, if they have some form of autonomy, remain hierarchically situated under the formal authority of the constitutional state.

As I discuss in greater detail in chapter four, Aboriginal governance in Canada progressively came to reflect this model. By the end of the 19th century, there was little doubt that the federal and provincial governments were the sole legitimate sources of political and legal authority on the territory, based on the constitutional division of powers and the principle of parliamentary sovereignty. The idea of an alternative, extra-constitutional, form of Aboriginal authority, as theorists of treaty-based federalism suggest today, was certainly not part of the conceptual landscape of the time. Aboriginal governance also came to be structured around a regime of bureaucratic command and control organized in relatively strict hierarchical terms and centralized in Ottawa. Band councils were creatures of the federal state, created for the purpose of administering governmental (mostly federal) policies at the local level. Aboriginal policies were also defined with a national (pan-Canadian) perspective, based on an integrationist logic, and expected to be implemented uniformly everywhere. The logic of governance thus varied little from one nation or community to another in this relatively homogenous governance regime.

This national-territorial model of governance first came to be challenged by communities, regions and groups seeking recognition of their difference and a greater role in the definition of their own policy priorities. Aboriginal claims for greater recognition and political autonomy are an integral part of a broader movement of small,

self-defined, communities that are challenging the established boundaries and unmediated sovereignty of modern states (Jenson, 1997; Keating, 2001). As Will Kymlika (2007: 57) argues, minority groups, and especially cultural minorities, have built on the legacy of the decolonization and civil rights movements to challenge the legitimacy of established boundaries of political communities and open up the relatively uniform model of citizenship associated with the postwar governance regime. Aboriginal peoples' claims to the right to self-determination participate in this movement for political and cultural recognition, which directly challenges the assumptions of the homogenous, national-territorial state.

Governments' response to these claims, at least in the Canadian context, has been to redefine and to a large degree "liberalize" the conditions of membership in, and participation in the governance of, the political community. As individual rights were entrenched in the Charter of Rights and Freedom in 1982, so too were the principles of liberal pluralism that characterize Canada: multiculturalism, bilingualism and Aboriginal rights. The very idea of a uniform citizenship model for all Canadians was abandoned, replaced by 'group-specific' and differentiated approaches to governance.[39] As I discuss in the next chapter, the contrast in the language and logic of Aboriginal governance between the 1969 White Paper and the post-1982 era is quite striking in this respect.

Beyond issues of recognition, the state-centered model of governance also came under stress in the last quarter of the 20th century as the fiscal crisis of the 1970's, coupled with rapid growth in social expenditures, led to an overall questioning of the sustainability of many core policies of the postwar era. In Canada, as elsewhere, large deficits, sharp inflationary pressures and high unemployment rates, increasingly

[39] Kymlicka (2007: 41) speaks of the three 'silos' of Canada's diversity policy.

constrained governmental capacities and eroded the postwar consensus on the role of the state in managing economic production. The state increasingly came to be seen as both too big to perform some functions, which were better left to the market and to local communities, and too small to regulate exchanges under the growing pressure for global trade liberalization. It also came to be seen by some as too rigid to adapt to what had become deeply pluralist and changing environments, where identities are more fluid, and where the circulation of knowledge, information and technology is key to economic development (Paquet, 1999; Stoker, 1998).

Neoliberal ideas, advocating for a rebalancing of the roles of state, the market and communities rapidly gained prominence, especially in Anglo-liberal democracies (Hall, 1993). Deregulation, trade liberalization, but also devolution of state responsibilities to lower tiers of governments, partly to offload spending responsibilities but also to increase the flexibility and adaptability of different locales to the market became the benchmark of the neo-liberal era, suggesting a rapid decline in centralized and national-territorial based governance (Jessop, 2002; Keating, 2001; Pierre and Peters, 2000)

These two challenges to the postwar understanding of the role of the state have different origins and obey different logics, but they have created similar pressures for greater "opening" of governance practices. While recognition claims challenge the homogenizing and culture-blind logic of postwar governance, neo-liberal economic ideas challenge the capacity of the state to regulate social and economic relations. A central tenet of the literature on new forms of governance is that these pressures resulted in a fundamental shift in both the *logic* and *spatial configuration* of governance from the national-territorial state *outwards* to market and community actors, *upwards* to

transnational bodies and *downwards* to local and regional bodies (Brenner, 2004:21; Pierre and Peters, 2000: 3; Rhodes, 1997:17; Stoker, 1998:34).

In this new approach to governance, the command and control style of state-centered governance is replaced by more indirect means of achieving collective goals (Pierre and Peters, 2000:131). While the state still controls the formal levers of legal-constitutional authority, actors previously excluded from the process are increasingly involved in policy decisions because of formal entitlements (rights) or informal, network-based, relations (Rhodes, 1997). Governance is explicitly constructed as a "partnership" involving governments, market-based but also community-based actors in the policy process.[40] As Denis Saint-Martin summarizes, "rather than acting alone, governments today increasingly engage with community-based and market actors in processes of co-regulation, consultation, joint policy development, partnerships in the delivery of services and other forms of governing that blur the traditional boundaries between state and society" (2004: 5).[41] In other words, governance is becoming more *horizontally diffused*.

New modes of governance are also characterized by a significant re-localization, or "rescaling", of many state functions above and below the national-territorial level (Brenner, 2004; Swyngedouw, 1997; Tickell and Peck, 2002). Transnational, but also local and regional governments are called upon to play increasing roles in the policy process, not simply as "agents" of central states but as distinct spaces of governance, with their own power dynamics and sources of legitimacy. The focus on national integration is

[40] This new approach to governance is of course closely related to New Public Management, which emphasizes horizontal decision-making, public-private partnerships and decentralization of service delivery as mechanisms to streamline government activities and maximize efficiency (Pal, 2004).
[41] This new approach to governance is closely related to the New Public Management philosophy, which emphasizes horizontal decision-making, public-private partnerships and decentralization of service delivery as mechanisms to streamline government activities and maximize efficiency (Rouillard et al. 2004).

also increasingly replaced by a logic of flexibility and adaptation of policies to local needs and reality, in order to facilitate the development of more autonomous communities, less reliant on the state for the social and economic development and capable of engaging in the market economy (Bradford, 2002). Another outcome of the current process of redefinition of the role of the state is thus a *vertical diffusion* of the policy process and the emergence of *multilevel* policy exercises, where local, regional and transnational actors increasingly interact with national, or in the Canadian case federal and provincial, governments at various stages of the process.

The concept of multilevel governance (MLG) was originally developed in the context of the European Union. Focussing on the policy process rather than formal structures of authority, it suggests the EU is becoming a "multilevel polity where the policy process is increasingly diffused across various levels of governance", mainly in order to cope with the challenge of coordinating policies between co-equal national governments in the context of economic integration (Bache and Flinders, 2004: 13).

The central argument of European MLG theorists is that such horizontal diffusion of governance creates a logic of *interdependency* between levels of governance, whether they are located hierarchically or not in a formal sense, as none fully controls all the levers, knowledge and resources involved in the policy process, from agenda-setting to implementation. For Hooghe and Marks (2001) for example, the multiplication of interactions across levels of governments in order to coordinate policy implementation creates a form of network-based governance where formal hierarchies are displaced by dynamics of mutual interdependencies. Similar patterns of interdependencies across governing spaces competing for authority and legitimacy have been observed in

federations (Painter, 2001) as well as in what are formally relatively hierarchical regimes such as central-municipal governments relations in Britain (Rhodes , 1997).

As I suggest in the coming chapters, Aboriginal governance in Canada has largely become a multilevel process in the 1980s and 1990s. To be sure, the colonial-hierarchical regime of governance characterized by uniform top-bottom structures and authoritative decision-making has not completely been displaced, but it is progressively being replaced by multilevel governance dynamics, where 1) Aboriginal government and organizations become "partners' in what is becoming a more diffused policy process and 2) intergovernmental policy negotiations become a key political space though which Aboriginal governments assert their claims for authority and legitimacy.

3.3.2. New Modes of Governance as Institutional Adaptation Mechanisms

The shifts from state-centered and hierarchical to new modes of partnership based on multilevel governance is central to understand the ongoing transformations of Aboriginal-state relations in Canada. That being said, as numerous critiques of macro-historical perspectives on globalization and other large-scale processes point out, ideational and structural shifts can explain the general direction of change towards some form of multilevel governance, but they cannot account for the outcomes and impacts of such changes in specific historical situations such as Aboriginal-state relations in Canada.

A key contribution of the political geography literature on state restructuring and rescaling has in fact been to underline the *place specific* and *context specific* impact of the global spread of neoliberal ideas and new approaches to governance (Peck, 2002). As Wendy Larner puts it, "although neoliberalism may have a clear intellectual genesis, it

arrives in different places in different ways, articulates with other political projects, takes multiple material forms, and give rise to unexpected outcomes" (2003: 511).

Analysts working from an historical institutional perspective have also reminded us of the context specific nature of change and of the importance of institutionalized patterns in explaining the specific trajectory of changes in various countries undergoing similar processes of market liberalization (Pierson and Skocpol, 2002; Thelen, 2003). To understand the particular trajectory of governance regime reconfiguration in Aboriginal-state relations in Canada, we need to take into account the specific historical legacies, institutional context, and political dynamics of such relations.

The self-reproducing character of institutionalized relationships has been theorized in the neo-institutional literature through the concept of path dependency. In its broadest sense, path dependency suggests that previous choices or policy directions create institutionalized patterns, which tend to be change resistant and will limit the range of possibilities for future choices in context of change (Mahoney, 2000; Thelen, 1999). Path dependency does not necessarily suggest institutions are immovable, but rather that they are change resistant, and thus affect the way broader macro-historical dynamics such as economic liberalization play out in a given context by structuring how actors involved in these shifts are interacting (Pierson, 2000: 263).

Streek and Thelen (2005) have proposed an analytical framework to make sense of the impact of liberal restructuring in context, such as Aboriginal governance, in which institutional dynamics are deeply entrenched. They suggest that deeply entrenched governance practices are more likely to change progressively, through what they define as a process of "institutional adaptation" rather than though a radical rupture in path

dependent dynamics. A number of authors have pointed recently to the importance of such process of adaptation, which, as Skogstad (2005: 529) suggests, can be conceived as non-radical, yet potentially transformative changes that fall somewhat in between incremental adjustments and abrupt and radical processes of discontinuity.[42]

Such process of institutional adaptation, Streek and Thelen suggest, can take various forms. I retain two for the purpose of this analysis.[43] First, institutional adaptation can occur through the *layering* of informal rules and norms that are in practice better adapted to the changing context without altering the structure of the existing institution or regime of governance. In other words, change in governance regime can occur through the addition of new informal norms that are supplanting or replacing, in practice, those established in formal structures of allocation of authority. One can conceive of the progressive adaptation of the Canadian federation from a highly centralized structure to one of the most decentralized federations largely through constitutional conventions and Court decisions as a process of layering. The diffusion of the policy process associated with multilevel governance is another example of such layering of new rules over formal structures of authority without directly altering them.

Another mode of institutional adaptation is what Streek and Thelen define as *conversion*, or the progressive transformation of the role and purpose of an institution without formal change in its formal rules of functioning. An institution can thus remain largely unchanged in its structure and legal foundations but have a fairly altered function

[42] The alternative model to account for change is based on the punctuated equilibrium model associated with evolutionary theory. It suggests institutional dynamics are defined by relatively long period of stasis, characterized by incremental adjustments, followed by short period of high instability leading to radical shifts provoked by a rupture in the equilibrium of the forces at play at critical moments, or "junctures" (Baumgartner and Jones, 1993; Mahoney, 2000).

[43] Streek and Thelen propose five different mechanisms of institutional adaptation: conversion, layering, drift, displacement and exhaustion (2005: 20-26). For the purpose of the current analysis, I retain only the first two as they are the most relevant to the transformation of Aboriginal governance regimes.

that does not correspond to its initial role. As I discuss in the next chapter, Aboriginal governance in Canada has largely evolved in the past century throught such conversion processes. For example, the *Indian Act* regime was in practice adapted to changing contexts and understandings of the place of Aboriginal peoples in relation to the Canadian polity without fundamentally altering its foundations. The slow, yet significant, change in the role and source of legitimacy of band councils, from administrative arms of the federal government to political agents of First Nations communities is another example of institutional conversion. While their role remains tightly defined in the *Indian Act*, in practice, they have taken a much greater role in the redefinition of Aboriginal governance.

3.3.3 Institutional Adaptation as a Political Strategy

The concept of institutional adaptation is useful to make sense of significant, yet non-radical shifts in institutionalized practices in the face of external pressures. But like MLG theorists, Streek and Thelen leave us with the impression that change is a somewhat mechanical process, occurring naturally without the intervention of any agency. Bringing back power relations in the equation, it is instead possible to conceive of such processes of institutional adaptation as the product of strategic choice by dominant actors in unequal relations of governance. From a strategic perspective, in facing a changing environment, dominant governance actors have alternatives beyond the status quo and radical transformations, which often is not possible and involves significant risks. Consistent with a path dependent logic, they can in fact be expected to act strategically to minimize the impact of changes and try to adapt the regime of

governance to this new context without altering their dominant position. In other words, processes of institutional layering and conversion are driven by strategic agents.

This perspective is shared by Pierre and Peters (2000: 3), who see the shift from classic state-centered approach to new modes of de-centered and multilevel governance as "state strategies to reassert control in face of a changing environment." The emergence of new modes of governance, they argue, "should be conceived as a gradual, incremental development in which governments transform their role in light of a new context, but ultimately maintain their control on the policy process" (2000: 74). From a different analytical viewpoint, Neil Brenner (2004: 18) argues the displacement of spaces of governance above and below the national-territorial state is not a mechanical process but rather a "concerted effort by political and economic elites to *layer* new processes of governance to the existing structure of state authority (…) in order to *adjust* the latter to global economic competition, in which both transnational regulatory regimes and local capabilities and flexibility play an essential role" (2004: 19, my emphasis).

The conceptualization of emerging modes of de-centered and multilevel governance as a process of institutional adaptation through which constitutional governments reassert their control provides an alternative to the early literature on new forms of governance suggesting a weakening, or even a withering away of the state (Castells, 1996; Rhodes, 1994). It also resonates with poststructural perspectives influenced by the work of Foucault in which the rise of new forms of governance in advanced liberal societies is seen as part of the various "technologies of government" used to modulate conduct and ensure compliance with societal norms "at distance",

without direct recourse to traditional forms of authority associated with sate coercion and laws (Daly, 2003: 117; Rose, 2000: 324).

In the next chapter, I argue that the emergence of multilevel governance regimes in the context of Aboriginal, federal, provincial relations in Canada can be similarly understood as a process of "strategic adaptation" of existing institutions of governance to the combined pressures of neoliberal restructuring and Aboriginal claims for greater recognition of their political agency. The reconfiguration of Aboriginal governance in the past thirty years is, I suggest, a very *contained* and *controlled* process of institutional adaptation, as federal and provincial governments seek to avoid radical shifts that would see their power and authority further challenged.

3.3.4. Institutional Adaptation and Political Opportunities

While adaptation processes are not radical shifts and by and large reproduce the power structure of existing regimes, they nonetheless create what Streek and Thelen define as an "institutional gap" between the formal structure of a regime and the actual practices on the ground and its representation by actors involved (2005: 19). This mismatch between formal rules and the logic of governance can become opportunities for actors with limited access to formal structures of authority. For Streek and Thelen, "these gaps become key sites of political contestation over the form, the functions and the salience of specific institutions" (2005: 20). Looking at central-local government relations in dynamics of diffused multilevel governance, Pierre and Peters suggest much the same:

> The displacement of political capacity between institutional levels is not necessarily a zero-sum game; institutions at one level can see their influence increase without institutions at other levels necessarily seeing their control decreasing. (…) By granting

> more powers and autonomy to subnational governments, the state loses some of its control but not as much as subnational governments increase theirs. Institutional empowerment is a dynamic, sometimes even a cumulative process (2000: 78).

In other words, shifts in governance dynamics can simultaneously reinforce state authority and legitimacy *and* open opportunities for a significant reconfiguration of the role of Aboriginal actors. By recognizing the legitimacy of, and transferring more responsibilities to Aboriginal governments, the state may simultaneously reinforce its legitimacy in those communities, without losing much control in the overall framework of governance. But at the same time, Aboriginal authorities, even with limited control over resources, can occupy more space in governance processes. Through negotiations, trade-offs and strategic representation in multilevel governance exercises, Aboriginal governing agents can gain certain leverage in how policy objectives will be translated into concrete programs and as a result increase their relevance and legitimacy within communities. While formal authority is often conceived in absolute terms, a more informal definition of influence allows us to conceive current shifts in cumulative, rather than exclusive terms.

Building parallels with social movement theories, one can argue the capacity of Aboriginal governments to engage in transformative politics in the context of multilevel governance will depend on their capacity to mobilize their existing and newly gained institutional resources to establish a power relation with their federal and provincial counterparts in intergovernmental processes. Institutional resources are highly variable from one Aboriginal government to another. Those with treaties and self-government agreements may benefit from more fiscal leverage and greater administrative capacities that can be mobilized in intergovernmental dynamics. As Cornell and Kalt (1992, 1998) demonstrate, American Indian tribes with effective governing institutions that resonate

with the culture and history of the community are far more likely to succeed in establishing a climate conducive to economic development and engage in political self-determination process. Human resources and fiscal capacities are also key in the development of knowledge and expertise in a policy area. Aboriginal governments can use this expertise to assert their claim for greater leverage in the policy process, or simply to engage in unilateral policy development (Cornell and Kalt, 1998).

A key aspect of Aboriginal capacity to engage in transformative multilevel exercises however is their representation strategies. As discussed previously, ideas, norms and values are often considered institutions themselves (March and Olsen, 1989), or mechanisms though which institutional configurations of relations between actors are reproduced. But ideas can also become strategic resources used by actors challenging the status quo. For Deborah Stone (2002: 34) for example, ideas constitute the "raw matter of politics" as actors define their interests and position in relation to others through discourse and the use of cognitive "frames" that shape political debate by identifying problems as well as their desirable and feasible solutions (see also Skogstad, 2005: 534). In this perspective, discourse becomes a mechanism though which the changing context of governance is appropriated by actors, and given meaning for strategic purpose (Hay and Wincott, 1998: 955). As I suggest in the coming chapters, the language of recognition and human rights was and is still central to Aboriginal peoples' challenges of assumptions of state sovereignty and to establish their own legitimacy as self-determining political actors.

Conclusion: Multilevel Governance as Space of Self-determination?

This chapter proposed a theoretical framework to understand shifts in Aboriginal, federal and provincial relations. I suggested the notion of governance regime was a useful way to conceptualize the institutionalized nature of such relationship. Governance regimes, I suggested, are the norms, rules, established practices and understandings that structure the interaction between various actors interacting in processes of decision-making and policy making. Regimes are thus not solely defined by laws and other formal mechanisms of allocation of authority, but also in practices established through time and discursive representation of what the process is about.

The transformation of Aboriginal governance regimes, I argued, must be located in the broader processes of political and economic liberalization that have traversed advanced industrialized societies in the second half of the twentieth century. The rise to prominence of the rights-based *recognition* discourse that characterizes Aboriginal politics in Canada is one element of this transformation. But ongoing shifts in Aboriginal governance must also be located within the context of economic liberalization and the rise to prominence of neoliberal understandings of the relation between state, market and society. A key impact of this redefinition of the role of the sate is the spatial reconfiguration of governance, from a model essentially organized hierarchically around the national-territorial state to a more diffused model where multiple actors located at multiple levels of governance interact in the policy process.

In the last section, I discussed the potential impact of the emergence of de-centered and multilevel modes of governance. I argued the development of new modes of governance should not automatically be seen as a sign of state decline. Building on a historical institutional conceptual framework, I suggested the emergence of new modes of

governance can be seen as the result of path dependent strategic adaptation by governments facing a new context. Institutional adaptations are not zero-sum processes however, and new modes of governance can also open new political spaces for actors to redefine their relationship with state authorities. In other words, the specific configuration and dynamics of multilevel governance regimes are not given and depend on the action, institutional resources and representation strategies of actors, like Aboriginal governments, seeking to redefine their relationship with the state.

I suggest that through negotiations and strategic representation in multilevel governance exercises in which actors are increasingly interdependent, Aboriginal governing agents can 1) gain certain leverage in the policy process and as a result 2) increase their relevance and legitimacy within communities and 3) create what de facto are new spaces for self-determination "from below", in everyday practices of governance. I explore this hypothesis empirically in the remainder of this thesis.

The coming chapters document changes in Aboriginal policies in Canada over time, with particular attention to the development of multilevel dynamics in recent decades. It demonstrates the extent to which recent policies at the federal and provincial levels are influenced by new approaches to governance. The following chapters discuss the changing nature of the governance regime of the James Bay Crees and the Kahanwá:ke Mohawks and explore how governing authorities in both cases have taken advantage of the development of multilevel dynamics to reconfigure their relationship with the Canadian federation.

Chapter 4

The Reconfiguration of Aboriginal Politics and Policies in Canada

If one compares recent government statements on Aboriginal policy with the ideology behind the White Paper of 1969, which proposed to do away with Indian status as a solution to socio-economic underdevelopment in First Nations communities, there is little doubt that the landscape of Aboriginal-state relations has changed significantly in the last thirty years. The Royal Commission on Aboriginal Peoples (1996, vol.1) defined the recent period as a time of renewal for relations between Aboriginal peoples and the Canadian government and society. What is the significance of recent discursive, policy and institutional shifts? Have they altered the power dynamics of the long established regime of colonial governance that has characterized Aboriginal-state relations in the past two hundred years?

This chapter first provides an historical overview of the evolution of Aboriginal governance in Canada leading to the contemporary period, focusing on the structural and institutional context shaping the relationship, and its representation and core logic in practices of governance. Far from a static reality, Aboriginal governance has gone through successive periods dominated by different conceptions of the relationship between Aboriginal peoples and the Canadian state, as the latter consolidated its authority on the land. From early colonial relations to practices of assimilation and more recent post-war attempts at incorporation, these changes in representation and policy direction are all significant, but in many ways they have not lead to radical shifts in the

institutional framework of Aboriginal governance. Building on the analytical framework developed in the previous chapter, I suggest the outcome of these successive transformations can best be understood as processes of institutional adaptation, in which existing structures of governance are reconfigured and *layered* with a new logic without being replaced. As a result, despite changes in the objectives of Aboriginal governance though time, the colonial legacy still plays an important role in contemporary relations.

In the second part of the chapter, I focus on the relatively rapid transformations that have occurred in the past thirty years. I suggest there are two distinct, yet interrelated, dimensions to these ongoing changes. The first, and most discussed, is the transformation in the representation of the relationship between Aboriginal peoples and the Canadian state from a perspective based on a logic of assimilation and incorporation to one based on legal and political *recognition*. This highly visible shift has led, among other things, to the consolidation of a rights-based relationship, now entrenched in the constitution, and to the re-emergence of treaties and self-government agreements through which Aboriginal peoples have regained some degree of political autonomy. But as with previous shifts in models of governance, I argue this reconfigured framework is still very much *contained* by, and layered over, the institutional structure of state authority that has limited Aboriginal autonomy in the past.

As discussed in the previous chapter, the current shifts in Aboriginal governance must also be located within a second broad historical process. The redefinition of the role of the state associated with neoliberal ideas is an important element of shifting Aboriginal policies both at the federal and provincial levels. A significant devolution of program administration towards Aboriginal governments and the development of new approaches

to funding and accounting in response to this new governance model are the main characteristics of this shift. This new *de-centered* model of governance has, in some ways, reinforced state authority through fiscal controls and accounting requirements. But combined with the dynamics of recognition, it has also resulted in a unique form of multilevel governance that has opened new spaces for Aboriginal political agency, especially though the increasingly important intergovernmental negotiations necessary to coordinate policy development and implementation.

Aboriginal governance has also seen a growing involvement of provinces in the past decades. While provinces have historically been reluctant to develop specific policies related to Aboriginal peoples, the recognition of Aboriginal rights and land titles has considerably changed this once distant relationship, and so has the shift to de-centered modes of governance. In the fourth section of this chapter, I discuss the specific context of Aboriginal governance in Quebec, where my case studies are located. The encounter of Quebec and Aboriginal nationalisms has created a specific dynamic over recognition and approaches to governance, creating a complex trilateral relation and providing Aboriginal peoples with significant political leverage to redefine their relationship with the provincial government.

4.1 Historical Legacies[44]

Far from obeying a single logic through time, Aboriginal-state relations have taken different forms according to the particular contexts, political economies and dominant ideologies of the day. Change, however, should not be read as a succession of

[44] This section draws from the detailed historical account provided by the Royal Commission on Aboriginal Peoples (1996, vol.1) as well as Dickason (2002).

discreet "moments" where previous institutions or modes of governance are simply replaced by new ones. Rather, new governance regimes, constructed around different cognitive frameworks, are layered over existing ones, keeping some elements while moving away from others, and providing more or less space for various actors involved. This is why it is essential to look at the past to understand contemporary dynamics. The colonial legacy still looms large in contemporary Aboriginal governance.

4.1.1 Aboriginal Governance From Early Coexistence to Colonial Domination

The early period of encounter between Europeans and the first inhabitants of what is now North America was characterized by relations based mostly on trade and military alliances (RCAP, 1996, v.1: 99; Dickason, 2002: ch.1). To be sure, conflicts were common place and it is only because of a relative balance in power that Aboriginal and Europeans were forced to enter into such diplomatic relations.[45] But historical records clearly show that colonial powers initially saw Aboriginal societies as distinct polities with their own internal governing logic, norms and rules (RCAP, vol.1: 130; Williams, 1997). This first period can be defined as one of *coexistence*, where a plurality of legal and political orders, rather than a single hegemonic state order, cohabitated in what is now North America (Lajoie et al., 1996:13).

This period of alliances came to an end with the conquest of New France by the British in 1760 and the stabilization of the southern border with the United States after the 1812 war. By then, military alliances were no longer relevant and the key issue for British settlers became territorial expansion. Between 1815 and the 1860's, Aboriginal

[45] For a detailed and fascinating account of early diplomatic relations, see Robert Williams (1997).

peoples in what is today Ontario and the Prairies were pushed to transfer their land to the Crown through simple real estate transactions at first, then through treaties in which they exchanged their title for guarantees of fiduciary protection and the allocation of "reserved" territories that would be protected from the encroachment of settlers.[46] Despite the treaties, colonial authorities constantly put pressure on protected "Indian lands", reducing their extent and progressively imposing their laws and policies on what were previously distinct and independent societies.

As discussed in chapter two, the creation of the Canadian federation in 1867 confirmed the political marginalization of Aboriginal peoples as "Indians and Lands reserved for Indians" became an object of federal jurisdiction.[47] Gradual civilization is the conceptual core of the governance regime established under the *Indian Act*, which was consolidated as a federal statute in 1876.[48] The annual report of the Department of the Interior for the year 1876 illustrates the philosophy of the Act:

> Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. ...the true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.[49]

The objective was thus to prepare Aboriginal peoples for "civilization" and integration into the broader society. In the meantime, they were considered children under the benevolent protection of the federal government. Status Indians were confined

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[46] Many Aboriginal nations signed such treaties under duress or based on oral promises made by Crown representatives that were not reproduced in the texts (Canada, RCAP, vol.1: 173).
[47] Section 91(24), *Constitution Act, 1867*. Following a 1939 decision of the Supreme Court, Inuit are included in the definition of "Indian" under section 94(24). See *Reference re "Indians"*, [1939] S.C.R. 104.
[48] The Act only applies to Status Indians and reserved lands. Its institutions were never formally established in Metis and Inuit communities.
[49] Department of the Interior, *Annual Report for the year ended 30th June, 1876*. As quoted in RCAP (1996, vol.1: 345).

to what were by then limited reserves, where they were exempted from taxes, but also prohibited from alienating their lands or contracting loans and mortgages. This "protection" from market-based economic relations essentially made them wards of the state, dependent on the government for their survival (Moscovitch and Webster, 1995).

The federal policy also aimed at accelerating the dismantlement of Aboriginal traditional systems of governance. Following the *Gradual Enfranchisement Act* of 1869, nations and tribes were separated into specific bands and traditional structures of governance were replaced by an agent from Indian Affairs and a local council with largely symbolic authority. Despite fierce resistance in many communities, the band council system progressively became the dominant governance structure on reserves.[50]

The federal government also sought to speed up the assimilation process through the prohibition of traditional practices, forcing the adoption of western norms, values and ways of life.[51] Aboriginal governance in the first part of the 20th century is thus characterized by a highly hierarchical and centralized structure of authority in which Aboriginal peoples lost any remaining political agency. To be sure, these measures were costly. Not only were Aboriginal peoples economically dependent on the federal state, but a significant bureaucratic apparatus was necessary to manage this system of direct control (Neu and Therrien, 2003: 97). But these costs were seen as necessary, until, to use the infamous words of Duncan Campbell Scott, superintendent-general of Indian Affairs in the 1920's, "there is not a single Indian that has not absorbed into the body politic."[52]

[50] There is still resistance in Aboriginal communities to this system today. As I discuss in chapter 6, this is notably the case in the Mohawk community of Kahnawá:ke.
[51] The establishment of residential schools, where Aboriginal children were educated according to the values of western societies was an integral part of this "civilizing" project (Cairns, 2000: 46; Milloy, 1999).
[52] As quoted in Gibbins and Ponting (1986: 26).

4.1.2 Postwar Incorporation

By the early 1940's, it became apparent that the civilizing project had failed and the highly centralized bureaucratic governance model of the *Indian Act* was not producing the expected results. The new liberal and egalitarian spirit of the post-war also made federal Indian policies increasingly hard to justify (Armitage, 1995; Weaver, 1981: 18). As a result, Aboriginal policy in the postwar period came to be dominated by a constant thrust to do away with segregated institutions in order to facilitate the incorporation of Aboriginal individuals into the Canadian citizenry.

This course was set in 1948, as a joint committee of the Senate and the House of Commons proposed "the removal of all legislative obstacles to the full participation of Indians into the Canadian economy" (Canada, 1948: 1655). In that spirit, a new *Indian Act* was adopted in 1951. While the basic institutions of colonial governance were left untouched, the new Act nonetheless marked a significant turn in approach to governance. It focused on political and institutional integration, rather than engineering cultural changes, as the primary mean of assimilation (Tobias, 1991). To that effect, the federal government opened the door to the exercise of municipal-type authority by band councils and to a more explicit application of provincial jurisdiction on reserves.[53] Status Indians also gained the right to vote in federal elections in 1960.

With the growth of the welfare state, the postwar period also saw a rapid expansion of the service functions of the Indian Affairs Bureau, which became the Department of Indian and Northern Affairs (DIAND) in 1966. Driven by a logic of

[53] The new section 88 of the Act opened the door for provincial laws of general application to apply to Indians, subject to certain limitations. See Morse (1989: 70). For a more detailed discussion of the 1951 Indian Act, see Tobias (1991) and RCAP (1996, vol.1, ch.9).

incorporation, but constrained by its constitutional obligations, the federal government developed a parallel welfare system for Status Indians and Inuit (Moscovitch and Webster, 1995). DIAND was called upon to provide services equivalent, at least in principle, to those offered by provinces to all Canadians, but to a population largely dependent on state support and scattered in often remote communities. As a result, Indian Affairs' budget (per capita) grew by 356% between 1961 and 1970 (Paton, 1982: 8).

Not surprisingly, pressures to reform this system of parallel services increased with time. A number of policy statements produced during this period encouraged greater provincial involvement in service delivery to Aboriginal communities, both as a cost-containment measure and in order to integrate Aboriginal peoples to the mainstream welfare system (Long, Boldt & Little Bear, 1988: 4). The *Indian Act* structure nonetheless proved highly resistant as civil servants socialized in the pre-war logic maintained close control over DIAND's activities (Weaver, 1981). Aboriginal band council leaders, attuned to the workings of the federal administration were also reluctant to lose their privileged position as intermediaries between federal agents and the population. It is in this context of institutional resistance that the 1969 White Paper must be understood.

The *White Paper on Indian Policy* (Canada, DIAND, 1969) was developed outside the traditional policy circles by a small group of civil servants and political advisors of the Prime Minister (Weaver, 1981). Setting aside the "progressive assimilation" perspective, it suggested radical changes in the approach to "the Indian problem", from the dismantlement of the Indian Affairs department to the transfer of all responsibilities regarding social programs for Aboriginal peoples to provinces. But most

importantly, it called for the termination of historical treaties and of the Indian Status as a solution to the ongoing socio-economic disparities between Aboriginal peoples and other Canadians (Canada, DIAND, 1969: 4). The White Paper was product of its time. It saw in the differentiated regime inherited from colonial practices not only the source of socio-economic inequalities, but also of the racism and prejudice that Aboriginal peoples were facing.

As Alan Cairns (2000: 51) argues, what is striking about the White Paper is not necessarily the nature of its proposals, which were again very much in line with the egalitarian postwar ethos, but rather its boldness in spite of the numerous failures in implementing similar approaches in previous years.[54] By 1969, the political climate had changed. The decolonization and civil rights movements were influencing the political thinking of marginalized indigenous populations around the globe. Aboriginal organizations were increasingly resistant to the government's autocratic approach to Indian policy. They sought to play a meaningful role in policy development in order for Aboriginal peoples to regain some of their lost political voice (Cardinal, 1969). The White Paper, developed in relative secrecy, was the antithesis of an approach recognizing the political agency of Aboriginal peoples, not only in its content but also in its conception (Weaver, 1981).

4.1.3 Political Revitalization and Recognition Claims

The mobilization of Aboriginal peoples following the release of the 1969 White Paper is well documented (Cardinal, 1977; Long, 1990; Weaver, 1981). Aboriginal

[54] This failure had been recognized only a few years earlier in the Hawthorn report, which documented the socio-economic conditions of Indians and recommended a shift in approach to integration, focussing on a form of affirmative action under the concept of "Citizens Plus." For a discussion, see Cairns (2000: 161).

organizations, such as the National Indian Brotherhood (the NIB, which later became the Assembly of First Nations), rejected the notion that Indian's differentiated status was the source of their disastrous socio-economic conditions. To the contrary, they argued, this status must be recognized to its full extent in order for Aboriginal peoples to regain their sense of dignity and to become meaningful participants in the Canadian society.[55] The main result of this mobilization was a rise to prominence on the mainstream political agenda of Aboriginal claims for *recognition* of their specific relationship with the state and for greater political agency in the definition of this relationship. From a non-Aboriginal perspective, the outcome was a rediscovery of the colonial past of the Canadian state.

Building from the example of the Red Power movement south of the border, Aboriginal leaders explicitly used the language of national self-determination and human rights to assert their claims for proper recognition of existing treaties, for control over their lands, and for political agency in defining their place in relation to the Canadian federation. The Dene declaration of 1975 is an early example of this emerging discourse:

> We the Dene insist on the right to be regarded as a nation. (…) Our plea to the world is to help us in our struggle to find a place in the world community where we can exercise our right to self-determination as a distinct people and as a nation. What we seek then is independence and self-determination *within* Canada (my emphasis).[56]

By the mid 1970's then, both the model of centralized governance developed under the *Indian Act* and a complete dismantlement of the institutions distinguishing Aboriginal peoples from the majority population in Canada were largely discredited as responses to the so-called Indian problem. This crisis opened the door to significant

[55] The main response to the White Paper, tabled in 1970, was prepared by the Alberta Indian Brotherhood. It was centred on the concept of "Citizens Plus", building on some of the ideas developed in the Hawthorn report of 1967. See Indian Chiefs of Alberta (1970).
[56] *Dene declaration of 1975*, as quoted in Jhappan (1993: 255).

changes in the conceptions and dynamics of the relationship between Aboriginal peoples and the Canadian federation in the contemporary period.

4.2 Contemporary Changes: Contained Recognition

The rooting of Aboriginal mobilization in the aftermath of the White Paper in the language of self-determination and human rights is fundamental to understand the contemporary dynamics of Aboriginal governance. As Will Kymlicka suggests, it inscribes theses claims in continuity with the postwar liberalization movement, "as a third stage in the unfolding of the human rights revolution" (2007: 51). The state response to such claims has been slow, but nonetheless significant. Moving away from assimilation practices and forced incorporation, the driving logic of Aboriginal governance today is arguably one of recognition. A central element of this new approach to governance is the development of a rights-based relationship that acknowledges not only the cultural difference of Aboriginal peoples but also the continuity of their presence as distinct political entities on the land.

This change in representation has led, amongst other things, to the recognition of Aboriginal and treaty rights in the Constitution and to the negotiation of "modern treaties" and self-government agreements. But while this shift is highly significant, it does not lead to a complete collapse of the governance model inherited from the colonial past. In fact, much of it remains intact today. The shift to a recognition paradigm is thus very much *contained* and *layered* over preexisting institutions.

4.2.1. Recognition Though Constitutional Politics and the Courts

Building on the mobilization against the White Paper and early court victories, Aboriginal political organizations, led by the National Indian Brotherhood, forayed in the constitutional debate in the late 1970s and secured the constitutional recognition of Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*.[57] This unprecedented recognition provided Aboriginal peoples with a significant political resource with which to challenge the authority of the federal and provincial governments and consolidate the distinctive legal foundations of their relationship with Canada.

Constitutional politics continued to be the primary vehicle for Aboriginal recognition claims in the following years. A series of constitutional conferences were dedicated to clarifying the extent and meaning of section 35 rights between 1983 and 1987. The conferences failed to produce concrete results for Aboriginal peoples, but by the time of the last conference in 1987, the principle of an "inherent" Aboriginal right to self-government, resulting from their historical presence as distinct political communities, had made its way into the Canadian public discourse (Brock, 1991: 274). A significant milestone in this respect was achieved in 1983 as a special House of Common Committee released a report echoing the emerging Aboriginal discourse on governance rights. In what is known as the Penner report, all political parties represented in Parliament endorsed the recognition of self-government as an inherent right and the

[57] Section 35(2) also formally includes Inuit and Métis in the definition of "Aboriginal peoples" for the purpose of interpreting the Constitution. Section 25 of the Canadian Charter of Rights and Freedom also protect Aboriginal rights from the overriding of Charter rights. For an analysis of Aboriginal mobilizations and strategies leading to the final text of the Constitution Act, 1982, see Sanders (1983).

definition of Aboriginal governments as a third order in the federation (Canada, House of Commons, 1983).[58]

Another important symbolic step in this process of recognition took place with the Charlottetown Accord of 1992.[59] The Accord proposed to include the inherent right to self-government under section 35(1) and to add an interpretative clause in the Constitution to the effect that Aboriginal governments formed a third order within the federation.[60] As Branford Morse (1999: 22) argues, the Charlottetown Accord reflected a fundamental shift in the legal and political landscape of the federation, as the legitimacy and distinct authority of Aboriginal governments were explicitly recognized by the provinces and the federal government. It was, however, a Janus-faced recognition for Aboriginal peoples. The inherent right was clearly circumscribed as it was to be exercised "within Canada" and in a manner consistent with "federal and provincial laws that are essential to the preservation of peace, order and good government."[61] In fact, a number of First Nations opposed the compromise bargained by their national organizations as a violation of their special treaty relationship with the Crown (Boldt, 1993: 94). Many boycotted the ensuing referendum.[62]

While the Charlottetown Accord failed to gain sufficient support amongst both Aboriginal and non-Aboriginal Canadians, the principle of an inherent right to self-government is arguably now part of the Canadian political landscape. In its final report in

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[58] For an early discussion of the Penner report and its impact, see Tennant, Weaver et al. (1984).
[59] The exclusion of Aboriginal peoples from the Meech Lake Accord, signed only a month after the last FMC on Aboriginal matters in 1987, created a significant capital of sympathy for Aboriginal organisations as they entered the Charlottetown process. The negotiations also followed a tense confrontation between the Canadian armed forces and Mohawks militants in the summer of 1990 at Oka, near Montreal.
[60] Paragraph 41 and 1b) respectively of the *Consensus Report on the Constitution*, Charlottetown, August 28, 1992. http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&doc=charlottetwn_e.htm.
[61] *Consensus Report*, at 41 and 47.
[62] According to available data, First Nations rejected the Accord by a margin of 3 to 1. Participation rate on reserve was as low as 8% (Turpel, 1993: 141). On the others hand, Inuit and Métis supported the agreement.

1996, the Royal Commission on Aboriginal Peoples endorsed the principle as a cornerstone of a renewed relationship between Aboriginal peoples and the Canadian federation (RCAP, 1996, vol.2). In 1995, the federal government also released a policy statement in which it recognized the inherent right of self-government as an existing right under section 35(1) of the *Constitution Act, 1982* (Canada, DIAND, 1995). As I discuss further below, there are significant limits to the 1995 statement, but it nonetheless confirms the shift in the dominant conception of Aboriginal governance towards a perspective that recognizes the historical presence, and permanent character, of Aboriginal peoples as distinct political communities in what is now Canada.

As national Aboriginal organizations focused their energy on constitutional recognition during the 1980s and early 1990s, Aboriginal governments and individuals also continued to use the courts as a key forum to redefine their relationship with the Canadian state. As a result, a significant jurisprudence has emerged in which the Supreme Court has confirmed the substantial nature of Aboriginal constitutional rights and limited the power of governments to infringe upon these rights without a compelling reason.[63] The Court has also contributed to the reinterpretation of the historical relationship between Aboriginal peoples and the state, establishing the foundations of Aboriginal land titles and rights in their historical presence, as organized societies, before the establishment of crown sovereignty.[64]

In its few decisions where issues of governance were directly at stake, however, the Supreme Court has adopted a relatively restrictive interpretation, maintaining a

[63] There is no space here to review landmark decisions, such as *R. v. Sparrow* [1990] 1 SCR 1075, *R. v. Van der Peet* [1996] 2 SRC 507, *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 and *R. v. Marshall* [1999]. For a critical review, see amongst others Christie (2002); McNeil (2001) and Macklem (2001).
[64] See for example *Delgamuukw v. British Colombia*.

deferential approach towards the authority of Parliaments. The Court has limited the extent of Aboriginal rights to "activities, customs or traditions integral to the distinctive culture of Aboriginal peoples."[65] This relatively strict, culturalist, interpretation has prompted commentators to suggest Aboriginal rights recognized under section 35 were "frozen in time" and did not constitute a basis for the development of modern governance relations (Borrows, 1997; Barsh and Henderson, 1997; Grammond, 2003).[66] Beyond questions of definition, the Court has affirmed a number of times that Aboriginal rights, including governance rights, must be interpreted within the context of the Canadian constitution. In *R. v. Van der Peet*, Chief Justice Lamer stressed that the purpose of section 35(1) was to "reconcile prior Aboriginal occupation with assertion of crown sovereignty."[67] In *Delgamuukw*, the Court reaffirmed the exhaustive nature of the division of powers contained in the *Constitution Act, 1867*.[68]

Thus, while court victories have allowed Aboriginal peoples to question the unmediated authority of the state and forced governments to recognize their presence and status, there are intrinsic limits to the role of tribunals as vehicles in reconfiguring the structure of Aboriginal governance. As the Supreme Court has itself recognized, the redefinition of Aboriginal-state relations is first and foremost a political project, in which

[65] The criteria to determine the existence of an Aboriginal right were developed in *Van der Peet*. In *R. v. Pamajewon* [1996] 2 S.R.C. 164, the Court applied these criteria to reject a First Nation claim that it had the authority to establish a casino on a reserve. It has maintained this interpretation in *Delgamuukw*, where an Aboriginal right to manage resources was at stake.

[66] The Court has since opened the door to an interpretation of Aboriginal rights beyond traditional activities, especially in *R. v. Marshall,* which recognized commercial fishing rights to the Maliseet and Mi'kmaq.

[67] *R. v. Van der Peet*, at 5034. This was reaffirmed in *Delgamuukw v. British Columbia*.

[68] As established in *A.G. Ontario v. A.G. Canada* [1912] A.C. 571. In a series of recent decisions however, the Court has opened the door the recognition of a form of Aboriginal residual sovereignty as a ground for the Crown's obligation to consult Aboriginal peoples regarding land development even in the absence of a treaty. See *Haida Nation v. British Columbia* [2004] SCC 73; *Taku River Tlingit First Nation v. B.C.* [2004] SCC 74, and comments by McNeil (2006).

legitimacy and viability rest, as discussed in chapter two, on negotiations and mutual consent by the parties involved.[69]

4.2.2 Modern Treaties and Self-Government Agreements

One of the most important outcomes of Court decisions has indeed been to force the federal government, and increasingly the provinces, to engage in negotiations with specific Aboriginal nations or communities over the recognition of land rights and the redefinition of their governance regime. With self-government negotiations, land claims settlements, or "modern treaties", have become a key institutional mechanism for Aboriginal peoples to redefine their relationship with the Canadian state.

The federal self-government policy took shape largely in the wake of First Nations reaction against the White Paper in the 1970s, as an alternative approach to the dismantling of the *Indian Act* structure of controlled governance. The federal government offered First Nations the possibility to "opt out" of the *Indian Act* and exercise instead delegated authority through federal legislation in a limited number of areas to be defined in negotiations.[70] Delegation was conditional on First Nations demonstrating "their capacity to administer programs according to modern standards" (Canada, DIAND, 1982a: 4). This legislated delegation approach was rejected by most First Nations, who, by then, saw self-government as a fundamental right, inherent to their status as distinct sovereign peoples. According to the Assembly of First Nations, the "municipal status" offered by the federal government "... did not reflect the sovereign authority of First

[69] In *Delgamuukw*, Chief Justice Lamer argued as much and invited the Crown to negotiate the necessary compromises to mange the coexistence of Aboriginal rights and other interests (paragraph 186).
[70] A number of variants to the legislated delegation approach were developed throughout the 1980s. For a detailed review of these proposals, see Weaver, 1991).

Nations" (AFN, 1982: 8). Together with the James Bay Crees and Naskapi, who negotiated legislated self-government following the settlement of their land claims,[71] the Sechelt in British Columbia were the only First Nation to opt out of the *Indian Act* under this delegation model in the 1980s.[72]

As already discussed, it is only in 1995 that the federal government opened up self-government negotiations to all Aboriginal peoples, based on the principle of an existing inherent right to self-government. Despite the recognition of the inherency principle, the 1995 policy establishes a detailed framework for the negotiation of self-government agreements. Negotiations are still limited to elements the federal government considers "integral to the unique cultures, identities and traditions" of Aboriginal peoples (Canada, DIAND, 1995: 5). Aboriginal authority is also significantly curtailed, as it remains subject to the laws the federal and provincial governments consider integral to their constitutional responsibilities (Canada, DIAND, 1995: 33). These limitations have hindered negotiations of self-government agreements and left some commentators to suggest the 1995 policy offered little more than the model of delegated authority established in the 1980s (McDonnell and Depew, 1999: 355). As of 2006, 19 self-government agreements of various forms were in force or ratified, and 69 at the various stages of negotiations. The vast majority of these agreements were negotiated as part of, or in parallel to, land claims settlements.[73]

Like self-government negotiations, "modern treaties" negotiations are hindered by a fundamental disagreement between Aboriginal peoples and Canadian governments as to

[71] The Naskapi signed the North-Eastern Quebec Agreement in 1978. The *Cree-Naskapi (of Quebec) Act* was adopted in 1984. The Inuit of Northern Quebec also negotiated a form of local and regional autonomy under the JBNQA. I discuss these agreements in the coming chapters.
[72] For a discussion of the Sechelt self-government model, see Taylor and Paget (1989).
[73] Information on the various agreements can be found at: http://www.ainc-inac.gc.ca/pr/agr/index_e.html.

the meaning of such settlements (Alfred, 2000; Tully, 2001b). For the federal government, and provinces when they are involved, the objective of new treaties is not to renegotiate the configuration of state sovereignty but rather to confirm its legality and legitimacy in light of the Canadian constitution. The stated objective of the federal comprehensive and specific claims policy established in 1973 in the aftermath of the *Calder* decision was, and is still today, "to obtain certainty respecting ownership and use of lands and resources" (Canada, INAC, 2007: 2).[74] To ensure certainty, the federal government requires that Aboriginal peoples first demonstrate the validity of their historical title, then accept the surrender of all Aboriginal rights on the territory covered by the agreement in exchange for the rights and benefits defined in the settlement. This approach, under which Aboriginal rights outside what is defined in the agreement are "extinguished" has been the object of numerous criticisms, including from the United Nations.[75] This legalistic and technical process, and its underlying understanding of settlements, is fundamentally at odds with Aboriginal conceptions of treaties. As discussed in chapter two, Aboriginal peoples tend to conceive of treaties as the confirmation of a lasting relationship between sovereign peoples sharing responsibility for stewardship of the land.

[74] In *Calder v. AG BC* [1973] SCR 313, the Supreme Court recognized for the first time the possibility that an Aboriginal title resulting from prior occupation of the land could have legal force in contemporary Canada if this title was not explicitly abrogated by a treaty or an Act of Parliament.

[75] See *Concluding observations of the Human Rights Committee: Canada.* United Nations, CPR/C/CAN/CO/5, November 2005. In response to such criticisms, the federal government has sought "alternative mechanism to provide certainty" (Canada, 2007:3). For example, the Nisga'a Final Agreement states that the Nisga'a "release all further claims" under section 35(2). Despite this change in wording, the objective remains to contain Aboriginal rights as explicitly stated in the treaty. More recently, the Quebec and federal governments agreed with four Innu communities to negotiate a settlement based on the continuity of Aboriginal rights, as defined in the treaty but also in future agreements. For a discussion of this recent approach, see Saint-Hillaire (2003).

Despite these important limits, and the extremely slow and frustrating nature of the process, comprehensive land claim negotiations have been an important vehicle for Aboriginal communities and nations to redefine their regime of governance. Since the James Bay and Northern Quebec Agreement of 1975, which I discuss in detail in the next chapter, as of 2006, 10 "final agreements" have been duly signed and are at various stages of implementation (Canada, INAC, 2007).[76] There is no space here to review all the agreements in detail, but it is worth mentioning the Nunavut Land Claim Agreement, signed in 1993, which lead to the creation of the Nunavut Territory in 1999 and the establishment of a public government controlled by a majority of Inuit.[77] Also significant is the Nisga'a Final Agreement signed in 1998 after 25 years of negotiations. It is the first agreement to contain detailed dispositions on self-government as an integral part of a settlement, thus creating constitutionally protected Aboriginal governing structures. The Nisga'a Lisims government has paramount legislative authority over the management of community lands, citizenship and local matters.[78] In a number of other areas, such as education, transport and environmental regulation, Nisga'a authority is concurrent with federal and provincial jurisdictions.[79] A similar system of paramount and concurrent jurisdictions was established under the Council of Yukon Indians Umbrella Agreement of 1993, under which Yukon First Nations have been negotiating specific self-government agreements.

[76] In addition, 9 specific agreements were signed under the Council of Yukon Indians Umbrella Agreement of 1993. The various agreements are available at: http://www.ainc-inac.gc.ca/pr/agr/index_e.html.
[77] For a discussion of the Agreement and its impact on Inuit governance, see Hicks and White (2001).
[78] Nisga'a Final Agreement, chapter 11, section 33. There are limits top Nisga'a authority however, as they cannot make laws that run contrary to the general interest of the federal and provincial governments, and must operate within the framework of the Canadian constitution and the Charter of Rights.
[79] In areas of concurrent jurisdictions, Nisga'a laws prevail only if they meet or exceed federal and provincial requirements. The agreement is summarized in a document prepared by INAC available at: http://www.ainc-inac.gc.ca/pr/agr/nsga/index_e.html, Accessed May 6, 2006.

4.2.3 The Limits of Recognition

The shift from an assimilation to a recognition perspective in the representation of Aboriginal-state relation, and the related constitutional, legislative and policy changes, are certainly significant. For one, Aboriginal peoples' cultural and political presence is recognized as a permanent feature of the Canadian landscape rather than as a "problem" to be solved by engineering assimilation. We are all "here to stay" as the Supreme Court stated a number of times in recent years. Second, and related to this logic of continuity, is a general acceptance that Aboriginal peoples' relations with the state are mediated by a regime of rights and governing institutions that serve as vehicles to assert their cultural distinctiveness and collective political agency. The Courts' interpretation of Aboriginal constitutional rights has firmly established this new set of rules; so did the revitalization of the treaty process, despite all its limits. Finally, and most significantly for this analysis, the governments, the Courts and to a lesser extent the Canadian public, increasingly recognize, in principle if not in practice, that Aboriginal governing institutions have a source of legitimacy of their own. Their authority is inherent rather than delegated from the Crown. They do represent, as such, a third partner in Canadian governance.

While these shifts are significant, the past decades were also characterized by institutional resistance to change and by a certain containment of the language of recognition in the definition of policies. In its self-government and land claim policies for example, the federal government has sought to limit the legal and political implications of the recognition of the inherent nature of Aboriginal rights. Moreover, the Courts have, with a few exceptions, resisted an interpretation of Aboriginal rights in which they would

supercede, rather than simply limit, the existing authority of governments as defined in the constitution. Aboriginal peoples are also constantly reminded in self-government and treaty negotiations that the federal and provincial governments, while willing to recognize some legitimacy for their governing authorities, also position this authority squarely within the confines of their sovereign powers under the *Constitution Act, 1867*.

This resistance to change has lead some to question the significance of the shifts of the past decades. For some, the current approach amounts to little more than a recasting of the old incorporation paradigm in the guise of the language of recognition (Alfred, 1999; Boldt, 1993; McDonnell and Depew, 1999). Building on the discussion of institutional change in the previous chapter, I suggest the shift from a logic of incorporation to one of recognition can best be understood as a process of *institutional adaptation,* where deeply entrenched institutional patterns and practices, which reproduce the interests of state elites but also certain dynamics in Aboriginal communities themselves, are adjusting to this powerful questioning of their legitimacy without completely breaking down. While the principle of Aboriginal political autonomy is accepted by governments, the principle is limited, or, more accurately, constrained by the resilient structures of the constitution and pre-existing legislations. The fact that the *Indian Act* remains the central institution governing Aboriginal-state relations despite being universally denounced is the best example of this institutional resistance.

4.3 Contemporary changes: state restructuring and the new governance agenda

While recognition is providing a new discursive and institutional landscape from which Aboriginal governments interact with their federal and provincial counterparts,

contemporary changes in Aboriginal governance cannot be fully understood by focusing only on the "high politics" of rights recognition, treaty-making and self-government negotiations. In fact, important changes affecting Aboriginal governance have taken place at the less spectacular, but nonetheless significant level of policy and program development. As discussed in chapter three, new approaches to governance favoring a greater role for communities and the market through devolution, privatization and partnerships have reshaped the role of the state from one focused on direct control to a more indirect role as "facilitator" in social and economic development.

This new perspective on the role of the state has had a significant influence on Aboriginal policy, as Aboriginal claims for greater autonomy converged with the emerging discourse on decentralization, self-reliance and cost containment. As a result, Aboriginal governance has evolved in the past two decades from a highly centralized system to what is now a largely decentralized structure of service delivery in which Aboriginal governments have increasing discretion in the implementation of their own priorities in various areas. A complex system of fiscal transfers has developed within this de-centered governance model, creating a new type of relation of authority between the federal, and to a lesser extent provincial, governments and their Aboriginal counterparts.

4.3.1 Devolution and Partnership-Based Governance

"For a government faced with a fiscal crisis, and seeking to reduce its long term responsibilities for native peoples, claims for self-government represent a gift" (Ian Angus, 1990: 28).

One of the most significant changes in Aboriginal governance in the past thirty years has been the massive devolution of program administration from the federal

government to band councils, tribal councils, and other Aboriginal-led governing institutions.[80] To be sure, such administrative transfers are not new. The first significant development in program transfer took place in education in the late 1960s, with the emergence of the first Indian controlled schools (Casteillano et al., 2000). By the late 1970s, a growing number of federal programs, from social assistance to local infrastructures, were administered by First Nations and Inuit local authorities (Canada, DIAND, 1993a: 43). It is in the 1980s however that administrative devolution became a systematic element of federal policy as Aboriginal claims for greater autonomy coincided with the rise of the neo-liberal agenda promoting a scaled down, more efficient, state.

As a result of population growth and the difficult socio-economic conditions of Aboriginal communities, expenditures in the federal Department of Indian Affairs rose significantly in the 1970s and 1980s (see figure 4.4). With the government entering in a period of fiscal restraint, Cabinet and Treasury Board exercised considerable pressure on the Minister of Indian Affairs to contain costs (Weaver, 1991). Devolution was an answer to Aboriginal claims for more autonomy, but it was also a way "to enhance program effectiveness" and "reduce the administrative costs of delivering programs to geographically dispersed communities" (Canada, DIAND, 1993a: i).

The link between fiscal control and the progressive disengagement of the federal government from Aboriginal program administration was made explicit in a report of the Task Force on Program Review commissioned by the newly elected Conservative government in 1985. In order to contain escalating costs, the Neilsen Task Force

[80] While I focus here on First Nations band councils, Métis and off-reserve First Nations are also increasingly managing federal programs through non-profit organisations such as Native Friendship Centres and other community-based groups. There are very little analyses of the changing role of these organizations. For a discussion, see Abele (2004) and Graham and Peters (2002).

suggested the federal Indian and Inuit programming should be scaled back "to its strict constitutional and legal obligations" and Aboriginal peoples should be "encouraged to assume more responsibilities for their own development" (Canada, Deputy Prime Minister's Office, 1986: 21).[81] The government was rapidly forced to repudiate the report, which Aboriginal leaders associated with the White Paper of 1969, but its logic, linking Aboriginal autonomy with a leaner, more effective and more flexible federal state, continued to inform policy developments in the ensuing years (Wilson, 1988: 38).

As the following tables suggest, the transfer of program management to Aboriginal governing authorities rapidly increased in the mid-1980s, creating a significant shift in the "locale" of program administration from Ottawa to local communities. In 1981, 41% of the department's budget was administered by First Nations and Inuit authorities. This proportion now reaches 85%. A corresponding decline in the number of employees in INAC suggests this shift also had an impact on the resources of the department despite the continued growth of its budget in the past twenty years.[82]

As administrative devolution grew to become a defining feature of Aboriginal governance, the nature of programs devolved and the conditions of devolution also changed. By the mid-1990s, the decentralization of Aboriginal programs had moved from what was initially a tightly defined structure, where Aboriginal governments have only minimum leverage in the definition of services, to a more "loosely coupled" structure of implementation. In line with the new governance agenda discussed in chapter three, the

[81] According to the task force, 40 percent of current federal expenditures could be transferred to provinces and another 35 percent assumed directly by Aboriginal governments.
[82] The data presented in table 4.3 suggest expenditures continued to rise significantly throughout the late 1980s and 1990s. A department report prepared in 1993 suggests the increase is largely due to growth in education and social assistance programming (Canada, DIAND, 1993b: 8). According to Angus however, the budget increase of almost 32% between 1984 and 1990 amount to a net reduction of 12% if inflation and population growth on reserve are factored in (1990:25).

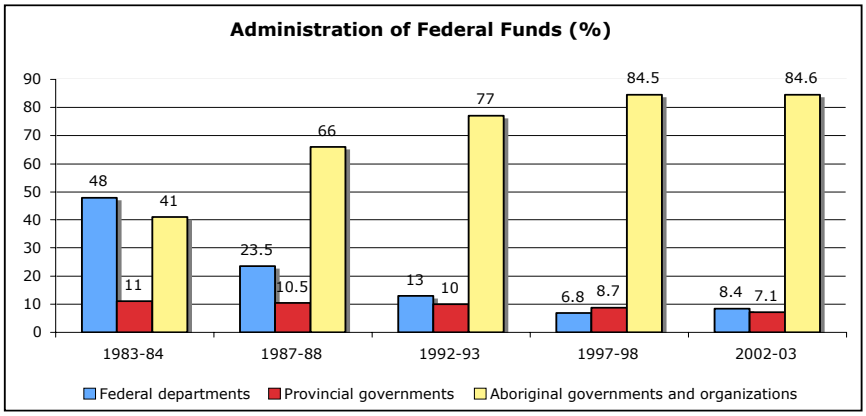
policy process is increasingly seen as a "partnership" both with Aboriginal organizations at the national level and local governing authorities. Policy objectives are now defined in fairly broad terms at the national level and designed to maximize the flexibility of implementation, with programs not only administered, but also increasingly designed at the community level by Aboriginal governments or organizations.

This conception of Aboriginal governance as a partnership is reflected in the *Gathering Strength* agenda, the federal government's response to the final report of the Royal Commission on Aboriginal Peoples, released in early 1998. According to the action plan, which established the basic framework of federal Aboriginal policies for the following years, "an important objective of the government is to build a new partnership with Aboriginal peoples, other levels of governments and the private sector (…) in the design, development and delivery of programs" (Canada, DIAND, 1997: 9). Under this partnership-based approach, the federal government establishes a specific fund tied to a general policy objective, to which Aboriginal organizations and governments can apply to finance local initiatives. The *Aboriginal Human Resource Development Strategy* (AHRDS), launched in 1998, is a case point. Endowed with $1.6 billion over 5 years, the objective of the Strategy is to "enable Aboriginal groups to develop their human resource programs in order to assist clients to prepare, obtain and maintain employment" (Canada, Human Resource Development Canada, 2003: 5). Under the AHRDS, Aboriginal governments and organizations are expected to develop their own employment and training strategies, according to the needs and objectives defined locally. The federal

government simply transfers funds to the programs that correspond to its general policy objectives.[83]

This partnership-based approach, in which the federal government minimizes its role in the direct administration of programs, is not exclusive to Aboriginal policies. It is in fact part of the overall shift towards new modes of governance associated with state restructuring discussed in chapter 3. In the context of Aboriginal governance however, it represents a significant change from the highly centralized regime established in past policy approaches. What is perhaps even more striking about this shift to a de-centered, partnership-based, policy process is the fact that it took place without fundamental change or rupture with the basic institutions of Aboriginal governance, including the *Indian Act* and the system of band councils.

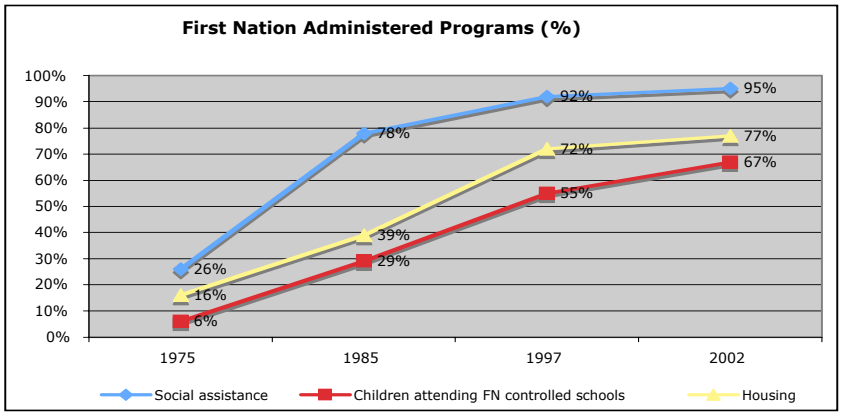
Figure 4.1 Administration of Federal Funds for Aboriginal Programming



Source: Canada. INAC, 1999 and 2004.

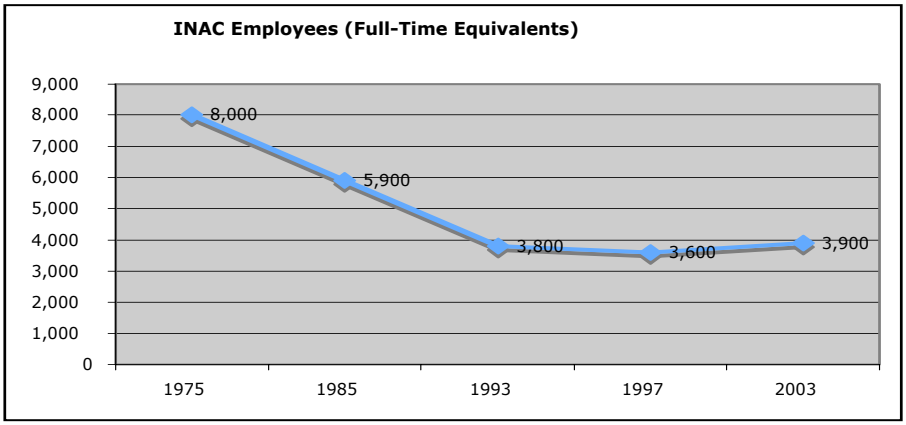
[83] For more information about the program requirements, see: http://www17.hrdc-drhc.gc.ca/AHRDSInternet/general/public/thestrategy/Opportunities_e.asp (accessed January 10, 2007).

Figure 4.2. Federal Program Expenditures Administered by First Nations



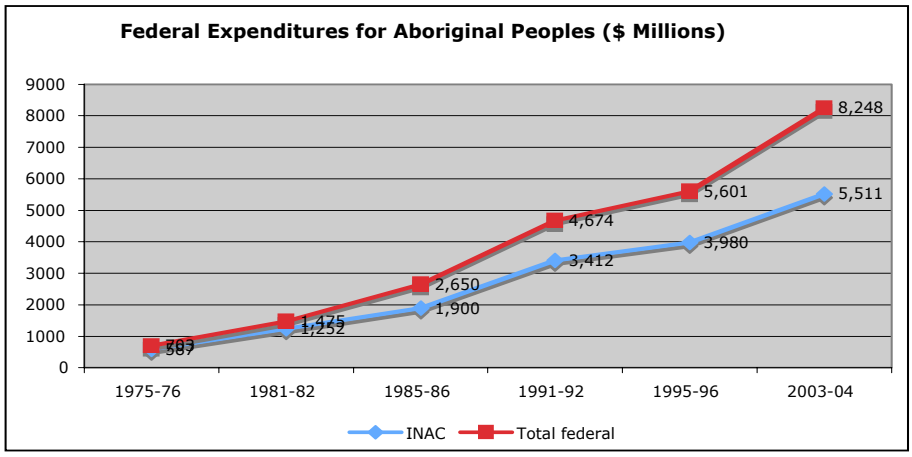
Source: Canada, DIAND 1993a; Canada, INAC, 2004.

Figure 4.3. Indian and Northern Affairs Employees



Source: Canada, DIAND 1993a ; Canada, INAC, 2004.

Figure 4.4. Total Federal Expenditures for Aboriginal Peoples



Source: Canada, DIAND 1993a and 1993b; Canada, INAC, 2004.

4.3.2 Accounting for Transfers: Fiscal Control and 'Good Governance' Practices

From its roots as a service delivery agency in the 1950s, DIAND is now essentially a funding agency, responsible for supporting First Nations governments (Canada, DIAND, 1993a:44).

The development of de-centered and partnership based governance has resulted in a significant growth in fiscal transfers to Aboriginal governments and organizations, as the above figures suggest. The management of such fiscal transfers is now an important element of intergovernmental relations and negotiations between federal, provincial and Aboriginal governments. It is also a significant source of contention as the growth in transfers has highlighted the deficiencies in the system of direct administrative control established under the *Indian Act*. A restrictive interpretation of the principle of ministerial responsibility, under which the Minister of Indian Affairs remains directly responsible to Parliament for the monies transferred to Aboriginal governments continue to limits the flexibility of such transfers.

Fiscal transfers to band councils and Inuit governments were initially considered on an ad-hoc basis, and were accompanied by strict conditions, couched in memoranda of understandings detailing every aspect of the program to be delivered. As devolution grew in importance, such a hands-on approach became difficult to manage, not to mention extremely costly. The rigidity of early fiscal transfers was criticized in the 1983 Penner report, which noted that band council administrators were spending more time and energy negotiating budgets with federal officials than actually running programs. First Nations governments, said the Penner report, should be accountable first and foremost to their own citizens, not to other governments (Canada, House of Commons, 1983: 336). In the same vein, an internal analysis prepared for DIAND in 1993 recognized the fundamental

contradiction between the stated objective of establishing "government to government" relations and the existing structure of fiscal transfers, under which Aboriginal governments are accountable first to DIAND, as administrative arms of the department, rather than to their citizens (Canada, DIAND, 1993a: 11).

The mechanisms governing fiscal transfers to Aboriginal governments were progressively reformed in the past fifteen years in order to provide more flexibility and leverage for Aboriginal governments in the management of funds. But the fundamental problem of top-down accountability remains. With the exception of funds transferred under legislated self-government agreements, which operate under terms specified in the agreement, most administrative transfers today are pooled together into single annual agreements, called Comprehensive Funding Agreements (CFAs). CFAs function under a mix of conditional grants, under which Aboriginal authorities have discretion on the delivery process, but must conform to predetermined objectives or standards, and more restrictive contributions transfers, under which funding is subject to terms and conditions that stipulate the service to be provided, to whom and what expenses are eligible (Canada, INAC, 1998). Canada-First Nation Funding Agreements (CFNFAs) are alternative, five-year block-budgeted, funding arrangements under which Aboriginal governments have more leverage in moving funds between budget items according to their priorities.[84] Given the increased risk attached to a fixed five-year funding structure however, many First Nations prefer negotiating grants and contributions every year.[85]

[84]A number of First Nations are under an older versions of the CFNFA, the Financial Transfer Agreement (FTA) which was limited to INAC funds. See Shepherd (2006: 221-231) for a detailed description. See also the description provided by INAC at www.ainc-inac.gc.ca/ps/ov/agre_e.html (accessed May 25, 2007).
[85] Only 21% of First Nations were under block-funding FTAs or CFNFAs as of 2004 (Canada, INAC, 2004).

These administrative reforms to the funding structure have created more space for Aboriginal governments to allocate funds according to their distinct priorities. But the principle of ministerial responsibility continues to create a need for INAC oversight. The main difference today is that control is less direct. It is now exercised through reporting and accounting structures rather than through strict control over the delivery of services. Under CFAs and CFNFAs, Aboriginal governments are expected to demonstrate their capacity for sound management and agree to comply with certain standards regarding accounting practices. They must also continue to produce yearly, and sometimes monthly, reports on expenditures and program outcomes. As a report of the Auditor General in 2002 indicates, even under recent block funding agreements, each branch of Indian Affairs and Northern Development Canada demands its own report, not to mention other departments that are also transferring funds for distinct programs. These reports often duplicate the same information and are in fact "rarely useful in evaluating performance or determining funding" (Canada, Auditor General, 2002: 1.2).[86] All funding agreements can also be the object of "remedial actions", under which the Minister intervenes in the administration of the band in cases where the terms and conditions of the agreement are not met, or reporting practices are deemed inadequate.[87]

Despite these multiple points of direct and indirect control over Aboriginal governments' management of federal funds, INAC has been under constant pressure in recent years to tighten its control over fiscal transfers. In addition to a series of critical

[86] The Auditor General estimates that an average of 202 reports are required each year under CFAs and 168 under FTAs. The Canada-First Nation Finding Agreements (CFNFAs), where funds coming from different departments are regrouped under a single transfer is an attempt to streamline the reporting process.
[87] There are three levels of intervention, the highest one involving the appointment of a third party to manage the band's assets. In 2003-2004, 23% of First Nations were under some form of remedial action according to INAC's 2004 departmental Performance Report (Canada, INAC, 2004: 19).

reports by the Auditor General on INAC's deficient reporting practices, cases of mismanagement of federal funds by band councils reported in the media increased pressures to reform the system.[88] The federal government responded to such criticisms by taking a more proactive role in fostering "good governance" practices amongst Aboriginal governing institutions. "Strengthening aboriginal governance though capacity building and enhanced accounting practices" was one of the four core policy priorities established under the *Gathering Strength* agenda (Canada, 1997: 13).

The federal government thus found a new role under de-centered Aboriginal governance. Far from being a passive "funding agency", as the quote heading this section suggests, INAC has not only established complex accounting mechanisms but has also taken on an active role in developing and shaping the institutions though which Aboriginal governments manage devolved programs and establish their policy priorities. In its 1999 Performance Report, the Minister of Indian Affairs explicitly acknowledges this reorientation in the department's role:

> For many years, our overriding focus was to transfer responsibilities to First Nations and Inuit and prepare ourselves to go out of business. Gathering Strength recognized that we have a *legitimate* role to play in the development of First Nations and Inuit capacities for strong and effective governance (Canada, INAC, 1999:34, my emphasis).

This shift in perspective is best illustrated by the *First Nations Governance Act* (FNGA), introduced in 2002, but eventually set aside in face of strong opposition by the First Nations leadership. The objective of the FNGA was to establish an alternative legislative framework outside the *Indian Act* to "modernize the governance of First Nations" and "establish the conditions for a successful transition to self-government"

[88] The case of Stoney Reserve in Alberta, where band leaders mismanaged public money was repeatedly in the news in 1998-1999. See for example, "Stoney Reserve troubles typical: Problems not `exceptional,' Indian Affairs memos say", *Calgary Herald*, Jun 28, 1998. p.A6.

(Canada, INAC, 2002b: 2). The Act proposed, among other things, to reinforce the legal capacity of band councils to facilitate their fiscal autonomy and to establish "governance codes" to enhance the transparency of band management practices. It would have also replaced existing administrative transfers agreements with a specific legislative structure governing all fiscal transfers to band councils still under the *Indian Act*, creating a more uniform structure for reporting and facilitating public access to band councils' books.[89]

While many in First Nations communities supported the principles guiding the federal initiative, the imposition of this new structure of accountability was not well received by the established leadership. Chiefs and leaders saw once again the federal government undermining their authority and imposing unilaterally its own conception of "good governance" as a premise for the development of a government-to-government relation. This was seen as fundamentally at odds with the principle of self-determination and the inherent right to self-government (Ladner and Orsini, 2005; Provart, 2003). In face of this strong opposition, the FNGA was withdrawn, but its principles still inform much of the government policy agenda today.[90]

4.3.3 The Impact of De-Centered Governance

What is the impact of the emergence of new governance practices and related fiscal relations? Administrative decentralization and partnership-based governance, however significant it is, does not amount to a formal transfer of authority. It does not affect the fuzzy constitutional status of Aboriginal governments nor the division of

[89] For a thorough analysis of the FNGA, see Provart (2003)
[90] At the time of writing, the new conservative government was still considering its option regarding the introduction of a number of measures contained in the defunct FNGA. See "Aboriginal governance still in limbo", *The Globe and Mail*, May 24, 2006. A14.

powers in the federation. As discussed, ministerial responsibility remains a fundamental obstacle to the development of a government-to-government relation. Unless devolution agreements are entrenched in legislation, as is the case for self-government agreements, the Minister of Indian Affairs still has the power to unilaterally remove program administration from band council authority. In 2004, close to one band out of five were under some form of direct or indirect ministerial supervision (Canada, INAC, 2004). Moreover, while transfers through CFAs and CFNFAs are more flexible today, the federal government can still impose on Aboriginal governments conditions it deems appropriate to fulfill its policy objectives. The objective behind the development of these new transfer mechanisms was not to radically transform Aboriginal-federal relations into the equivalent of federal-provincial fiscal federalism.

It can be argued that administrative decentralization is in fact increasing the dependency of Aboriginal governments since their capacity to deliver services that Aboriginal communities now expect depends entirely, at least in most cases, on fiscal transfers from the federal, and to a lesser extent provincial, governments. Moreover, as many analysts have pointed out, in this new regime of governance, Aboriginal governments may have increasing leverage in the administration of programs, but direct federal authority has simply been replaced by indirect control through what INAC defines, citing the guidelines established by Treasury Board, as "result oriented accounting and reporting methods" (Canada, INAC, 1999: 2).

New modes of de-centered governance may thus be reproducing, under new guises, the logic of incorporation developed in the postwar period (Boldt, 1993; Cassidy, 2003). As the Gathering Strength agenda and the failed FNGA illustrate, Aboriginal

governments are called upon to adopt management procedures deemed acceptable under Western conceptions of "good governance", which, for some, "amounts to a form of administrative incorporation, if not assimilation" (Neu and Therrien, 2003: 14).

In many ways, the recent episode of the *First Nations Governance Act* (FNGA) illustrates both the limits of new approaches to governance and the challenges in reforming a system with deep and complex institutional roots. The FNGA, like previous attempts at reforming Aboriginal governance, did not propose a radical break with existing practices and structure of authority. In line with the approach established with the Gathering Strength action plan, the objective of the Act was to clarify the lines of accountability between governments. Nowhere was it suggested that the structure of authority should change. Faced with the resilience of the *Indian Act* structure and the limited success of its self-government policy, the federal government sought to adjust the existing system to the new reality of de-centered governance. The FNGA essentially proposed to "layer" over the existing institutional settings a whole new set of rules and procedures to adjust, rather than radically reform, the old governance regime to the contemporary context.

It is thus tempting to conclude that the development of new approaches to governance associated with the ongoing process of state restructuring is not radically altering the foundations of Aboriginal governance. That being said, one should not underestimate the long-term political impact of Administrative transfers and partnership-based governance on the role and legitimacy of Aboriginal governments. For one, even if they do not formally transfer any jurisdiction, these agreements considerably increase the relevance of Aboriginal governments in the daily life of communities. As I suggest in the

coming chapters, they are, in effect, becoming the sole governmental presence in those communities.

Second, despite tight fiscal controls, administrative decentralization leaves a certain degree of leeway for Aboriginal governments in the implementation of programs. As discussed in the previous chapter, in a diffused policy-process, the relation between policy objectives defined at one level and the implementation process at another need to be relatively loose, as agents responsible for implementation have to adapt them to their specific context. The administration of decentralized programs targeted at Aboriginal economic development or training, for example, does involve a substantial degree of policy choices in defining priorities at the community level. In addition to the development of a policy capacity, this margin for Aboriginal governments can also reinforce their legitimacy, as it fosters political debates and deliberation in communities that have been, for the most part of the last century, governed from above and shut out of any substantial democratic debates regarding their own development.

Finally, this decentralized approach to governance is also significantly altering the nature of the relationship between Aboriginal governments and their federal and provincial counterparts. Administrative decentralization, just like formal self-government arrangements, increases the need for coordination and consultation between governments. Ongoing discussions are necessary in order to negotiate the various administrative agreements, establish financial needs and evaluate services, but also to coordinate federal or provincial objectives with Aboriginal ones, and define future priorities. For example, the transfer of federal education responsibilities to Aboriginal school boards creates a need to coordinate with provincial governments in order to ensure the recognition of

diplomas and facilitate Aboriginal students' access to postsecondary education. The transfer of responsibilities over public security involves similar trilateral relations to ensure coordination and cooperation between Aboriginal, federal and provincial police corps. Intergovernmental relations are thus increasingly becoming part of the Aboriginal policy landscape.

In other words, Aboriginal governance is becoming a multilevel reality. Not only is the policy process increasingly diffused at multiple levels, but it is also increasingly taking place through intergovernmental negotiations. Aboriginal governments, just like their federal and provincial counterparts, have significantly developed their intergovernmental capacities in the past decade. Many Aboriginal governments now have a team of professional civil servants whose expertise is not in running programs but in policy analysis, fiscal relations and the negotiation of intergovernmental agreements. To be sure, Aboriginal governments are not on an equal footing with their federal and provincial counterparts in such intergovernmental negotiations, as the latter have the jurisdictional upper hand and control the purse strings. But intergovernmental meetings and negotiation processes are political spaces through which Aboriginal governments can assert their authority and legitimacy as governments, representing self-determining nations or communities. They can therefore act as significant transformative spaces in their relation with the two formally recognized orders of governments.

4.4 Changing Aboriginal-State Relations in Quebec

As a result of the division of powers in the *Constitution Act, 1867*, Aboriginal peoples have historically had a tenuous relationship with the provinces (Long et al., 1988:

3). Since the federal government inherited the fiduciary responsibilities of the Crown and the royal prerogative to negotiate treaties with Aboriginal peoples, many groups, especially First Nations, see their relationship with the Canadian state as a bilateral one, under which their legitimate interlocutor is the federal government. The *Indian Act*, under which Ottawa exercises almost complete authority over First Nations, has reinforced this conception of Aboriginal-state relations as a bilateral affair.

As discussed in the first section of this chapter, with the development of the welfare state, the federal government sought to limit the costs of running parallel programs for Aboriginal peoples by transferring some of its obligations to the provinces. By the 1970s the federal government had entered into numerous bilateral agreements with provinces for the delivery of services to Aboriginal communities, including First Nations on reserves, in areas such as education, health, social assistance and community development.[91] It is, however, only with the constitutional negotiations over the definition of Aboriginal rights in the 1980s that most provinces developed policy positions with regard to the status of Aboriginal peoples. Despite the reluctance of Aboriginal leaders, the federal government had no choice but to recognize the role of provinces not only in constitutional debates, but also in land claim negotiations and in the implementation of self-government agreements. While Aboriginal peoples have resisted this increasing provincial role,[92] Aboriginal governance has by and large become a trilateral affair today (Abele and Prince, 2002a).

[91] In1970, DIAND reported 47 federal-provincial accords for the delivery of services in Aboriginal communities (Canada, DIAND, 1970).

[92] A number of First Nations boycotted the Charlottetown negotiations in 1991-1992 and the more recent First Ministers-Aboriginal meeting of November 2005 that resulted in a federal-provincial agreement on an action plan for Aboriginal socio-economic development, precisely on the ground that provinces should not have a say in defining the nature of Aboriginal-Crown relations.

It is perhaps in Quebec that this trilateral relation has most forcefully influenced Aboriginal governance. Since the early 1960s, the Quebec state has become the main vehicle of a powerful nationalist movement that is itself challenging the boundaries and legitimacy of the Canadian state. Quebec, often in competition with similar nation-building attempts by the federal government, has constantly sought in the past four decades to consolidate its territorial and social boundaries, affirming its authority and legitimacy though the development of its own political, social and economic national project (Jenson, 1997; Papillon and Turgeon, 2003). A key element of this national-territorial project has been to assert the authority of the provincial state on its far north boundaries, a territory annexed in 1912 but largely ignored by successive governments, where Inuit and Crees form a majority of the population. It is thus largely "*en passant par le Nord*" that Quebec nationalism encountered Aboriginal peoples and their own national aspirations (Simard, 2003: 120).

From this encounter, and the tensions it created, emerged a unique trilateral dynamic of overlapping and competing national projects. While elsewhere in Canada provinces are often unwilling participants in Aboriginal governance, the Quebec government has adopted an activist perspective, seeking simultaneously to assert its authority over Aboriginal peoples within its territorial boundaries and gain legitimacy as their primary interlocutor in negotiating the conditions of exercise of their rights and political autonomy (Salée, 2003; Simard, 2003).

For Aboriginal peoples, this unique context produced mixed results. On the one hand, they are faced with not one, but two national-territorial states competing for sovereignty over the land and peoples (Alfred, 1995b; Whitaker, 1999). The Quebec

government has often acted no differently than its Canadian counterpart in affirming its authority over Aboriginal peoples, reproducing the colonial practices and then the universalizing tendencies of most liberal democratic nation-states. This double layer of aspiring and competing national states has reinforced the institutional power grid Aboriginal peoples already faced under a federal system of government (Whitaker, 1999). On the other hand, the presence of two competing national states has also played to the advantage of Aboriginal peoples in Quebec. At the pan-Canadian level, Aboriginal organizations have used the political openings created by Quebec nationalism to engage in constitutional politics in the early 80s and 90s (Jhappan, 1993). In Quebec itself, they have also learned to play the two competing national states against each other and bargain concessions from one another (Dupuis, 1995). As I discuss in the coming chapters, the James Bay Crees and Mohawks have been particularly effective at taking advantage of federal-provincial disputes in order to further their own interests.

The presence of two competing versions of the national state has also contributed to the development of a discursive environment where assumptions about political membership, identities and state sovereignty are constantly challenged and debated. Aboriginal claims to self-determination have found a fertile ground in Quebec politics, as it would be hard for Quebec nationalists to deny Aboriginal peoples the recognition and rights they claim for themselves. This was not lost on René Levesque, the founder and historical leader of the nationalist Parti Québécois. Despite their limited demographic weight (less than 1 percent of the population), Levesque understood the potential challenge Aboriginal peoples, especially in the northern part of the province, could mount against the territorial integrity of a sovereign Quebec. He was thus a strong advocate of a

politics of "rapprochement" with Aboriginal nations (Gourdeau, 1994). As a result, while Aboriginal and Quebec nationalisms often collided in the last thirty years, sometimes negating each other's legitimacy (Salée, 2003; Whitaker, 1999), the political environment created by the presence of the latter has also opened possibilities for the former that are not available elsewhere in challenging the orthodoxy of state sovereignty and reconfigure their governance regime.

4.4.1 The Foundations of Quebec Aboriginal Policies

The development of a distinct, Quebec-centered, approach to Aboriginal peoples started to take shape in the early 1960s under the Liberal government of Jean Lesage. Aware of the economic potential of its resource-rich northern frontier, the Quiet Revolution government sought to establish its authority on what was then called "Nouveau-Québec." At the time, the only governmental presence in the most remote parts of Northern Quebec were RCMP officers and a few federally-run schools and nursing posts servicing the Inuit populations and collaborating with religious groups to facilitate their settlement in small communities dispersed along the Hudson Bay and Ungava Bay coasts. Following a visit of these remote communities, then Minister of Natural Resources René Lévesque proposed the creation of a specific governmental agency to assert Quebec's role and presence in the North (Gourdeau, 1994). In 1963, the *Direction générale du Nouveau-Québec* (DGNQ) became responsible for the coordination of governmental activities in the North. Its main objective was to "connect organically" the territory and its populations to the rest of the province (Dupuis, 1995).

While it concerned Inuit only, the embryonic Quebec Aboriginal policy of the time was not substantially different from that of its federal equivalent. Incorporation into the broader polity and the consolidation of the state's territorial authority were the driving logic of the DGNQ actions in northern communities. Only Inuit were expected to integrate first to the Quebec, rather than Canadian political community. To that end, the DGNQ developed its own service infrastructures in Inuit communities, often reproducing services offered by churches and the federal government. It also proposed the creation of special "Northern Municipalities" to incorporate the previously nomadic population into the provinces' local governance regime (Dupuis, 1995).

The consolidation of Quebec's territorial authority remained a central preoccupation of the provincial government in the ensuing years.[93] In 1971, when Premier Robert Bourassa announced plans for a massive hydroelectric complex in the James Bay area, he suggested Quebec was "finally taking possession of its northern territories."[94] The court proceedings and multilateral negotiations with the James Bay Crees and Inuit that eventually lead to the James Bay and Northern Quebec Agreement were a turning point for Quebec in its relations with Aboriginal peoples. Like its federal counterpart, the provincial government was forced to acknowledge not only the existence of Aboriginal rights limiting its territorial authority (which were then extinguished by the Agreement) but also the political relevance of Aboriginal peoples as distinct and

[93] The Dorion Commission, created in 1966 to study Quebec's territorial integrity, released an important report in 1971 in which it recommended that Quebec fulfil its legal obligation under the 1912 boundary extension act, and negotiate with the relevant Aboriginal populations the cession of potential land titles in exchange for monetary compensations (Québec, Commission d'étude sur l'intégrité du territoire du Québec 1971: vol.4.1). According to the federal and provincial legislation adopted to give effect to the 1912 boundaries extension, Quebec agreed to "recognize the rights of the Indian inhabitants in the territory (…) and obtain surrenders of such rights." For a discussion of the legal implications of this obligation, see Brun (1992) and Grand Council of the Crees (1995).

[94] Extracts of the Premier's 1971 speech launching the project is reproduced in Bourassa (1985).

permanent communities that could not simply be dissolved in the broader citizenry (Vincent, 1992).

Reflecting the growing importance of its relations with Aboriginal peoples, the Quebec government replaced the DGNQ with a new *Secrétariat aux activités gouvernementales en milieu amérindien et inuit* in 1978. The Secrétariat was placed under the direct authority of the Premier, as a branch of the Executive Council.[95] By then, René Levesque was Premier and a referendum on Quebec sovereignty was on the governmental agenda. In order to orchestrate a rapprochement with Aboriginal peoples, Levesque participated in a 3-day meeting with 125 Aboriginal leaders from various communities in Quebec in December 1978. For a number of First Nations, this was their first direct contact with elected Quebec officials. It was an occasion for many leaders to voice their concerns regarding Quebec sovereignty, but also to express their own claims for recognition (Gourdeau, 1994: 332).

4.4.2. Recognition Politics and Policies in Quebec

Quebec policies regarding Aboriginal peoples came to full maturity in the aftermath of the 1980 referendum and the 1982 constitutional changes. Following the pan-Canadian agenda, rights recognition became a central element of Quebec-Aboriginal relations. Since the Quebec National Assembly opposed the *Constitution Act, 1982*, the Aboriginal leadership in the province sought clarifications on the provincial government's position regarding the recognition of the inherent right to self-government.

[95] The agency was renamed the Secrétariat aux Affaires Autochtones (SAA) in 1985 but has largely conserved the same mandate. See Gourdeau (1994) for the Secrétariat's evolving role since 1978.

In its 1983 response, the PQ government established 15 principles guiding its relationship with Aboriginal peoples. Among others, Quebec:

> "Recognizes that the Aboriginal peoples of Québec constitute distinct nations, (…) having the right to determine, by themselves, the development of their own culture and identity."
> "Recognizes the right of Aboriginal nations, within the framework of Québec legislation, to govern themselves on the land allocated to them."
>
> "Considers that these rights are to be exercised as part of the Quebec community and hence could not imply rights of sovereignty that could affect the territorial integrity of Québec."

In a motion adopted in 1985, the National Assembly reaffirmed these principles and:

> "Urges the government to pursue negotiations with aboriginal nations to conclude agreements guaranteeing them a) the right to self-government; (…) d) the right to own and control land; (…) so as to develop as distinct nations having their own identity and exercising their rights within Quebec." [96]

These policy statements, which continue today to form the backbone of Quebec's Aboriginal policy, illustrate the ambiguous position of the provincial government in relation to the recognition of Aboriginal rights. On the one hand, Quebec embraces the logic of recognition. The two statements go further than any other federal or provincial governments official policy documents in using the language of nationhood and recognizing the collective nature of Aboriginal rights.[97]

On the other hand, it clearly establishes the limits of this recognition. The statements stop short of recognizing the inherent nature of the right to self-government. Instead, self-government is to be exercised "within Quebec" and is not to affect the territorial integrity of the province. As with federal policies on self-government and treaty negotiations, the Quebec approach to recognition is also accompanied by a logic of containment. But in this case, contained recognition is deployed to simultaneously gain Aboriginal peoples' loyalty in the struggle over national boundaries with the federal

[96] The full texts of the15 principles adopted in 1983 and the 1985 Motion of the National Assembly are reproduced in Quebec (1998: 17-19) and in Annex 1 of this thesis.
[97] In 1991, the Ontario government recognized that Aboriginal peoples had "an inherent right to self-government within the Canadian federation" (Cameron and Wherett, 1995).

government while at the same time asserting the Quebec National Assembly's own sovereign authority over Aboriginal peoples.

Quebec's ambiguous position on recognition was put to the test in no small fashion in the following decade as Quebec and Aboriginal nationalisms collided in multiple arenas. On the constitutional front, the collapse of the Meech Lake Accord in 1990 and the ensuing debates over Quebec and Aboriginal peoples' place in the federation resulted in a war of words over respective claims to nationhood. Quebec Premier Robert Bourassa insisted that "no matter Quebec's future, the rights of Aboriginal peoples must be exercised within the jurisdictional boundaries of the National Assembly."[98] In response, Ovide Mercredi, the Grand Chief of the AFN, provoked a tidal wave when he declared to the National Assembly that as a province, Quebec did not have the right of self-determination "since it does not constitute a single people." To deny our right to self-determination in the pursuit of your aspirations, he added, "would be a blatant form of racial discrimination."[99]

This collision between Quebec and Aboriginal claims for recognition took a very concrete turn with the Oka crisis of 1990. As tempers flared on both sides of the barricades, and manifestations of intolerance were reverberated and amplified in the media, the conflict turned into a bitter battle between two nations, both claiming sovereign authority on the land and negating the other's legitimacy (Trudel, 1995). The summer of 1990 was barely over when Quebec nationalists were confronted with another challenge to their legitimacy, this time by the James Bay Cree who engaged in an international campaign to halt the development of the Great Whale hydroelectric

[98] In Delisle, Normand, "Le droit à l'autonomie governementale ne mène pas à la souveraineté territoriale", *La Presse*, March 6, 1992, B.14. My translation.
[99] In Lessard, Denis, "Pour Mercredi, il n'y a pas de peuple québécois", *La Presse*, February 12, 1992, A1.

complex. In alliance with a network of environmental groups, the Cree put together a highly effective international campaign, portraying the project as "a new Amazonian catastrophe" and decrying Quebec's lack of respect for human rights, a devastating image for a government itself about to seek recognition on the international stage.[100]

With the 1995 referendum on Quebec sovereignty, the conflict between Aboriginal and Quebec nationalisms reached new heights as Aboriginal leaders, to the delight of English-Canadian media and politicians, started to evoke the possibility of partition.[101] Aboriginal representatives boycotted the consultations leading to the referendum, arguing the strictly majoritarian process was a violation of their own right to self-determination.[102] The Crees and Inuit organized their own referendum, while the Mohawks did not allow Quebec elections officials on their territory. In Aboriginal communities that participated in the referendum, the PQ option was massively rejected.[103]

In the aftermath of the referendum, with the close results in mind and an acute understanding of the legitimacy gained by Aboriginal peoples during the process, the PQ government, now led by Lucien Bouchard, sought to rebuild the bridges after a decade of tense relations. In a major policy orientation document released in 1998, the Quebec government reaffirmed its recognition of Aboriginal nations and its commitment to self-

[100] See, for example, Leconte, Catherine, "Nouvelle attaque des autochtones contre Hydro-Québec dans le New York Times" *Le Devoir*, April 14, 1993, A10. The PQ government put the Great Whale project "on the ice" a few weeks after its return to power in 1994. See Dubuc, Alain "La mort de la Grande Baleine", *La Presse,* November 22, 1994. B.2.
[101] See for example the editorial "Quebec Secession Questioned by Natives", *The Globe & Mail,* December 6, 1994; and the federal Indian Affairs Minister's declaration in support for partition in "Cree Have the Right to Remain Canadians: Ron Irwin", *Ottawa Citizen*, April 24, 1994.
[102] Cantin, Philippe, "Un «déni» du droit des autochtones," *La Presse,* December 7, 1994, B4.
[103] Delisle, Norman, "Les autochtones se sont massivement prévalus de leur droit de vote pour appuyer le NON", *La Presse,* November 9, 1995, B4.

government "as a means to reconcile aboriginal aspirations with those of Quebecers as a whole, while maintaining the territorial integrity of Quebec" (Quebec, SAA, 1998: 12).

Again here, the PQ government rejects the principle of an inherent Aboriginal authority, and recognition is still clearly contained within state territorial and political boundaries. But in the same document, it also insists on the need to "develop specific Quebec-Aboriginal peoples dynamics in which the federal government will be invited to participate when necessary" (Ibid: 15). The policy proposed concrete steps to achieve this goal; most importantly, the negotiation of bilateral Quebec-Aboriginal agreements of "mutual understanding" and the delegation of "contractual jurisdiction in areas of relevance for Aboriginal social, economic and cultural development" (Ibid: 22), which I discuss below. Arguably, this form of delegation doesn't go further than the federal policy of 1995 (Salée, 2003). But Quebec is the only provincial government to develop such a comprehensive approach to bilateral relations with Aboriginal peoples outside the framework of the federal self-government policy.

It is in this bilateral perspective too that in 2000, the provincial government and four Innu communities of northeast Quebec agreed on a common approach in the negotiation process of a land claim settlement that had been stalled for decades as a result of the federal and provincial extinguishment policy. Quebec agreed to negotiate a settlement based on the principle of continuity of Aboriginal rights rather than their exhaustive and final definition in a treaty, as it has been the case in land claim settlements in Canada since 1975 (Otis, 2004; Maclure, 2005).[104] A few months later, the "*Paix des*

[104] The Nisga'a and Tlicho agreements do not extinguish Aboriginal rights, but they restrict their exercise to the content of the treaty. The federal government eventually agreed to the approach and an Agreement in Principle on the land claim was signed in march 2004 with two Innu communities. For information regarding the negotiations, see Quebec, SAA (2004b).

Braves" was also signed with the James Bay Crees, putting an end to numerous legal proceedings and establishing the framework for a "new era of mutual recognition and nation-to-nation cooperation between the Crees and Quebec" according to press releases of the government and the Grand Council of the Crees.[105] While I discuss the *Paix des Braves* in greater detail in the next chapter, it is relevant to underline its symbolic importance for the two parties. The Crees are amongst the strongest opponents to Quebec's national-territorial aspirations and this act of mutual recognition, five years after the referendum episode, constituted a major breakthrough for both parties.

4.4.3. De-Centered Governance and the Politics of Partnerships

Like its federal counterpart, the Quebec government was also influenced by changing understandings of the role of the state as it defined its own approach to Aboriginal governance in the 1980s and 1990s. In fact, despite a strong statist tradition associated with the Quiet revolution (McRoberts, 1993) and the importance for Quebec nationalists to consolidate the provincial state's territorial integrity and authority, the idea of de-centered Aboriginal governance took root quite early on in Quebec. The creation of the DGNQ in the early 1960s, a "regional" agency in charge of coordinating government activities for Nouveau-Québec, was itself an acknowledgement that services to the Inuit required a certain flexibility that may not be provided by general programming in line departments (Gourdeau, 1994). The institutions created under the James Bay and Northern Quebec Agreement for the Cree and Inuit, most of them under Quebec legislation, were, at the time, by far the most advanced experiment in Aboriginal

[105] See Quebec, SAA (2004c). *Signature d'une entente de principe entre les Cris et le Gouvernement du Québec*, www.autochtones.gouv.qc.ca/centre_de_presse/communiques/2001/saa_com20011023.htm.

autonomy in Canada. To be sure, the implementation of this system of de-centered governance faced significant obstacles. It did not mesh well with the relatively centralized machinery of government in Quebec City (Gourdeau, 2002: 199). But the provincial government progressively adapted its administrative practices to the differentiated regime created by the JBNQA, most significantly in education, health and social services, where distinct Inuit and Cree regional structures had to be integrated to the existing provincial programs.[106]

As elsewhere, it is with the emergence of the broader decentralization agenda, associated with neo-liberal restructuring, that Quebec more systematically embraced de-centered Aboriginal governance. In line with developments previously discussed in the context of federal policies, the province increasingly engaged in bilateral and trilateral agreements on the administration of programs by band councils and Aboriginal organizations. Starting in the mid-1980s, direct agreements with Aboriginal authorities on policing, social services and wildlife management, amongst others, replaced previous bilateral, Canada-Quebec, agreements through which the province provided Ottawa-funded services directly in Aboriginal communities.

Quebec took advantage of the federal government's budgetary restraints to occupy more actively the field of Aboriginal governance through the conclusion of direct bilateral agreements with Aboriginal authorities in areas where the federal government chose not to intervene. In an early example of this practice I discuss in detail later on, the Quebec government reached an agreement with the Mohawk Council of Kahnawá:ke for the construction and administration of an hospital on the reserve in 1984 when the federal government, which has jurisdiction for such matters on reserves, refused to pay for the

[106] I discuss this process of adaptation in the chapters concerning the Cree and Inuit.

health centre. This first bilateral accord between a First Nation under the *Indian Act* and Quebec, served as a basis for other agreements in the following decade and, according to officials, inspired the "contractual jurisdiction" approach established in 1998.[107]

Under these new bilateral and trilateral agreements, not only did Quebec engage directly in negotiations with Aboriginal authorities, but the latter also took charge of administering programs according to Quebec's (and not Ottawa's) regulatory framework, even if they were mostly funded by Ottawa.[108] As Renée Dupuis suggests:

> *With these ad-hoc agreements, we moved from a regime of federal-provincial agreements through which the federal government essentially bought provincial services for Aboriginal peoples under its jurisdiction to a trilateral regime in which Aboriginal authorities insist for participating directly, with Quebec, to the negotiation and ratification of agreements in order to assert their own political will and autonomy* (1995: 51, my translation).

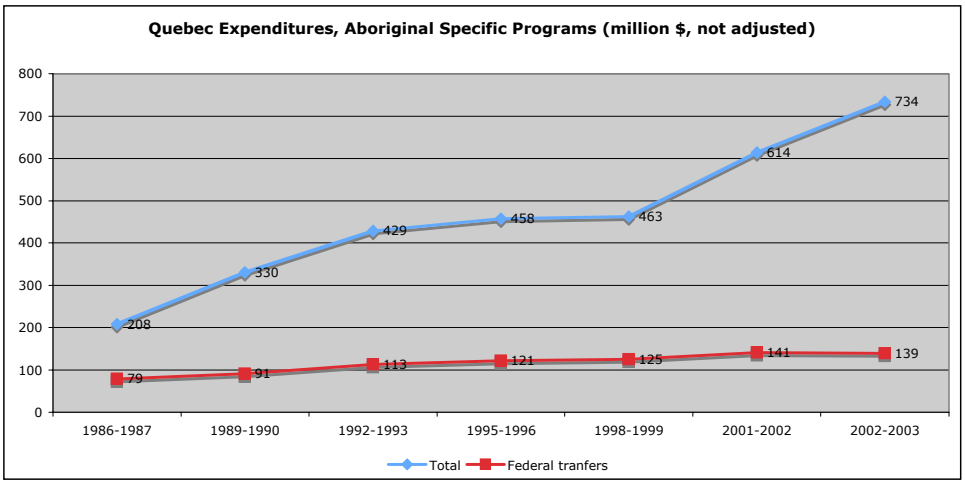
To be sure, such bilateral and trilateral agreements are not unique to Quebec. Other provinces have also engaged in such practices under the impetus of the federal government. But in the Quebec context, these agreements are more than federal downloading of responsibilities. For the provincial government, they are seen as way to both "consolidate Quebec's jurisdiction on its territory (…) while at the same time build trust though direct relations with Aboriginal peoples."[109]

This increasingly proactive role in Aboriginal governance though trilateral and bilateral agreements is reflected in the growth of expenditures specifically targeted at Aboriginal peoples in various sectors of government activities. According to data collected by the SAA and reproduced in figure 4.5 below, Quebec expenditures on Aboriginal peoples more than doubled between 1986 and 1992, and continued to grow in

[107] Interview with Quebec officials, G01-12 and G01-13.
[108] There is no comprehensive account of the agreements signed before 1998. Recent ones are available on the SAA site: www.saa.gouv.qc.ca/relations_autochtones/ententes/liste_ententes_conclues.htm.
[109] Interview with Quebec official, G01-12 (my translation).

the following years.[110] While these expenditures include federal transfers, the proportion of funds coming from the federal government sharply declined after 1986, from 38 percent down to 26 percent in 1992 and less than 18 percent in 2003.[111]

Figure 4.5 Quebec Expenditure Targeted at Aboriginal Peoples



Source: Québec, SAA, 2004a.

De-centered Aboriginal governance is thus not new in Quebec. But it is only with the 1998 policy statement discussed previously that a coherent framework fostering such an approach was articulated. The *Partenariat, Développement, Achievement* policy was developed in the wake of the RCAP report and the federal government's *Gathering Strength* plan. It echoes the latter in many ways. Like the federal policy, the focus -as its name suggests- is on the development of partnerships to foster economic development and self-reliance in Aboriginal communities. Throughout the document, references are made to the role of the provincial government in fostering the conditions for aboriginal

[110] These data include Hydro-Quebec expenditures, which represent between 14 and 18 percent of total government spending on Aboriginal peoples, depending on the year.

[111] It is important to note that a significant proportion of these expenditures are resulting from the government's JBNQA obligations related to Cree and Inuit education, health, housing and social services. Yet again, the proportion of Quebec Aboriginal expenditures tied to specific JBNQA obligation is also declining, from 89 percent in 1986 to 69 percent in 2003 (Quebec, SAA, 2004).

autonomy through "an approach encouraging greater responsibility for Aboriginal communities in achieving self-sufficiency through participation in local and regional economic activities" (Quebec, SAA, 1998: 23).

It is in this perspective that Quebec proposed to negotiate three types of bilateral agreements with Aboriginal nations and communities. "Statements of understanding and mutual respect" are general framework agreements under which Quebec and an Aboriginal nation or a specific community agree to principles guiding their relationship and establish a framework for the negotiation of sector-specific agreements in areas of common interest. "Contractual jurisdiction" agreements are essentially sector-specific devolution agreements within areas of Quebec jurisdiction under which an Aboriginal nation and Quebec agree on the nature of each partner's responsibilities (including certain norms in the delivery of services), the funding and accountability mechanisms, and the conditions for withdrawing from the agreement (Quebec, SAA, 1998: 22).

Significantly, in cases where the agreement negotiated is not consistent with provincial laws and regulations, the policy states that the latter should be modified "in order to accommodate the specific needs and reality of each aboriginal nation" (Quebec, SAA, 1998: 29). This is at the very least an implicit recognition that Aboriginal peoples operates under a distinct governance regime that the rest of the citizens of the province.

Such agreements do not, however, imply a transfer of legislative authority, which remains with the National Assembly. The minister responsible for the program devolved, as in de-centered models of governance developed in Ottawa, also remains accountable for expenditures engaged though such agreements. As of 2005, Quebec had signed ten framework agreements and statements of mutual understanding, but only five sector-

specific devolution agreements, including two with the James Bay Crees and Inuit under the JBNQA implementation framework.[112]

The third kind of bilateral agreement created under the 1998 policy are economic and community development agreements to fund specific projects in Aboriginal communities. The latter are financed though an Economic and Community Development Fund endowed with an initial $125 million to encourage Aboriginal-led initiatives and Aboriginal-private enterprise partnerships for local development (Quebec, SAA, 2000: 11). Thanks to an agreement with Ottawa, federal monies allocated to Aboriginal economic development in Quebec are transferred to the province and pooled together with the Fund, under provincial management. The Fund, and the pooling of federal monies, created a significant incentive for Aboriginal governments to engage in direct bilateral relations with Quebec. At the time of writing, most Aboriginal communities in Quebec had signed at least one such agreement.

To this increasingly proactive role of the provincial government in Aboriginal governance also corresponds a growing role for the *Secrétariat aux Affairs Autochtones*. The cross-departmental coordination mandate of the SAA is now much more complex than it was in the early days of the secretariat. In addition to its initial role of coordination and promotion of governmental activities in Aboriginal communities, the SAA now coordinates the negotiation of agreements with Aboriginal nations and ensures the implementation of such agreements in collaboration with line departments. The only program it directly manages, however, is the Economic Development Fund. Unlike the federal INAC, its remains strictly a coordinating agency with a limited budget and a

[112] Eleven specific agreements were also signed with the Kahnawake Mohawks under a framework agreement in 1998. The various agreements can be consulted on the government's website at: www.autochtones.gouv.qc.ca/relations_autochtones/ententes/ententes_conclues_en.htm (April 23, 2006).

correspondingly limited influence on government programs themselves, unless Aboriginal affairs become a priority of the Premier.[113] Most line departments also now have "aboriginal affairs coordinators", officials responsible for liaison with the SAA and Aboriginal governments, but also responsible for the implementation of agreements with Aboriginal governments within the department. This role is particularly important in a complex bureaucratic environment where the asymmetries in administrative practices associated with new governance structures are often met with resistance by program mangers. Aboriginal affairs coordinators often act as "institutional guardians" of Aboriginal interests and perspective in their respective departments.[114]

4.4.4. Conclusion: Opportunities and Constraints in Quebec

From early postwar attempts at incorporating the Inuit into the broader regime of municipal governance in Quebec to more recent negotiation of government to government agreements of de-centered governance, the evolution of Quebec Aboriginal policies is, not surprisingly, remarkably similar to that of the federal government. As in the federal case, the politics of recognition played a central role in reshaping approaches to Aboriginal governance in Quebec in the 1980s. As with federal policies, while the language used in Quebec's political statements and policy documents mirror in many ways Aboriginal claims, the process of recognition remained in effect contained by, and

[113] Under Premiers Bouchard and Landry, the Secretariat gained significant influence, allowing its officials to play a leading role in flexing the resistance of line departments in the development of flexible legislative and regulatory frameworks to accommodate Aboriginal policy perspectives and devolution. Interview with Quebec official G01-12, G01-02.

[114] They also play a fundamental "pedagogical" role in reminding program officers of the specific reality of Aboriginal peoples and of the political reality driving much governmental actions in Aboriginal communities. One coordinator interviewed suggested one of his most compelling tasks was to raise awareness amongst his colleagues of the fact that Aboriginal peoples "cannot be considered like any other Quebec citizens." (G01-17).

defined within, the boundaries of state authority, albeit this time as understood and defined in Quebec City. The development of new approaches to Aboriginal governance, combining administrative decentralization with fiscal and regulatory control in new "partnerships" also largely parallels the evolution of federal practices. The similarities between Quebec's 1998 *Partnership, Development, Achievement* policy and the federal *Gathering Strength* agenda of 1997 suggest the two policy universes are indeed deeply interconnected.

That being said, there are important differences in the context of Aboriginal-state relations in Quebec that affect how these changes play out in the province. The main difference is, as I have suggested, the role played by the provincial state as a vehicle for Québécois nationalism. Aboriginal claims to self-determination have found a fertile ground in Quebec politics, in a discursive environment where assumptions about political membership, identities and state sovereignty are constantly challenged and debated. Quebec was the first to recognize their status as distinct nations, and to engage in direct government-to-government negotiations on a bilateral basis with Aboriginal authorities. This willingness of the provincial government to engage in bilateral acts of mutual recognition prompted Peter Russell to suggest that "Quebec, under both Liberal and PQ administrations, has shown a much greater capacity than either the Government of Canada or any other province for working towards the decolonization of Aboriginal peoples" (1997: 118).

That being said, while it is true that the language of recognition is perhaps more explicit in the Quebec context, so is the state's containment of this recognition. The Quebec government has constantly sought in the past decades to assert its direct authority

over Aboriginal peoples within its territorial boundaries. Its proactive role in Aboriginal governance, as well as the symbolic use of the language of recognition, must be located in a context where the provincial state seek to establish itself as Aboriginal peoples' primary interlocutor in negotiating the conditions of exercise of their rights and political autonomy (Salée, 2003). The development of a "made in Quebec" approach to de-centered governance in 1998 under the model of contractual jurisdiction is a good example in this respect.

This constant assertion of political authority and legitimacy has not been without conflicts, as Aboriginal peoples have long considered their relationship with the Crown as a strictly bilateral one with the federal government. In many ways, the provincial government's activist position created a whole new layer of institutional constraints for Aboriginal peoples seeking to assert their own political autonomy. They now have to negotiate with two states, both unwilling to let go of their sovereign authority. Quebec's state nationalism also entered in direct competition with Aboriginal peoples' own aspirations. As Reg Whitaker suggests, "for Aboriginal peoples, Quebec's assertion of national-territorial sovereignty represents (…) a fundamental denial of their own right to self-determination" (1999: 83).

Yet again, Quebec's policy of direct engagement with Aboriginal authorities has created a unique context for Aboriginal governance. The relatively rigid framework of the *Indian Act* and federally-centered governance is replaced by a more complex configurations where Aboriginal governance takes place in multiple layers of bilateral and trilateral relations, thus creating new spaces of interactions and intergovernmental negotiations where Aboriginal authorities can bargain concessions from both the federal

and provincial governments. They have also found in the provincial state a relatively flexible partner in developing governance regimes that suit their interests and perspectives, as long as they agreed to play within the rules of the game established by the province on territorial integrity and legislative authority. Without the heavy institutional legacy of the *Indian Act*, the Quebec state has been able to adapt relatively easily to the highly variable expectations, perspectives and institutional capacity of Aboriginal nations. As the coming chapters discusses, the signing of highly distinct political agreements with the Kahnawá:ke Mohawks and James Bay Crees are a testimony of this flexibility.

4.5 Conclusion: From Hierarchical to Multilevel Governance

Far from a static reality, Aboriginal governance has gone through successive periods dominated by different conception of the relationship between Aboriginal peoples and the Canadian state, as the latter consolidated its authority on the land. There are certainly fundamental differences between assimilation policies of the late 19th century, political incorporation perspectives, as embodied by the White Paper of 1969, and more recent policies that recognize Aboriginal peoples as a permanent feature of the Canadian political landscape. The Constitutional recognition of Aboriginal and treaty rights in 1982 as well as the negotiation of new treaties and self-government agreements all represent major reconfigurations of the norms, rules, logic, representation and institutional foundations of Aboriginal governance.

Building on the analytical framework developed in the previous chapter, I suggested these historical shifts in the formal rules, norms, logic and representation of the

relationship could best be understood as successive processes of institutional adaptation, in which existing structures of governance are reconfigured and *layered* with new logics without being simply replaced. Despite significant shifts in policy approaches, institutional configurations and representations of the relationship, the Constitutional structure of the Canadian state and the foundations of the regime of Aboriginal governance established under the *Indian Act* still remain largely intact today. The recognition of the legal and political status of Aboriginal peoples remains very much contained in pre-existing governance structures.

This logic of containment confirms the importance of institutional legacies and agency in the definition of the specific trajectory of regime transformation. Far from a mechanistic process driven solely by ideological or paradigmatic shifts, the reconfiguration of Aboriginal governance in the past thirty years is best understood as a process of strategic institutional adaptation. This process is driven by governments' reactions in face of pressures exercised by Aboriginal organizations, who have also strategically located their claims in the broader movement of political liberalization associated with the human rights revolution.

I have also insisted on the importance of locating the shifts in Aboriginal governance of the past thirty years within a second broad historical process. The redefinition of the role of the state associated with the rise to prominence of neoliberal ideas is also an important element of shifting Aboriginal policies both at the federal and provincial levels. A significant devolution of programs administration towards Aboriginal governments and organizations is the main characteristic of this shift. Again, as with recognition practices, this new *de-centered* model of governance has not fundamentally

altered the formal allocation of authority in Aboriginal governance. Instead, new forms of indirect control mechanisms, through fiscal transfers and accounting requirements, have replaced more direct forms of authoritative governance.

Despite their inscription in continuity with the colonial past, these shifts in the representation and logic of Aboriginal governance are significant. While not path braking, processes of institutional adaptation, I argued in chapter 3, can lead to significant cumulative shifts over time. The most significant outcome of these shifts in the representation and logic of Aboriginal-state relations, I have suggested, is the reconfiguration of Aboriginal governance from a highly centralized, tightly controlled and relatively uniform model to a much more complex multilevel governance landscape.

Aboriginal governance is now increasingly being played out in multiple venues and at multiples scales. If the federal government has kept the upper hand with its constitutional authority and fiscal capacity, provinces now play an increasing role as a result of their involvement in treaty negotiations and in the process of administrative devolution to Aboriginal governments and organizations. The diffusion of the policy process has also created new spaces for collective decision-making at the community, regional or national levels for Aboriginal governments and organizations, opening opportunities for the latter to develop their own policy capacity as the coming chapters demonstrate. This diffusion of the policy process has also led to the development of much more sustained intergovernmental relations between the various governing actors involved in Aboriginal governance, again creating new spaces for Aboriginal authorities to assert their legitimacy and challenge the dominant conception of the relationship.

Aboriginal governance is also far less homogenous, as each Aboriginal nation, or even community, has its own set of governance rules and practices, established in treaties, self-government agreements, political or administrative agreements in specific policy sectors, and more broadly in the dynamics of intergovernmental relations that are developed through time to manage these multiple agreements. Aboriginal governance is not only a multilevel reality, it is also much more fragmented today. It is thus more accurate to talk of a mosaic of multilevel governance regimes between Aboriginal nations and their federal and provincial counterparts, each with its own institutional framework and evolving dynamics.

The place specific and context specific nature of Aboriginal governance is especially relevant in Quebec, where the legitimacy and boundaries of the Canadian polity are also challenged by a provincial government seeking to assert its own national project. This specific context, I argued, opens opportunities for Aboriginal peoples to profoundly reshape their governance regime, by playing the federal and provincial governments against each other, and establish their own legitimacy as self-determining political communities on their own. In the next two chapters, I discuss how the James Bay Crees and Kahnawá:ke Mohawks have taken advantage of this new multilevel and fragmented reality to alter in very significant way the nature of their own governance regime.

Chapter 5

The James Bay Crees: Treaty-Based Governance in Eeyou Istchee

In February 2002, Ted Moses, Grand Chief of the Crees and Bernard Landry, Premier of Quebec, signed an agreement that launched, according to the main protagonists, a "new era of mutual recognition and cooperation in Cree-Quebec relations."[115] The agreement, often referred to as the *Paix des Braves*, marked a significant change in direction for two parties who had clashed on numerous occasions throughout the previous decade over many of the questions tackled by the agreement: territorial authority, natural resource extraction and boundaries of political communities.

The Crees of Eeyou Istchee[116] and Quebec had indeed long been on a collision course. The development of its Northern frontier had been a core element of Quebec state nationalism since the 1960s. The Crees on the other hand, like most Northern Aboriginal peoples, have a strong attachment to the land. Traditional hunting and trapping activities, while less prominent today in economic terms, are still very much a core of their collective identity (Niezen, 1998). Cree resistance to the expansion of state-led capitalism on their traditional lands, and especially of hydroelectric development, lead to the first "modern treaty" in Canada, the James Bay and Northern Quebec Agreement (JBNQA) of

[115] Press Release, *Entente historique entre le Québec et les Cris,* Secrétariat aux Affaires autochtones, Gouvernement du Québec, February 7, 2002.

[116] The Crees have started in the early 1990s to use Cree names to refer to their community and its territory. The *Eeyou* or *Eeyouch* are the peoples and *Eeyou Istchee* is their traditional land. The name is sometimes spelled differently (*Eeyou Astchee* or *Iyiyuuschii*), but the former has now established itself in the literature produced by the Grand Council of the Crees and will be used in this chapter.

1975.[117] While still controversial, the JBNQA ushered a new era in Aboriginal governance in Canada, and the Crees have been at the forefront of these developments ever since.

This chapter documents the transformation of Cree governance from the early JBNQA negotiations to the 2002 agreement with Quebec. Far from being passive victims of broader structural forces, the Crees have been active agents in shaping and re-shaping their governance regime within the changing political and economic context of the past thirty years. Through the actions of the Grand Council of the Crees and the Cree Regional Authority (GCC/CRA), a regional governance organization pooling administrative and political resources, the Crees were able to progressively transform the limited structures resulting from the JBNQA into a complex regime of multilevel governance through which they are gaining significant leverage in policy exercises at the federal and provincial levels.

In the process, what were initially eight (now nine) communities with only limited political ties have been transformed into a unified polity with a strong sense of national identity and territorial boundaries, asserting its status as a nation and challenging assumptions of state sovereignty. The *Paix des Braves* is the result of this long transformative process in which the Cree leadership combined a nationalist representation strategy with the resources gained through administrative devolution to establish a distinctive political relationship with Quebec, and to a lesser extent with the federal government. While it does not alter the formal structure of state authority, the *Paix des Braves* is, I argue, a significant example of how, in the current context of state

[117] The Inuit of Northern Quebec were also signatories of the JBNQA.

restructuring, multilevel governance exercises can become spaces for transformative politics for Aboriginal peoples.

5.1 Cree Governance Prior to the James Bay and Northern Quebec Agreement

The approximately 14,500 Crees of Northern Quebec live today in nine communities spread along the Eastern shore of the James Bay and further inland.[118] Originating from the plains of Western Canada, the Crees have lived in the James Bay region for about 5,000 years. For most of the twentieth century, they continued to live at least part of the year in groups of 3 to 5 families in encampments in the woods, where they practiced the traditional activities of hunting and fishing for subsistence as well as commercial trapping. In the summer months, the hunting groups gathered in or around the Hudson Bay Company trading posts, where they could trade furs for equipment and basic goods.[119] As missionaries and the federal government started to provide services at major trading posts in the 1920s, families began to establish themselves permanently in those settlements, which today form the main Cree communities.

Without a treaty and geographically isolated, the Crees of Northern Quebec were relative latecomers to the structure of governance established under the *Indian Act*. Only in the late 1930s did the federal government progressively introduce compulsory school attendance and built permanent homes in the communities in order to facilitate the "civilizing" process of the Crees. Despite these significant changes, as late as 1970, 40% of Cree adults were still involved in full-time hunting, fishing and trapping activities.

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118 See Annex II for a map of cree territory and communities. For a distribution of the cree population in the different villages, see http://www.autochtones.gouv.qc.ca/nations/population_en.htm#cris.

119 Cree traditional way of life, which I can only summarize briefly here, is well documented. See for example Morantz (2002), Niezen (1998) and Salisbury (1986).

Another 40% shared their time between bush activities and wage labour, and only 20% of adults were permanently employed, mostly in government services (Salisbury, 1986:25).

Cree traditional political structures were organized around the hunting groups. A senior hunter, or "tallyman", managed the traplines and organized the hunting and trapping activities of the group. Unelected, his authority was based on seniority, knowledge and spiritual leadership (Morantz, 2002: 228). This system of traditional authority, while well-established, was limited to the conduct of hunting and trapping activities. The Crees did not have a political system that formally connected them across hunting groups, and even less across settlement communities. It was thus relatively easy for the federal government to impose the band council system in Cree settlements. Starting in the late 1930s, elections were organized and chiefs and councilors were chosen by residents of settlements the government had designated as band members. The two governance structures came to coexist, as life in the bush was organized around the authority of a tallyman while the band council chiefs served as intermediaries with Indian Affairs agents for the organization of services in the communities (Niezen, 1998:61). As in most Aboriginal communities at the time, the authority of band councils was limited. Meetings were irregular and essentially served to legitimize decisions made by DIAND officials on local governance issues (Morantz, 2002: 227; Salisbury, 1986:30).

Cree relations with the Quebec government were minimal until the late 1960s. As discussed in the previous chapter, jurisdiction over the Northern part of what is now Quebec was transferred to the province by two acts of Parliament in 1898 and 1912

respectively.[120] The two Acts required Quebec to "recognize the rights of the Indian (…) and obtain surrender of such rights in the same manner as the Government of Canada."[121] Quebec, however, never engaged in treaty negotiations for the surrender of Aboriginal rights on its newly acquired territory and showed only minimal interest in the development of its Northern frontier until the 1960s.[122] As a result, with some exceptions, such as the regulation of hunting activities in the southernmost section of Cree territory in the 1930s (Morantz, 2002:180), Quebec has had a limited presence in Cree communities.

It is thus fair to say that the Crees of Northern Quebec remained on the fringe of Canadian politics and government administration until the last half of the 20th century. The governance structure of the *Indian Act* was only loosely established in communities and coexisted with traditional modes of governance. There were also no political structures or organizations linking the Crees of various villages together. As LaRusic suggests (1979: *ix*), "the only contacts between the leaders of Cree communities were through the District office of DIAND and the occasional meetings of the Indians of Quebec Association." This situation changed radically with the announcement of the James Bay Hydroelectric project.

5.2 Governance Under the James Bay and Northern Quebec Agreement

As the first 'modern' treaty, the signature of the JBNQA is arguably a defining moment for Aboriginal-state relations in Canada. It creates an unprecedented framework

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120 It was previously part of the vast territory of Rupert's Land, granted by King James I of England to the Hudson's Bay Company in 1670 and transferred to the Dominion of Canada in 1870. For a more detailed analysis of the 1898 and 1912 boundary extension acts, see GCC (1995a: 199ff).

121 *An Act to extend the Boundaries of the Province of Quebec*, S.C. 1912, c.7, as quoted in GCC (1995a: 203).

122 No treaties were negotiated in Quebec. The rationale for this distinctive treatment was that any remaining Aboriginal land title had been extinguished with the transfer of authority from the French Crown to the British Crown. For a discussion, see Grammond (2003).

for Aboriginal governance, which, for better or for worse, became the standard against which ensuing land claims and self-government agreements came to be measured.

5.2.1. Negotiating the JBNQA [123]

The James Bay hydroelectric development project, launched by Quebec Premier Robert Bourassa in April 1971, carried much economic and symbolic weight.[124] Energy production and the expansion of the natural resource extraction industry to the North had been a central element of the province's economic development strategy since the early 1960s. State-owned Hydro-Quebec, one of the world's largest public utility companies, was a core vehicle of this strategy but also a symbol of Francophones' new secular savoir-faire and technical capability closely associated with the Quiet Revolution. The development of the James Bay territory was also significant for the newly assertive nationalism in the province. In the words of Robert Bourassa (1973: 12), northern Quebec was a "vast reservoir of untapped resources" that "had to be conquered" for the benefit of all Québécois.[125]

The announcement came as Aboriginal peoples across the country were mobilizing against the federal White Paper of 1969, and the idea of Aboriginal rights was quickly making its way into the public discourse. Significantly, the project was launched two months after a report on the territorial integrity of Québec concluded the province was bound by the terms of the 1912 *Boundaries Extension Act*, and had to negotiate the

[123] My Translation. There are numerous accounts of the process leading to the signature of the JBNQA. See, amongst others, LaRusic (1979), Feit (1980; 1985) and Salisbury (1986).
[124] The initial proposal was for the construction of three distinct projects that would have produced 28,000 megawatts of electricity. Only the first one, the La Grande project, was launched in 1971. 11 500 km^2 of land were eventually inundated to produce 15 700 megawatts of electricity as of 1986 (Williams, 1993).
[125] For an analysis of the symbolic of the "Conquest of the North" for Quebec nationalism, see Desbiens (2004).

cession of Aboriginal rights over the land before engaging in any development of the region (Quebec, Commission d'étude sur l'intégrité du territoire du Québec, 1971). The Indians of Quebec Association (IQA), created in 1967, had been involved in the hearings of the Commission and was in negotiation with Quebec for the settlement of Aboriginal rights in the province.

It was thus in a fairly tense context that a group of young Cree leaders organized, in collaboration with the IQA, the first ever political meeting of all Eastern James Bay Cree chiefs in June of 1971 in order to gather support against the project. After a year of unsuccessful attempts to negotiate with Quebec, and faced with a passive federal government,[126] the IQA and the Crees, now joined by the Inuit, launched court proceedings seeking an injunction to halt the construction of the project. At the time, no Canadian tribunal had yet recognized the existence of Aboriginal rights outside a treaty.[127]

After hearing 167 witnesses, most of them Crees and Inuit, Justice Malouf of the Quebec Superior Court granted the preliminary injunction in November 1973. Quebec, he argued, "cannot develop these lands without the prior agreement of the Natives and Eskimo."[128] This highly publicized decision was overturned in appeal, but it nonetheless had significant effects on all parties. Faced with a shifting public opinion and legal uncertainties, Quebec submitted a settlement proposal to the Crees and Inuit two weeks after the initial court decision. In exchange for the surrender of the Aboriginal title on the

[126] The federal government, worried of provoking Quebec nationalism in the aftermath of the War Measures Act, would not intervene on behalf of the Crees (Feit, 1985: 28).

[127] The Nisga'a of British Columbia had undertaken similar court action, but the final judgment on what became the *Calder* case in the Supreme Court of Canada was not released until March 1973.

[128] The IQA lawyers successfully argued Quebec was violating Aboriginal tenure rights, which had never been abrogated or ceded through a treaty, contrary to the *Quebec Boundary Extension Act* of 1912. *Gros Louis et al. c. Société de développement de la Baie James et al.* [1974] R.P. 38, p77. See Mainville (1993).

Northern part of the province, the government offered financial compensation and agreed to modify some elements of the project. But the sovereignty of the National Assembly on the land and its resources was not negotiable (Mainville, 1993: 75).

Divergent viewpoints rapidly emerged between Cree leaders and the IQA on the strategy to adopt following Quebec's settlement proposal. The IQA executive saw in continuing court action an opportunity to force Quebec and the federal government to recognize the land rights of all Aboriginal peoples on the territory. For the Crees, with the construction of access roads and deviation channels already under way, the recognition of Aboriginal rights was a less immediate preoccupation (Feit, 1985: 32; Richardson, 1975: 135). The priority for the Crees at the time was to protect their way of life and minimize the impact of the project on the land. They were also increasingly aware of the importance of gaining some guarantees regarding their participation in the governance of the region. As Feit (1980: 162) suggests:

> The Crees not only articulated a common definition of their rights in their testimonies during the court case, but also a common identity around a shared experience on the land. Terms like *Cree people* and *Cree territory* gained legal and political meaning for the first time. From this newly gained shared consciousness emerged a desire to redefine their collective relationship with the Canadian government and society.

The Cree leaders chose to break ranks with the IQA and engage in negotiations with Quebec and the federal government for a general settlement, focusing their energy in securing hunting and trapping rights and negotiating a new structure of governance where they could have a greater voice in decisions affecting the development of the region (LaRusic, 1979: 18). A new organization, the Grand Council of the Crees (GCC), was created in June 1974 to represent Cree interests in the negotiation process with the province, the federal government and the Inuit, who also agreed to negotiate a

settlement.[129] With the construction of the project underway, all parties were under significant pressure to reach a settlement. An Agreement in Principle was reached in less than three months, and the Final Agreement was signed in November 1975.

5.2.2. An Overview of the Agreement

The James Bay and Northern Quebec Agreement is a 456 page document covering a wide array of issues related to governance of the land and the communities.[130] In exchange for a payment of $225 million (divided between the two groups), the Crees and Inuit agreed to a slightly modified version of the hydroelectric complex and "cede, release, surrender and convey all their claims, rights, titles and interests, whatever they may be, to land in Quebec" (Section 2.1). The nature of remaining Aboriginal rights varies according to a 3-level system of land tenure. Most of the 1,000,000 km^2 of land covered by the agreement are category III lands, public lands available for development where the Crees and Inuit retained specific hunting, fishing and trapping rights. In category II lands, they enjoy exclusive harvesting rights, but the land remains under Quebec jurisdiction. Category I lands, which for the Crees corresponds to 5,600 km^2, or 1.5% of their traditional hunting grounds, are under local Cree control, but Quebec retains jurisdiction on sub-surface resources.[131]

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[129] While the GCC represented all Cree communities, the Inuit were divided on the opportunity to negotiate under the conditions imposed by Quebec. The federal government was involved by virtue of its jurisdiction over Aboriginal peoples. It played a relatively passive role in the negotiations themselves (LaRusic, 1979: 18).

[130] The Agreement is available at www.ainc-inac.gc.ca/pr/agr/que/jbnq_e.html. For useful summaries, see LaRusic (1979), Gourdeau (2002) as well as Peters (1989).

[131] Category I lands are under a mixed regime of federal jurisdiction for the communities and provincial jurisdiction for the adjacent lands. It was the choice of the Crees to maintain federal jurisdiction on the communities themselves. The Inuit opted for local land administration under provincial jurisdiction.

The bulk of the Agreement is dedicated to the creation of new governance structures, boards, committees and organizations designed to ensure the viability of Cree and Inuit traditional activities and facilitate their participation in the decision-making process regarding the development of the region.[132] A key element of the Agreement for the Crees was the creation of the Income Security Program, which provides subsidies for those who wish to pursue traditional activities (section 30).[133] The protection of traditional activities is also an objective behind the creation of a series of joint committees for wildlife management (section 24) and monitoring of the environment (section 22). Most of these bodies, equally composed of Cree, provincial and federal representatives, only have an advisory role however. Their mandate is also often vaguely described, which leads to numerous problems in their operation (Scott, 2005: 134).

One of the most significant elements of the Agreement is the transfer of administrative responsibilities for a number of services in Cree communities from the federal to the Quebec government, and the creation of a series of regional bodies controlled by the Crees to manage such services, which remained funded by the two orders of governments. The Cree School Board (CSB), for example, is funded at 75% by the federal government but exercises its administrative authority over education under the provincial *Education Act* rather than under the federal *Indian Act*. In addition to regular powers of school boards under Quebec law, the CSB has significant discretion in establishing policies designed to promote Cree culture and language. A similar regional body, the Board of Health and Social Services provides health care in Cree communities.

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[132] Institutions created for the Crees and Inuit mirror each other. With few exceptions, regional bodies created in the Inuit territory are public, while Cree structures are mostly ethnic-based. See Peters (1989).

[133] The program, administered jointly by Quebec and the Crees remains a core element of the JBNQA for the Crees. According to Salisbury (1986: 77), the number of full-time hunters increased by 50% from 1971 to 1981 as a result of the ISP. Close to 30% of Cree adults are still enrolled in the program today (GCC, 2002).

The Cree Regional Authority (CRA) is perhaps the most important organization created under the JBNQA. The CRA was incorporated in 1978 by provincial legislation and has the formal power and status of a regional municipality under Quebec laws. It was originally designed to play a relatively minor role in assisting local band governments in the delivery of newly devolved programs and services and in managing the compensation money on behalf of the Crees (through a Board of Compensation). But with time, it has become a core vehicle of Cree governance (LaRusic, 1979: 34; Salisbury, 1986: 65). In the early years of implementation, many of the experts and consultants who were involved in the JBNQA negotiations with the Grand Council of the Crees were hired by the newly created CRA to coordinate the creation of the numerous boards and committees at the regional level. The two organizations shared offices and staff as well as the same elected executive. As a result, the CRA has become the administrative wing of the GCC, forming the second branch of what is *de facto* a powerful regional structure, where most of the knowledge and resources of the Crees are located (Niezen, 1998: 73).

While they agreed to provincial jurisdiction at the regional level, the Crees chose to maintain direct ties with the federal government for the purpose of local self-government. It is only in 1984, with the adoption of the *Cree-Naskapi Act (of Quebec),* that Cree bands were incorporated as legal entities outside the *Indian Act*.[134] In line with the federal policy of the time, the Act establishes a structure of delegation in which Cree bands became the equivalent of federal municipalities. The Cree bands remained under the legislative responsibility of the Minister of Indian Affairs, but they were now responsible for the administration of most programs previously managed by DIAND,

[134] The small Naskapi Nation lives along the border of Labrador. It signed its own settlement, the Northeastern Quebec Agreement, in 1978. Its similar local governance structure was included in the 1984 Act.

such as public health, land management or policing.[135] Cree local governments also operate through annual grants rather than more restrictive contribution-based transfers under which *Indian Act* bands operated at the time. As a result, the oversight powers of the Minster are considerably limited under the *Cree-Naskapi Act.*[136]

5.3 Governance Under the JBNQA: Administrative Containment

The JBNQA created a very particular governance regime for the James Bay Crees. It did not establish, in formal terms, a third order of government in the federation. But at the same time, Cree institutions are in a distinct category, partly incorporated into the provincial structure of regional governance and partly within federal jurisdiction at the local level, but outside the *Indian Act*. The limits of this complex structure, notably in terms of fiscal and policy autonomy, rapidly became evident for the Crees.

5.3.1. Relations with Quebec

For Quebec, the initial steps towards the implementation of the JBNQA were more difficult, given the limited experience of the government in dealing with Aboriginal and Northern realities. But political will was relatively high in the early years, as one of the key objectives of the Quebec government in negotiating the JBNQA was to assert its jurisdiction and presence in the North. The provincial government, under the newly elected Parti Québécois, was eager to concretize this new reality and proceeded relatively

[135] For a complete analysis of band responsibilities under the *Cree-Naskapi Act*, see Peters (1989).
[136] The Minister can only intervene in Cree band management in cases of major fiscal crisis. This has never occurred despite some band's early difficulties with managing the significant fiscal transfers early on.

quickly in creating the new governance structures. By 1978, Quebec had adopted most legislation relevant to its obligations (LaRusic, 1979: 23).

In the absence of a central agency dealing with Aboriginal programs, the *Secrétariat des activités gouvernementales en milieu amérindien et inuit*, established in 1978 to replace the DGNQ, was to coordinate the implementation process. The Secrétariat did not have specific authority over the newly created administrative structures however. Instead, the various JBNQA bodies were incorporated in the operating structure of line departments. Without a say in the definition of programs or budgets, the Secrétariat's influence, beyond information sharing, was thus limited.[137] The result was significant variations in the implementation of the Agreement from one area to another, as Cree programs were subject to the operational logic specific to each department.[138]

Despite this added complexity, the implementation process functioned relatively well as long as the newly created structures operated within the general administrative framework of equivalent institutions in Quebec. The incorporation of the Crees School Board (CSB) to provincial structures was easily achieved, for example. The CSB was officially recognized as a school board under the *Quebec Education Act* through special legislation in 1978. In the early 1980s, pursuant to section 16 of the JBNQA, the CSB was setting up its distinctive curriculum and its own policy regarding the language of education in schools. By 1981, the CSB had 332 employees in its schools, a significant administrative capacity and a budget of $20 million (CSB, 2003).

[137] Interview G01-03.
[138] Ibid.

In many cases however, the rigidity of existing regulations and programs made the functioning of Cree institutions as distinct entities, servicing a distinct population with distinct needs and expectations, much more difficult. For example, health in Cree communities was in a state of crisis in the early 1980s. Family violence, suicide and drug abuse, and sanitary conditions in many communities were growing concerns (Simard et al. 1996). The newly created Cree Board of Health and Social Services sought to respond to the crisis with an approach that corresponded to the cultural, social, and geographical reality of the communities. But the highly centralized *Ministère de la Santé et de Services sociaux* refused to accommodate the budgetary needs of the Board or loosen its tightly coupled structure of decentralization, designed to ensure uniform services to all citizens in the province (Niezen, 1998: 96). As a result, the Board's capacity as a vehicle for a Cree-specific approach to health care was very limited (Beauvais, 1988: 99).

The problems were even more acute in cases where the new structures created by the JBNQA were conflicting with the interests of influential actors on the provincial scene. The James Bay Advisory Committee on the Environment was established as a forum for the federal and provincial governments to work with Cree representatives on the coordination of their respective environmental policy and oversee the impact assessment process of chapter 22 of the JBNQA. The tripartite committee had, in theory, a broad mandate that placed it at the centre of the land management regime of the JBNQA (Peters, 1992: 399). In practice however, representatives from Quebec's *Ministère de l'Environnement* on the Committee had no say on the decision-making processes in other, more influential agencies, such as the *Ministère des Ressources Naturelles* and Hydro-Québec, whose policies affected the territory. Like many structures

created by the JBNQA, the Committee became a forum for exchange of information rather than a space for substantial policy coordination (Penn, 1995: s.6).

The work of the Advisory Committee on the Environment and other trilateral bodies where federal and provincial jurisdictions overlapped was further hampered by intergovernmental conflicts, especially after the election of the PQ in 1976. Neither government wanted to create a precedent in a policy area where responsibilities were contested. As a result, the Committee effectively became a two-headed structure, with federal representatives dealing with issues in areas of federal jurisdictions in Cree communities and provincial representatives dealing with matters related to provincial jurisdiction. The Committee was thus never able to meet its original expectations. Commenting on its efficiency to a Senate hearing in 1997, Brian Craik of the GCC remarked that "in 23 years, no environmental regulations, laws or policies have ever been implemented by either government pursuant to the work of the Committee."[139]

The Crees were thus rapidly faced with the inherent limits of the administrative regime negotiated with Quebec. The province maintained a fairly strict interpretation of its obligations under the Agreement, limited to the creation of new administrative structures incorporated into the regular programs of the government. The hierarchical, and in many cases highly centralized governance logic dominant in the provincial government at the time was reproduced in relations with the new Cree bodies. Civil servants interacting with Cree representatives, despite their good intentions, simply did not have the latitude and authority to adapt existing programs to Cree reality.[140]

[139] As quoted in Rynard (2001: 27).
[140] A number of officials involved in the early implementation years noted during interviews that their leverage varied from one department to the other, depending on the corporate culture and regulatory framework under which they operated, but also their capacity to "sell" the JBNQA within the government.

5.3.2. Relations with the Federal Government

While the Crees and Quebec faced uncharted territory in implementing the governance regime resulting from the JBNQA at the provincial level, in the case of the federal government, the most significant constraint to implementation was the well-established patterns of governance under the *Indian Act*. The key federal actors during the negotiations were from the Department of Justice, but responsibility for the implementation of the agreement fell under DIAND's authority. This transition from negotiation to implementation was made in the absence of clear guidelines coming form the political level.[141] Without specific directions, officials in DIAND interpreted the agreement within their existing mandate, unless guidelines to proceed otherwise were established.

As a result, Cree programs, now delivered by Cree bodies at the local level, continued to be managed in DIAND's regional office in Quebec City according to the same criteria as other First Nations and with funds coming from the same regional operation budget. Following representations from the Crees and Inuit to Parliament, the Minster of Indian Affairs mandated an internal review of the implementation of the Agreement in 1982. The report concluded that while "Canada has not breached the Agreement as a matter of law", the spirit of the JBNQA clearly called for a commitment beyond that of existing programs (Canada, DIAND, 1982b: 9).

In the aftermath of the report, a new JBNQA implementation office was set up to oversee federal obligations and new funds were invested in housing and infrastructure in the villages, two areas the Crees considered a high priority (CRA, 1982). Most

[141] Interview G02-03.

significantly, the *Cree-Naskapi Act* was finally adopted in 1984, formally removing Cree local governments from the *Indian Act* regime. Learning from their experience, the Crees insisted that the Act be accompanied with an implementation plan and guarantees regarding the funding for the operations of local governments. A Statement of Understanding was signed by Cree Chiefs and the Minister of Indian Affairs to that effect shortly after the adoption of the *Cree-Naskapi Act*.[142]

The agreement was short-lived however. With the arrival of a new Conservative government in Ottawa, and a renewed emphasis on deficit reduction, DIAND came under particular pressure to contain its rising costs.[143] The funding formula agreed to by the previous administration was victim of the new political context and was unilaterally amended by the Treasury Board. Responding to political pressures from the Grand Council of the Crees, the new Minister of Indian Affairs argued the agreement only established "administrative guidelines" that were "not legally binding." [144]

This dispute is revealing of the federal position regarding the nature of the governance regime established under the JBNQA. While it recognized that the Agreement created special obligations, those were to be addressed as much as possible within the framework of existing programs and budgets. Even under a distinct self-government legislative framework, the Crees were in effect operating within the same administrative structure as other First Nations under the *Indian Act*. As one official interviewed conceded, faced with many competing demands, "the department was not

[142] *Statement of Understanding of Principal Points Agreed to By the Implementation Working Group*, August 9, 1984. See Canada, Cree-Naskapi Commission (1986).
[143] As discussed in the previous chapter, the Nielsen Task Force targeted Aboriginal programming as an area where expenditures could be reduced significantly.
[144] *Letter to the Grand Chief Ted Moses*, October 23, 1986 (On file with the GCC, Ottawa). It took an out of court settlement in 1988 for the federal government to agree to new a funding formula.

inclined to treat the Crees any differently than other groups. Setting precedents with one, no matter the nature of its legal relation with the state, can have significant repercussions in other sets of negotiations across the country."[145] In other words, the structure and culture of DIAND posed clear limits to the transformative potential of the JBNQA.

5.3.4. Contained Recognition Under the JBNQA

The first decade of implementation of the JBNQA was thus marked by continuity in the dynamics of Cree governance despite the significance of the changes to the formal structure of the regime. The Crees now had an ongoing relationship with Quebec and were no longer under the *Indian Act* at the federal level, but their status in those relationships did not radically change. With the exception of the necessary legislative changes, the implementation of the JBNQA was considered essentially as an administrative matter, to be dealt with within existing structures and programs by both the federal and provincial governments. In areas where federal and provincial responsibilities overlapped and cooperation was expected, both governments interpreted their own responsibilities in a co-ordinate and separate rather than collaborative manner. Trilateral governance structures were thus largely ineffective. As the participants to a colloquium evaluating the impact of the JBNQA ten years after its ratification concluded:

> Rather than allow for the administration of native affairs to be put in the hands of those most concerned, the Agreement gave rise to a plethora of committees and commissions whose powers overlap to such an extent that no one knows exactly who is responsible for what. (…) The role of native representatives in those bodies is mostly symbolic and most of the time, governments make policy decisions without consultation, especially with regards to funding. In effect, governments have maintained their administrative and political control over the Crees and Inuit (Vincent, 1988: 14).

[145] Interview G02-01 (translation).

In many ways, the JBNQA regime is an early example of the model of contained recognition through rights-based and de-centered governance that was generalized in Aboriginal-state relations in the 1980s and 1990s. While the Crees are recognized as a distinct group with specific rights and a distinct regime of governance in formal terms, in practice, Cree authority remained within the well-defined boundaries of federal and provincial jurisdiction. In the absence of existing alternatives, and under pressure at the time of negotiation, the Crees agreed to this model of governance hoping to gain access to the centers of decision-making through ongoing contacts with civil servants (LaRusic, 1979: 37). The result was instead a reproduction of the logic of administrative containment of the *Indian Act*, only this time with a double structure at the federal and provincial levels (Rynard, 2001).

The initial phase of the JBNQA implementation generated important lessons for the Crees. For one, legal and administrative structures are of little use if one's status in a governance relationship is not adequately recognized. The JBNQA did create channels of access to the state for the Crees, but the understanding of the relationship created under these new structures did not change within government circles. Second, who you negotiate with, and the status of this interlocutor, is as least as important as what you are negotiating. Most federal and provincial representatives interacting with the Crees in the years following the adoption of the JBNQA were civil servants who did not have an executive mandate to adapt existing regulations, let alone policy guidelines and legislation, to the Cree reality. They effectively operated within the boundaries of existing programs. Engaging in relations at the political level, rather than through administrative channels, became a priority for the Crees as they sought to negotiate

changes in the position of their governance institutions beyond the regime of contained recognition established in the early years of implementation of the JBNQA. As a result, far from receding to the background, the main political arm of the Crees, the Grand Council, continued to occupy a prominent place in relations with governments.

5.4 Beyond Containment: The Political Assertion of the Cree Nation

> If the regional organization, which now primarily administers services, should start to pursue a political line, the nature of the relationship could be radically altered, and something resembling a Cree order of government might rapidly emerge (I. LaRusic, 1979: 59).

The James Bay Cree had high hopes for the JBNQA. As a result of a limited recognition of the political nature of the relationship however, formal changes in the *structure* of Cree governance did not lead to a radical alteration in the *dynamics* of governance. That being said, with time, the Agreement has provided the Crees with an institutional basis from which they came to challenge the dominant mode of administrative governance. The recognition of Aboriginal and treaty rights in the Constitution opened up new avenues to force governments to comply with their JBNQA obligations. As new modes of de-centered governance came to occupy a greater place in governments' approaches to Aboriginal policy, the Crees also faced a different dynamic in their ongoing interactions with the state. This changing context contributed to the consolidation of Cree organizations at the regional level and their assertion as a self-defined nation, with legitimate and effective institutions of governance, opening the door to a reconfiguration of Cree governance beyond the JBNQA.

5.4.1. A Rights-Based Relationship

The JBNQA was signed in 1975, when legal developments regarding the recognition of Aboriginal and treaty rights in Canada were still in their infancy. For the Crees, it was clear from the beginning that the "rights" that were recognized in the agreement in exchange for the surrender clause were not limited to those established to protect their traditional activities. Instead, the entire document was understood as a "charter of Cree rights," ensuring their social and economic future. For the GCC:

> While the implementation of treaties is seen by governments as any other aspects of policy-making and program management, the Crees consider the implementation of treaty provisions as a right, creating a legal obligation for the governments, not a policy option.[146]

With the inclusion of treaty rights under section 35 of the *Constitution Act, 1982*, and the subsequent debates on the meaning and extent of such rights, the courts became an important tool for the Crees to break the mould of administrative containment and force governments to comply with their JBNQA obligations. Led by the GCC, the Crees successfully used the courts to force a joined federal-provincial environmental assessment process of the second phase of hydroelectric development on the Great Whale river in the early 1990s (Penn, 1995). They also used the courts to force governments to include the Cree School Board in trilateral negotiations over the definition of its budget.[147] In 1996, the GCC launched a major case seeking $3 billion in compensation

[146] GCC, *Presentation to the Crees-Naskapi Commission*, 1988. On file with the GCC, Ottawa.
[147] According to Chapter 16 of the JBNQA, the CSB funding was to be determined jointly by Quebec, DIAND and the Crees. *Cree School Board v. Canada* (Attorney General), [1998] 3 C.N.L.R. 24.

for breach of JBNQA obligations in various areas.[148] By 1998, the Crees had more than 20 cases in various courts, seeking compensation for more than $5.6 billion from governments.[149]

Legal action has been a powerful tool for establishing new norms of operation for Cree governance outside the administrative structures through which Quebec and the federal government were reading the JBNQA. Faced with the possibility of an enforceable court decision, governments were often willing to engage in negotiations with the Crees. But there are also consequences to the systematic use of courts. In addition to the time and costs of legal proceedings, which by 2000 were seriously draining the financial resources of the GCC,[150] the language of rights is a polarizing one. It creates a dynamic of "us against them" that is not necessarily conducive to constructive negotiations. As an elected official of the Grand Council conceded:

> It is important to assert our rights. But at some point, the legal language gets in the way. In the end, court cases are only useful if they allow us to work from a stronger position in negotiations. At some point, we have to be ready and make some compromises.[151]

There are also broader trade-offs to the definition of a relationship in strict legal terms. Relying on the JBNQA meant the Crees accepted its legitimacy, including its controversial clause regarding the surrender of their land rights. As they sought to gain better control over natural resources extraction on their traditional lands, the JBNQA regime became an obstacle for the Crees. The limits of administrative autonomy under the JBQNA also became more apparent as the understanding of the right to self-government continued to evolve in Canada. The Crees were thus often juggling between

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[148] *Grand Chief Matthew Coon Come et al. v. Att Gen. Quebec and Canada*, SCM 500-05-027984-960.
[149] This is based on GCC*, Disposition of various Cree legal proceedings*, July 19, 2002. On file with the GCC, Ottawa.
[150] The GCC expenditures on litigation for the 1999 fiscal year was $2.48 million (GCC, 2000a).
[151] Interview A01-13, at 0131.

a defense of the JBNQA as the basis of their relation with the state and one seeking to move beyond it.

5.4.2. *Eeyou Governance Beyond the JBNQA*

As the limits of the JBNQA became more apparent, the GCC leadership started to shift its focus towards a broader assertion of the status of the Crees as a nation, with the right to self-determination. With the failure of the Meech Lake and Charlottetown accords, and the return to prominence in Quebec of the sovereignty movement, the Crees, as other Aboriginal peoples in the country, found themselves in a context where assumptions about political identities and state sovereignty were constantly challenged and debated in the Canadian public discourse. Aboriginal peoples were increasingly using the language of nationalism to assert their status as an "equal partner" in relations with governments.

For the James Bay Cree, this political assertion came to be expressed in two interrelated processes of internal nation-building and external representation of this nation as a territorially defined and self-determining political community. Increasingly, the Crees came to use their own language to assert their political status, using the term "Eeyouch" to name themselves and "Eeyou Istchee" to define their traditional territory.[152] This process of self-naming is, in and of itself, a significant act of self-determination for a political community. But the assertion of one's own identity also plays an important role in locating a collectivity in the political landscape and establishing its status and legitimacy in governance relationship. As the Grand Chief Mathew Coon Come declared

[152] As mentioned, "Eenouch" and "Eenou Estchee" or "Astchee" are sometimes used depending on the communities. For a discussion, see Cree Eeyou Estchee Commission (1996:8).

to the Quebec National Assembly during the 1992 hearings of the commission on Quebec sovereignty:

> We want to be clear. We are a nation, a people with the inherent right to self-determination. The territory you sometimes define as the James Bay is called Eeyou Astchee in our language. It is the Crees territory. (…) We are not opposed to Quebec's claims and aspirations. But no change can take place without taking our own rights and aspirations into consideration. No change to our land will take place without our consent.[153]

This political assertion gained even further resonance as the Crees were also involved in a very successful international campaign against the second phase of the James Bay hydroelectric complex, the Great Whale project.[154] The Crees challenged the project on legal and moral grounds, comparing it to the destruction of the Amazonian forest, and its related abuse of Indigenous rights, in Brazil (Coon Come, 1991: 10).

The campaign rapidly gained the support of American and international environmental groups, and the attention of the media.[155] For the Parti Quebecois, which was returned to power in 1994 on a promise to hold a new referendum on sovereignty, this negative international attention was highly problematic. Shortly after Mathew Coon Come delivered a speech in Washington questioning Quebec's own right to self-determination, the new Premier, Jacques Parizeau, shelved the Great Whale project.[156]

The Crees nonetheless maintained their international campaign, this time directly challenging their "forcible inclusion" into a sovereign Quebec (GCC, 1995a: 3). In the year between the PQ election and the October 1995 referendum, GCC officials delivered

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[153] GCC, *Présentation à la Commission sur les questions afférentes à la souveraineté*, National Assembly, Québec, Febuary 12, 1992, on file with the GCC, Ottrawa. My translation.
[154] The Crees targeted American States, where Hydro-Quebec was expecting to sell the electricity produced by this new complex. Hydro-Quebec guaranteed the financing of the project based on exportation contracts with Maine, Vermont, Massachusetts and New York totaling $25 billion (Can). See Williams (1993).
[155] The Quebec media, following public opinion in the province, were highly critical of the Crees campaign. See, for example, C. Rioux, "Comment les Cris ont planté Hydro", *L'Actualité*, December 15, 1991.
[156] J. Aubry, "The beaching of the Whale", *Ottawa Citizen*, November 26, 1994.

speeches around the world, from UN forums on Indigenous rights to Ivy League universities, questioning the right of Quebec to secede without Cree consent:

> We conceive of ourselves as one people, tied together by the land we share and care for (…). Now, the government of Québec proclaims the Québécois –that is anyone who reside in the province, including Cree,- a people. The Parti Québécois claims for that people the right to self-determination, while in the same breath denying the Crees the same right. If the separatists win the referendum, we will simply stay in Canada with our territory.[157]

In a direct challenge to the democratic legitimacy of the provincial state, the GCC also organized its own plebiscite on the future of the Cree Nation a few days before the October 1995 Quebec referendum. 77% of eligible voters participated to the consultation, and 96.3% rejected the inclusion of the Cree territory into a sovereign Quebec without Cree consent.[158] In the aftermath of the Quebec referendum, as opponents to Quebec independence raised the spectre of territorial partition, the Crees remained front and centre on the political scene, playing out the democratic legitimacy of their own referendum and feeding the debates with legal opinions on the principle of national self-determination (GCC, 1995a). It was clear that the Crees could no longer be ignored in future debates on Quebec's sovereignty.

The projection of their claims and their political status on the Canadian and international scene also lead the Crees to engage in an internal process of rethinking and recasting their own conception of governance.[159] In a process that mirrored developments in Quebec, a *Eeyou Estchee Commission* was created in 1995 to consult Cree communities on the future of the Cree Nation. The Commission produced a Declaration

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[157] M. Coon Come, *The Status and Rights of the James Bay Cree in the Context of Quebec Secession,* Conference to the Centre of International Studies, Washington, September 1994. On file with the GCC.
[158] GCC, Les Cris demandent au governement de respecter le résultat du referendum cri, Press Release, October 27, 1995. On file with the GCC, Ottawa.
[159] See for example P. Awashish, *Political Considerations and Status of the Eenouch/Eeyouch and their Homeland (Eenou Estchee)*, August 7, 1992; and D. Romeo Saganash, *Maintaining the Pillars of our Identity. A report of the Crees Nation Gathering*, November 1994. Both are on file with the GCC, Ottawa.

of Principle asserting the "territorial and cultural unity of the Eeyou Nation", and the principle of "Eeyou consent for any changes to the status of Eeyou Estchee." [160] A working group of the GCC continued the work of the Commission after the 1995 referendum, with the objective of redefining Cree governance structures and Cree relations with Quebec and Canada.

In addition to proposing the creation of a national Cree government at the regional level, with a legislative assembly elected directly by the population, the working group adopted a more explicitly sovereignist discourse in defining Cree status in relation to the Canadian federation. It encouraged the Crees to distance themselves from the JBNQA and the *Cree-Naskapi Act*, which "are interpreted by Canada and Quebec within their own legal framework in a unilateral manner, (…) and are not consistent with Cree self-determination."[161] For Matthew Mukash of the working group:

> We have a choice to make between negotiations with governments, which legitimize the JBNQA (…), or a process of nation-building through which we assert our jurisdiction over Eeyou Istchee and establish on such basis a new relationship with Quebec and Canada.[162]

Not everyone in the Cree leadership shared this "either/or" understanding of the relationship with the state, as the JBNQA still offered a powerful legal basis to engage with governments. The work of the committee nonetheless reflected a growing understanding amongst Crees of the importance of establishing their political status as a self-determining nation in their interactions with federal and provincial authorities.[163]

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[160] GCC, *Grand Council of the Crees lauches 'Cree Eeyou Astchee Commission' on Cree rights in context of Quebec secession*, Press Release, Montreal July 21, 1995. On file with the GCC, Ottawa.
[161] M. Mukash and P. Awashish, *Plan of Action for the Development of A Cree Nation Government,* January 10, 2000. On file with the GCC, Ottawa.
[162] M. Mukash, *Letter to Grand Chief Mathew Coon Come*, March 11, 1998. On file with the GCC, Ottawa.
[163] See for example T. Moses, Letter to Minister Ron Irwin on Cree-federal Negotiations for a New Relationship, October 1997. On file with the GCC, Ottawa.

5.5 Seizing Opportunities: Capacity Building under De-Centered Governance

While the GCC established a strong principled position rejecting the logic of administrative containment under the JBNQA and asserting the political status of the Cree Nation, it also understood the need to engage pragmatically with governments in negotiations to consolidate the role of Cree organizations at the regional and local level in the management of Cree affairs. The shift in federal and provincial approaches from a traditional model of hierarchical decentralization to more flexible conceptions of Aboriginal governance in the mid-1980s opened opportunities in this respect. This shift, as discussed, was partly a response to Aboriginal demands for more autonomy but it must also be understood in the context of neoliberal state restructuring. The federal and provincial governments now encouraged Aboriginal communities to manage their own programs, replacing direct control with more loosely coupled devolution agreements that, in many cases, went further in terms of autonomy than the regime established under the JBQNA.

Faced with the prospect of ongoing legal deadlocks over the nature of governments' obligation under the JBNQA, the GCC/CRA often chose pragmatically to engage in bilateral negotiations with governments under the conditions established in their regular programs, as long as a clear distinction was made between these administrative transfers and rights-based obligations under the JBNQA. Negotiations over policing and human resources programs illustrate how such governance exercises, despite being contained within an administrative logic, allowed the GCC/CRA to gain

new leeway in defining policies affecting Cree communities without jeopardizing their rights under the JBNQA.

5.5.1 Policing Negotiations

Chapter 19 of the JBNQA provides for two types of police services for the Crees. "Cree units" of the provincial police force were to be created at the regional level (section 19.1), and a municipal-type police corps under the authority of band councils for the communities themselves (section 19.2). Funding for policing was to be shared between Ottawa and Quebec at a 60/40 ratio. In 1978, local Cree police forces were created under the Native Policing Program of the *Sûreté du Québec* (SQ). The sections pertaining to the regional police units were never implemented, however, as Quebec interpreted chapter 19 as an option between local and regional police. The implementation of the policing section of the JBNQA was thus typical of the model previously discussed. Quebec worked within an existing program and ignored the more complex issue of regional police units. The federal government simply withdrew from the field and did not provide funding for policing (GCC, 1994: 29). As a result, the budget of the local police was insufficient, and its role –essentially that of a municipal police- inadequate in the particular context of isolated Northern Cree communities (Brodeur, 1997).

After many unsuccessful attempts to negotiate reform of the local police with Quebec, a door opened for the GCC when the federal government adopted a new First Nation Policing Policy in 1991. In line with new approaches to governance, the objective was to support the transfer of administrative responsibility for policing to the communities through funding agreements with the provinces and First Nations (Canada,

Solicitor General, 1996:2). The GCC used the new federal policy as a channel to force the two governments to engage in negotiations over policing in Cree communities, for which both governments had responsibilities according to the JBNQA. Quebec could not run the risk of having the federal government establishing new standards in an area it considered its jurisdiction. It thus agreed to participate in trilateral negotiations.

As in other areas, however, the civil servants negotiating on behalf of Canada and Quebec had no mandate to discuss issues that went beyond the framework established by their governments' policing policy. To the frustration of Cree negotiators, issues pertaining to JBNQA implementation were off-limits.[164] Instead of withdrawing from the negotiation process and risk losing the new source of funding for local police, the GCC agreed to engage in "strictly financial and administrative discussion" with government representatives.[165] The result was the 1994 tripartite Policing Agreement, which effectively doubled the budget of local Cree police services, thanks to the injection of federal funds, without changing the status or structure of the police force under Quebec law. Federal moneys were channeled through the provincial governments, and transferred to the CRA through a grant "without prejudice to the provisions of the JBNQA."[166] A new three-year agreement was negotiated in 1998 under similar conditions.[167] This time however, the Crees secured changes to the provincial policing policy: the *Police Act* was modified so that Cree constables had the same status as regular officers under provincial law and their jurisdiction was slightly extended (GCC, 1999).

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[164] GCC, *Memorandum of Deputy Grand Chief Kenny Blacksmith*, October 20, 1993. On file with the GCC, Ottawa.
[165] GCC, *Memorandum on Policing Negotiations*, December 1996, p.3. On file with the GCC, Ottawa.
[166] 2nd paragraph. The November 1994 *Policing Agreement* is on file with the GCC, Ottawa.
[167] The 1994 agreement was first renewed for a year in 1997.

The tripartite policing agreements of 1994 and 1998 clearly have their limits. They remain administrative in nature and subject to changes in government policies or budget priorities at the time of their renewal. Outside the JBNQA, they are in no way a form of recognition of Cree jurisdiction over policing. That being said, through successive trilateral negotiations, the Cree were able to secure changes to the Quebec *Police Act* and a significant increase in funding for local Cree police, from $1.9 million in 1993 to $6.3 million in 2001. Perhaps more significantly, through those successive negotiations, the GCC engaged with governments in trilateral policy exercises, not as an interest group seeking to influence governments, but as governing actor, representing a distinct polity with its own internal dynamics that had to be coordinated with the federal and provincial policies.

5.5.2 Human Resources Negotiations

The policing agreements are an example where the Crees agreed to maintain the logic of administrative devolution in exchange for greater *de facto* control, but "without prejudice" to what they considered their rights under the JBNQA. In other cases, regular devolution programs and JBNQA obligations were combined in negotiations to produce agreements that go significantly further than established government policies. The bilateral negotiations with the federal government on human resources development are an example. Special government support for training and access to employment in Cree communities was included in section 28.8 and 28.9 of the JBNQA. The vague formulation of these sections meant no concrete actions were taken outside regular

economic development programs available for all Aboriginal peoples for most of the 1980s.[168]

In 1990, the federal government established a new strategy for training and access to employment in Aboriginal communities, which favored, among other things, "activities developed, managed and controlled by Aboriginal peoples." (Canada, Employment and Immigration Canada, 1990: 3). The GCC/CRA chose to engage in administrative negotiations with Human Resource Development Canada (HRDC) for the devolution of training programs to the Cree Regional Authority. In this case, negotiations were strictly bilateral, as Quebec chose to limit its role in training under the JBNQA to its responsibilities in education. After two years of negotiation, and despite efforts to bundle the new federal program with JBNQA implementation obligations, the GCC again had to settle for an agreement within the limits of the federal policy "without prejudice to the JBNQA" for the transfer of certain federal responsibilities for training and access to employment programs to the CRA (GCC, 1997: 12).

A second five-year agreement was signed in 2001 following the adoption by the federal government of a second Aboriginal Human Resource Development Strategy, favoring a more complete transfer of programs to Aboriginal organizations (Canada, HRDC, 2003). Following political representations at the ministerial level, the Crees this time were able to include JBNQA obligations under the framework of bilateral negotiations. The HRDC program was thus "layered" over JBNQA obligations to produce a much more substantial fiscal commitment from the federal government. Under this new agreement, the CRA effectively became the sole provider of employment services, including employment insurance programs for the territory (Latraverse,

[168] *Memorandum on HRD Negotiations*, April 8, 1999. On file with the GCC, Ottawa.

2002:14). A distinct department was created in the CRA to manage the annual $9.5 million transfer from Ottawa and define new Cree policies with regard to training and employment services.[169] While it remains an administrative transfer, the fact that the 2001 Agreement is recognized as a partial fulfillment of federal obligations under the JBNQA transforms it into a potentially legally binding document (Latraverse, 2002).

5.5.3 The Impact of De-Centered Governance

These two examples illustrate how governance under the JBNQA progressively evolved between 1975 and the late 1990s from a restrictive regime of administrative containment, characterized by unilateral and a hierarchical dynamics, to much more complex governance relations, characterized by constant negotiations between Cree and government representatives. Between 1994 and 2001, despite significant tensions with both the federal and provincial governments on JBNQA implementation issues, the GCC/CRA signed at least 9 agreements similar to those over policing and human resources with either governments in areas such as child care, public health, housing, infrastructure management, administration of justice or economic development.[170]

These governance exercises are taking place within the unaltered framework of federal and provincial jurisdictions, and could certainly not be defined as a process between two, or three, equal partners. That being said, the GCC has been able to change the unidirectional dynamics that characterized the early years of JBNQA governance and exercise through such negotiations a degree of influence beyond the simple implementation of programs. In effect, these negotiations have become a new space for

[169] GCC, *Cree Human Resources Development: An Overview*, 2003. On file with the GCC, Ottawa.
[170] This number is based on the GCC annual reports and federal data.

Cree organizations to influence the policy process even in the absence of formal shifts in the allocation of authority.

These agreements "without prejudice" to the JBNQA also have a broader long-term impact on Cree governance. The transfer of program administration and corresponding funds to Cree authorities has considerably increased the policy capacity, resources and knowledge of Cree organizations. The GCC/CRA, which started as a small group of Crees and consultants in 1974, employed 104 peoples twenty years later, in offices located in Nemaska, Montreal and Ottawa (GCC, 2005). The combined operation budget of the GCC/CRA and local bands grew from $4.2 million in 1978-79 to $51.6 million in 2003-04, to which must be added funds resulting from various administrative agreements and revenues from the investment funds created to manage the compensation for hydroelectric development since the JBNQA.[171]

Table 5.1 GCC/CRA: Main Sources of Funding in 2003-2004

Government of Canada	**($million)**
Operations and Maintenance Grant (Bands and CRA)	51.6
Program-Specific Transfers (Housing, Human Resources, Policing, etc.)	28.1
Quebec	
Paix des Braves (Transfers for Economic Development)	46
Program-Specific Transfers (Day Care, Policing and other agreements)	26.5
Total for 2003-2004	**152.2**

Source: GCC (2005). Compensations for hydroelectric development are not included (see note 171).

Perhaps even more telling of the growth of Cree resources and capacity are the data regarding the increase in overall federal and provincial expenditures directed

[171] Compensation funds totaled $389 million before the *Paix des Braves* agreement in 2002. These funds are managed by the CRA through its Board of Compensations and invested in economic ventures.

towards programs administered by Cree organizations, including not only the GCC/CRA, but also the School Board, the Health Board and others. As table 5.2 indicates, federal expenditures for the Crees jumped from $3.8 million in 1976 to $124 million twenty years later, and have continued to rise since. The last aggregate data available suggest federal funding totaled $141 million in the fiscal year 2000-2001, most of it transferred for direct management to Cree bodies. Funding from the Quebec government has grown even more significantly, from half a million in the pre-JBNQA era to $148 million in 2001-2002.

Table 5.2 Federal/Provincial Program Expenditures for the James Bay Crees ($million)[172]

Federal	**75-76**	**86-87**	**96-97**	**00-01**	**Quebec**	**75-76**	**84-85**	**89-90**	**02-3**
Operations		15.3	36.7	45	Health	1.3	11.9	19	51
Infrastructure	2.3	23.1	23	27	Education	0.14	29	45	80
Education	0.34	23	46	49	Police		1.6	2.7	3.2
Police			2.4	3.5	Social Security	1.3	13.2	13.9	16
Health	0.82	0.52	2.3	3.1	Econ Dev		0.75	0.63	45
Training		0.5	5.6	6.8	Compensations		24.2	18.6	17.8
Econ Dev	0.1	3.1	2.3	2.1	**Total**	**2.74**	**89.5**	**118.9**	**213**
Total INAC	2.3	53.2	75	80	Federal transfer	2.2	21.8	34.4	65
Total Federal	**3.8**	**66.3**	**124.4**	**141**	**Total Qc. Net**	**0.54**	**67.7**	**83.9**	**148**

Sources: Simard et al. (1996)*;* Canada, DIAND (1989) ; Canada, INAC (2000 ; 2002a); Québec, SAA (2004)*.* Social security includes the Income Security Program for Hunters & Trappers.

Such increases in transfers took place largely within the confines of the federal and provincial governments' regular programming and should, again, not necessarily be

[172] Total expenditures include other programs not listed. Some federal money is first transferred to the Quebec government, who then funds Cree organizations such as the School Board. Quebec funding data also include compensation funds from complementary agreements to the JBNQA and the *Paix des Braves* transfer for economic development.

equated with a shift in formal authority. As discussed in the previous chapter, governments do keep relatively tight control on fiscal transfers through accounting and reporting mechanisms. Yet again, thanks to the legislative structure created under the JBNQA and the *Cree-Naskapi Act*, close to 75 percent of Cree funding is based on statutory grants rather than service-specific contributions, thus providing significant flexibility in the allocation of funds. Through such administrative transfers, and the use of funds obtained as compensation for hydroelectric development, the GCC/CRA has become a "very efficient policy machine", as government officials at the federal and provincial levels interviewed for this thesis conceded,[173] pooling resources and skills of otherwise small communities into an organization that has the capacity to challenge federal and provincial structures of administrative containment.

In addition to an increase in resources, these administrative agreements transfer the knowledge to implement the programs into Cree hands. As a result, the unilateral logic of the JBNQA regime has given way to more loosely organized governance dynamics where the parties are becoming increasingly interdependent with regards to the definition and implementation of policies affecting Eeyou Istchee. In a growing number of policy areas, federal and provincial agencies no longer have the legitimacy or the capacity to act unilaterally, without the support and collaboration of Cree organizations. These devolution agreements have thus increased, and not reduced, the need for ongoing coordination, exchange of information and data, as well as collaboration between Cree administrative organizations and federal and provincial agencies. The channels of communication at the administrative levels are thus much more established and stable

[173] Interviews G02-01; G01-16; G01-06.

than they were in the early stages of the JBNQA implementation process.[174] More importantly, while the formal lines of authority in such relations remain clearly drawn, in practice the lines of influence in the policy process are much more blurred and complex.

Finally, decentralization agreements have also had an effect on the configuration of Cree governance in relation to Canadian federalism. The initial objective of the JBNQA was to create a trilateral structure of governance for the region, under which federal and provincial authorities would collaborate with the Crees to develop joint policy objectives. As discussed, this never occurred as the two orders of governments opted to establish parallel administrative structures in their respective areas of jurisdiction. This double-bilateral, rather than trilateral, model was further consolidated by the negotiation of decentralization agreements in the 1990s. With a few exceptions, such as the policing agreements discussed above, devolution is mostly a bilateral process that logically follows the dividing lines of federal-provincial jurisdiction. As a result, for the most part, Cree organizations such as the GCC/CRA interact and negotiate with Ottawa on the one hand, and in a completely separate and distinct process, with Quebec. While outcomes at one level can certainly influence negotiations at the other (as the *Paix des Braves* discussed next illustrates), the dynamics of interactions at the two levels are completely independent. The structure of the Grand Council of the Crees, where federal and provincial relations are managed by two distinct units, located in distinct offices, reflect this bipolar, rather than triangular, logic in dynamics of multilevel governance.

5.6 The *Paix des Braves*: A New Governance Regime with Quebec?

[174] Interview, A01-11.

As mentioned in the introduction to this chapter, the 2002 agreement establishing a "new relationship" between Quebec and the Crees came as a surprise to many observers of the political scene in Quebec. But as the previous section demonstrates, dynamics of Cree governance had shifted progressively in the 1990s from a relatively strict logic of containment and control to a more complex relationship characterized by (mostly) bilateral governance exercises in various policy sectors and a significant growth in the political and administrative capacity of the GCC/CRA. The political assertion of the Crees as a nation with the right to self-determination further consolidated their position in relation to governments. The negotiation of the *Paix des Braves* with Quebec is, in some sense, the cumulative result of these incremental changes in the dynamics of Cree governance.

5.6.1. A Changing Context: the Politics of Economic Development in Eeyou Istchee

Beyond questions of political assertion, the Crees were facing important socio-economic dilemmas in the late 1990s. At the time of the JBNQA negotiations, a central objective of the Crees was to protect their traditional way of life and limit the impact of natural resource extraction on the fragile ecosystem upon which they depend. By the late 1990s, while this preservation objective remained significant, priorities had somewhat shifted. From 7,000 at the time of the JBNQA negotiations, the Crees numbered more than 14,500 in 2000. 35% of the Cree population is under 15, with 400 young adults entering the workforce every year. In 1998, 30% of Cree adults were employed in the already saturated services industry, and 35% were involved in the Income Support

Program for hunters and trappers. Another 30% of the population was unemployed. The resource-based economy in the region employed less than 4% of the adult Cree population.[175]

In a striking contrast with this portrait, according to a study prepared by a consulting firm for the GCC in 2004, hydroelectric production on the JBNQA territory is a $3.5 billion annual economic activity, while the forestry and mining industries on traditional Cree lands generates $1.5 billion in annual revenues, and sustains 15,000 workers (Fortin *et al*., 2004). Not only are Crees virtually excluded from this important source of employment, but they are also only marginally profiting from natural resource extraction taking place on their traditional lands. The JBNQA and subsequent compensation did transfer significant sums to the Crees, which were invested in various economic ventures, but these sums are marginal compared to the annual income Quebec generates from resource extraction. Greater Cree participation in these activities, and a greater sharing of the revenues generated on Cree lands, figured prominently on the GCC agenda at the turn of the 21st century.

After 25 years of ongoing conflicts, the provincial government was also forced to recognize the need to adapt the JBNQA regime to the contemporary context. As discussed in the previous chapter, the focus of Aboriginal policies at the federal and provincial level in the late 1990s was on economic self-reliance. Quebec was looking for avenues to change the dynamic of dependency established under the transfer economy of the JBNQA and for fostering development in Cree communities beyond the devolution of

[175] GCC, *Presentation to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, April 30, 1998. On file with the GCC, Ottawa.

services.[176] Ongoing legal battles were also a constant source of tension. Not only were the actual and potential costs of Cree legal actions significant, in fiscal and political terms, but the litigation process was also creating much uncertainty and hampering the economic development of the region. As the international demand for electricity continued to rise, hydroelectric projects were still on the government agenda. Given the legal and political climate, however, it was clear that Quebec could not proceed with new developments without Cree consent.[177]

The ongoing tensions with the Crees were also problematic at a broader political level for Quebec. The PQ was reelected in 1998 with a promise to hold a new referendum on sovereignty as soon as the "winning conditions" were met. The nationalists could not afford to loose a third referendum, and the disruptions resulting from another international Cree campaign challenging the territorial integrity of a sovereign Quebec could be significant. Developing better relations with Aboriginal peoples, and especially the Crees, was clearly one of the "winning conditions" of the new Premier, Lucien Bouchard.[178] For both the Crees and Quebec, there was thus a general sense that the JBNQA regime needed substantial rethinking. Its framework no longer corresponded to the political and economic context, creating a certain institutional dissonance between existing structures and the reality of the relationship they embodied.

5.6.2. The Conflict over Forestry

The conflict over forestry on traditional Cree lands is a good illustration of the consequences of the growing mismatch between existing governance structures resulting

[176] Interview G01-03.
[177] Interview G01-02.
[178] The 1998 policy discussed in chapter 4 was part of this "stratégie d'ouverture" (Interview G01-01).

from the JBNQA and the changing dynamics of Cree-Quebec relations. In 1986, the Quebec government adopted a new policy that shifted the responsibility regarding the management of public lands targeted for forestry extraction to companies exploiting the resource.[179] Following the adoption of this new regime, forestry has undergone rapid expansion to the North and became increasingly present in lands of categories II and III under the JBNQA. Harvesting on Cree traditional hunting grounds went from a yearly level of 125 km^2 in 1975 to more than 800 km^2 in 1999, with forestry companies holding licenses over 70 000 km^2 in the JBNQA territory (GCC, 2000b). In addition to being virtually excluded from its benefits, such intense extraction has had a significant impact on the hunting and trapping activities of the Crees. The definition of logging areas rarely takes into account Cree traplines, and clear-cutting, road building and related activities were also causing irreparable environmental damage (GCC, 1996).

Despite its significant impact, the Crees had no voice in the management of forestry. The only process for input by third parties under the Quebec forestry regime is a mechanism through which harvesting plans are subject to a 45 day public consultation period before their approval by the *Ministère des ressources naturelles* (MRN). In effect, the plans were rarely modified at such a late stage and consultations were mostly symbolic.[180] The GCC also attempted to have forestry activities reviewed under the environmental impact assessment procedures of chapter 22 of the JBNQA, but Quebec had always refused to engage in such a process for forestry activities (Penn, 1995: 21).

Faced with such limited points of access to the policy process, the GCC launched a public relations campaign accompanied by legal proceedings to force Quebec to

[179] *Forest Act* (Bill 150, LQ 1986 ch.108). For a detailed analysis, see Paillé and Deffrasnes (1988).
[180] Bergeron, Y. and C. Messier. "Un régime forestier trop timide," *Le Devoir*. 5 juillet 2000.

negotiate changes to forestry on Cree lands. The objective of the Crees was not to stop forestry completely, but to establish a governance structure outside the *Forest Act* to ensure their participation in the management of harvesting plans (GCC,1998: 14). To sustain its claims, the GCC used its resources and expertise to document the environmental and social impact of forestry on Cree lands, and developed a comprehensive policy position calling for more sustainable forestry practices.[181] The Cree campaign rapidly gained support amongst groups concerned with forestry practices in Quebec and elsewhere in the world.[182]

An initial Cree victory in a first instance court in 1998 over the applicability of the JBNQA environmental assessment regime to forestry added pressure on Quebec to engage in negotiations with the GCC. The forestry lobby, however, was exercising strong pressure to limit changes that would see the Crees playing a statutory role in forestry regulation.[183]

5.6.3. Nation-to-Nation Negotiations

Expectations thus were low in June 2001 when Bernard Landry, who had just replaced Lucien Bouchard as Quebec Premier, and Ted Moses, who had taken over the reins of the Grand Council of the Crees, met to renew the dialogue on various contentious issues, including the stalled negotiations on forestry.[184] Faced with the prospect of

[181] A booklet called *Crees and Trees* was published and widely distributed in 1996. The Cree policy position is elaborated in GCC (1998) and in GCC, *Status of Forestry Negotiations*, October 16, 2000. On file with the GCC, Ottawa.
[182] See the documentary produced by Desjardins and Monderie (1999).
[183] *Mario Lord et al. v. Quebec*, Quebec Superior Court, SCM 500-05-043203-981. See "Les Cris souhaitent un partenariat avec Québec en foresterie." *La Presse*, October 7, 1998.
[184] The present account is based on interviews with the parties involved. For a similar description see Aubin, B. "dancing with the Enemy" in *Maclean's*, vol.115, no.7, February 18, 2002, p. 20-24.

renewed political tensions and costly legal battles, both leaders agreed on the need to inject a new dynamic in the negotiations. At the request of Ted Moses, the Quebec Premier agreed to high-level political discussions, and mandated the *Secrétaire-Général,* the highest civil servant in the provincial government, to take the lead on comprehensive negotiations on forestry and other contentious issues.[185] This change in the "locale" of negotiations, something the Crees had sought for a long time, effectively removed the administrative barriers that constrained negotiations. The process became a "bilateral policy-making exercise, among top executives," as a Cree negotiator put it in an interview.[186]

In addition to removing the negotiations from the framework of existing policies and regulations, this shift to the political level had an important effect on the substance of negotiations. Other interested parties, such as Hydro-Québec or the powerful forestry industry, were effectively shut out of the process. This protection from external influence was further compounded by the secrecy of negotiations. Outside a close group of high civil servants and ministers, no one in the provincial government was aware of the bilateral discussions. On the Cree side too, only a small group of close advisors was involved. This "closed door" approach not only allowed the parties to establish negotiations without the potentially disruptive intervention of competing interests, but it also shielded the process from media scrutiny, thus allowing the parties to set aside the high-flying rhetoric that had come to characterize Cree-Quebec relationships. The 'two-level game' characteristic of intergovernmental negotiation exercises was thus avoided.[187]

[185] Interview G01-11; G01-06.
[186] Interview A01-13.
[187] As one negotiator put it in an interview, the game was played with "cards on the table," proposals were concrete and substantial, and often based on difficult compromises across issues. Interview G01-11.

Another key change in the dynamics of negotiation was the development of a shared understanding between Cree and Quebec negotiators regarding the objective of the process. Bernard Landry and Ted Moses had agreed to a "truce" on the most intractable elements of their conflicts. Issues of territorial sovereignty and competing claims to self-determination were set aside. On the symbolic side, they agreed that Quebec-Cree relations should be based on the principle of mutual recognition between two nations who share a territory and must find mechanism for coexistence. More pragmatically, they also agreed to focus on their common interest in the economic development of the region, something they could build on to establish collaborative governance mechanisms.[188]

5.6.4. The New Relationship Agreement

On October 23, 2001, after a few weeks of secret negotiations, Ted Moses was in Bernard Landry's office again, this time to sign an Agreement in Principle (AIP) that was to establish "the basis of a new relationship between the parties for the next fifty years."[189] Most Cabinet ministers, civil servants, Cree chiefs and their advisors were presented with a fait accompli. The final text of the *Agreement Concerning A New Relationship between the Government of Quebec and the Crees (of Quebec)*, or what came to be known as the *Paix des Braves,* was signed in February 2002.[190]

The preamble of the Agreement speaks of a "nation-to-nation partnership that strengthens the political, economic and social relations between Québec and the Crees."

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[188] Interview A01-13.
[189] SAA, *Signature of an Agreement Between the Grand Council of the Cree and the Québec Government*, Québec, October 23, 2001. See: www.autochtones.gouv.qc.ca/centre_de_presse/saa_archives_communiques_en.htm.
[190] The name stuck after Landry's comment that "one has to be brave to make peace with long time adversaries." The agreement is at www.autochtones.gouv.qc.ca/relations_autochtones/ententes/cris/ententes_cris_en.htm. (June 20, 2007).

It calls for a new relationship based on mutual respect and "greater autonomy, responsibility, and participation by the Crees (…) in the economic development of the region." Questions of territorial integrity and legislative authority are carefully avoided, and while it modifies certain provisions of the JBNQA, the Agreement clearly establishes the principle of continuity with regard to the obligations of the parties under the original treaty. In other words, this is not a "final" settlement, but rather a vehicle through which the JBNQA can be modernized and adapted to the current context.[191]

A key aspect of the Agreement for the Crees was the creation of an "adapted forestry regime" that modifies both the *Forest Act* and the JBNQA land regime to allow Cree participation in the management of forestry in the region (Chapter 3). Among other elements, the boundaries of forestry management units were reorganized to correspond to the limits of Cree traplines. Cree tallymen can define 1 percent of their land as off-limits to logging, and another 25 percent as "areas of special wildlife interest" subject to harvesting restrictions. Logging is also not permitted in a hunting territory that had more than 40 percent of its area cut or burnt in the past 20 years.[192]

In order to manage forestry activities on Cree lands, the Agreement establishes the Cree-Quebec Forestry Board with five members appointed by the Crees and five by Quebec.[193] The Board has a monitoring role in regard to the implementation of the new forestry regime and advises the Minister responsible regarding overall forestry policies for the region (paragraph 3.30). While the Crees were not able to secure a decision-making role for the new co-management structure, the Minister must "inform the Board

[191] Interview A01-02. The Crees have always rejected the idea of a final settlement of JBNQA obligations.
[192] The various dispositions regarding the protection of Cree traplines under the new regime are discussed in details in GCC (2003:18). See also Scott (2005: 145-146).
[193] The veto-holding Chair is appointed by Quebec in consultation with the GCC. If the Crees refuse 3 candidates, Quebec can make a unilateral appointment (paragraph 3.18).

of his reasons for not accepting its recommendations" (paragraph 3.42). As a MRN official interviewed argued, while the Minister could ignore a Board recommendation, it would be politically costly as it might well jeopardize the capital of trust and the channels for informal collaboration the agreement created between the parties.[194]

In addition to the forestry provisions, Quebec and the Cree finally agreed to the creation of a regional Cree police force and on new education funding guidelines -two contentious issues in JBNQA implementation. Quebec also transferred its obligations over economic development in Cree communities under Chapter 28 of the JBNQA to the Cree Regional Authority for a period of 50 years. This transfer addresses one of the major sources of tension between the parties in relation to the JBNQA and effectively provides the Crees with the tools and resources to establish their own social and economic development policies without any government interference.[195]

One important innovation of the agreement is the mechanism through which funding for economic development is transferred to the Crees. Quebec transfers a minimum of $70 million annually to the CRA through unconditional grants, indexed to the value of natural resource extraction on the territory (paragraph 7.4). While this is not explicitly defined in the agreement as a form of revenue sharing over natural resources, the significance of the amount, which over 50 years totals more than $3.5 billion, suggest this is indeed a form of compensation for hydroelectric, forestry and mining activities (Scott, 2005: 148). In their comments on the Agreement, Cree leaders have not hesitated

[194] Interview G01-19.
[195] A Cree Development Society, with a board composed of Quebec and Cree representatives, is also created to promote economic initiatives in the region. Guarantees regarding employment in the construction of new hydroelectric projects, in mining and forestry are also part of the Agreement (chapters 8 and 10).

to define the transfers as a "recognition of our inherent rights on our traditional lands" and a "new and innovative form of revenue sharing for natural resources"[196]

The tradeoff for these significant adaptations to the JBNQA regime for the Crees was to withdraw all judicial proceedings against Quebec in matters relevant to the agreement, including the forestry cases.[197] But more importantly, the Crees gave their consent to a new hydroelectric project (the Eastmain 1-A/Rupert diversion project) and agreed to give up their opposition to the already projected Eastmain-1 extension to the La Grande complex. In exchange, Quebec abandoned definitively the larger Nottawa-Broadback-Rupert (NBR) project that was part of the original James Bay development plan. The consent to the two new projects remains very controversial in Cree communities, but the original NBR project would have had a much greater impact.[198]

Finally, the agreement establishes a permanent Liaison Committee between the Cree and the Quebec government (chapter 11). At least one Quebec representative on the committee must report directly to the Secrétaire Général, thus maintaining access to the Premier's office. The primary objective of the committee is to facilitate coordination and dialogue in the implementation of the agreement at the executive level, and ensure conflicts regarding its interpretation are solved through political negotiation rather than through the courts. This intergovernmental mechanism is still seen by Cree leaders as a key element of the Agreement. Such a direct access to the Premier's office guarantees the relationship will be maintained at the political level, ensuring its primacy over regulatory

[196] See GCC, *Speech by Ted Moses at the 'Redefining Relationships' Aboriginal Claims Conference*, November 13, 2003, Ottawa. On file with the GCC. See also Saganash, in Trudel and Vincent (2002).
[197] 16 cases were discontinued against Quebec, but maintained against the federal government.
[198] The Eastmain-Rupert diversion project will flood 640km^2 of land, compared to 8000km^2 for the original NBR project (Craik, 2004: 180).

obstacles at the administrative level. For a Cree leader interviewed, "what this new structure brought was a political, and not just a bureaucratic relationship with Quebec."[199]

5.6.5. The Impact of the Agreement on Cree-Quebec Relations

The New Relationship Agreement is, in and of itself, not revolutionary. It is not a new treaty nor does it recognize any form of shared sovereignty over the territory. The federal Parliament and Quebec's National Assembly are still the sole expression of that sovereignty. In its substance, it is an agreement over the governance of regional economic development. Quebec sought guarantees regarding forestry exploitation and hydroelectric development in face of the many legal procedures the Crees had engaged in over time. The Crees were seeking more control over natural resources extraction on their traditional lands and greater levers in fostering economic development in their growing and young communities (Scott, 2005; Trudel and Vincent, 2002). This strictly economic perspective on the agreement was expressed in many interviews with Cree and provincial officials. But a number of interviewees involved in the negotiation on both sides also concurred that beyond its economic logic, the agreement was an attempt to adapt the JBNQA regime to the political reality of the day. It had become clear that Quebec could no longer deal with the Crees as an "administered" group. The status of the Crees as a distinct political community with a legitimate territorial claim had to be acknowledged.[200]

The impact of the agreement on Cree-Quebec relations was felt immediately. Highly acrimonious relations characterized by competing claims for political legitimacy were reshaped into dynamics of collaboration in a number of policy areas. More

[199] Interview A01-13.
[200] Interviews G01-02; G01-05;l G01-06; G01-16; A01-02; A01-04; A01-16.

significantly, the position of the Crees in such relations of governance changed. The negotiation of the *Paix des Braves* itself, with its secretive process of open-ended discussions between high executives, suggested a new dynamic. The language used in the *Paix des Braves* also indicates a change, at least in symbolic terms, in the status of the Cree in their governance relationship with Quebec. But more importantly, officials interviewed are adamant about the importance of the agreement in instilling, in concrete terms, a new dynamic in Cree-Quebec relationship. As one Quebec official puts it:

> It is still the Minister who is responsible for the money. The National Assembly is still the ultimate authority on the territory of Quebec. But the *Paix des Braves* creates a whole new political dynamic. No one would say this openly, but we are really working with the Crees as we would with a distinct order of government.[201]

Although there is still much suspicion on both sides, and all agree the implementation of the agreement is a challenge, most people involved in Cree-Quebec relations interviewed felt it had significantly improved the climate of negotiations in many policy areas. In other words, while the *formal structures* of authority have not changed, in practice, the *status* of the governing partners and the *dynamics* of governance have. The creation of the Liaison Committee at the executive level in order to maintain the communication channels established by the *Paix des Braves* also suggests a recognition, by Quebec, of the need to interact with the Crees on a basis that reflects their political status. Whether this state of affairs will remain in the long run in the absence of more formal changes to the JBNQA structure itself remains to be seen, but the Liberal government headed by Jean Charest maintained the approach established under the Parti Quebecois.[202]

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[201] Interview G01-16 (my translation).
[202] The new government reaffirmed its commitment to the *Paix des Braves* shortly after its election.

What made this agreement possible? In addition to its growing policy experience, through the language of self-determination, the GCC/CRA positioned itself as a distinct source of democratic authority and legitimacy in its relations with both the Canadian and Quebec governments, making it increasingly difficult for the latter to maintain a strictly administrative relation. In the political context of Quebec at the turn of the new millennium, the Crees certainly held a powerful bargaining tool with their growing recognition in, and access to, international forums.

But in a sense, what made this agreement possible was also the change in perspective in Quebec City on the role of the government. The Agreement goes hand in hand with the logic of "partnerships" and shared governance that has permeated various provincial policies for the last decade. This agreement was a breakthrough in political terms, but in administrative terms, it is very much in continuation with the logic of neoliberal de-centred governance that established itself in government circles in the 1990s. In forestry management for example, centralized governance had been abandoned by Quebec in its 1986 policy fostering "self-management" by the industry.[203] The Agreement simply pushes this logic further by involving a third partner. The devolution of Quebec's responsibilities to the CRA in relation to economic development is also perfectly in line with the Aboriginal policy adopted by the PQ government in 1998 and other policies fostering a greater role for local administrations in the coordination of

[203] Quebec's forestry policy has long been criticized for its overly decentralized regulatory framework. See for example Bergeron, Y. and C. Messier. "Un nouveau régime forestier trop timide pour la protection de la biodiversité. Pour un projet de loi sur les forêts plus audacieux" *Le Devoir*, July 5, 2000.

economic initiatives.[204] Quebec was thus well-disposed to reorganize its governance relation with the Crees and adapt it to the changing context.

On the Cree side, it is clear that the need to gain greater access to economic development tools was the driving factor behind the agreement, but the prospect of greater political recognition in everyday governance certainly convinced many Cree leaders who had been involved in the ongoing deadlocks over the JBNQA implementation. That being said, not everyone was pleased with the Agreement and maintaining a united voice has been a challenge for the GCC leadership ever since. Not surprisingly, communities affected by the new hydroelectric developments reacted particularly strongly. Young Cree leaders also voiced their opposition to an agreement that, in their view, put capitalist economic development before the protection and promotion of the Cree traditional way of life.[205]

The Agreement was eventually approved by 70 percent of the Crees in a referendum organized prior to its final ratification.[206] But there is still strong resistance to the Agreement and the way it was negotiated. In 2005, Ted Moses, whose leadership was strongly associated with the *Paix des Braves*, lost to one of the main opponents of the Agreement, Matthew Mukash, in a general election for the Grand Chief position. The new chief has since toned down his opposition to the Agreement. As the main political representative of all Cree communities, he is in fact forced to defend the GCC's commitment to the Agreement with Quebec despite the strong opposition to the

[204] The most recent regional economic development policy of the government goes in the same direction. See www.mdeie.gouv.qc.ca/page/web/portail/en/developpementRegional/nav/local/41474.html?iddoc=41474
[205] The December 2001 special issue of the independent Cree by-weekly magazine *The Nation* 2001 provides a good overview of Cree viewpoints. See www.ottertooth.com/Reports/Rupert/News/nation.htm (May 10, 2005).
[206] 60% of eligible voters participated. See www.gcc.ca/gcc/newagreement/referendum.html (April 10, 2005).

hydroelectric development in the communities that are most directly affected.[207] At the time of writing, tensions were still high as the Eastmain/Rupert hydroelectric project was soundly rejected in a referendum organized by local leaders in three Cree communities most directly affected by the project.[208] While the GCC does not consider this recent referendum as a rejection of the *Paix des Braves*, the divisions are threatening the unity of the Cree nation achieved during the negotiations of the JBNQA thirty years ago.

5.6.6. The Paix des Braves and Federal-Cree Relations

Before the New Relationship Agreement with Quebec, the GCC had sought to establish a similar –political- approach to governance with the federal government for a number of years.[209] The federal government also recognized the limits of the structure of governance resulting from the JBNQA. In fact, a federal negotiator was mandated by the Minister of Indian Affairs in 1996 to "establish a new relationship that would reflect the principle of Aboriginal self-government and be guided by a spirit of partnership" with the Crees.[210] The negotiations never took off however, as the parties could not agree on the status of the negotiation process. In essence, the Crees refused to negotiate with someone who did not have a mandate from Cabinet while the Minister of Indian Affairs did not want to create a precedent and risk having all Aboriginal nations seek direct Cabinet access.

[207] Nicholls, Will (2006), "Pulling the strings with Grand Chief Matthew Mukash. The State of the Cree Nation Interview," *The Nation*, April 28, 2006.
[208] "Three Quebec Cree communities vote against hydro plan to diver Rupert River", *Canadian Press*, December 1, 2006.

[209] See comments in Canada, Cree-Naskapi Commission (1998: 7).
[210] GCC, *Letter to Prime Minister Jean Chretien*, December 5, 1996. On file with the GCC, Ottawa.

The institutional resistance to reform in the nature of the relationship was thus much stronger at the federal level. While the political climate of the time and the ongoing costs created by legal uncertainties surrounding natural resources extraction gave the Crees some bargaining power with the province, the federal government had little incentive to change the logic of administrative containment under the JBNQA.

The *Paix des Braves* nonetheless changed the political dynamic between the Crees and Ottawa. The GCC used the agreement to put pressure on the federal government to obtain similar conditions for a "renewed partnership." Praising Quebec for its innovative approach in establishing a "true Nation-to-Nation relationship" the GCC leaders attacked the federal government for its "lack of vision in articulating a coherent response to the new political, legal and financial situation resulting from the agreement between the Crees and Quebec."[211] In an ironic twist of event, elected Cree leaders participated in a European tour with Quebec officials selling the virtues of their new partnership while attacking the federal government for its "old colonial mentality."[212] In the 2002 provincial elections, Ted Moses even declared his support for the Parti Québécois, all this in the context of a possible third referendum on Quebec sovereignty.[213]

The strategy eventually paid off, as the Prime Minister named former Canadian Ambassador in Washington Raymond Chrétien as the government chief negotiator with the Crees, recognizing for the first time the need to establish more direct political channels with the GCC. In July 2007, the Grand Council of the Crees and the federal government

[211] GCC, *Report to the Council/Board on Federal Negotiations*, July 23, 2003. On file with GCC.
[212] GCC, *Notes for Speech, Grand Chief Ted Moses European Tour*, November 2002, On file with GCC.
[213] Deglise, F. "Un geste sans précédent: Ted Moses accorde son appui au PQ" *Le Devoir,* March 25, 2003.

announced they had signed a draft agreement for their own "*Paix des Braves*".[214] The agreement would see the federal government pay $1.4 billion in order to settle outstanding JBNQA implementation issues that were still the object of legal disputes with the GCC and establish implementation mechanisms for the next 20 years.[215] The *Cree-Naskapi Act* would also be amended to empower the Cree Regional Authority with similar powers as local Cree Bands, allowing it to fully assume its responsibility in a number of areas where, as discussed, it is already *de facto* running programs, such as the administration of justice, policing and human resources development.

Further reflecting the political integration of the Cree communities since the JBNQA was signed, the draft agreement also establishes a negotiation agenda towards a new self-government agreement, which would see the *Cree-Naskapi Act* replaced by a Cree Constitution and a Cree Nation government with an elected regional assembly replacing existing governance structures. If the process succeeds, the GCC/CRA would be transformed into a full-fledged Cree government federating all communities in the territory of Eeyou Istchee.[216]

5.7. Conclusion: From Administrative Containment to Multilevel Governance

Between the first meeting of Cree chiefs in the weeks following the announcement of the construction of the James Bay hydroelectric complex in the summer of 1971 and the 2001 *Paix des Braves*, the governance regime of the peoples of Eeyou Istchee changed

[214] "Ottawa fait sa *Paix des Braves*", *La Presse*, July 16, 2007.
[215] *Agreement Concerning a New Relationship between the Government of Canada and the Crees of Eeyou Istchee*, Final Draft, July 10, 2007. Available at http://www.gcc.ca/pdf/LEG000000018.pdf. (July 25, 2007).
[216] The Agreement was ratified by the Cree population in a referendum held in October 2007. 90.1% of those who voted supported the Agreement. See http://www.gcc.ca/referendum2007/ (October 20, 2007).

quite significantly. Interestingly however, there is also much continuity in Cree governance. With the exception of the proposed creation of a Cree National Government in the recent agreement with the federal government, none of the changes since the JBNQA that are described in this chapter constitute a radical reconfiguration in the formal structure of authority in Cree governance. Under the *Paix des Braves*, just as under the JBNQA, decision-making authority, and sovereignty, remain firmly in the hands of the federal and provincial Parliaments.

This chapter does not suggest that the Crees are now free to exercise their right to self-determination and engage with the federal and provincial governments into a federal-type relation. Despite the rhetoric in this sense coming from both Quebec and the GCC in the aftermath of the *Paix des Braves*, we are still far from a relationship amongst equal partners. In fact, if one were to limit the analysis of Cree governance to the structures and channels of authoritative decision making, the picture would effectively be one of continued domination and administrative control. Formally speaking, the Cree are still very much under a regime of contained recognition today.

But taking a deeper look into the actual practices of governance, one notes gradual changes throughout the 1980s and 1990s, not only in the role of Cree authorities in governance processes but also in their status in such processes. Since the JBNQA, Cree governance has progressively shifted from a logic of containment to what has de facto become a regime of multilevel governance, characterized by bilateral (and sometimes trilateral) policy-making exercises, and growing interdependencies between governing agents in a number of policy areas where no one fully controls the resources, or has the legitimacy, to act unilaterally.

The *Paix des Braves* is very much a recognition of this progressive transformation of Cree governance. While it does not alter the constitutional status of the parties or attributes new jurisdictions, the agreement with Quebec does recognize that the Crees can no longer be confined to an administrative relationship. The status of the Cree Nation as a distinct polity, with its own source of authority and legitimacy, is reflected in the process that lead to the Agreement but also in the language of the *Paix des Braves* itself. The various governance mechanisms that were created, including the executive level liaison committee, clearly suggest that the norms and rules of Cree governance, at least with Quebec, have in practice moved beyond administrative containment.

Another key characteristic of current dynamics of multilevel governance is precisely their asymmetric nature. Relations between the Crees and Quebec are increasingly differentiated from those with the federal government. The institutional context at the federal level, including the long legacy of governance practices within DIAND, certainly makes the process of change more difficult with Ottawa. But resistance to change also comes form the inherent risk of creating precedents for the federal government, which faces highly diverse realities in its relations with Aboriginal peoples across Canada. Relations are also different because of the respective jurisdictions of the two orders of governments, as reconfigured under the JBNQA. It is first and foremost with Quebec that issues of territorial control and resources extraction are played out, leading to more direct confrontations, but also more assertive positioning by the Crees in their challenge to state authority. Finally, and perhaps most significantly, the political context in Quebec, where the language of self-determination takes a very concrete meaning, also

explains the greater leverage gained by the Crees in reconfiguring practices of governance with the provincial government.

It is still too early to evaluate the impact of the more recent agreement with the federal government concerning the settlement of disputes regarding the implementation of the JBNQA and the reform of the governance structure of Eeyou Istchee. But the overall outcome of recent developments is a consolidation of the double-bilateral, rather than trilateral nature of Cree governance, in which the norms, rules and established practices of governance are not the same in Cree-Quebec and Cree-federal relations.

5.7.1. Institutional Adaptation and Cree Agency

One striking element of the shifts in Cree governance over the past thirty years is their incremental, rather than radical nature. The shift from administrative containment to multilevel political relations cannot be reduced to a specific event or a rupture in what are, after all, deeply entrenched patterns of governance. The transformation in Cree governance is best understood as a process of cumulative adaptations, or adjustments, of the norms and practices guiding Cree-Quebec and Cree-federal relations to a changing political and economic context. It is the expansion of the natural resources extraction economy of the province to its Northern territories that lead to the JBNQA, and ultimately to the *Paix des Braves*. The development of de-centered governance mechanisms through which the GCC/CRA gained leverage in the policy process must also be understood in the context of neoliberal state restructuring. And the emergence of a rights-based relationship, relayed by Cree nationalism, is also largely in line with broader political dynamics in Canada.

While the evolution of Cree governance must be located in its historical, economic and political context, a purely structural, or functionalist, explanation for the transformations that have taken place in the past thirty years is clearly insufficient. In fact, the specific trajectory of this process of institutional adaptation has largely been driven by the Cree leadership, and by its capacity to seize the opportunities arising from this changing context to reinforce its legitimacy and resources, as well as its status in governance exercises. The choice to engage in negotiations towards the creation of a regional structure of governance under provincial jurisdiction at the time of the James Bay and Northern Quebec Agreement has had a profound effect on the position of the Crees in the Canadian federation. It effectively created a bipolar regime of governance through which the Crees have been able to negotiate and gain access to the policy process with both orders of governments. This double regime, while cumbersome in administrative terms, also has its advantages as the political dynamics surrounding the *Paix des Braves* suggest.

The new structures created under the JBNQA did not immediately translate into significant changes in patterns of governance, but they nonetheless opened the door to more substantive change with time. As the language of rights and recognition became more entrenched in Canadian politics, and debates on the future of Quebec created a context where assumptions about boundaries of political communities were openly discussed in public discourse, the Crees were able to use the resources and access points gained under the JBNQA to assert their status and challenge governments on the terrain of democratic legitimacy and territorial integrity. Through an increasingly nationalist discourse, and strategic use of their unique position in relation to federal and provincial

jurisdictions, the Crees were able to establish their status as a distinct political community with a legitimate claim to territorial self-determination.

The recognition of the Cree Nation and of the GCC as its legitimate voice has also much to do with the capacity of the latter to maintain and consolidate the unity of the nine Cree communities and articulate a common vision for Cree governance. This unity, sometimes taken for granted by external observers, is far from obvious given the diversity of the communities in geographic and economic terms, and the relatively recent articulation in political terms of their common national identity as the peoples of Eeyou Istchee. Despite differences in interests between communities, and also between traditionalists who assign top priority to the preservation of the traditional Cree way of life and those who envisage political autonomy as a tool for the modernization of the Cree society, the GCC spoke with one voice in its relations with governments. Maintaining this unity, and reinforcing its internal legitimacy has been key to the GCC success in its relations with governments, and the *Paix des Braves* has certainly put this unity to test, as discussed.

Faced with the resistance of governments in engaging in formal negotiation over the implementation of the JBNQA, the GCC also pragmatically chose to take advantage of changes in approaches to governance resulting from the neoliberal turn of the 1980s. As governments sought to disengage themselves from direct management of Aboriginal programs, the GCC agreed to negotiate a number of bilateral and trilateral agreements for the devolution of services and programs, "without prejudice" to what it considered Cree rights under the JBNQA. As a result, it consolidated its policy capacity and engaged in a growing number of joint policy-making exercises with governments, bargaining additional

funding or authority, or adapting existing policy frameworks to the needs of Cree communities.

This combination of political assertion and growing policy capacity resulted in a progressive displacement of the JBNQA framework for something resembling more closely, at least in practice, a regime of multilevel governance where mutually interdependent spheres of political authority interact and compete in joint policy exercises. The *Paix des Braves* is also the outcome of these new multilevel dynamics between politically interdependent agents of governance. The new forestry regime, the negotiated consent for new hydroelectric development and the transfer of responsibilities for economic development in exchange for long-term financial guarantees are all in some ways recognition of the interdependent nature of the Cree-Quebec relation in key policy areas for both parties. Interestingly, with its focus on new partnerships and collaborative governance to foster economic development in the region, the *Paix des Braves* is also very much in line with neoliberal approaches to governance. In this respect, it should be understood not as a radical shift, but as an adjustment of the JBNQA regime to a new economic and political context.

5.7.2. Multilevel Governance and Self-Determination "From Within"

Throughout this transformative process that led to the *Paix des Braves*, the Crees also engaged in a significant redefinition of their collective priorities. From a focus on regional governance to protect hunting and trapping activities to the political and economic partnership for regional development that underpins the *Paix des Braves*, the

Crees were proactive in debating and asserting their policy priorities. In the process, they also came to articulate a common national project through their regional institutions.

The combination of rights-based and neoliberal governance, as constrained as it is, has opened new spaces for the Cree in the policy process, and seizing these opportunities has provided the GCC with the capacity to engage in self-determination exercises, both within the communities where policy priorities must be defined, and though multilevel governance exercises themselves. In fact, negotiations with the federal and provincial governments have become key "locales" of governance where the GCC has translated collective Cree priorities into policy positions and asserted the legitimacy of such positions as those of a self-determining polity.

To be sure, the Cree position in such exercises cannot be compared to that of a sovereign entity, or even a constitutionally empowered government, negotiating on par –in formal terms- with its federal and provincial counterparts. Multilevel governance takes place within the framework of the Canadian federal constitution where only two orders of governments have sovereign authority on the land. Even in the case of the *Paix des Braves*, the underlying assumption was that the Canadian constitution, and for the specific elements of the agreement, the National Assembly in Quebec, remained the ultimate sources of authority under which the Crees and the provincial government operate.

Engaging in negotiations that assume the legitimacy of the Canadian constitution was nothing new for the Crees. In fact, since the JBNQA, they have continuously used the constitution to assert their treaty rights though the courts and force governments to engage in negotiation processes. As I discuss in the next chapter, this is in stark contrast with the Kahnawá:ke Mohawks, who have refused to engage in any exercises that would legitimize

Canadian sovereignty over their community. The Cree choice to work within the parameters of the Canadian constitution, which may in part be explained by their greater geographic isolation and more recent encounter with the authority of the state, has proven fruitful in the long run. They have been able to gain considerable leverage in multilevel governance exercises, and consolidate their governing capacity and legitimacy in such processes. Moreover, as the negotiation of the *Paix des Braves* demonstrates, multilevel governance exercises can closely resemble federal-provincial intergovernmental negotiations amongst equal governing partners.

There are obviously certain trade-offs to this approach. For one, as they embraced administrative devolution, the Crees also increased their fiscal dependency towards the federal and provincial governments. The (significant) capacity of Cree organizations to engage in policy exercises is almost entirely dependent on the financial resources transferred from the two orders of government, and remains largely at the mercy of their changing priorities. The focus of the Cree leadership on greater access to the revenues generated by natural resources extraction in the context of the *Paix des Braves* is a recognition of this dependency and its potential consequences.

In addition to reinforcing fiscal dependency, engaging with governments in multilevel governance exercises also implied the Crees had to follow the "rules of the game" established in Canadian politics and governance. While the Crees have gained leverage and influence through multilevel governance exercises, their institutions of governance are increasingly reproducing the practices and operating logic of Canadian governing institutions. The reaction in Cree communities to the *Paix des Braves* and its secretive negotiations illustrates the consequences of adopting a model of multilevel

governance that resembles intergovernmental relations, with its classic trade-offs between efficiency and democratic accountability. Despite the significant support among the Crees for the *Paix des Braves* in the referendum preceding its ratification, the leaders who negotiated the Agreement were defeated in the following Grand Council elections. A key argument of the new leadership was that the previous administration had "lost touch" with Cree traditions and democratic practices in negotiating the *Paix des Braves*.

Here lies the paradox of the transformation of Cree governance in the past thirty years. As the Crees consolidated their governing institutions, developed their political capacity and resources, asserted their political status and have now a much greater say on policies affecting them, they also became more tightly woven into the structures of the Canadian state. Whether this is a positive or negative development depends on one's perspective on the possibility of achieving self-determination from within.

Chapter 6

Kahnawá:ke: Governance Through Mutual Recognition

The Kahien'kehá:ka (Mohawk)[217] community of Kahnawá:ke is well known for its strong legacy of militancy and political activism. An example of Aboriginal peoples' capacity to challenge the Canadian state for some (Alfred, 1995a), Kahnawá:ke is also often portrayed negatively in the Quebec media as a rogue community.[218] This representation is in part due to the long history of conflicts between Kahnawa'keró:non and federal and provincial authorities over the application of Canadian laws within the boundaries of the community. The images of the 1990 Oka crisis, during which Kahnawá:ke residents and armed Warriors dressed in army fatigues blocked the Mercier bridge in solidarity with their sister community of Kanesatake, have certainly reinforced this perception of a rebellious community (York and Pindera, 1991: 115).

Such tensions and acts of defiance are not new in Kahnawá:ke. Unlike James Bay Cree communities, which were until recently relatively isolated from the settlers' society and institutions, Kahnawá:ke is located in the geographic and historic heart of colonial Canada: on the South Shore of the St-Lawrence river, less than 20 minutes drive from downtown Montreal. Kahnawá:ke today is a suburb of Montreal, economically and

[217] Throughout this chapter, I use the terms preferred by the community to define itself in its own language. *Kahnawá:ke* (still spelled Kahnawake in government documents) used to be referred to by its anglicized name, "Caughnawaga" until the community formally changed its name in 1982. *Kahnien'kehá:ka* (meaning people of the flint) is used here interchangeably with the more commonly used "Mohawk". Although the later term derives from an anglicized version of an Algonquian term meaning "man eaters," it is still commonly used in Kahnien'kehá:ka communities. The Kahnien'kehá:ka (Mohawks) of Kahnawá:ke are *Kahnawakehró:non*. For a discussion on terminology used in Kahnawá:ke, see Reid (2004: 198, note 1) and Alfred (1995a: 18).

[218] See the references to various newspaper articles in Trudel (1995).

physically embedded in the region. But it is also a staunchly independent community, defending its territorial boundaries and asserting its political autonomy in face of ongoing pressures from the dominant society surrounding it.

Behind this resilience, and the protracted conflict with state authorities, lies a fundamental and deeply held principle amongst Kahnawa'keró:non: Kahnawá:ke is a territory of the Mohawk Nation, which never surrendered its sovereignty to French, British or Canadian authorities. The Canadian constitution, and Canadian laws and institutions by extension, have historically had limited legitimacy on the territory. This position of principle –which is clearly at odds with the model of contained recognition developed in Canada in the past thirty years- is fundamental to understanding dynamics of governance both within Kahnawá:ke itself and between Kahnawá:ke's political institutions and their federal and provincial counterparts.

In the past thirty years, this principled stand has become a powerful political tool for the Mohawk Council of Kahnawá:ke (MCK), the band council created under the *Indian Act*, in its interactions with federal and provincial authorities. As Taiaiake Alfred (1995a) argues in his chronicle of the rise of nationalist politics in Kahanwá:ke, while many traditionalists in the community reject the authority and legitimacy of the MCK as an institution imposed by the Canadian state, the latter nonetheless managed to reinvent itself as the leading political arm and governing body of the community towards a reassertion of Kahnien'kehá:ka sovereignty.

Central to this transformative process has been the capacity of the MCK to establish itself as a political agent -as well as a political space- through which the community was able to redefine its own norms, rules and institutions of governance

independently of the state. In a process that parallels the experience of the Grand Council of the Crees, the MCK took advantage of shifts in approaches to governance at the federal and provincial levels to progressively transform what was essentially a classic command-and-control hierarchical regime of intergovernmental relations into a regime of multilevel governance where policies and laws applicable in Kahnawá:ke are increasingly the product of negotiated compromise between competing sources of authorities. Unlike the James Bay Crees, whose multilevel regime rests largely on a rights-based interpretation of their relationship with the Canadian state that stems from the JBNQA, Kahnawá:ke's regime rests on the unilateral assertion –and implicit tolerance by governments- of a parallel legal and political system in Kahanwá:ke that lies outside the Canadian constitution.

The emergence of multilevel governance in the context of Kahnawá:ke is thus best portrayed as a two-tiered process of institutional adaptation through displacement and conversion. Alternative policies and programs were first developed unilaterally in Kahnawá:ke, in an attempt to displace existing Canadian structures. The competing Kahnawá:ke and governmental policies and programs were then mutually adapted to facilitate coordination through bilateral intergovernmental negotiations. I discuss in this chapter the political implications –and limits- of such processes, using examples from a number of policy fields where the MCK has established governance structures that are eventually recognized by the provincial and the federal governments. Before analyzing current multilevel governance dynamics however, I begin with an overview of the community. I then look at the evolution of Kahnawá:ke governance, from early

diplomatic alliances to the imposition of the *Indian Act*, and then to the postwar transformation of the MCK into an agent of self-determination for the community.

6.1 A Brief Overview of the Community

Kahnawá:ke lies approximately 10km southwest of Montreal, on the banks of the St. Lawrence River, near what is known today as the Lachine rapids (the word "Kahnawá:ke" means "at the rapids").[219] The territory of Kahnawá:ke is considered an Indian Reserve in federal law and is thus governed under the land management system of the *Indian Act*. Kahnawa'keró:non rarely use the term "reserve" however, as they consider their community as Mohawk, rather than federal or Canadian, territory (Delisle, 1984: 142). Kahnawá:ke's current land base of 24km^2 is crossed by two highways and a series of access ramps to the Mercier bridge, which connects the suburbs of the area to the island of Montreal. While it borders the St Lawrence River, the Seaway built in the 1950s physically separates the community from the waterfront. Railway tracks and power lines also encroach on the land base of the community.

There are approximately 8,500 residents of Kahnawá:ke, making it one of the larger First Nation communities in Canada. English is the main spoken language in Kahnawá:ke, although the Kahnien'kehá:ka language is going though a significant revival as it is now being taught in community-run schools. There are few publicly available statistics on the socio-economic profile of Kahnawá:ke residents, largely because Census Canada has not been allowed on the territory since 1976. That being said,

[219] The information in this section was retrieved from the Mohawk Council of Kahnawá:ke's website at www.kahnawake.com (accessed January 21, 2007) or otherwise noted.

in relative terms, Kahnawá:ke is one of the wealthier Aboriginal community in Canada, with an average annual family income estimated at $33,000 (Sixdion, 1998: 3).

The community's proximity to a large urban centre and to major transportation axes facilitates the development of services and commercial activities. The Kahnawá:ke Mohawks also have a long tradition as 'high steel' workers, a well-paid trade in the construction industry.[220] Kahnawá:ke nonetheless shares with other Aboriginal communities a difficult legacy of social alienation, with rates of family violence and drug abuse above the Canadian average, and relatively poor health conditions.[221] As in most Aboriginal communities, a large proportion of revenues is derived from government transfer payments (66% according to Alfred, 1995a: 2).

In political terms, Kahnawá:ke is one of seven communities of the Kanien'kehaka (Mohawk) nation and one of three in Quebec (Kanesatake and Akwesasne are the other two). While ties with other communities of the nation have been sporadic at times, closer relationships have developed in the latter part of the 20th century as Kanien'kehaka traditional governance structures were revived. The same is true of relations with other nations of the ancient Iroquois Confederacy, as I discuss later. The Mohawk Council of Kahanawake is the main governing body for the Kahnawá:ke Mohawk Territory. It is, in formal terms, a band council with delegated administrative authority under federal law. It is composed of a Grand Chief and eleven Chiefs chosen by the community in single-district elections now held every three years. In 2004-2005, the MCK had 267 full-time employees and managed a budget of $41 million (MCK , 2005).

[220] For more than a century now, Mohawks have been building New York's skyscrapers. 250 Kahnawa'keró:non worked in the high steel industry in New York State in 2002 (MCK, 2002: 3).
[221] See Deer, K. 'Alcohols and Drugs Are Epidemic', *The Eastern Door*, vol.18, no.12, April 16, 1999.

In addition to the MCK, a number of sector-specific Mohawk-controlled institutions also participate in the governance of the community. These include the Kahnawá:ke Education Center that manages the five schools in the community, the Kahnawá:ke Court, as well as arms-length MCK bodies such as the Peacekeepers (police force) and economic development and social services agencies. There are also three parallel traditional governance institutions in the community based on the Iroquois Longhouse model (Alfred, 1995a: 3; Lajoie et al., 1998: 693). As I discuss further later on, these traditional spiritual and political institutions have at times held a significant weight in internal politics and have openly challenged the authority of the MCK on the territory.

The institutional portrait of Kahnawá;ke is completed by a fairly dense network of civic and voluntary organizations such as sports associations, a chamber of commerce, the Legion, the Knights of Colombus and various social and cultural clubs that contribute to the social and cultural vitality of the community. These strong civic networks have also played an important role in the community's history and contribute to its unique capacity for developing autonomous institutions of governance (Ponting, 1986: 161).

6.2 Kahnawá:ke Governance from the Great Law to the *Indian Act*

Archeologists and historians still disagree on the exact origins and timeframe of Kahnien'kehá:ka settlement in what is now southern Quebec and northern New York state.[222] It is generally agreed, however, that at the time of European contact, the Kahnien'kehá:ka controlled a territory more or less bordered to the north by the St. Lawrence River, to the east by Lake Champlain and the Hudson River, to the south by the

[222] See Chapdelaine (1992), Delage (1991) and Trudel (1991) for a discussion of the various theories.

Mohawk River and to the west by Lake Oneida in New York State. Through warfare and adoption into the communities of conquered tribes, the Kahnien'kehá:ka grew to become one of the most powerful nations in the region at the time of European contact.

6.2.1 Governance in the Rotinonhsiónni Confederacy

The Kahnien'kehá:ka were, and still are, part of the Iroquois Confederacy, or Rotinonhsiónni (People of the Longhouse) a powerful association of five nations that came to dominate the region south of the Great Lakes in the 16th and 17th century.[223] The Confederacy, which is an early example of treaty-based federalism discussed in chapter 3, is governed by the Kaianarehko:wa, or Great Law of Peace, an orally transmitted series of spiritual and political decision-making guidelines that also establishes the concordat between the member nations.

The nations of the Confederacy were matrilineal societies, organized into family units (the longhouses) grouped into clans. Clan mothers would collectively choose male leaders to represent the families at the nation level. These chiefs would then also represent their nations at the Confederacy's Grand Council. Decisions were consensual, although some chiefs representing "senior" nations in the Confederacy would have more weight in the deliberations. The Confederacy was in fact a fairly loose alliance despite its high level of organization and rules. Each nation -and each community for that matter- remained a distinct political unit, entirely autonomous in its internal governance. When

[223] The equivalent Seneca term "Haudenausonee" is often used to refer to the nations of the Confederacy. The other original nations of the Confederacy are the Oneidas, the Onondagas, the Cayugas and the Senecas. A sixth nation, the Tuscarora joined the Confederacy in the early 1700s. The exact date of the founding of the Confederacy is uncertain, but it was fully consolidated by the mid-fifteenth century. The total population of the Confederacy exceeded 20 000 by then (Reid, 2004: 2). For a detailed history of the Confederation and its functioning, see Canada, RCAP (1996, vol.1: 50-61) as well as Jennings (1985).

consensus was not possible amongst member nations on any given issue, the dissenting groups would generally dissociate themselves from the majority and function independently of the Confederacy on such matters. This possibility of "opting out" proved to be a strength for maintaining the Confederacy through time, but it also turned out to be a weakness that French and English authorities were quick to exploit, building separate alliances with nations of the Confederacy, who often ended up on opposite sides in the conflict between European powers (Reid, 2004: 5).

Hostilities between the Confederacy and Algonquian and Wendat (Hurons) established on the northern side of the St. Laurence and Great Lake watershed were ongoing at the time French explorers established their first settlements in the area. The French alliance with the latter two naturally led Kahnien'kehá:ka and their Iroquois allies to establish closer ties with the English settlers along the Hudson waterway in today's New York State. This alliance evolved into a series of treaties, cumulating with the Silver Covenant Chain, a diplomatic alliance established in 1677 between the Confederacy and representatives of the English crown (Canada, RCAP, 1996, vol.1: 58.).

Historical records clearly show that the parties did not consider these treaties as acts of submission or recognition of European authority on the territory. They were the product of diplomatic relations in the most classical sense, between independent nations seeking peaceful relations in order to facilitate commercial exchanges. The continuing autonomy of the members of the Confederacy is confirmed by their actions, including subsequent peace treaties with the French in 1665 and 1667, and again in 1701, despite English opposition (Alfred, 1995a: 32; Havard, 1991).

6.2.2. The origins of Kahnawá:ke

It is in this context of complex diplomatic alliances and ongoing warfare that Kahanwá:ke was established in the late 17th century. French Jesuits set up the community as a Catholic settlement for converted Indians fleeing persecution in their own villages. Despite limited contact with missionaries, the practice of adopting conquered populations into Kahnien'kehá:ka communities, notably Wendat and other Iroquois who had been in more sustained contact with French, allowed Catholicism to enter Mohawk life (Delage, 1991: 64). In addition to religion, commercial opportunities and social tensions in many Kahnien'kehá:ke communities contributed to the migration to the new community (Dickson-Gilmore, 1999: 431).

Given its strategic commercial position and relatively peaceful situation, the community grew rapidly and by the 1730s, it was by far the largest Kahnien'kehá:ka community with more than 1200 residents (Reid, 2004: 9). As the balance of power between French and British colonies progressively shifted to the advantage of the latter, Kahnawá:ke first chose to stay neutral, maintaining commercial ties with both, only to support the British Crown when the outcome of the war became evident. After the fall of Montreal, British authorities immediately recognized title to the land at "le Sault St Louis" to the "resident Indians", despite opposition from the Jesuits who had initially received title to the land from French authorities (Reid, 2004: 14).

Throughout these tumultuous episodes, Kahnawá:ke maintained a delicate balance between its ties with the Confederacy, which despite its decline remained

culturally and politically at the core of Kahnien'kehá:ka identity,[224] and diplomatic alliances with the French and English, which provided economic opportunities and a certain stability. Not only did the community manage to keep its unity relatively intact, it also forged a strong sense of its own identity as a distinctive and autonomous polity. In the words of Taiaiake Alfred, "the unique role Kahnawake played during the colonial era created a political culture oriented primarily toward the preservation of local autonomy, and the maintenance of cultural and political boundaries between Kahnawake and surrounding political communities" (1995a: 4).

6.2.3 Kahnawá:ke under the Indian Act

The end of the colonial wars and the rapid decline of the fur trade in the 18th century considerably weakened Kahanwá:ke's position in the political landscape of British North America. Like other Aboriginal communities, Kahnawá:ke progressively came under the tutelage of the Crown and was no longer considered an autonomous political entity by the colonial government. The territory of the community was constantly reduced as successive governments tolerated the settlement of white farmers and unilaterally took over lands to build infrastructure for the rapidly industrializing region. From the original 40 000 acres of the Seigneurie du Sault St. Louis, the community was reduced to 12 000 acres by 1890 (Reid, 2004: 22). The scarcity of land created tensions in the community with non-Aboriginal families who came to own land on the territory though mixed marriages or inheritance (Blanchard, 1982: 230).

[224] Significantly, the Confederacy no longer recognized Kahnawá:ke as a member community after 1684, largely because of religion and competing commercial alliances.

The tensions over land opened the door to greater intervention by the government in the 1870s and 1880s and to the implementation of the band council system in the community. At the time of the creation of the Dominion of Canada, the colonial government still recognized the authority of Kahnawá:ke's Council of Chiefs for local matters. The Council was then composed of seven chiefs representing the seven existing clans in the community.[225] In 1875, a group of Kahnawá:ke residents, disappointed with the way traditional chiefs were dealing with land issues, petitioned the federal government for the implementation of the *Gradual Enfranchisement Act* of 1869, which promoted the replacement of traditional governments by elected band councils under the supervision of the federal Superintendent of Indian Affairs. This led to the organization of the first elections in 1878 (Reid, 2004: 51).

The community was certainly divided over the process since no new elections were held for ten years (Blanchard, 1982: 223). It is only in 1889 that the local Indian Agent was able to organize elections again, this time under the more stringent *Indian Advancement Act* of 1884. Six councilors who represented geographic districts instead of traditional clans were elected and directed to choose a Chief amongst themselves. The Band Council has been the recognized interlocutor of the federal government ever since.

There are diverging views in the literature as to the extent of the resistance to the implementation of the band council system. Alfred (1995a: 58) suggests most Kahnawakehró:non initially considered the elected council as little more than an intermediary between their community and the government, and continued to view the

[225] There are only four clans in traditional Kahnien'keá:ka governance, but the mixed origins of Kahnawá:ke led to the inclusion of clans from Oneida and Onondaga lineage. The seven clans at the time were: Turtle, Great Bear, Old Bear, Wolf, Snipe, Deer and Rock. Chiefs were still named for life by clan mothers following Iroquois traditions (Reid, 2004: 55).

traditional Council of Chiefs as their legitimate governing authority for internal matters. By contrast, Reid (2004:81) argues the community rapidly became divided into three "factions" following the imposition of the band council system.[226]

According to Reid, a first group of "reformists" composed mostly of land and business owners of mixed ancestry supported the new council. A second group rejected the imposition of a foreign regime of governance, but nonetheless participated in the electoral process, hoping to gain control of the new institution through which the community was now administered. This "pragmatic" group seemed to be dominant, as a number of its leaders were elected to the council (Reid, 2004: 81). The failure of the latter group to loosen the grip of the Indian Agent, who systematically ignored council resolutions, led to the emergence of a third group who advocated a return to the traditional way of choosing chiefs for the community. A 1890 petition to the Governor General signed by 121 residents illustrates the views of the traditionalists:

> "We the said Caughnawaga Confederate Nation do not approve the republic form of government, as we are not fully British subjects, but merely allies to the British Government. (…) We also find the republic form of government of electing person injurious to our national rights, therefore we wish to have the Hereditary Chiefs to take the reins and conduct our welfare (…)."[227]

This traditionalist movement, as important as it may have been in keeping alive the practices and philosophy of Iroquois governance, did not succeed in removing the structures of the *Indian Act*. As government services became more important, and fiscal dependency increased, the band council system progressively took root in the community. The federal government was able to use the council as a transmission belt for

[226] In addition to Reid (2004) and Alfred (1995a), see also Dickson-Gilmore (1999) on the topic.
[227] Quoted in Reid (2004: 93). This attempt at revitalizing traditional governance eventually lead to a closer relationship between Kahnawá:ke and its old allies of the Rotinohshoni Confederacy, and to a revival of the governance structure of the Confederacy in the 1920s. In 1926, Kahnawá:ke hosted for the first time a meeting of the Grand Council of the Confederacy (see Blanchard, 1982: 284).

legitimizing its policies, while the latter was limited to the regulation of local maters such as road maintenance and commercial permits. This structure of governance, in which key policy choices were made in the Department of Indian Affairs rather than in the community, "became part of ourselves" as a former chief explained in an iterview.[228]

6.3 The Institutional Conversion of the Mohawk Council of Kahnawá:ke

Politics has always been a contested arena in Kahnawá:ke, as the previous discussion of the implantation of the *Indian Act* regime suggests. External influences, traditions, as well as more immediate political and economic interests all converge to create a complex mix of ideologies and viewpoints regarding the political orientation of the community. While sometimes seen as a weakness, one can argue with Alfred (1995a: 76-77) that such factionalism is in fact a sign of democratic vitality and political strength in a community subjected to the tight hierarchical governance structure of the *Indian Act*. This strong political consciousness certainly played an important role in the progressive transformation of the Band Council from a federally-controlled structure into an agent defending Mohawk self-determination in the second part of the 20th century.

6.3.1 Legitimacy Shift: The Seaway Episode

The unity of the community and its capacity to control its destiny were seriously tested in the 1950s when the federal government chose to build the St. Lawrence Seaway right through Kahnawá:ke's territory, cutting the community off from access to the river. Significant land and house expropriations were necessary, and in a familiar pattern seen

[228] Interview A03-02.

in the previous chapter, the federal government did not even consider consulting the community before proceeding. This direct and significant encroachment on Kahnawá:ke's territory mobilized the community. The Band Council strongly opposed the project and took it upon itself to stop it. In petitions to the federal government, the construction of the Seaway was portrayed as a breach of the trust relationship at the base of Mohawk's acceptance of the *Indian Act* (Alfred, 1995a: 159). The Council unsuccessfully challenged the project in Canadian courts, arguing it was an illegal trespassing of Mohawk land protected under the *Indian Act* and under the British title recognition of 1760.[229]

The failure to stop the project represents what many consider to be a turning point in Kahnahwá:ke politics (Alfred, 1995a; Blanchard, 1982; Dickson-Gilmore, 1999). The flagrant lack of consideration given to their concerns, and the limited usefulness of Canadian institutions such as the *Indian Act* and the court system, convinced many that the community could no longer trust the government to act in its best interest. In Alfred's words, "faith in the Canadian government as a reliable protector of Mohawk land rights was shattered by the Seaway debacle" (1995: 65).

A former Chief of Kahnawá:ke interviewed also spoke of the sense of betrayal and humiliation felt by the entire community as the bulldozers -under the protection of the RCMP- invaded their lands.[230] Despite its fierce opposition to the project, the authority of the Band Council was also weakened in the process. The Council's legitimacy rested largely upon an understanding that it was the best tool available to

[229] In an ultimate attempt, the band council also petitioned the United Nations for assistance against Canada's violation of treaty rights. MCK, *Band Council Resolution 354/1956*, on file with the MCK Archives. See also Alfred (1995a: 160).
[230] Interview A03-02.

protect the community's interests in relations with Ottawa. Its failure to move the government on such a fundamental issue displayed its limited effective authority and the hierarchical nature of its relationship with the Minister of Indian Affairs.

The Seaway episode resulted in a certain radicalization of the position of the community in relation to the Canadian state. The traditionalist leaders promoting the Longhouse as the only source of legitimate government in Kahnawá:ke gained considerable support. Many in the Longhouse movement also challenged the non-confrontational stand of the Band Council. In the words of a traditional leader:

> "The Seaway demonstrated the only way forward was to rebuild our sovereignty from the ground up, using traditional ways. (…) It showed everyone the extent to which we are under siege. It showed us that to survive, we have to defend our land at all costs."[231]

The strength of the traditionalist movement, and of its option of disengaging from Canadian institutions in order to reinstate the Longhouse system, continued to grow in popularity over the next decades. At least three groups eventually claimed legitimacy as the traditional government of the community.[232] In the 1970s, these traditionalist groups all came to compete with the Band Council for the allegiance of Kahnawakehró:non as the legitimate government of the community.

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[231] Interview A03-06.

[232] The traditionalists are divided mostly over the specific interpretation given to the Great Law. One group, the Mohawk Trail Longhouse, is more closely associated with the official structures of the Confederacy and follows the Handsome Lake spiritual revival movement. A second longhouse, the Nation Office, sees the Great Law as the basis to establish a modern constitution for a sovereign Kahnawá:ke. This latter longhouse is the most influential politically and is closely associated with the Warriors, a militant group who is seeking to revitalize the traditional ethic of Mohawk war chiefs. The Warriors have played a central role in confrontations with the state in later years, notably during the Oka crisis. Other smaller groups also emerged, notably the Five Nations Longhouse who is advocating for a stricter interpretation of the Great Law. For a more complete analysis of the traditionalist factions and their influence, see Dickson-Gilmore (1999), Lajoie et al. (1998) as well as Alfred (1995a: 84).

3.2. The Political Assertion of the MCK

This competition for legitimacy came to a head in 1973. As mentioned, with territorial issues, membership and residency in the community is one of the most contentious and symbolically charged questions in Kahnawá:ke. When a group of armed Warriors associated with one of the more militant Longhouse tried to evict a few non-native residents of the territory, a conflict erupted with the Band Council and its small security force that had replaced the RCMP on the reserve a few years previously. At stake was the authority to establish the rules of membership in the community.

Faced with an open challenge to its legitimacy, and seeking to demonstrate its capacity to maintain law and order, the Council called for an intervention by the RCMP and the Quebec police. Longhouse peoples perceived the appeal to external forces as another proof of the Council's subordination to Canadian laws and authorities. The conflict escalated rapidly, with Warriors launching an attack on the Council's building and threatening its elected members.[233] As the conflict dragged on, the presence of the provincial police on the territory became a sore point for the community, and the Council came under pressure to solve the issue internally, through negotiations with the Longhouse militants (Trudel and Chartrand, 1991: 119).

The Warriors eventually retreated, but not without claiming moral victory. The Council had been largely discredited in the community for its reliance on Canadian laws and external forces to assert its authority (Alfred, 1995a: 134). It had also proven largely unable to find a solution to the issue of membership under the constraining rules of the

[233] "Violente confrontation chez les Indiens de Caughnawaga", *La Presse*, September 8, 1973.

Indian Act. The Chief eventually resigned, and the Council was forced into a reflection about its role and position in relation to federal and provincial governments.

All of this took place as the 1969 White Paper was still fresh in memories. It was also the height of the Red Power movement in the United States. With strong connections to Confederacy nations south of the border, Kahnawá:ke was directly influenced by the revival of Aboriginal nationalism in the United States. Militants of the American Indian Movement were standing side by side with the Warriors during the 1973 standoff (York and Pindera, 1991: 134).

The Band Council was not insulated from these emerging ideas. After 1973, as a new generation of leaders was elected, it embraced a more openly nationalist stand in its relations with federal and provincial authorities, distancing itself from the *Indian Act* and asserting the principle of a nation-to-nation relation with Canada. Moreover, rather than challenging traditionalists, it came to embrace the principle of a return to community-based traditional institutions of governance in Kahnawá:ke.

Unlike the various Longhouse groups, however, the Council still saw itself as an essential component of the transition from the *Indian Act* to an independent form of government that would take its legitimacy and authority from the people rather than from the Department of Indian Affairs. The administrative and political resources and expertise of the Council, it was argued, should be redirected towards the goal of Mohawk self-determination.[234]

It is in this spirit of rapprochement with the traditionalists that the Band Council agreed in 1979, in the wake of another confrontation with the provincial police, to a mandate to "work itself out of business" towards the reinstatement of a traditional

[234] Interview A03-02

government in Kahnawá:ke. This goal was confirmed in a 1982 motion of the Council stating that "this Chief and Council take immediate steps to make a transition from the *Indian Act* elective system to the Aboriginal form of government of the Iroquois Confederacy" (in Alfred, 1995a: 136). Symbolically distancing itself from the *Indian Act*, the Council was also renamed the *Mohawk Council of Kahnawake*, councilors became *Chiefs* and the Chief of Council became the *Grand Chief*.

For Alfred, the MCK was able to re-establish some of its legitimacy in the community in this process, largely because of the divisions amongst traditionalists and their incapacity to come up with concrete, pragmatic, alternative to the existing structure for the administration of policies and programs for the community (1995a: 93). Building on its resources and capacity, the MCK was able to recast itself as the main agent of Kahnawá:ke's political revival while at the same time maintain its role as the institutional link with government programs and services. This internal repositioning was accompanied by a more assertive discourse regarding the boundaries of the political community and its relations with the Canadian state. Kahnawá:ke-Canada relations, the MCK argued, should be based on the Two-Row Wampum principle. For Joe Norton, Grand Chief of the MCK for most of the 1980s and 1990s:

> As a community of the Mohawk nation, member of the Rotinohshoni Confederacy, the people of Kahnawá:ke never consented to Canada's sovereignty on their land or to the imposition of the *Indian Act*. Instead, Canada and Kahnawá:ke should be recognized as coexisting sovereign entities, and their relationship should be based on the principles of mutual respect and non-interference in each other's business.[235]

The MCK was thus careful to situate itself as an agent of a sovereign community that exists outside of the Canadian constitutional framework. It was also careful to locate this autonomous political entity within the broader framework of the Mohawk nation and

[235] *The Eastern Door*, vol.4, no.45, December 1996.

the old Iroquois Confederacy, thus grounding its authority in structures that predate not only the *Indian Act* but also the very existence of the Canadian state.

6.3.3 Conflicts of Sovereignty: the 1988 and 1990 Crises

In reasserting the primacy of ancient political structures, the MCK established itself as a vehicle of change, but also as the main guardian and advocate of Mohawk sovereignty in relations to federal and provincial authorities. This political stand was once again tested in the late 1980s as Kahnawá:ke nationalists came into direct confrontation with Canada's law enforcement authorities. In the 1980s, the illegal –under Canadian law- sale of tax-free cigarettes smuggled through the Canada-US border became an important source of income for the community. In 1988, the RCMP and the Sureté du Québec entered the territory, arresting 17 people and seizing $450 000 worth of tobacco. In response to the raid, armed Warriors blocked the Mercier bridge for 29 hours, symbolically reclaiming sovereignty over the territory (York and Pindera, 1991: 186). This time however, the MCK was not sidelined. It chose instead to act as a mediating force, tacitly supporting the militants' assertion of sovereignty while negotiating a solution to the crisis with government.

When the conflict erupted again in summer of 1990, the MCK again tread a fine line between its role as a political agent for the community and a governing authority responsible for maintaining law and order. As with previous confrontations, the 1990 conflict was triggered by a police raid on Mohawk land. This time, the police intervened in Khanesetake, near Oka, where residents were protesting against the construction of a golf course over a traditional Mohawk cemetery. The militant Warriors of Kahnawá:ke

once again established a blockade on the Mercier bridge in solidarity with their sister community.[236] Tensions were high as a police officer was killed in the raid at Oka.

As the conflict in Oka-Kahnesatake continued and the blockade dragged on, the Canadian Armed Forces were called in to replace the Sureté du Québec in both Kahnesetake and Kahnawá:ke. The strong reaction of the federal and provincial authorities united the community in support of the Warriors. But the MCK, eager to maintain its credibility as the legitimate political body representing the community, sought to negotiate an exit strategy with the provincial government to avoid any further violence (York and Pindera, 1991: 330). A compromise was eventually reached for the dismantling of the barricades, but the powerful images of the Canadian Armed Forces entering the community, arresting people and searching for weapons, was a stark reminder of the limited effective power of Mohawk institutions in face of the state.

Paradoxically, despite its failure to stop unilateral action by state authorities on the territory of the community, the MCK's legitimacy was reinforced by the 1988 and 1990 crises. It had carefully avoided any association with the actions of the Quebec police or Canadian armed forces and maintained its position of principle regarding Mohawk sovereignty. In the immediate aftermath of the 1988 raid, the MCK also defined a new policy framework guiding its relations with federal and provincial authorities. From then on, intergovernmental negotiations were to be based on: 1) the recognition of the inherent sovereignty of the Mohawk nation; 2) the recognition of ultimate and exclusive jurisdiction of the Mohawk nation in Kahnawá:ke; 3) the recognition of the right of Mohawks in Kahnawá:ke to govern their own affairs; 4) the recognition of the

[236] For a detailed account of the Oka crisis, including the role played by various actors in Kahnawá:ke, see York and Pindera (1991).

oppressive character of the *Indian Act* and of the necessity to replace it with a new framework mutually acceptable to both parties.[237]

It is thus through a series of crises and confrontations pitting the community's more militant traditionalists against state authority that the MCK progressively redefined its position as an agent of change and renewal in the community. Of course, the formal structure of the Council remains that of a band council under the *Indian Act*. It remains a controversial political body in Kahnawá:ke, with a large proportion of community members still refusing to vote in council elections.[238] That being said, the MCK's political status and its role in relations with Canadian authorities has changed significantly. From a relatively passive resistance to the imposed structure of the *Indian Act* at the time of the Seaway construction, the MCK has come to embrace a conception of the relationship with the state that openly challenges its own legitimacy as a body created by federal law.

Like Cree institutions discussed in the previous chapter, this conversion of the MCK largely took place incrementally, without radical rupture with the past. In fact, the MCK proved to be resilient and flexible enough to adapt itself to a new role *despite* its formal ties to the Canadian state. At one level, the Council maintained its role as an elected body responsible for the management of funds coming from governments. But at another level, the MCK became a political space for Kahnawakehró:non to debate their priorities in establishing their own institutions of governance. This enhanced legitimacy allowed the council to redefine Kahnawá:ke's governance regime as I discuss next.

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[237] See MCK, *Band Council Minutes 03/06/89*, on file with the MCK.
[238] In the 2004 Council elections, less than 30 percent of eligible voters cast a ballot. "Three New Chief Elected", *The Eastern Door*, vol.13, no.25, July 9, 2004.

6.4 From Hierarchical to Multilevel Governance

While it progressively asserted itself as an agent of self-determination for the community, the MCK also fundamentally changed its approach to policy-making, seeking to develop Kahanwá:ke's institutional capacity in a number of areas where the community previously relied on federal, and to a lesser extent, provincial services and programs. As the federal government progressively tried to reduce its involvement in direct service delivery in Aboriginal communities from the 1970s on, the MCK became increasingly proactive at "filling the gap" and replacing federal programs and institutions by locally created policies and structures. But instead of waiting for the stamp of approval from the Minister, as required in the *Indian Act*, or until government funding became available, the MCK started to act unilaterally –often in collaboration with local associations and with the traditionalists- in asserting the community's jurisdiction and developing programs or structures of governance to replace those of the federal government in the community.

The objective for the MCK was to progressively develop an independent institutional capacity for the community, or what Ponting (1986: 159) defines as "institutional completeness", that is the capacity for a community to function on a daily basis without recourse to external organizations. The legitimacy of this process was ensured through ongoing community consultations, public meetings and referenda on key topics such as membership, policing or economic development priorities.[239] Beginning in the late 1970s and throughout the 1980s, the bulk of Kahnawá:ke's autonomous institutions were created through such process. The creation of the Peacekeepers, the

[239] Interview A03-02.

Survival School and the development of a distinctive membership policy are a few examples I discuss in further detail in this section.

As it embarked on this process of institutional consolidation and assertion of jurisdiction, the MCK rapidly became aware of the necessity of engaging with federal and provincial governments in negotiating arrangements that would ensure the recognition of Kahnawá:ke's institutions by Canadian authorities. Beyond issues of jurisdiction, the Council and other Kahnawá:ke institutions were, and still are, largely dependent on federal funding for their operations. Moreover, the MCK, the schools, the Court of Justice or the Alcohol Beverage Control Board, could not function effectively without some recognition of their legitimacy by federal and provincial authorities. Autonomous schools have little relevance if institutions of higher education outside the community do not recognize their diplomas. A mandate of arrest from the community Peacekeepers is of limited use if it is not recognized and enforced by police forces and tribunals outside the boundaries of the community.

Thus, the MCK was forced to engage pragmatically in negotiations for the recognition of its institutions not only with the federal government, which controlled the purse-strings for its operations, but also with the provincial government, who happened to have jurisdiction in most areas where Kahnawá:ke sought to assert its authority and establish its own governance structures. This led to the creation of what were initially more or less loosely defined bilateral negotiation channels between the MCK and the federal and provincial governments.

Negotiations with provincial authorities proved to be particularly hard to justify in the community for the MCK. For Mohawk nationalists, the historical interlocutor in a

nation-to-nation relation was the federal government, who inherited the British Crown's fiduciary responsibilities. The provincial government was, and is still today, seen as an adversary, competing for authority on the territory. Moreover, in the aftermath of the PQ election in 1976, the provincial government was seen as an agent defending the interest of the predominantly francophone population of the province, with little sympathy for English-speaking Mohawks. This perception was certainly reinforced after the 1990 Oka crisis (Trudel, 1995: 54).

In addition to internal resistance, the obstacles faced in negotiating the recognition of institutions created unilaterally were significant. Neither federal nor provincial authorities were willing to recognize any form of sovereign authority or jurisdiction to institutions that were not under their own legislative prerogative. In the words of a provincial official involved in negotiations with the MCK in the early 1980s, "even if we want to, as negotiators, we cannot recognize any legislative authority of an institution that has no existence according to the laws adopted by the National Assembly (of Quebec) or the Canadian constitution."[240]

That being said, both the federal and provincial governments were open to negotiating new governance arrangements with the MCK that would see the latter, and other Kahnawá:ke institutions, taking on more responsibility in the management of programs and services to the community. Negotiating such agreements was, as discussed, consistent with their respective policies on Aboriginal governance in the 1980s and 1990s. The federal government saw such agreements both as a response to Aboriginal claims for greater autonomy and as an effective cost containment mechanism as it sought to reduce its role in the direct implementation of its programs

[240] Interview G01-11.

For the Quebec government, negotiations with the MCK in areas of provincial jurisdiction were also consistent with its policy of asserting and expanding its territorial authority in Aboriginal communities through new governance agreements. In the 1980s, the administrative decentralization model of the JBNQA, in which Quebec laws replaced the federal *Indian Act* as the legislative framework for regional Cree and Inuit governance structures, was seen by federal and provincial authorities as the model to be reproduced in other Aboriginal communities. Negotiations with the Mohawks to create new local autonomous institutions were perfectly in line with this policy.[241]

While the MCK, the federal, and provincial governments were coming to the process from varying viewpoints, they all shared an interest in engaging in negotiations over the structure and mechanisms of governance in the community. Not surprisingly, conflicting views about the very nature of the negotiations have stalled the process in many policy areas, notably in cases where territorial control and the definition of citizenship rights, two key elements of classic state sovereignty, were directly at stake. In other areas however, negotiators found space for compromise, navigating a delicate diplomatic road between what appeared at first to be incommensurable positions on sovereignty. As I discuss in the remainder of this section, early successes, especially with Quebec, established precedents that came to be reproduced in a growing number of policy areas. With time, a new pattern of multilevel governance through *mutual institutional adaptation* slowly emerged from these negotiations.

[241] Interview G01-11.

6.4.1 An Early Example of Unilateral Institution-Building: the Survival School

It is in the field of education that Kahnawá:ke had its first success at taking advantage of the retreat of governments from direct program administration to "fill the gap" and eventually negotiate the recognition of its own governance structure. Historically, Kahnawá:ke children went to local Catholic or Protestant day schools run by religious orders which provided education up to grade 8. The few children who continued their education were sent to residential schools in Ontario (Reid, 2004: 109). In the 1960s, as the residential school system was being dismantled, the federal government began its policy of divesting itself from direct management of First Nation education. It therefore reached a funding agreement with the province for Kahnawá:ke's growing school age population to attend the nearby public high school in Chateauguay (Ryan, 2005: 47).

Resistance to this unilateral transfer led to the creation of the Kahnawà:ke Combined School Committee (KCSC) in 1968 by a group of parents seeking greater control over the nature of their children's education at the federally run schools in the community as well as in provincial high schools. The KCSC rapidly came to assert its authority in local elementary schools, for which the federal government was happy to transfer administrative responsibility. Control over high school education, however, continued to elude the community (Blanchard, 1980: 470).

An incentive to act came about when Quebec adopted its language policy in 1977. *The Charter of the French Language* required parents of Aboriginal children attending English-language public schools to obtain a special ministerial permit to that effect. The KCSC and the MCK saw such a ministerial permit as a recognition of Quebec's authority

over the education of Kahnawá:ke children (Blanchard, 1980: 474). In protest, Mohawk children attending the Chateauguay high school walked out of classrooms in 1978 and the KCSC established a makeshift school in the community with private donations and limited financial support from the Council. After months of negotiations, the Kahnawá:ke Survival School was eventually recognized by the federal government as an autonomous school, and provided with some funding to hire accredited teachers (Ponting, 1986: 158).

In 1988, the MCK reached an agreement with the federal government to formalize what had been a *de facto* reality for more than a decade: the responsibility over school management and curriculum development for all schools in the community was transferred to the Kahnawá:ke Education Centre (KEC), which now acts as the equivalent of a school board funded by the federal government. The agreement did not formally transfer jurisdiction over education matter to Kahnawá:ke. Instead, it recognizes the responsibility of the "competent authority (to) adopt relevant and appropriate measures to ensure (…) the quality of education services in the community."[242] This ambiguous formulation proved to be enough for the MCK to maintain its claim to community jurisdiction, while allowing the KEC to receive much needed federal funding. Today, the Kahnawá:ke Education Centre manages a budget of more than $12 million, coming mostly from a federal block funding agreement, and supervises the functioning of four schools in Kahnawá:ke, with approximately 800 students from pre-school daycare to the end of high school.[243]

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[242] As quoted in Horn, G. "Education and the Government", *The Eastern Door,* vol.9, no,12, April 14, 2000.

[243] The schools have a curriculum geared towards Mohawk culture, with language immersion and a specific history program that uses material developed in the community and focuses on Mohawk traditions. In other areas, the schools follow Quebec's curriculum requirements, ensuring the recognition of its diploma by postsecondary institutions. Kahnawá:ke Education Centre, *Kahnawá:ke Community Education*, November 2002, On file with the MCK archives.

The success of the Survival School as an alternative to provincially controlled education led the MKC to adopt a more proactive policy in establishing Mohawk-controlled organizations. A new opportunity to regain practical control over a significant policy area came a few years later when the federal government refused to fund the construction of a new hospital in Kahnawá:ke, arguing once again that provincially run institutions in the region offered adequate services to the community. The process leading to the construction of the community-run Kateri Memorial Hospital played a key role in establishing the ground rules of Kahnawá:ke's emerging multilevel governance regime.

6.4.2 A Precedent: the Kateri Memorial Hospital

Like education, health care in the community was historically provided by religious orders and funded by the federal government. Faced with financial difficulties and limited support, the small community hospital was about to close in 1955 when the local population mobilized to take over its administration. It survived on limited provincial funding, in a sort of administrative black hole between federal and provincial jurisdiction, until it became clear its infrastructure no longer met modern standards and the growing community's needs. The Band Council repeatedly failed to obtain any financial support from federal and provincial authorities for the construction of a new hospital. The former argued the hospital was no longer its responsibility while the latter stated it could only provide core infrastructure funding for health service providers integrated into the public provincial system, something deemed unacceptable by the Council (Bobet, 1988: 135).

The new hospital project was more or less dormant until 1978, when Quebec's new Aboriginal policy opened new opportunities for the MCK. As discussed in chapter 4, the 1978 policy explicitly promoted collaboration with First Nations communities for the delivery of social services. The Band Council suggested Quebec demonstrate the seriousness of its intentions in improving its relations with First Nations through the negotiation of an arrangement for the funding of the hospital that would recognize the specific character of Kahnawá:ke.[244] The governing Parti Quebecois was open to such an argument, and established a negotiation team headed by the top civil servant from the newly created *Secrétariat des activités gouvernementales en milieu amérindien et inuit*.

As negotiations began, three major points rapidly set the parties apart: the issue of land ownership, as Quebec's policy required publicly funded hospitals to be built on provincial lands; the place of the hospital in the larger provincial health network, especially with regards to the regulatory framework for health care procedures and protocols; and the requirement, in the *Loi sur les services de santé et les services sociaux*, that the hospital be incorporated as a non-profit institution under Quebec law (Bobet, 1988: 137). All three elements, seen as preconditions for an agreement by Quebec, proved to be incompatible with the MCK's stand on jurisdictional issues.

A compromise solution emerged in 1984, after a joint Quebec-MCK working group agreed to set aside issues of jurisdiction and focused instead on practical means to build the hospital. The solution proposed, which eventually led to an agreement, was to maintain the status of the new hospital outside the Quebec public health care network, and leave the responsibility of constructing and administering the new building, which would be on land belonging to the community, to an arms-length community-controlled

[244] Interview, A03-04.

body. The hospital was recognized as a Mohawk, rather than Quebec, institution and could continue to exist outside of Quebec's legislative framework.[245]

In exchange for such recognition, the hospital was to be operated according to plans, regulations and a fiscal framework "consistent with the rules" established by the *Ministère des Affaires sociales* and had to submit an annual report to the Minister to that effect.[246] In other words, without being formally incorporated into the provincial health network, the hospital was to adopt in its internal functioning the rules defined by the province for the management of publicly funded health institutions. In a major policy shift, the Quebec government agreed to modify its legislative framework in order to ensure the implementation of the agreement, giving the latter full legal status and ensuring its dispositions were paramount in case of conflict with the *Loi sur les Services de santé et les services sociaux*.[247] In other words, the agreement established a precedent outside the existing administrative framework. Quebec negotiators, backed by the Premier's Office, were thus able to engage the will of the National Assembly in a political agreement negotiated outside any pre-existing legislative or policy framework.

The agreement, and its subsequent implementation law, came as a bit of a surprise to the civil servants of the Justice and Health departments. Both ministries were resisting the practice of creating legislative exceptions through political agreements with specific groups in society. The latter feared such precedent would be reproduced elsewhere and create an unmanageable situation, eventually compromising its core policy goal of

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[245] *Entente concernant la construction et l'exploitation d'un centre hospitalier dans le territoire de Kahnawake*, April 24, 1984, preamble paragraphs 2 and 3. On file with the Secrétariat aux affaires autochtones, Ministère du Conseil Exécutif, Québec.
[246] Ibid., sections 1b) and 4.
[247] The *Loi approuvant l'entente concernant la construction et l'exploitation d'un centre hopsitalier sur le territoire de Kahnawá:ke* (LRQ, 1985, ch.13) was sanctioned in June 1984.

ensuring uniform cross-province health services. The former, as the guardian of the rule of law, saw in this kind of bilateral agreement a misappropriation of the sovereign authority of the National Assembly.[248] That being said, the negotiators were directly supported by the Premier's Office and were able to bypass most administrative hurdles in gaining abinet approval for the agreement.

At the time, with the PQ government eager to engage more directly in Aboriginal affairs, the political benefits of such an agreement outweighed administrative and legal concerns for Premier René Lévesque. The fear of negative media attention on the poor condition of health services in a community a few steps from Montreal was also a factor contributing to the political priority received by the agreement.[249] Without direct support from the highest political authority however, it is unlikely such an agreement would have been possible in the political context of the early 1980s. In fact, no other agreement of such a political nature, engaging Quebec to modify its legislative framework *post facto*, was signed with Aboriginal nations until the 1990s.

The agreement also received mixed reviews in Kahanwá:ke. For the more radical traditionalists and nationalists, any agreement with Quebec was considered an abdication of sovereignty. Others saw the adoption of Quebec's regulatory framework for the operation of the hospital as an indirect form of submission to provincial laws. But by and large, the MCK succeeded in convincing the population that the agreement did in fact recognized Kahnawá:ke's autonomy over health care while at the same time ensuring the construction and funding of a modern hospital (Bobet, 1988: 142).

[248] Interview, G01-04.
[249] Interview, G01-04.

The importance of this agreement, which after all is simply about the construction of a hospital, should not be underestimated. At the ratification ceremony, Premier René Lévesque hailed the agreement as an "agreement between nations" (Bobet, 1988: 143), a language that would be used again by a Quebec Premier almost twenty years later, when Bernard Landry ratified the *Paix des Braves* with the James Bay Crees. Much more than the construction of an hospital, for both Quebec and for the Kahnawá:ke Mohawks, the agreement was in effect an act of mutual recognition, as both parties agreed to recognize their respective political legitimacy and authority, notwithstanding the formal jurisdictional structure established in the Canadian constitution.

The Kateri Hospital agreement is also significant as it established a mechanism through which the MCK could negotiate an agreement with governments for the recognition of its institutions and policies without having to explicitly recognize the jurisdiction of the latter. Two elements are key here: 1) the guidelines and regulations of the *Ministère des Affaires sociales* were freely *adopted by*, rather than *imposed on* the MCK and the community-based hospital administration; and 2) Quebec agreed to change its laws and regulations in order to *adapt* them to the bilateral agreement rather than forcing the agreement to fit into its existing legislative and policy framework. The very strict administrative framework of health care governance in Quebec was thus set aside, in an implicit recognition of the specific political status of Kahnawá:ke in relation to the National Assembly. This subtle process allowed both parties to maintain their respective positions with regards to jurisdictional issues, while reaching a political compromise in order to establish a joint policy framework.

Despite its innovative character, the model of mutual recognition through institutional adaptation developed in the Kateri Hospital agreement was not immediately reproduced in other policy areas where Mohawks were challenging federal or provincial jurisdiction. Similar negotiations with Quebec over social services resulted in a relatively classic administrative decentralization agreement in 1990.[250] With the exception of education discussed previously, few advances were made with the federal government as well. Without political imperatives to move beyond their already existing policies, both governments maintained a relatively rigid policy framework, agreeing only to administrative devolution in negotiations. The *status quo* thus remained until the 1990s.

6.4.3 Second Round in the 1990s: The Peacekeepers

As a powerful symbol of state authority, policing has been a contentious issue in Kahnawá:ke for decades. Given its proximity to large non-Aboriginal communities, and the roads and highways crossing the territory, control over law enforcement has very concrete meaning for Kahnawá:ke. It is a very real measure of the community's capacity to control its boundaries and govern itself based on its own laws. Constant intervention by the RCMP to enforce the alcohol restrictions of the *Indian Act* in the 1940s or during the Seaway episode, and more recent interventions by the *Sûreté du Québec* (SQ) to enforce provincial laws, have all served to remind Kahnawakehró:non of the limits of their own sovereignty.

In a pattern that parallels education and health, the process leading Kahnawá:ke to control its own police force was driven first and foremost by unilateral actions, as the

[250] Interview, G01-04.

Council took advantage of the vacuum created by the progressive retreat of the federal government from policing on reserves. In 1969, the federal government established its policy of progressively replacing the RCMP on reserves by provincial police forces or by Aboriginal constables under the supervision of provincial authorities (Canada, INAC, 1990: 7). In Quebec, the *Police Amérindienne*, a special pan-provincial police force composed of Aboriginal constables under the authority of the SQ, became responsible for patrolling on reserves, including Kahnawá:ke (Ponting, 1986: 197).

The *Police Amerindienne* rapidly showed its limits. The officers, while employed by the Band Council, had a strict mandate to enforce only council bylaws consistent with federal and provincial laws and were subordinated to the authority of the *Sureté du Quebec* in their operations. The limited effectiveness of the force became obvious during the 1973 crisis, when a group of traditionalist warriors sought to evict non-Aboriginal residents and threatened to take over the Council. The *Police Amérindienne* did not have the capacity or the mandate to face this type of crisis. As discussed, the Council was eventually forced to call in the SQ to protect itself. A few years later, when the Amerindian officers refused to follow a Council resolution to close a Quarry exploited by a non-resident who violated local by-laws, the Council chose to dismiss the constables and replace them with a "police force fully controlled by the Mohawk nation."[251]

The Peacekeepers (PK) were established in 1978 outside of any agreement with Ottawa or Quebec, and were consequently not recognized as a legitimate police force by the two governments. They essentially operated in a jurisdictional vacuum, unrecognized

[251] MCK, *Band Council Resolution 40/1978*, on file with the MCK. The Peacekeepers were created unilaterally, but the Council resolution establishing the force makes explicit reference to section 80 of the *Indian Act*, which authorize the creation of local band security forces upon ministerial approval. The Council, however, never sought ministerial approval.

by the federal and provincial Parliaments.[252] This lack of recognition by external authorities was potentially problematic as Kahnawá:ke lacked the infrastructure and capacity to follow-up on arrests or even simply force the payment of fines. A key test case came in 1982 as the Peacekeepers arrested two non-Aboriginals for impaired driving and handed the men to the SQ. Charges were eventually pressed against them. The lawyers for the two challenged the authority of the Peacekeepers to make arrests, but the Quebec Superior Court judge hearing the case held that like other security forces, PK had the authority to enforce the Criminal Code.[253]

After this decision, the SQ and other local police corps in the region began to collaborate with the Peacekeepers, informally sharing information and proceeding with arrests upon request. Quebec also agreed to fund the training of the Peacekeepers and became reluctant to challenge their legality, fearing a new precedent could well be set in courts.[254] Progressively, the Peacekeepers established themselves as a legitimate police force, and extended their *de facto* jurisdiction well-beyond that of a municipal police, despite lacking any formal recognition by the federal or provincial governments.

The situation remained essentially unchanged for more than a decade, until the 1988 police raid on the community and the 1990 Oka crisis. As discussed previously, the Oka crisis consolidated the nationalist stand of the MCK, but it also had the paradoxical

[252] Further polarizing the situation, shortly after the PK were created, the SQ entered the territory, chasing a Mohawk who was speeding, and fatally shot him in the scuffle that ensued. The SQ officers were held criminally responsible for the death, but an inquiry concluded the uncertainty regarding jurisdiction over law enforcement in Kahnawá:ke contributed to the confusion that led to the shooting. The SQ refused to enter the territory after that incident, except to patrol the provincial highway.
[253] As related in Ponting (1986: 171). Interestingly, the judge relied on sections 80 and 81 of the *Indian Act* to recognize the legitimacy of the Peacekeepers in Canadian law. It was not a recognition of any form of Mohawk sovereignty over policing. The decision was not appealed.
[254] Interview, G01-04.

effect of opening new channels of negotiations with the federal and provincial governments, who sought to avoid a repeat of the 1990 "Indian Summer."[255]

It is in this context that, in 1991, the MCK and the federal government established a formal negotiation structure towards the redefinition of the Canada-Kahnawá:ke relation (the CKR process). Sitting at the CKR table were elected Kahnawá:ke Chiefs, an adjunct Assistant Deputy-Minister for DIAND and a representative of the Minister's Office.[256] One of the first priorities of the negotiations was to clarify responsibilities over policing and law-enforcement on the territory. Such negotiations were to take place under the federal First Nations Policing Policy, adopted in 1991. The policy promoted the conclusion of tripartite agreements between federal, provincial and First Nations authorities for the creation of "First Nations Administered Police Services" funded by the federal government but operating under provincial laws (Canada, Solicitor General, 1991). Despite the resistance of the MCK, Quebec was thus invited to participate in a trilateral negotiation process.

As with other policy areas, negotiations stalled on issues of jurisdiction. The MCK insisted an eventual agreement must recognize the Peacekeepers as an existing police force legitimately created under Kahnawá:ke's sovereign authority, and with prime responsibility for enforcing Kahnawá:ke's laws. For Quebec, the Peacekeepers could only be a legitimately recognized police force if it was established under, and followed the regulations established by, the provincial *Police Act*.[257] The federal government insisted funding for the Peacekeepers would only be forthcoming if the criteria established under its First Nations Policing Policy were met. There was little interest in

[255] Interview, G01-04.
[256] Interview, G02-12.
[257] Intreview G01-04.

federal circles in creating some form of exceptional regime that would jeopardize similar negotiations elsewhere in the country.[258] In other words, for both governments, the negotiations strictly concerned the implementation of existing laws and policies.

More than 10 years after their creation, the Peacekeepers were at the time a well-established institution in the community. As with the hospital, it became clear that the object of the negotiations was not the *creation* of a police force by governments but the *recognition* of an already existing institution. Federal and Quebec negotiators were forced to recognize this reality.[259] Quebec representatives, under pressure from the Premier's Office to avoid a new political crisis, eventually agreed to a series of bilateral meetings with the MCK in 1993 over the recognition of the Peacekeepers. The parties agreed to set aside the federal policy framework in order to find a compromise that would satisfy their respective sensibilities.

Revisiting the process that lead to the hospital agreement, Quebec and the MCK were able to find common ground in mutual institutional adaptation and eventually established a framework that formed the basis of the 1995 Policing Agreement. Leaving issues of jurisdiction deliberately vague, the agreement states that the community can "maintain a police force duly constituted under the authority of the Mohawk Council of Kahnawá:ke", who, in return, agreed to the incorporation, in the agreement, of specific criteria regarding hiring standards, training and police ethics that effectively put the Peacekeepers on par with other police forces in the province.[260]

[258] Interview, G02-07.
[259] Interview, G01-04.
[260] *Agreement respecting Police Services in Kahnawake*, April 22, 1995. On file with the Secrétariat aux affaires autochtones, Ministère du Conseil exécutif, Québec.

The MCK also agreed to the incorporation of the Criminal Code and Quebec's *Code de la sécurité routière* in its internal laws, giving the Peacekeepers an explicit mandate to enforce them on the territory. In other words, Quebec agreed to recognize the Peacekeepers as a distinct police force under the authority of the MCK in exchange for a joint definition of the rules under which it would operate. The federal government, which had not been part of the last negotiation round, agreed to provide its share of funding in accordance with its existing policy.[261]

As with the hospital agreement, Quebec modified its *Police Act* to establish a new category of constables, the Special Aboriginal Police. This time, however, the *Police Act* was modified *before* the provincial government ratified the agreement with the MCK. This procedural trick was designed by Quebec's justice department lawyers to avoid repeating the hospital precedent, for which the authority of the National Assembly was sidestepped in a negotiation with an Aboriginal nation. This "preemptive legislation" ensured support for the agreement at cabinet level.[262] But it also sent a symbolically important message to the Mohawks: it was, in effect, a denial of the bilateral, government-to-government, nature of the policy-making exercise.[263]

This last minute trick provoked a strong reaction against the agreement in Kahnawá:ke. Not only were the Peacekeepers to enforce Canadian laws, adopt the code of conduct, training and operational guidelines established by Quebec, but the agreement implicitly suggested that the Peacekeepers existed *because* provincial law allowed Kahnawá:ke to create its own police force. In a letter diffused to the media, a group of

[261] This was thus formally a trilateral agreement, although most negotiations took place between Quebec and the MCK. Funding was established for a period of two years with the federal government providing 52 percent of the operation costs of the Peacekeepers.
[262] Interview, G01-04.
[263] Interview, G01-04; Interview A03-02.

traditionalists called the MCK "sellouts" and refused to recognize the "municipalized" Peacekeepers as a legitimate institution of the Mohawk Nation.[264] The MCK nonetheless maintained it was Quebec who recognized its jurisdiction, not the other way around.[265]

Despite its controversial nature, the 1995 police agreement contributed to further institutionalizing the practice of recognition through institutional adaptation established with the hospital case. As with the latter, there is nothing in the police agreement that alters the formal allocation of authority in the Canadian federation, but according to Arnold Goodleaf, the lead Mohawk negotiator for the hospital and police agreements, in practice, both agreements "forced Quebec and Ottawa to recognize Kahnawake's capacity and legitimacy in establishing its own institutions and its own laws."[266]

6.4.4 The Limits of Institutional Adaptation: Membership Policy

By the mid 1990s, the MCK was engaged in a significant redefinition of its relationship with federal and provincial authorities through the negotiation of sector-specific agreements of a political-administrative nature. That being said, the process remained fragile and contested. It produced results in certain areas only, mostly those in which Kahnawá:ke's jurisdictional claims and government policies regarding deregulation, decentralization and flexible governance could find a meeting point.

In a number of areas where the interests of the parties were colliding more directly, or where it was not possible to set aside competing views on jurisdiction, unilateral institution-building often remained unanswered, creating a zone of legal and

[264] Mohawk Nation Office, *A Disagreeable Policing Agreement*, August 4, 1995. On file with Indian and Northern Affairs Canada, Ottawa.
[265] "Traditionalists Speak Out Against Policing Agreement", *The Eastern Door*, vol.4:27, August 11, 1995.
[266] As quoted in "Policing Agreement Open House", *The Eastern Door,* vol.4:25, August 1995.

political uncertainty where governments, by their inaction, were *de facto* recognizing Kahnawá:ke's authority despite their official positions to the contrary. One such area is the development of a Kahnawá:ke-based membership policy.

As discussed in chapter four, control over status and band membership under the *Indian Act* has historically been a key institutional mechanism for the federal government to establish its authority in First Nations communities. Regaining control over the rules of membership -a central attribute of sovereign polities- is not surprisingly a central, and often contested, aspect of the political reassertion of the community since the 1960s (Dickson-Gilmore, 1999).

The issue of membership came to prominence in the 1970s as the constant influx of non-Aboriginal residents came to be seen as a threat to the cultural and social fabric of a community. These debates were compounded by the decision of the Department of Indian Affairs to transfer the management of the band registry for the purpose of defining who is entitled to federally funded services to the Kahnawá:ke Band Council in 1972. This administrative transfer was, again, driven at least as much by the federal government's new emphasis on local decentralization as it was by the political situation in Kahnawá:ke itself.[267]

Far from abating tensions, the transfer led to the already mentioned 1973 conflict between a group of traditionalists and the Council over an attempt by the former to assert their legitimacy as the governing body of the community and evict non-Aboriginal residents. In the aftermath of that crisis, the Council sought to move beyond the simple administration of federally defined rules and progressively established its own

[267] Based on DIAND's position in: *Letter from H. Chapman, Membership Division, to Montreal District Supervisor. Re: Transfer of Membership Functions to Caughnawaga Band*, August 30, 1972. On file with the MCK, Kahnawa:ke.

membership policy. In 1978, a committee appointed by the Council to tackle the residency problem recommended the Council limit intermarriages between Mohawks and "non-Indians" in order to protect the cultural fabric of the community (Alfred, 1995a: 165). The recommendation was implemented in 1981 when the Council adopted a moratorium on access to the benefits associated with band membership for Kahnawá:ke residents who married non-Indian men or women.[268] This decision, hotly contested in the community and condemned by Ottawa, was followed by the adoption of the *Kahnawá:ke Mohawk Law,* a full-fledged policy on membership, in 1984.[269]

The 1984 Law maintains the intermarriage exclusion, but it also establishes a distinction between those "born Mohawks" and other, "non-Indians" residents of the community. Only Mohawks, defined as "any person whose name appear on the present Band List (the registry) and whose blood quantum is 50% or more,"[270] are entitled to the rights, privileges and responsibilities of membership, including the right to vote, tax exemptions and other benefits provided through the MCK. Paradoxically, this controversial definition of membership simply extended the already established logic of the *Indian Act*, which had long defined Indian status based on family lineage. Interestingly, while a majority supported the law in the community, it was condemned by traditionalists who considered it a perversion of the historically inclusive rules of membership in the Rotinohshoni Confederacy (Alfred, 1995a: 165).

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[268] MCK, *Moratorium*, 05/22/81. On file with the MCK.
[269] MCK, *Kahnawake Mohawk Law,* 12/11/84. On file with the MCK.
[270] *Kahnawá:ke Mohawk Law,* section 3. The blood quantum is established through family lineages. For example, someone born from parents that are 25% and 75% Indian respectively would be 50% Indian. This person's children would thus need to marry with someone with more than 50% blood quantum to keep its membership. A committee of the MCK was established to establish resident's blood quantum, going back as far as four generations in some cases (See 'Non-natives asked to leave the Kahnawake Mohawk reserve', *Canadian News Facts*, September 16-30 2000, vol. 34, no.17, p.6117).

It is important to situate the membership law in its broader political context. At the time, a Canada-wide debate was taking place over the reinstatement of women who had lost their Indian status because of the discriminatory measures of the *Indian Act*.[271] Bill C-31, adopted by Parliament in 1985, partially eliminated the discriminatory measure in the *Indian Act* and established the rules of reinstatement, which, as expected, created significant demographic pressures on reserves, as a number of people previously excluded sought to return to their family's community.[272] Faced with strong opposition from the Assembly of First Nations and band councils across the country, the federal government established a new provision allowing councils to adopt their own membership codes, provided those were consistent with Canadian laws and approved by the Minister of Indian Affairs.[273]

Alfred (1995a: 169) suggests the Kahnawá:ke Mohawk Law can be explained both as a preventive measure against the socio-economic impact of Bill C-31 in Kahnawá:ke and as a political statement, the MCK seeking to reaffirm its authority on membership in the face of the pending federal legislation. Kahnawá:ke never sought ministerial approval of its membership law as required by Bill C-31 and the coexistence of the federal policy as defined through Bill C-31 and the Mohawk Law created a complex situation in Kahnawá:ke. Some residents, especially women, regained Indian Status according to federal law but were excluded from MCK-defined band membership. A direct result of this situation was that a significant number of residents of the

[271] The *Lovelace* case, in which the United Nations Human Rights Committee condemned Canada's discriminatory policy forcing women marring non-Indian men to renounce their Indian status while men marring non-Indian women were able to keep their status. It is the latter rule, which resulted in an influx of non-Mohawk women in the community, that the moratorium sought to counter.
[272] "Feds under fire over Bill C-31", *Windspeaker*, vol.5, no.51, February 26, 1988.
[273] For a discussion of Bill C-31's impact and the reaction in First nations communities, see J Holmes. 1987. *Bill C-31, Equality Or Disparity? The Effects of the New Indian Act on Native Women,* Ottawa: Canadian Advisory Council on the Status of Women.

community, many who had previously been involved in its social, cultural and political life, were denied the right to vote in Council elections.[274] In a decision that sparked even more debate, children of lifelong residents now considered non-members were also denied access to the community-run schools.[275]

The growing controversy created by the membership code led to a reexamination of the MCK policy in the mid-1990s.[276] At the time, the MCK was engaged in self-government negotiations with Ottawa (see below) and federal negotiators made it clear the membership law was going to be an obstacle to the negotiations. The federal government also threatened to withhold its funding for MCK programs if the code was not amended. In a series of community consultations between 1997 and 1999, the legitimacy and necessity of the membership code was reaffirmed, but it also became clear the code had to be more flexible for residents who, without sufficient blood quantum, were nonetheless culturally and socially integrated into the community.[277]

A revised membership code was finally adopted in November 2003. The new Kahnawá:ke Membership Law maintains the blood quantum rules and the distinction between member and non-member residents, but it adds more flexible mechanisms through which residents can apply for membership if they "honor the customs and traditions, and comply with the codes, laws and regulations of the Kahnien'kehá:ka" and

[274] In 1986, the first election after the adoption of the law, 475 out of the 1266 residents who attended the polls were denied the right to vote based on the Membership Law according to Dickson-Gilmore (1999: 31).
[275] "Kahnawake school system excludes students based on blood content", *Windspeaker*, vol.13, no.1, May 1995. An opponent of the Council was also denied the right to run for office in 1995 because his blood quantum was determined to be 46.87%. See "Curotte challenges election regulations", *The Eastern Door,* vol.5, no.17, May 1996.
[276] In 1998, the Canadian Human Rights Tribunal found that the MCK engaged in acts of direct discrimination against families that were excluded from the membership list based on the moratorium on intermarriages, in violation of section 5 of the Canadian Human Rights Act. See *Jacobs v. Mohawk Council of Kahnawake*, Canadian Human Rights Tribunal, March 11, 1998. In its declaration to the tribunal, the MCK warned that it would not comply with the decision given the Mohawks of Kahnawá:ke do not recognize the Act, nor the jurisdiction of the tribunal.
[277] Deer, K. "The difficult issue of racism in our membership code", *The Eastern Door,* 11: 12, April 2002.

demonstrate their will to "seek affiliation to a Kahnien'kehá:ka clan".[278] In other words, the membership code has become a vehicle to revive the traditional membership structure based on family clans. A Council of Elders appointed by the community at large is responsible for the study of applications for membership.[279] The law also establishes a registrar for non-members who seek permission to reside in the community and benefit from services, without the right to vote.[280]

The long process leading to the adoption of the more recent membership code in Kahnawá:ke illustrates how an apparently limited administrative transfer of responsibility can progressively lead to a profound reconfiguration of the governance regime in a given policy area. The initial transfer to the Council of the management of the band registry in 1972 first opened the door, and the community progressively took ownership of the issue under the leadership of the MCK. By the time the federal government attempted to legislate in the area through Bill C-31, Kahnawá:ke had a well-established, albeit controversial, policy. Building on community support, the MCK was able to stay the course and maintain its membership code outside of the Canadian legal framework, despite ongoing pressure.

In this case, it is hard to point to institutional adaptation as in the previously discussed cases. The MCK directly challenged the federal government's policy, not to mention Canadian human rights law, creating what can be defined as a competing, rather than complementary, institutional framework. The recent changes to the code are particularly significant since it has become a substantial mechanism for the community to

[278]See for example section 11.4 d) and f) of the *Kahnawá:ke Membership Law, Resolution 51/2003-2004*, on file with the MCK.
[279] Id. Section 8 and 9.
[280] Id. Section 7.

reaffirm its traditional understandings of citizenship through clan membership. The new code clearly sets Kahnawá:ke on its own course, moving away from the institutional legacy of *Indian Act* blood-based criteria without necessarily bringing the community closer to the liberal standards espoused in contemporary Canadian law.

The sensitivity and symbolic nature of membership rules can partly explain the unwillingness of the MCK to negotiate a compromise that would have moved the code closer to Canadian standards. But the federal government was not in any position to negotiate a compromise. What was at stake here is fundamental human rights, an issue that doesn't easily give way to multilevel governance bargaining. The membership example in fact suggests there are some "hard" issues where the flexibility of governments is limited even under neoliberal approaches to governance. But the experience of Kahnawá:ke also suggests that even in cases where multilevel governance fails to produce institutional adaptation, there is in fact a political space for Aboriginal communities to chart their own course outside of Canadian norms. The price to pay may be significant however, as the membership issue was one of the key factors that led to the break down of negotiations between the Canadian government and the MCK towards the definition of a new legal framework for the relationship outside of the *Indian Act*. I discuss the failure of this process in the next section.

6.5 Beyond Institutional Adaptation: Attempts at Consolidating the New Regime

The institutional capacity of the MCK continued to grow in the 1980s and 1990s as it took over further responsibilities, either unilaterally or in taking advantage of federal and provincial decentralization policies. In its 2000-2001 annual report to the community,

the Council reflected on these changes: "the MCK is no longer simply an administrator on behalf of the Department of Indian Affairs. Rather the MCK is evolving into a true Kahnawa:ke government. We must concentrate on developing and enhancing the organizational structure to accommodate this new role." (MCK 2002: 12.).

In a now familiar scenario, the budget of the Council grew substantially with newly acquired responsibilities, although not nearly enough to cover the range of activities being undertaken and certainly not in the same proportion as the Cree Regional Authority in the same period. In 1985, the MCK operations budget was $10 million, 85% of which came from DIAND, mostly through a Financial Transfer Agreement mixing grants and more tightly controlled contribution-based transfers (Ponting, 1986: 153). As table 6.1 shows, at the time of writing, the MCK operation budget had more than quadrupled, to $41.7 million, 55% of which was derived from federal grants. While it remains largely dependent on government support, the MCK has been able to diversify its sources of income and generate some autonomous revenue, a good portion of it from the operations of Mohawk Internet Technologies, a high-capacity server hosting (mostly) online gambling sites.[281]

Table 6.1 MCK Operations Budget

	Budget ($ million)	% federal	% provincial	% other sources
1984-85	10	85	N/A	N/A
1992-93	18.1	81	12	7
2001-02	31	76	16	8
2005-06	41	57	19	24

[281] In 2003, MIT was a $3.5 million business, hosting a fifth of the world's online gaming sites. The Kahnawá:ke Gaming Commission transferred more than $500 000 in licensing fees to the MCK and the various online operations employed close to 300 peoples in the community. See "Kahnawake, la meque des casinos virtuels", *Le Devoir*, Wednesday, July 13, 2005.

Source: MCK (2002; 2005); Ponting (1986:153). NB: Data unavailable for sources of revenues other than federal for 1984-85.

The MCK's restructuring process also involved the professionalization of its staff, as more and more programs were run directly through the its various branches. The Council's structure came to resemble that of most small governments, with an executive composed of elected officials overseeing the operations of the four branches and ten units under which the more than 80 programs and services managed by the MCK are operated. The number of employees under the Council authority more than doubled in less than a decade, from 112 in 1993 to 267 in 2004 (MCK 2004: 9). The knowledge and professional experience of its staff proved to be an important resource for the MCK in the development of new institutions, but also in the negotiation of the recognition of these institutions by governments. As with the Grand Council of the Crees, Quebec and federal civil servants recognized in interviews that the capacity of MCK negotiators to propose concrete and credible policy alternatives often allowed them to keep control of the negotiation agenda.[282]

The Intergovernmental Relations Team (IRT), created in the 1990s to negotiate with federal and provincial authorities, also played a central role in developing the political and policy capacity of the Council. With time, the IRT became the core advisory body for the Council on various policy files. The IRT changed its name to the Office of the Council of the Chiefs in 2001, reflecting its growing role as the key advisory body of the elected council. With a staff of 25, the OCC operates as a central agency for the Council, developing key policy orientations and acting as a transmission belt for ongoing relations with the federal and provincial governments at the administrative level (MCK,

[282] Interview, G01-04; G02-06.

2004: 12). The more structured and permanent nature of the IRT/OCC meant more consistency in the perspectives adopted and the language used in policy development. It also meant greater continuity in relations with federal and provincial civil servants, contributing to the progressive institutionalization of the model of mutual institutional adaptation.[283]

However, as the membership example illustrates, there are significant limits to a case-by-case approach in which the principles, rules and the legal framework structuring the relationship are left ambiguous. Accordingly, the MCK sought to take advantage of the negotiation channels established with both governments to create formal intergovernmental structures that correspond to its status as the governing agent of a sovereign political community. Both the federal and provincial governments were receptive to the idea of formalizing the emerging model. For the federal government, Kahnawá:ke became a "test case" for its newly minted self-government policy based on the negotiation of legislated transfers of jurisdictions. For Quebec, negotiations with Kahnawá:ke were also an important step in developing a distinctive framework for its relations with Aboriginal peoples outside of any federal interference. As a result, two parallel processes were established in the mid-1990s in order to redefine the rules of multilevel governance between Kahnawá:ke and Quebec on the one hand, and between Kahnawá:ke and the federal government on the other.

[283] This view was expressed by a provincial civil servant. Interview, A01-02.

6.5.1 The Quebec-Kahnawá:ke Process

In 1996, Quebec and the MCK established a joint working group in order to establish the basis of a new relationship between the parties. Even after the policing agreement, tensions between Quebec and Kahnawá:ke remained high in a number of areas, notably the collection of taxes on alcohol and tobacco sales and control over highways crossing the territory. Both parties agreed it was in their mutual interest to find mechanisms to resolve such conflicts and avoid the escalation that led to the 1988 and 1990 crises.

The working group, composed of MCK Chiefs and senior officials from the Secrétariat aux Affairs Autochtones who had been involved in the negotiations over the policing agreement, established a number of joint principles that should guide the Quebec-Kahnawá:ke relationship. Among others, it recommended Quebec formally recognize the government-to-government nature of the relationship and the legitimate authority of the MCK to establish its own institutions of governance. The working group also suggested the creation of a permanent political channel between the MCK and the provincial government in order to diffuse potential conflicts and facilitate the negotiation of new sectoral agreements based on the 1995 police accord.[284]

The recommendations of the working group led to the signature, in 1998, of a Statement of Understanding and Mutual Respect as well as a Framework Agreement to pursue bilateral negotiations in a number of policy areas where the two parties had clashed in previous years. The Statement, signed by MCK Grand Chief Joe Norton and

[284] Québec, SAA, *Rapport du groupe de travail conjoint sur les relations Quebec-Kahnawake*, on file with the Secrétariat aux Affaires autochtones, Quebec City, August 1997. 14p.

Quebec's Aboriginal Affairs Minister Guy Chevrette, establishes the basic principles to redefine the relationship between the parties, based on the "mutual respect of their respective national identities and each other's history and presence on the territory."[285] The Framework Agreement signed the same day establishes a wide-ranging negotiation agenda for the two parties to come up with specific sectoral agreements which "reconcile the exercise of their respective powers (…) where exists a shared interest."[286]

Five months after the signature of the Framework Agreement, the parties announced they had negotiated 10 agreements on such matters as tobacco, petroleum and alcohol products taxation, collection of goods and services taxes, cross-territory transport, economic development funding, the registration of marriage, births and deaths, the creation of a child care centre in the community, a renewed police agreement and the regulation of alcohol sale permits.[287] The nature of these agreements, and their focus on economic issues, is directly inspired by Quebec's 1998 Aboriginal policy framework, which, as discussed, proposed guidelines to negotiate "contractual jurisdiction" agreements through which the provincial government would transfer responsibilities for the management of programs in certain areas of provincial jurisdictions in order to facilitate the participation and integration of Aboriginal nations into the social and economic life of the province (Québec, SAA, 1998). Quebec officials interviewed

[285] Québec, SAA) *Statement of Understanding and Mutual Respect (Kahnawake-Quebec Agreement*), on file with SAA, Quebec City, October 15, 1998.
[286] Québec, SAA, *Framework Agreement between Quebec and the Mohawks of Kahnawake,* paragraph 3, on file with SAA, Quebec City, October 15, 1998.
[287] The 10 agreements are available at:
www.saa.gouv.qc.ca/relations_autochtones/ententes/liste_ententes_conclues_en.htm
(accessed June 10, 2007).

confirmed the 1998 policy was developed with a close eye on the ongoing negotiations with Kahnawá:ke.[288]

Each agreement follows a pattern directly inspired by the hospital and policing agreements. Despite the initial intention of the parties in clarifying their respective authority, the question of jurisdiction wes once again carefully left as vague as possible. Instead, for each sectoral agreement, the parties basically agree to disagree, and establish instead a joint framework in order to facilitate the compatibility of their respective laws, regulations and policies. As in the case of the policing agreement, in some sectoral agreements, this amounts to Quebec amending its legislative framework in order to acknowledge the 'continued operation and responsibility' of a Kahnawake institution. For example, Quebec agreed to amend its legislation on liquor sale permits in order to recognize the MCK-created Alcohol Beverages Control Board of Kahnawá:ke and its capacity to deliver permits to sell alcohol in the community. In exchange, the MCK agreed to the guidelines defined in the agreement jointly by the parties for the allocation of permits and list of legal suppliers.[289] In other cases, such as the tax collection agreement, the creation of an entirely new institutional framework was required.[290]

In October 1999, eight months after the signing of the agreements, the Quebec National Assembly adopted an omnibus bill in order to ensure the implementation of the ten agreements and amend all relevant legislation.[291] The agreements were generally well-received in the Quebec media, with the exception of the taxation agreement, which

[288] Interviews G01-02; G01-04.
[289] Québec, SAA, *Agreement Relating to Liquor Permits between Quebec and the Mohawks of Kahnawake,* paragraphs 4 and 5, on file with SAA, Quebec City, March 30, 1999.
[290] The tax collection agreement called for the creation of a computer-based system for Kahnawá:ke stores to charge the federal and provincial sales taxes to non-Aboriginal consumers and reimburse the province, and for stores outside the territory to automatically remove the sales taxes form the price of certain goods consumed by Kahnawá:ke residents. The system was never effectively put in place (Interview A03-04).
[291] Deer, K. "Bill 66 Passes in the National Assembly", *The Eastern Door*, October 8, 1999.

further entrenched the exceptional status of Aboriginal peoples with regards to fiscal matters.[292] The reaction in Kahnawá:ke was more subdued. The MCK hailed the agreements as an example of its capacity to engage in government-to-government relations and assert the community's jurisdiction. Editorials in the local newspaper were mixed, but many commentaries criticized the process as another step towards the "municipalization" and "provincialization" of Kahnawá:ke.[293]

The traditionalists were most vehement in their disagreement with the agreements, questioning the legitimacy of the MCK in engaging the community in negotiations of this nature.[294] For traditionalist leaders, especially those close to the tobacco sale industry that was expected to lose some of its business because of the new tax agreement, the MCK was using negotiations with Quebec to reinforce its grip on Kahnawá:ke and delay the return to traditional governance.[295] Indeed, the Framework Agreement of 1998 recognizes that "the Mohawks of Kahnawake govern themselves through the Mohawk Council of Kahnawake", suggesting the MCK is the sole legitimate authority in Kahnawá:ke.

The implementation of the ten agreements also turned out to be more complex than anticipated for Quebec. In a now familiar pattern, the agreements were negotiated by a reduced team of high-level civil servants of the *Secretariat aux Affaires autochtones*, with the chief negotiator, Louis Bernard –the same person who negotiated the *Paix des Braves* with the James Bay Crees a few years later- reporting directly to the Premier.

[292] "Quebec Mohawks win special tax treatment", *Globe and Mail*, March 31, 1999.
[293] Deer, K. "The Quebec Agreements", *The Eastern Door,* vol.8, no.9, March 26, 1999.
[294] A petition signed by 470 residents opposed to the agreements was tabled at a community meeting organized by the MCK. "Petitions Against Agreements", *The Eastern Door,* v.8, n.14, April, 1999.
[295] Kahnawá:ke Tobacco Association, *Newsletter*, Vol.1, no.1, October 2004, p.28.

Officials in line departments affected by the negotiations were consulted, but were not directly engaged in the negotiations.

While this executive-centered and politically driven structure facilitated negotiations outside the constraints of pre-existing administrative frameworks, it did not contribute to the diffusion of the spirit and intent of the agreements in the various departments responsible for their implementation.[296] The officials in charge of implementing the agreements had very few guidelines around how to proceed. More significantly, no clear funding commitment was established, which meant new expenditures had to go through the internal budgetary process of each department, often with no "champion" justifying them. As a result, as for the JBNQA, it was easier for officials in charge of programs to take a "business as usual" approach.

When asked to explain the variation in the degree of implementation of the ten sectoral agreements, a Quebec official candidly admitted the successful agreements were those, like the police or alcohol licensing ones, for which Kahnawá:ke had already established institutions on the ground, thus forcing Quebec's hand.[297] Those requiring the creation of new programs or institutions, like the proposed taxation system, have produced little results. The outcome of the Quebec-Kahnawá:ke process was thus less a fundamental shift in dynamics of governance than a consolidation of the model of institutional adaptation that progressively emerged in the 1980s and 1990s. In fact, the 1998 agreements and their uneven implementation reinforced the MCK's conviction that having effective, legitimate, policies or institutions established unilaterally *prior* to the

[296] Interview G01-04.
[297] Ibid.

negotiation of their recognition by governments was the most efficient strategy to create a power relationship in multilevel governance exercises.[298]

6.5.3 The Canada-Kahnawá:ke Process

The MCK had agreed as early as 1989 to engage in formal negotiations with the federal government for the redefinition of the legal framework of its relationship with Canada.[299] Significantly, the INAC-MCK negotiations were established at the political level, with a federal negotiator appointed by the Minister and with elected Chiefs from the MCK. The negotiations produced limited results in their early years however. For the federal government, the negotiations were about the delegation of jurisdiction to First Nations through the definition of an alternative legal framework outside the *Indian Act*, but this new framework was still premised upon the supremacy of the Canadian constitution, including the *Charter*. This was in stark contrast to the principles adopted by the MCK when it received a mandate from the community to negotiate the replacement of the *Indian Act* by a new legal framework that would, among other things, recognize full Mohawk sovereignty on the territory of Kahnawá:ke.[300]

Given the gap between their respective positions, the parties initially agreed to focus on sectoral negotiations, including, as discussed previously, policing. The 1995 federal self-government policy, which recognized self-government as an inherent aboriginal right under section 35(1) of the *Constitution Act, 1982*, did not radically alter

[298] Both Quebec and MCK officials concurred in this respect. Interviews G01-04; G01-03; A03-02.
[299] The process was established in the aftermath of the 1988 police raid on the territory. *Agreement on an Agenda and Process for the Negotiation of a New Relationship between Kahnawake and Canada*, December 13, 1991. INAC Library: Ottawa, p.1.
[300] MCK, *Band Council Minutes 03/06/89*, on file with the MCK.

the negotiation dynamic. The policy was carefully received by the MCK and severely criticized in the local Kahnawá:ke bi-weekly as it still assumed the primacy of the Canadian Constitution upon self-government agreements.[301]

Faced with a deadlock, the parties agreed in 1997 to change their approach to the negotiations. Inspired by the Kahnawá:ke-Quebec model, the MCK negotiators proposed a process of mutual institutional adaptation, in which the objective would not be to create a self-government structure for Kahnawá:ke, but rather for both parties to recognize their *existing* jurisdictions and establish the basic rules surrounding future intergovernmental relations. This was a significant change for the federal government, whose self-government policy was premised upon the *creation* of new governance rules to implement the right to self-government within the Canadian constitutional framework.[302]

The negotiations led, in 2001, to a preliminary Umbrella Agreement which proposed the adoption, by both parties, of a new framework for Canada-Kahnawá:ke intergovernmental relations outside the *Indian Act*.[303] Following the model of the Quebec agreements, the Umbrella Agreement did not propose, strictly speaking, a transfer of jurisdiction. It rather proposed the recognition of Kahnawá:ke's existing jurisdiction in a number of areas and the removal of the community from the *Indian Act* for such purposes, notably membership, education, policing and taxation.[304] In return, the MCK agreed to a number of principles and norms that will be incorporated in a "Kahnawake

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[301] Deer, K. "DIA New Self-Government Negotiating Policy", *The Eastern Door,* vol.4, 28, August 21, 1995.
[302] A federal interviewee compared the federal policy to the "big bang" theory, as it assumes no independent governance structure existed in Aboriginal communities prior to the negotiation of a self-government agreement. Interview, G02-12.
[303] *Draft Umbrella Agreement with respect to Canada/Kahnawake Intergovernmental Relations Act,* January 17, 2001. Available at http://www.ainc-inac.gc.ca/pr/agr/index_e.html (accessed June 10, 2007).
[304] Id. Section 4.

Charter", notably guarantees regarding democratic governance and accountability, as well as a "Code of Rights and Responsibilities" for residents of the community.[305]

In other words, the MCK agreed, in exchange for a recognition of Kahnawá:ke's jurisdiction, to *internalize* in its own fundamental law the basic principles of democratic governance established in the Canadian constitution. That being said, limits to Kahnawá:ke's authority are clearly established in the section dealing with conflicts between the two sets of laws. While the Agreement recognizes the overriding supremacy of Kahanwá:ke's law on the territory, it also recognizes that Canada's laws of "overriding national importance," would prevail in case of conflict.[306] Moreover, in what was a major concession for the MCK, it agreed that Kahnawá:ke laws were to be subject to the *Canadian Charter of Rights and Freedoms*.[307]

The agreement received mixed reviews in Kahnawá:ke. While it was clearly a major breakthrough in reforming the relationship and removing the community from the *Indian Act*, it also legitimized the authority of the Canadian state in Kahnawá:ke. In a series of editorials to the *Eastern Door*, Taiaike Alfred summarizes the dilemma facing Kahnawá'keró:non:

> In reality, Canada already operates as if it has total legal authority over us. We have been living with this situation for 125 years. The difference now is that we are being asked to formally acknowledge this 'legal supremacy' in exchange for two things: 1) a limited recognition of our own inherent authority in certain areas; and 2) a promise by the federal government to limit the use of its powers according to the terms of this agreement.[308]

Based on journalistic accounts, the opposition to the agreement rapidly gained momentum in the community. It became clear this was not an agreement based on mutual

[305] Id. Section 6.
[306] Id. Section 56 and 57.
[307] Id. Section 68.
[308] Alfred, T., "A hard look at the CKR Umbrella Agreement, part II", *The Eastern Door,* 10: 16, May 2001.

recognition of sovereignty. As a result, the MCK chose not to submit the draft agreement to a vote, arguing the exact nature of the agreement had to be clarified in respect to jurisdictional supremacy and the application of the *Charter*.[309]

The final blow to the draft agreement was given by the federal cabinet, which also refused to approve the draft Umbrella Agreement without further guarantees Kahnawá:ke would amend its existing membership code to remove the restrictions pertaining to blood quantum requirements.[310] As discussed, Kahnawá:ke was also undergoing a divisive revision of its controversial membership code in the same period and the version of the new membership code circulating at the time maintained the controversial measures. As an MCK negotiator put it:

> The Minister of Indian Affairs drew a line in the sand: that line was membership. (…) But we were not going to negotiate our internal rules of membership in exchange for the recognition of our jurisdiction in that very same area. It didn't make sense.[311]

The Umbrella Agreement was never ratified. Negotiations continued in the following years but the gap between the respective positions of the two parties continued to widen. INAC also came under greater pressure to tighten its accountability requirements for fiscal transfers to First Nations after 2001. The inclusion of additional requirements in this respect created new obstacles in the negotiations. Faced with such obstacles, the MCK decided once again to focus on the consolidation of its internal governance structures, including the Membership Code. The Canada-Kahnawá:ke

[309] "MCK releases info on CKR consultations", *The Eastern Door,* Vol.10, no.18, June 2001.
[310] Interview, G02-12.
[311] Interview, A03-02

intergovernmental process was maintained, but the the MCK steered the negotiations towards Kahnawá:ke's land claim concerning the Seigneurie du Sault St. Louis.[312]

6.6 Conclusion: Multilevel Governance as Institutional Adaptation

The MCK and the federal government have failed to reach an agreement on the establishment of a new framework to formally redefine the relationship between Canada and Kahnawá:ke. As a result, Kahnawá:ke is still, in Canadian laws, a community under the tutelage of the federal government, governed under the rules established by the *Indian Act*. Accordingly, the MCK is still, in formal terms, a band council with delegated administrative powers under the authority of the Minister of Indian Affairs. Unlike the James Bay Crees, whose regional and local administrative structures of governance are constitutionally protected under a treaty, the MCK has no legal protection against unilateral action form the federal Minister, who could theoretically dissolve the MCK and administer Kahnawá:ke directly. If one was to look at Kahnawá:ke's regime of governance uniquely from a legal stand point, it would thus not be hard to conclude that little has changed in the past 30 years. The hierarchical structure established in the early 20th century is still very much the formal architecture of Kahnawá:ke governance.

Behind this apparent continuity, however, lies significant changes in the norms and practices of Kahnawá:ke governance. The Band Council has evolved into a politically independent agent deriving its legitimacy not from the *Indian Act* but rather from its function as a representative body of the community, paradoxically advocating its

[312] Kahnawá:ke claims rights and relevant compensation for the loss of the territory of the old Seigneurie, which was recognized as "reserved land" by the British Crown in 1760. A number of suburban divisions are now established on the land. For the MCK position, see http://www.kahnawake.com/sssl.asp.

own demise and replacement by a governance structure that reflects more adequately the identity and history of that community. Through this process of institutional conversion, that same Council has reframed its representation of the relationship with federal and provincial authorities as one between co-equals, each party representing a distinct sovereign community, with its own territorial, cultural and political boundaries.

Taking advantage of the progressive retreat of the federal government from direct service delivery in Aboriginal communities, and of the resulting institutional gap between federal and provincial responsibilities, the Mohawk Council of Kahnawá:ke also engaged in a process of institutional expansion that saw the creation of a number of community-based organizations and structures that came to exist outside of any federal or provincial legislative framework. Following the analytical framework developed in chapter 3, these new institutions, like the Peacekeepers or the Membership Code, were progressively layered over existing Canadian structures in Kahnawá:ke.

This process of institutional displacement through layering contributed to reinforcing the position of the MCK internally, but it also created a distinctive power dynamic in relations with federal and provincial authorities. As the MCK asserted itself and openly challenged state authority in the community, the federal and provincial governments were forced to recognize the existence and legitimacy of Kahnawá:ke's institutions, and instead of imposing the norms and rules established under their own decentralization policies, found themselves negotiating political agreements with the MCK regarding the conditions for the adaptation of their policy framework to Kanawá:ke's realty.

The result of this process of adaptation is a unique model of multilevel governance in which the parties are called upon to coordinate and adapt their respective policies, rules and processes through political accords whose ambiguous wording more closely resemble international diplomacy than administrative decentralization agreements. Through this mode of governance, the Kahnawá:ke community expanded its sphere of *de facto* authority and autonomy in a number of policy areas without having to concede or recognize the jurisdictional supremacy of the federal and provincial governments.

6.6.1 One Regime, Two Bilateral Processes

Kahnawá:ke traditionalists, and the MCK to a lesser extent, have historically sought to limit their relationship with the provincial government. Kahnawá:ke, they argued, is a community of the sovereign Mohawk nation, and as such, should only interact with the federal government, which inherited the responsibilities of the British Crown as the main interlocutor and protector of Aboriginal peoples. As Kahanwá:ke asserted its authority and developed its institutional capacity in a broad array of policy areas traditionally associated with provincial jurisdiction, it became increasingly difficult to exclude Quebec from the equation. The provincial government was also eager to expand its authority to Aboriginal communities, and negotiations with the MCK on the construction of the hospital and policing provided such opportunities. As a result, Kahnawá:ke governance today is very much a trilateral affair, despite the formal structure of the *Indian Act* which suggests an almost exclusive federal responsibility. In fact, it is perhaps more accurate to say that Kahnawá:ke governance is organized along two more

or less institutionalized channels established between the MCK and the federal government (mainly INAC in this case) on the one hand and between the MCK and the provincial government on the other.

Even in areas where the federal government policy explicitly calls for trilateral coordination, such as policing, the process was effectively separated in two distinct bilateral negotiation rounds. Quebec's reticence to negotiate with the federal government in areas of provincial jurisdiction certainly explains this particular dynamic, but the MCK also rapidly came to prefer this double-bilateral dynamic. While more costly in resources and time, it allows the MCK to negotiate directly on a government-to-government basis without having to deal with federal-provincial jurisdictional conflicts. Like the Grand Council of the Crees, the MCK also rapidly realized that negotiating on two distinct fronts has some advantages, notably in playing one side's concessions against the other. The 1998 agreement with Quebec certainly put pressure on the Canada-Kahnawá:ke process, which had produced little results since 1991.

Interestingly, despite the ongoing tensions in the aftermath of the Oka crisis, it is also with the provincial government that the MCK made the most significant inroads in the 1990s. Despite Quebec's failure to fully implement the sectoral agreements that resulted from the 1998 process, the framework agreement moved the Quebec-Kahnawá:ke relation much closer to a formal political relation between equal partners. As in the case of the Crees, the absence of pre-existing political and institutional framework to regulate relations with Aboriginal peoples explains the more flexible approach of the provincial government. With the federal government, the legacy of the *Indian Act* creates a much more structured regulatory environment. Even self-government negotiations are

set within a predetermined framework outside of which federal negotiators do not have the mandate to act. The ultimate failure of the Canada-Kahnawá:ke process after 2001 reflects the greater institutional rigidity of a government that is adverse to precedent setting compromises that could have repercussions in negotiations across the country.

6.6.2 Change and Continuity in the Emerging Multilevel Governance Regime

The model of bilateral governance through institutional displacement and adaptation that progressively emerged in the 1990s is thus not cast in stone. In fact, as this chapter demonstrates, it is very much a work in progress. At the federal level, the parties have failed to translate it into more permanent institutional arrangements outside of the *Indian Act* and there is no guarantee the *modus vivendi* established with Quebec will survive the test of time and the changing priorities of the provincial government. In the absence of any legislative or constitutional framework reflecting the evolution of the relationship 'on the ground', the institutional dissonance between the legal architecture of the regime and its practice may well just be temporary.

It is also important to underline the extent to which the model of governance through mutual adaptation is largely consistent with the overall policy direction taken by federal and provincial authorities. By the mid 1990s, both governments had adopted policy frameworks fostering Aboriginal political and economic autonomy through greater decentralization and more flexible governance arrangements. The model developed with Kahnawá:ke is consistent with this perspective. It is a place-specific, sector-specific and loosely coupled approach to governance that allows governments to divest themselves of direct responsibilities over the management of programs.

Also consistent with new modes of de-centered governance, this loosening of governmental control is also accompanied by indirect mechanisms to ensure the basic objectives and requirements of their polices are respected. The incorporation of provincial or federal norms into the community's internal laws, as in the policing agreement, or in through a mutually-agreed upon description of the basic rules of governance in the agreement itself, as in the Canada-Kahnawá:ke agreement of 2001, are indirect mechanisms for governments to ensure a governance framework that is coherent with, rather than strictly similar to, their own norms and rules.

It is tempting to conclude that the resulting multilevel governance regime is little more than a new form of indirect control, leaving the community with the illusion of autonomy while in fact, it is driven to exercise its political choice through institutions that are defined within the boundaries of what the Canada and Quebec consider acceptable. The failure of the Canada-Kahnawá:ke process to produce an alternative to the *Indian Act* certainly suggests that ultimately, state sovereignty remains firmly in place and is not negotiable for the federal government.

Going even further, despite the MCK's discourse on sovereignty and the increasingly political nature of its relationship with governments, the emerging regime may in fact further entrench Kahnawà:ke's integration into the Canadian political ensemble. Not only is Kahnawá:ke still largely dependent on fiscal transfers from governments, but most of its institutions, despite their political autonomy, are also part of the administrative and policy networks of equivalent provincial institutions. This is certainly true of the schools and health care centre, but it is also true of the Peacekeepers, who are trained with, and follow the same standards as other police forces.

The challenge facing Kahnawá:ke in charting its own way under the new regime is perhaps best illustrated by the evolution of the MCK itself. Despite its 1978 pledge to "put itself out of business" in order to reinstate traditional government structure, the MCK is still the dominant institution of governance in Kahnawá:ke. In fact, it has grown considerably in the past twenty years, to the point of becoming a community government that largely mirrors, in its mode of operation if not its goals and political objectives, any municipal government in Canada. The paradoxical effect of the institution-building strategy of the MCK has been to displace state-imposed institutions to replace them with community-based structures that largely reproduce the Euro-Canadian model of governance. It may be worth recalling that the implantation of "civilized government" was one of the original objectives of the federal government when it imposed the band council system to the community more than a century ago.

That being said, it would once again be unfair to dismiss the changes of the past thirty years as little more than superficial and symbolic shifts. The policy capacity and legitimacy the MCK has gained is very real. While the emergence of multilevel governance has a lot to do with federal and provincial restructuring policies, the particular configuration of the Kahnawá:ke regime is the product of the MCK's strategy and agency. As with the Grand Council of the Crees, the MCK was able to seize the openings created by the changing context, and maximize its leverage within an otherwise constraining environment.

Unlike the GCC however, which was able to use the constitutional protection of the JBNQA, the MCK had limited legal and institutional resources under the *Indian Act*. The MCK has been reticent to use Canadian tribunals since the Seaway construction

episode. Not only are the results of court arbitration uncertain, but accepting the ultimate authority of a Canadian tribunal is an indirect recognition of the supremacy of the Canadian constitution. Instead, the MCK built a *rapport de force* with governments using very coherent and historically grounded argumentation about the community's status outside the legal and political boundaries of the Canadian state.

In doing so, the MCK has challenged the democratic legitimacy, rather than the strict legality, of government actions. The framing of the relationship as one between distinct polities, with distinct sources of democratic legitimacy and authority, adds an entirely different layer to the negotiation of new governance arrangements. The strong resonance of this argument in the community was echoed in Canadian public discourse in the 1990s in the aftermath of the Oka crisis. The Royal Commission on Aboriginal Peoples also provided strong normative grounding for this argument.

Building on the gains made in the 1990s, the MCK recently reaffirmed its goal of reinstituting traditional structures of governance in the community in the aftermath of the collapse of the self-government negotiations (MCK 2002: 8). An advisory committee was put together to develop some concrete initiatives to work toward this goal. One outcome has been the reintroduction of the clan system into the 2003 membership policy and a series of proposals to reactivate the clan structure as a mechanism of community consultation and decision-making (MCK, 2005). One can thus argue that the conversion process of the MCK, and the related institutional displacement of sate-imposed norms and rules is still very much on ongoing process.

Despite its controversial nature, or perhaps because of it, the membership policy is a good example of the leverage gained by Kahnawá:ke through their displacement

strategy. The federal government does not recognize the policy, largely because it is in conflict with Canadian individual human rights principles. But politically, there is little the government can do without risking further polarization in its relationship with the community. A unilateral re-imposition of federal rules, even human rights standards, would be the equivalent of another Oka-like armed invasion in a community that sees membership as a core element of its sovereign authority.

In brief, the ambiguous language of the agreements discussed in this chapter and the approach taken, of mutual institutional adaptation, is a direct consequence of this representation strategy. Multilevel governance in Kahnawá:ke is thus still very much a work in progress, but through incremental processes of conversion and displacement, the community is finding significant political space to slowly redefine its relationship with the Canadian state.

Chapter 7

Conclusion
Prospects for Self-Determination under Multilevel Governance Regimes

What can we learn from the evolution of Kahnawá:ke and Eeyou Istchee governance in the past thirty-five years? Are the shifts described in the previous chapters significant? What are the consequences for the James Bay Crees and Kahnawakehró:non of the progressive displacement of the logic of centralized governance that has characterized Aboriginal-state relations in the past century by one organized around principles of recognition and de-centered governance? Are the dynamics of multilevel governance observed conducive to the development of federal-type intergovernmental relations as suggested in the early chapters of this thesis? And what are the factors driving or hindering this transformation? In this last chapter, I review some of the main conclusions drawn throughout this thesis about the changing nature of Aboriginal-state relations in Canada.

7.1 Regime Shift: Contained Recognition and Neoliberal Governance

I discussed in chapter four how the conception of Aboriginal governance in what is now Canada evolved in successive phases, from early alliances to approaches openly seeking cultural assimilation and political incorporation. Through these successive periods, Aboriginal governance came to be characterized by fairly centralized and bureaucratic decision-making processes, in which key policy orientations were decided in the head office of the Department of Indian Affairs in Ottawa. Traditional Aboriginal

governing authorities and structures were largely excluded from the governance process and were progressively displaced as legitimate interlocutors of state authority in favor of state-imposed band councils (at least in the case of First Nations under the *Indian Act*). Despite significant differences in the nature of their historical governing structures, the histories of Kahnawá:ke and James Bay Cree communities follow this pattern.

I argued this model of centralized and hierarchical governance largely mirrored the dominant conception governance in most liberal democratic state at the time, in which the proper scale for policy-making is assumed to be that of the national-territorial state (Brenner, 2004; Pierre and Peters, 2000). This model of governance, organized around a rational-legal conception of authority and a logic of territorial homogeneity, dominates the landscape of Aboriginal governance for most of the twentieth century.

The homogenizing logic of the governance model of the postwar came to be challenged by communities, regions and groups seeking recognition of their difference and a greater role in the definition of their own policy priorities. Aboriginal claims for greater recognition and political autonomy are an integral part of a broader movement of small, self-defined, communities that are challenging the established boundaries and unmediated sovereignty of modern states in the later part of the twentieth century (Keating, 2001). Aboriginal mobilizations led to the constitutional recognition of Aboriginal and treaty rights in 1982 and the negotiation of land claim settlements and self-government agreements that confirmed, despite their numerous limits, the permanent character of Aboriginal peoples' differentiated relationship with the state and their status as distinct political communities.

As discussed however, the reconfiguration of Aboriginal governance along the line of differentiated rights, as it was deployed in Canada through court decisions, constitutional negotiations and government policies, has significant limits from the perspective of Aboriginal self-determination. Aboriginal rights remain very much contained by existing structures of authority as they were established in successive Canadian constitutional documents. What I defined as the *contained recognition* paradigm, under which current court decisions and government policies regarding Aboriginal rights operate opens up opportunities for Aboriginal peoples to redefine their status and relation with governments, but within the clearly defined boundaries of state sovereignty.

Aboriginal recognition claims were only one of the factors driving the redefinition of Aboriginal governance in the 1980s and 1990s. The state-centered perspective on governance also came under stress under the impetus of capital-driven pressures and the related expansion of neoliberal ideas. In Canada as elsewhere, the state increasingly came to be seen as both too big perform some functions, which were better left to the market and to local communities, and too small to regulate exchanges under the growing pressure for global trade liberalization. Neoliberal ideas, advocating for a smaller and leaner state and a greater reliance on market-driven approaches rapidly gained prominence and replaced the Keynesian consensus of the postwar era as the dominant policy paradigm in the 1980s. Deregulation, trade liberalization, but also decentralization of state responsibilities to lower tiers of governments, party to offload spending responsibilities but also to increase the flexibility and adaptability of different locales to the market became the benchmark of the neoliberal era (Pierre and Peters, 2000: 3).

Consistent with this overall shift in the understanding of the role of the state and of the mechanisms through which this role should be achieved, federal government agencies massively decentralized program administration to Aboriginal governments starting in the 1980s. New approaches to governance inspired by the New Public Management, fostering "partnerships" with Aboriginal communities in policy development and implementation were also developed in the 1990s. Coherent with neoliberal perspectives, the objectives of such policies have been to reduce direct government involvement in program management and promote locally driven development initiatives and implementation approaches.

Human resources development agreements, education agreements and other sector-specific transfers have progressively transformed INAC from a service delivery department into what has largely become a funding agency. Self-government agreements are only one mechanism through which Aboriginal governing bodies came to play a greater role in the definition and implementation of policies and the delivery of services to their communities. In fact, the data presented in chapter four suggest administrative decentralization agreements have played a far greater role in reconfiguring the overall landscape of Aboriginal governance in the past twenty years.

The Quebec government adopted a similar approach in its attempt to gain some leverage in developing a closer relationship with Aboriginal peoples living within the province's boundaries. As it sought to assert its legitimacy and authority on the territory of the province, the government established policies that simultaneously recognized Aboriginal peoples' status as distinct nations while at the same time firmly anchoring this recognition within the contained boundaries of its jurisdictional authority. In order to

consolidate its political and administrative links with Aboriginal communities, the Quebec government also sought to negotiate agreements directly with First Nations and Inuit in areas of provincial jurisdictions. While less visible than the clash over territorial sovereignty that pitched the province against the Mohawks and James Bay Crees in the 1990s, these agreements have also had a significant impact on the regime of Aboriginal governance in the province.

The Kahnawá:ke hospital agreement of 1984 was a precursor to the bilateral partnership-based social and economic development agreements that have become a hallmark of Quebec-Aboriginal relations in the 1990s. A fairly consistent pattern has emerged in such agreements: Quebec accepts to adjust its legislative and regulatory framework to accommodate Aboriginal realities, and transfers resources to an Aboriginal community in exchange for the development of local programs or initiatives that are coherent with provincial policy objectives.

As a result, the highly centralized and hierarchical regime that characterized Aboriginal governance for most of the twentieth century was progressively redefined in the 1980s and 1990s. First, Aboriginal governance is now much more fragmented. The relatively uniform model established under the *Indian Act* has not disappeared, but it has certainly been modified and reconfigured. Self-government agreements, land claim settlements, but also political and administrative accords with federal and provincial governments, such as the *Paix des Braves* or sector specific devolution agreements, have created a much more complex landscape in which it is increasingly difficult to speak of a single Aboriginal governance regime for the entire country. Each nations, or even communities, establish through bilateral or multilateral negotiations, the rules, norms and

practices of their own governance regime with their federal and provincial (and territorial) counterparts.

This fragmentation is largely consistent with theoretical accounts of the impact of neoliberalism on previously state-centered governance regimes. Wendy Larner (2003) points to this fragmenting effecting her work on New Zealand and elsewhere. The burgeoning literature on state rescaling also argues the diffusion of the policy process upward and downward from the national-territorial scale open up the door to a more complex geography of governance, where place specific and context specific patterns, notably in a given urban locale or a region, are likely to be norm rather than the exception (Brenner, 2004). Again, Aboriginal governance in Canada follows that pattern observed in the general literature.

Another outcome of these shifts is the multiplication of actors involved in Aboriginal governance. Looking for the key agents of Aboriginal governance in Canada the 1950s, one would have logically focused on the Minister of Indian Affairs and the senior officials of DIAND in Ottawa. Regional officers of the Department would have also come to mind, and a handful of Aboriginal leaders who had an impact at the local and national levels.[313] Today, INAC officials remain central agents in Aboriginal policy-making, but they have been joined by other departments at the federal level, provincial governments and agencies such as Quebec's *Secrétariat aux Affaires Autochtones*, and also by legal experts and judges whose decisions are now an integral part of the landscape of Aboriginal governance. While political parties have not figured prominently in this thesis, it is also fair to argue that Aboriginal policy has now moved beyond the

[313] Accounts of Aboriginal policy developments in the post-war are revealing in this respect. See for example Weaver (1981) but also Neu and Therrien (2003), the RCAP report (1996: vol.1) and for a very detailed analysis of Aboriginal welfare policy from the late 1800s to the post-war, see Shewell (2005).

confines of bureaucratic administration and is part of most political parties' platforms. In Quebec, the Parti Quebecois, under Renée Levesque and later under Bernard Landry has been a major driver in establishing the keystones of the province's Aboriginal policy.

In addition to these 'classic' policy actors, Aboriginal organizations at the national and provincial levels are now an integral part of the policy landscape. Again, while this thesis focused on relations between federal, provincial and local Aboriginal governing authorities, national Aboriginal organizations such as the Assembly of First Nations also occupy a central position in establishing the policy agenda and engaging with government officials in the definition of policies. This central place was in part gained during the constitutional negotiation rounds of the 1980s and early 1990s, but since then, the AFN and other organizations have continued to play a key role in representing the interests of Aboriginal peoples in the public arena as well as through government consultation and direct involvement in "joined policy process."[314]

Finally, and most relevant for this thesis, Aboriginal local and regional governing bodies, such as band councils and tribal councils, who until recently were seen as relatively passive extensions of the federal government's administrative apparatus, are now fully engaged in policy development and implementation. Self-government and administrative devolution agreements have led to a much more consistent and proactive role for local governments in implementing programs, managing resources but also establishing their own policy priorities and negotiating such priorities with their federal

[314] This partnership approach to policy development was evident in the case of the process leading to the Kelowna Accord of 2005. The accord was in fact the result of a series of roundtable discussions involving federal officials and national Aboriginal organizations representatives. Similarly, the creation of the First Nations Statistical Institute was the result of a joined policy process between the AFN, INAC and Statistics Canada. See http://www.firststats.ca/home.asp. This collaborative approach adopted by the AFN and other national organizations doesn't have unanimous support in Aboriginal communities, many seeing this as yet another form of cooptation. The Assembly of First Nations of Quebec and Labrador boycotted the Kelowna process for example.

and provincial counterparts. I discuss the impact of these shifts in the case of the James Bay Crees and Kahnawá:ke Mohawks in greater details below, but a key outcome of this new form of de-centered governance is the increased capacity of local Aboriginal governments to openly and consistently challenge the authority and legitimacy of federal and provincial governments on the territory of their communities.

The combination of recognition politics and neoliberal restructuring has thus led to a displacement of the state-centered model of governance and the development of a more fragmented, more diffused policy process in which multiple actors interact in multiple venues. If the *formal structure* of Aboriginal governance remained relatively unchanged despite recognition policies, the *logic* and *meaning* of governance exercises can no longer be reduced to the *Indian Act* model. Building on the example of the European Union, I have suggested Aboriginal governance in the era of contained recognition and neoliberalism has become a multilevel reality, in which actors located at different scales are becoming increasingly interdependent since resources, knowledge and legitimacy are also increasingly diffused. Aboriginal multilevel governance in Canada does not simply mirror European governance obviously. The formal structures of authority, the distribution of resources and the sheer political power of actors in presence can hardly be compared. That being said, I have tried, through two detailed case studies, to understand the specific logic, and the broader impact of this emerging model of multilevel governance.

7.2 Multilevel Governance: Strategic Adaptation and New Political Spaces

Building on the neo-institutional literature on changes in contexts in which institutional patterns are deeply entrenched, I have suggested the development of new governance practices can be understood in continuity with previous evolutions of Aboriginal governance in Canada. Just like successive understandings of the place of Aboriginal peoples in relation to the Canadian state were layered over a fairly stable *Indian Act* structure in the first half of the twentieth century, the same can be said of the emerging dynamics of multilevel governance. Contained recognition and de-centered approaches to the policy process do not radically alter the formal structure of Aboriginal governance. If the constitutional recognition of Aboriginal and treaty rights put limitations on federal and provincial governments' actions, institutional developments associated with recognition practices, such as the James Bay and Northern Quebec Agreement, have been layered over existing structures and practices without fully replacing them. This explains why the James Bay Crees faced a largely unchanged bureaucratic structure and logic of governance in the early years of implementation of the JBNQA.

Similarly, de-centered governance has led to a growing role for Aboriginal governments and organizations in the policy process, but this shift was also accompanied by a greater emphasis on accountability mechanisms and reporting practices that are essentially reproducing the logic of containment and control of the *Indian Act* through less direct means. As Robert Shepherd (2007) argues in his detailed review of federal policies with regards to fiscal transfers to Aboriginal governments, the reporting and accounting structure of more recent funding agreement models, including the one used

for First Nations operating under a self-government agreement, clearly maintain the logic of government control and vertical authority established under the *Indian Act*. Again, this suggests the federal government has adjusted its governance practices to a rapidly changing context in which its authority and legitimacy are increasingly challenged, but without fundamentally altering the foundations of the old regime.

This process of strategic adaptation and layering of new governance practices over established structures tends to confirm the argument of a number of analysts who dismiss the shifts in the language and practice of Aboriginal governance in the past thirty years as little more than an adjustment in what remains fundamentally a colonial structure of governance imposed by the state (Alfred, 1999; Ladner, 2001; Neu and Therrien, 2003; Salée, 2005). This perspective on recent developments is also supported by poststrcutural analyses inspired by the work of Foucault on forms of control and authority in neoliberal societies (Hindess, 2002; Rose, 1999). Nikolas Rose, for example, suggests new liberal practices fostering individual and community autonomy are also accompanied by new techniques of indirect "control at distance". Under these new "technologies of government", authority is exercised less through direct coercion and legal constrains and more through the production and internalization of ethical norms of behavior under which autonomous agents "self-discipline" themselves. The language of "responsible citizenship" and security, but also, and more relevant for us, the focus on accountability and public disclosure that has penetrated Aboriginal governance are all part of these new forms of indirect governmental control (Rose, 2000: 324).

As Neu and Therrien (2003) suggest, the main condition for Aboriginal autonomy today is for Aboriginal governments to reproduce the norms, rules and principles of

"good governance" as defined by euro-Canadian standards. The episode of the *First Nations Governance Act* discussed in chapter 4 is a perfect illustration of an attempt to impose ethical standards on First Nations who, supposedly, have an *inherent* (that is independent of Constitutional norms) right to self-government according the federal government's 1995 policy. As discussed in chapter four, INAC is now quite open about its new role as a an agency supporting and accompanying Aboriginal peoples towards the development of good governance practices in the exercise of their right to self-government, adding credibility to the "control at distance" thesis.

The experience of the James Bay Crees and Kahnawá:ke Mohawks also suggest governments constantly seek to maintain their control through alternative, less direct, means. One recurring aspect of administrative devolution agreements is that despite the minimal constraints put on the actual content of the policies and programs developed locally, Aboriginal governments and organizations have to respect some minimal standards and principles set at the federal or provincial levels. For example, policing in Kahnawá:ke is entirely controlled by the MCK, but the Peacekeepers have to espouse the ethical guidelines, training and accountability practices established by the Quebec Police Act and its related regulatory framework. The James Bay Crees have gained significant access to the management of natural resources on their traditional lands through the *Paix des Braves*, but again, the new forestry regime and the revenue sharing formula were conditional to the acceptance, by the GCC, of the basic principles of a liberalized regime of natural resources extraction. The Crees now have a vested interest in opening the territory to capitalist investments.

To sum up, it would be a mistake to conclude new forms of governance are radically altering the power structure of the Canadian state. In this respect, this thesis confirms the critiques of Alfred (1999, 2005), Ladner (2001), Neu and Therrien (2003), Salée (2005) and many others. That being said, critiques of these new developments may also underestimate their long-term impact. As I have argued throughout this thesis, multilevel governance is not a zero-sum game. Despite the persistence of federal and provincial direct and indirect control, Aboriginal governing authorities have also gained much leverage in this new liberalized governance environment. As Pierre and Peters argue, "institutional empowerment is a dynamic, sometimes even a cumulative process" (2000: 78). New governance mechanisms may not constitute the radical redefinition of state sovereignty advocated by Aboriginal nationalists and postcolonial critiques, but it does open opportunities for Aboriginal authorities to challenge the uniform and unilateral structure of state authority. To use Wendy Larner's words, the scalar diffusion of governance at multiple levels can create new "spaces of contestation for social movements, cultural groups and local communities (…) who are reconfiguring these spaces into sites of self-government" (2003: 512).

As discussed in chapter three, the literature on institutional adaptation similarly suggests that non-radical alterations in the logic, purpose or conceptual representation of a regime may lead in the long term to a more significant reconfiguration of power relations from within. Even if the development of new modes of governance is largely controlled by governments, it creates what Streek and Thelen define as "institutional gaps" between the formal structure of a regime and the actual practices on the ground and its representation by actors involved. Again, for Streek and Thelen, "these gaps become

key sites of political contestation over the form, the functions and the meaning of established institutions" (2005: 20).

Translated into the specific context of Aboriginal-state relations, this suggests the outcome of multilevel governance is not given, and depends largely on the capacity of Aboriginal actors to seize the opportunities it creates to reconfigure their regime of governance. The examples of the James Bay Crees and Kahnawá:ke Mohawks illustrate this point. Within the bounded context of their preexisting regime of governance, the Grand Council of the Crees and the Mohawk Council of Kahnawá:ke used multilevel governance exercises to assert their legitimacy and authority, and redefine their relationship with both Quebec and Ottawa.

7.3 Comparing Trajectories of Multilevel Governance: the Crees of Eeyou Istchee and the Kahnawá:ke Mohawks

The interest of selecting the James Bay Crees and Kahnawá:ke Mohawks as case studies to understand emerging patterns of Aboriginal multilevel governance resides in their relative success at challenging established rules and norms of governance. These are two 'strong' cases, not necessarily representative of all Aboriginal communities across Canada, but certainly indicative of the directions dynamics of multilevel governance can take in the current context. The Crees and Mohawks are also interesting from a comparative viewpoint because of their differences. Geography, institutional legacies and different political representation strategies have led to different patterns of multilevel governance.

7.3.1 Shaping Multilevel Governance: Geography, History and Institutional Legacies

While they are both located in Quebec and have both adopted a fairly strong political stand in their assertion as autonomous political communities, a number of elements distinguish the two cases studied here and these differences all play a role in explaining the specific nature of their governance regime. Geography plays an important role in defining the priorities of the two groups in political and economic terms. Given their proximity to a large urban centre, maintaining tight control over the boundaries of the community, the use of lands, the rules governing membership and access to the territory more broadly are central to Kahnawá:ke politics. So is the protection and revitalization of traditional Mohawk values, history and language in what is essentially a suburban community.

The James Bay Crees do not face the same everyday pressures. The protection of their language and culture is also important, but territorial control takes a whole different meaning. In Eeyou Istchee, the struggle for self-determination is played out at a different scale, in the forests and along the rivers of their vast and less densely populated territory. Control over natural resources extraction, both in terms of its impact on Cree lifestyle and as an economic development tool is the central element of Cree political self-determination. These differences in priorities and realities are affecting the strategies of the two community's leadership, but also the nature of their relations with governments.

Political legacies also matter. Kahnawá:ke has a long history as a self-defined and self-conscious political community seeking to maintain its autonomy through diplomatic alliances, political activism and, of course, warfare. Today more than ever, traditionalism and nationalism are deeply intertwined in the complex internal politics of the community.

As a creature of the federal government, the Mohawk Council of Kahnawá:ke is still struggling to assert its internal legitimacy. This reality is reflected in its relations with governments as well. The MCK must constantly thread a fine line between the promotion and assertion of traditional perspectives and the need to engage in negotiations with governments in order for the community to gain the space and resources to develop its own political and economic priorities.

The James Bay Crees also have their own traditional governance structures, organized around hunting clans and families. In this case, however, traditional practices can inform the way existing institutions go about in establishing their priorities and making collective decisions, but they cannot replace them. There is no equivalent of the Rotinohshoni Confederacy for the Crees. Band Councils operating under the Cree-Naskapi Act do not face the same internal challenge to their legitimacy as the MCK in Kahnawá:ke. The absence of an historical political narrative uniting the Cree communities also means the boundaries of the political community, its identity and relation with Canada is much more fluid and open-ended.

Finally, and this cannot be understated, the two groups operate under different institutional frameworks in their relations with the federal and provincial governments. The James Bay Crees have signed a Land Claim Settlement protected by the Canadian Constitution. The JBNQA establishes the basic rules and structures under which the governance of the territory and the relationship between Cree communities and the federal and provincial governments operate. For better or for worse, the JBNQA is, in essence, a constitutional document defining the governance regime of Eeyou Istchee. The Crees have at time rejected its principles, but more often than not, they have used it as a

tool to establish their power relation with governments, mostly through legal action against what the GCC considered violations of the spirit, intent and content of the treaty.

By contrast, the Kahnawá:ke Mohawks are still, in formal terms, a band under the *Indian Act* regime. In the absence of any treaty or self-government agreements, federal and provincial obligations towards Kahnawá:ke, notably in terms of transfer of resources and consultation over policies are much more limited. The MCK rejects the legitimacy of the *Indian Act* and refuses to negotiate under its premises with the federal government. It also refuses to use Canadian Courts to force governments to respect their legal obligations under the Act, as this would legitimize its application to Kahnawá:ke. As a result, the MCK does not have the institutional resources the Crees have under the JBNQA. It also means multilevel governance in Kahnawá:ke is essentially a political affair: the MCK's power base in such relations is derived from its political positioning rather than based on constitutional rules and legal obligations.

These differences have led Kahnawá:ke and the James Bay Crees to articulate their respective conception of their relationship with the Canadian federation in very different ways. Of course, the Grand Council of the Crees and the Mohawk Council of Kahnawá:ke have both embraced the language of nationalism and self-determination. But for the James Bay Crees, who have signed a treaty and do not have an alternative framework under which to operate, self-determination can perfectly be exercised *within* Canada. That is, the GCC accepts the legitimacy and ultimate authority of the Canadian Constitution, as long as the status of the Crees as a distinct nation, with the right to self-determination and treaty rights, is recognized and protected by this constitution.

By contrast, the Kahnawá:ke Mohawks, or at least the majority of them, reject the legitimacy of the Canadian constitution altogether. The MCK conceives of its relationship with the federal and provincial governments as relations between representatives of two separate and sovereign political entities. As discussed, Kahnawá:ke still sees the Two Row Wampum alliance with European powers as the foundation of its relationship with Canada. The MCK thus refuses to recognize any form of jurisdiction to federal and provincial authorities on the territory of Kahnawá:ke. These differences in the representation of the relationship play an important role in shaping the regime of multilevel governance of the two communities.

7.3.2. Convergences and Divergences in Dynamics of Multilevel Governance

In their own ways, the Kahnawá:ke Mohawks and James Bay Crees were able to use the openings created by recognition politics and neoliberal state restructuring to reconfigure their regime of governance. While some features of their regime of governance are unique, reflecting the dynamics discussed above, there are also certain similarities in the trajectory of the two groups. These common features allow me to attempt a few theoretical generalizations regarding contemporary Aboriginal multilevel governance in Canada.

A first element of convergence is the incremental nature of the transformative process. In neither case was there a radical break in the institutional configuration of the governance regime in the past thirty years. To be sure, the James Bay and Northern Quebec Agreement is a significant institutional change but, as discussed, if the JBNQA established a new structure of regional governance outside the *Indian Act* and created

formal institutional links between the Crees and Quebec, the *logic* of the regime did not change significantly. Both the provincial and the federal governments continued to manage Cree programs and administrative structures under the same guidelines and regulatory framework as other similar government institutions.

Consistent with processes of institutional adaptation discussed in chapter three, it is through progressive layering and conversion of existing institutions that the Cress and Mohawks reconfigured their regime of governance. Despite its many limitations, the Crees used the JBNQA as a an institutional leverage, building strong regional political and administrative structures pooling the resources and expertise gained under their regime of administrative devolution. While they were initially expected to play a relatively minor role in governance, the GCC and CRA became the main instruments through which the Crees articulated their political visions, mobilized their expertise and engaged in joint policy definition exercises with governments.

A similar conversion is at the root of Kahnawá:ke's political assertion. The Mohawk Council of Kahnawá:ke formally remains a band council under the *Indian Act*, but it has evolved into a politically independent agent deriving its legitimacy not from the *Indian Act* but rather from its function as a representative body of the community, paradoxically advocating its own demise and replacement by a governance structure that reflects more adequately the identity and history of that community. Through this process of institutional conversion, the Council has reframed its representation of the relationship with federal and provincial authorities, as one between co-equals, each party representing a distinct sovereign community, with its own territorial, cultural and political boundaries.

As the GCC and the MCK progressively transformed themselves politically, they were also aware of the importance of maintaining and enhancing their legitimacy within the communities. In both cases, ongoing consultation processes allowed the leadership to articulate a clear vision of what they were seeking to achieve and under what guiding principles they were to approach negotiations with governments. In the aftermath of the 1995 Quebec referendum, the GCC launched the Eeyou Istchee Commission to establish the basis of a future regional government and reaffirm its commitment to both internal and external self-determination. Similarly, the MCK has adopted a number of resolutions committing itself to the reestablishment of traditional governance structures truly independent of the Canadian state in Kahanwá:ke. The consolidation of their internal legitimacy goes hand in hand with the repositioning of the MCK and the GCC as agents of self-determining political communities in their relations with governments.

Both the MCK and the GCC also took advantage of the specific context of Quebec politics in the 1980s and 1990s. Debates on the future of Quebec created a context where assumptions about boundaries of political communities were openly discussed in public discourse. The Crees were able to use the resources and access point gained under the JBNQA to assert their status and challenge governments on the terrain of democratic legitimacy and territorial integrity. The Kahnawá:ke Mohawks, as discussed, reasserted their historical position as a community that never gave its consent to Canadian sovereignty. Through an increasingly nationalist discourse, and strategic use of their unique position in relation to federal and provincial authorities, the Crees and Mohawks were able to establish their status as distinct political communities with a legitimate claim to territorial self-determination.

Aboriginal peoples outside Quebec have also used a nationalist discourse with some success. The main difference is in the openings such positioning created in the context of Canada-Quebec relations. The Crees and Mohawks put the Quebec government in a delicate position in the 1990s as it was itself embarking in a process of international recognition of the province's right to self-determination. The Crees and Mohawks used this bargaining chip with great success, forcing Quebec to recognize their political status and engage in 'nation to nation' negotiations in which the pre-existing policies and regulations were set aside to establish governance frameworks acceptable to all parties. The *Paix des Braves* is the most striking example in this respect, but the 1998 agreements with Kahnawá:ke were also premised on the recognition of the political, rather than strictly administrative, relation between the parties. The MCK and the GCC were also able to use the gains made in relations with Quebec at the federal level, establishing a "bottom line" for future negotiations.

The reframing of the relation with federal and provincial authorities as one between distinct political communities is an important element in challenging the logic of administrative containment, but it is certainly not enough. Beyond symbolic action and a principled discourse challenging state authority and asserting their own legitimacy, the GCC and the MCK also took advantage of policy shifts at the federal and provincial levels to engage in sector-specific negotiations with governments over polices and programs. The trajectories of the two groups diverge here, as they have adopted different strategies in order to take advantage of this new context.

Faced with the resistance of governments in engaging in formal negotiation over the implementation of the JBNQA or its adaptation to their new political reality, the the

Crees chose pragmatically to take advantage of changes in approaches to governance resulting from the neoliberal turn and agreed to negotiate a number of bilateral and trilateral agreements for the devolution of services and programs, "without prejudice" to what they considered Cree rights under the JBNQA. As a result, the GCC/CRA consolidated its policy capacity and engaged in a growing number of joint policy-making exercises with governments, bargaining additional funding or authority, or adapting existing policy frameworks to the needs of Cree communities.

Policy-level negotiations with the federal and provincial governments have become key "locales" of governance where the GCC has translated collective Cree priorities into policy positions and asserted the legitimacy of such positions as those of a self-determining polity. The combination of Cree political assertion and growing policy capacity resulted in a progressive displacement of the strictly administrative and hierarchical framework of the JBNQA for a more diffuse logic of governance, where mutually interdependent spheres of political authority interact and compete in joint policy exercises. The *Paix des Braves* is both an outcome and an illustration of this new multilevel dynamic. The new forestry regime, the negotiated consent for new hydroelectric developments and the transfer of responsibilities for economic development in exchange for long-term financial guarantees are all in some ways a recognition of the interdependent nature of the Cree-Quebec relation in key policy areas for both parties.

Because of its geographic and political situation, the Mohawk Council of Kahnawá:ke chose a different route to assert its political authority, but it also took advantage of a more diffuse policy process. If the GCC agreed to engage in administrative devolution negotiations, as long as Cree rights under the JBNQA were

acknowledged and remained unaffected, the MCK refused, as it would have led to a recognition of federal and provincial authority on Mohawk lands. Instead, the MCK chose to act unilaterally and occupy the administrative and political void left by the federal disengagement from direct service delivery in Aboriginal communities. Starting in the late 1970s, the community engaged in a process of unilateral institutional expansion that saw the creation of a number of programs and structures that were not recognized by federal and provincial authorities. These institutions, such as the Survival School or the Peacekeepers rapidly gained legitimacy in the community. The MCK continued this practice in the 1990s, establishing a number of policies openly challenging federal and provincial laws. The membership policy is a case point in this respect.

As the MCK asserted itself and openly challenged state authority in the community, the federal and provincial governments were forced to recognize the existence and legitimacy of Kahnawá:ke's institutions, and instead of imposing the norms and rules established under their own decentralization policies, found themselves negotiating political agreements with the MCK regarding the conditions for the adaptation of their policy framework to Kanawá:ke's realty. The result is a unique model of diffused multilevel governance in which the parties are called upon to coordinate and adapt their respective policies, rules and processes through political accords. Through this mode of governance, Kahnawá:ke expanded its sphere of *de facto* authority and autonomy in a number of policy areas without having to concede or recognize the jurisdictional supremacy of the federal and provincial governments.

Table 7.1 Comparing Patterns of Governance

	James Bay Crees	Kahnawá:ke Mohawks
Formal allocation of authority	JBNQA/Cree-Naskapi Act	*Indian Act*
Representation of the relationship	Rights-based (treaty) entitlements Nation-to-nation Within Canada	Two-Row Wampum Nation-to-Nation Outside of Canada
Logic of governance	Bilateral policy development Flexible and diffused implementation	Separate and competitive policy development coordination through mutual adaptation

Despite the differences in the models of multilevel governance that have emerged in Kahnawá:ke and Eeyou Istchee, they share many elements. In both cases, the federal and provincial governments were progressively brought to engage in policy negotiations in which their had to recognize the legitimacy, expertise and authority of their Aboriginal counterparts. Multilevel governance exercises have thus become important political spaces for the Crees and Mohawks to expand their sphere of authority without altering the formal structure of their governance regime.

A common characteristic of both Cree and Mohawk governance is the increasingly important dissonance between the formal rules of allocation of authority as defined in the *Indian Act* and the JBNQA and the logic of governance as established through time in multilevel exercises. In both cases, hierarchical structures are displaced by new regimes characterized by:

1) The political and institutional assertion of Aboriginal governing bodies as legitimate source of authority of distinct national political communities;

2) The *de facto* and sometimes explicit recognition, by federal and provincial authorities, of this status in policy exercises; and

3) The development of patterns of *interdependence* between Aboriginal, federal and provincial authorities in what are becoming increasingly diffused policy processes, in which no single government has the legitimacy, resource and capacity to impose its own priorities unilaterally.

The evolution of Eeyou Istchee and Kahnawá:ke multilevel governance regimes also suggests a decoupling of what was initially a single (hierarchical) relationship with Canadian authorities, largely with the federal government in both cases, into two bilateral relations with the provincial government and the federal government. Consistent with the observations made above, contemporary Cree and Mohawk governance is not only multilevel, it is also more fragmented. It is in fact more appropriate to talk of double bilateral than trilateral intergovernmental relations in both cases. Specific patterns of multilevel governance are established with different government, based on the division of powers in the Canadian federation.

Patterns of governance also vary from one policy area to another. It has been much more difficult for the Crees to establish their role in natural resource management than in education or policing issues. The importance of resource extraction for the economy of the province largely explains the greater resistance of Quebec to recognize some form of authority to the Crees in the area. Other actors are also involved in natural resource management, notably the forestry industry representatives and, in the case of hydroelectric development, Hydro-Quebec. The presence of these actors has long been an obstacle to the development of bilateral political relations between the GCC and the government of Quebec. It is only with the *Paix des Braves*, in secret negotiations, that those actors were displaced.

The MCK has also been less successful at establishing its own governance rules in the regulation of economic activities. While I do not discuss it in details in the chapter six, the development of an online gambling industry in Kahnawá:ke is a growing point of contention with Quebec authorities, and so is the ongoing cigarette trade industry. In these two cases, Quebec is more sensitive to public opinion and media scrutiny given the controversial nature of the activities. The government has been consequently more reluctant to engage in negotiated compromise or mutual institutional adaptation. No agreement have been reached so far for the harmonization of Quebec and Kahnawá:ke laws regarding these two activities.

This suggests more systematic case studies of Aboriginal governance are needed in order to provide a complete portrait of the emerging model. Policy-specific comparisons could help us make sense of the factors explaining variations between Aboriginal communities for a same area of governance. More systematic comparisons of Aboriginal communities with different institutional relations with the state, with or with or without treaties, under the *Indian Act* or not, but also cross-provinces comparisons, are also certainly necessary in order to test the conclusions reached in this thesis and propose a more fine-tuned theorization of contemporary Aboriginal governance in Canada.

7.4 Federalism from Below?

Going back to the initial question this thesis raised, that is an evaluation of the impact of the changes observed for the broader project of Aboriginal self-determination, what can we concludes from our cases studies? In chapter two, I argued for a relational approach to self-determination that leads to some form of federal association with the

existing state. This federal association can take multiple forms, but its underlying principle should be that of a lasting association of shared rule and self-rule based on free and mutual consent. In a federal relation, I argued, the freely consenting partners are also equal in status, in the sense that none can override the choice of the other partners.

I have also suggested there are two roads to a federal relation. The first, and generally assumed path is through the negotiation of a constitutional agreement creating a formal division of powers between two or more equal orders of governments. From an institutional standpoint, the Canadian federation was created in 1867 with the adoption by the British Parliament of the British North America Act. But from a sociological standpoint, it is fair to argue the Canadian federation existed before 1867 and continued to evolve after that date into a much more complex federal polity. In trying to explain the 1837-1938 rebellions in Upper and Lower Canada, Lord Durham saw "two nations warring in the bosom of a single state,"[315] suggesting the federal nature of Canada as an association of distinct political communities predated its institutional formation.

The second road to a federal relation is through the recognition, in practices of governance, of such a sociological reality. The development of federal-like practices in the absence of formal federal structures can lead to the progressive institutionalization of what becomes *de facto* a federal governance regime. I suggested federal-like governance could emerge "from below", in conventions and practices established through time.

Can the relationship between the James Bay Crees and Kahnawá:ke Mohawks and the Canadian state be defined as a federal relation? In formal terms, it would be hard to argue the current structures of Cree and Mohawk governance are federal. Kahnawá:ke

[315] A copy of the *Report Of Lord Durham On the Affairs of British North America* [1839] is available at http://faculty.marianopolis.edu/c.belanger/quebechistory/docs/durham/ (October 29, 2007).

is still under the formal authority of the *Indian Act*. The structures established under the Act are certainly not the product of mutually consenting and equal partners. Similarly, the James Bay and Northern Quebec Agreement offers little to suggest a federal relationship. The *Paix des Braves* changes nothing to this situation, and it is too early to evaluate what will come out of the framework agreement recently signed with the federal government.

What about the dynamics of multilevel governance discussed in this thesis? Can we conclude that a federal relationship is de facto emerging in practices of governance? The answer must necessarily be nuanced here. The patterns, as discussed, are not systematic in all policy areas. It is also too early to say if the trends observed are permanent or simply the product of a particular conjuncture, namely the politics of recognition in Quebec and neoliberal state restructuring, and will eventually recede if and when governments fully adjust to their changing environment.

That being said, the dissonance observed between the formal structure of Cree and Mohawk governance and the logic and language of multilevel governance exercise suggest an important regime shift is underway. First is the previously discussed recognition of the status of Aboriginal governing authorities. They non longer can be considered creatures of the state. The legitimacy of the GCC and MCK in multilevel governance exercises clearly rests on their status as representatives of distinct political communities, whether these communities are considered within or in parallel to the Canadian constitutional framework.

Second, an important shift, resulting in part from this recognition, is the fact that it would be almost inconceivable for the federal or provincial governments to implement a policy or change a law that has direct impact on the core elements of Kahnawá:ke and

Eeyou Istchee governance without consulting them and, in some case, without negotiating their consent. The *Paix des Braves* certainly set a precedent for Quebec with natural resources extraction in traditional Cree territory in this respect. As the *First Nations Governance Act* episode shows, it is almost impossible for the federal government to impose changes to the *Indian Act* without First Nations consent. A unilateral change in the rules governing the status of the Peacekeepers in Kahnawá:ke would create a major crisis between the MCK and its federal and provincial counterparts.

Of course, there are still a number of areas where changes are made to policy affecting Aboriginal governance with only limited, often after the fact, consultations. Funding for various programs for example is still established largely unilaterally. But the principle of consent is progressively establishing itself in Cree and Mohawk governance.

Third is the question of equality between the mutually consenting partners. Here, the situation is perhaps less encouraging for proponents of a federal model. It would be hard to argue the Grand Council of the Crees or the MCK interact on an equal basis with their federal and provincial counterparts. Despite their stronger legitimacy, newly gained resources and expertise, they still face constitutional governments with the resources, legal apparatus and legitimacy of modern democratic states. The simple fact that governments control the purse strings and impose on Aboriginal governments reporting and accounting requirements that have more to do with internal administrative imperatives than with democratic accountability in the communities suggest relations remain very much hierarchical in the fiscal arena. The imposition of preconditions to negotiations in many policy sectors, such as the respect of the principles of the Quebec

Police Act in both Crees and Mohawk communities, also suggest equality is not quite established as a principle of governance.

That being said, again, we cannot simply conclude the governance regimes of the Crees and Mohawks are simply frozen in colonial times. The growing interdependencies created by the diffusion of the policy process in a number of areas create a new equilibrium in power relations. We are not under a regime of strict equality of status, but neither can we say this is strictly a hierarchical relation. It is perhaps best to see the current transformations along a continuum, between the old colonial model of state-centered governance and a theoretical 'postcolonial' model of federal governance. The James Bay Crees and Kahnawá:ke Mohawks have moved along this continuum, and are today much closer to a federal-type governance regime in their everyday relations with the federal and provincial governments, without being quite there. Whether this 'federalization' of Aboriginal governance will continue remains an open question.

Table 7.2 A Continuum of Regimes

	Colonial/Hierarchical → **Multilevel** → **Federal**		
Formal Authority	Federal/provincial	Federal/provincial	Aboriginal/federal/provincial
Representation of relationship	Administrative (principal-agent)	Distinct and interconnected polities	Distinct and equal polities
Governance logic	Imposition Homogenizing, centrally controlled Interactions are minimal and one-way	Recognition/consent Fragmented and diffused process Interdependencies managed through intergovernmental negotiations	Recognition/consent Each jurisdiction has its own independent policy process Coordination though intergovernmental negotiations

This incremental, yet increasingly significant, reconfiguration of Aboriginal governance towards various forms of quasi-federal regimes certainly doesn't suggest state authority is disappearing or 'withering away' as early analysis of globalization or neoliberal governance might have suggested. In line with contemporary accounts of new forms of governance in other sectors of state activities, this thesis suggests new models of Aboriginal governance must be understood as part of a re-articulation, rather than a dissolution, of state sovereignty. The traditional rational-legal Weberian model is increasingly displaced in practice by more diffused and multilayered governance models in which multiple spheres of authority coexist and compete. Aboriginal peoples are progressively (re)gaining a sphere of authority of their own in this new diffused environment.

There is, as I have pointed out, a paradox to this re-emergence of Aboriginal spheres of authority "form below", in practices of governance. As I discussed in chapter two, an important element of self-determination is the capacity to define independently one's own internal structure of governance. Institutional consolidation is also identified in a number of studies as a core component of Aboriginal self-determination. And both the Grand Council of the Crees and the Mohawk Council of Kahnawá:ke have embarked in internal processes of redefinition of their respective communities' governance structures. The political project of a national government for Eeyou Istchee or the return to traditional governance in Kahnwá:ke are examples of in this respect, and so is the Membership Code in Kahnawá:ke.

The paradox is that the more the GCC and MCK engage in multilevel governance exercises, and the more recognition and authority they gain from their federal and provincial counterparts, the more they come to resemble, behave and operate like modern governments. The two organizations now have complex bureaucratic structures and have adopted the same managerial practices common to municipal, regional, provincial or federal administrations in Canada. They have also embraced the behavior of utility-maximizing actors in what are becoming classic intergovernmental negotiation games with their federal and provincial counterparts. The reinstatement of traditional modes of consensus-based governance has not been successful so far in Kahnawá:ke and the model of national government proposed by the GCC largely mimic existing state structures.

This is certainly not wrong *per se*, these governments, again, are historically situated in contemporary Canada. But one is brought to wonder whether this multiplication of spheres of authority that are essentially complying with and reproducing the norms and standards of Western liberal democratic governance is not, again, a different form of discipline and 'control at distance.' It is thus useful, in conclusion, to remind ourselves once more that the reconfiguration of Aboriginal governance is not a one-way process. It can be both empowering for Aboriginal peoples and at the same contribute to the reproduction of the established structures of the settlers state.

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Appendix A

Resolution of the National Assembly on the Recognition of Aboriginal Rights
Assemblée nationale du Québec, 20 March, 1985

The National Assembly:

Recognizes the existence of the Abenaki, Algonquin, Attikamek, Cree, Huron, Micmac, Mohawk, Montagnais, Naskapi and Inuit nations in Québec;

Recognizes existing aboriginal rights and those set forth in the James Bay and Northern Québec Agreement and the Northeastern Québec Agreement;

Considers these agreements and all future agreements and accords of the same nature to have the same value as treaties;

Subscribes to the process whereby the Government has committed itself with the aboriginal peoples to better identifying and defining their rights—a process which rests upon historical legitimacy and the importance for Québec society to establish harmonious relations with the native peoples, based on mutual trust and a respect for rights;

Urges the Government to pursue negotiations with the aboriginal nations based on, but not limited to, the fifteen principles it approved on February 9, 1983, subsequent to proposals submitted to it on November 30, 1982, and to conclude with willing nations, or any of their constituent communities, agreements guaranteeing them the exercise of:

a) the right to self-government within Québec;
b) the right to their own language, culture and traditions;
c) the right to own and control land;
d) the right to hunt, fish, trap, harvest and participate in wildlife management;
e) the right to participate in, and benefit from, the economic development of Québec so as to develop as distinct nations having their own identity and exercising their rights within Québec;

Declares that the rights of aboriginal peoples apply equally to men and women;

Affirms its will to protect, in its fundamental laws, the rights included in the agreements concluded with the aboriginal nations of Québec; and

Agrees that a permanent parliamentary forum be established to enable the aboriginal peoples to express their rights, needs and aspirations

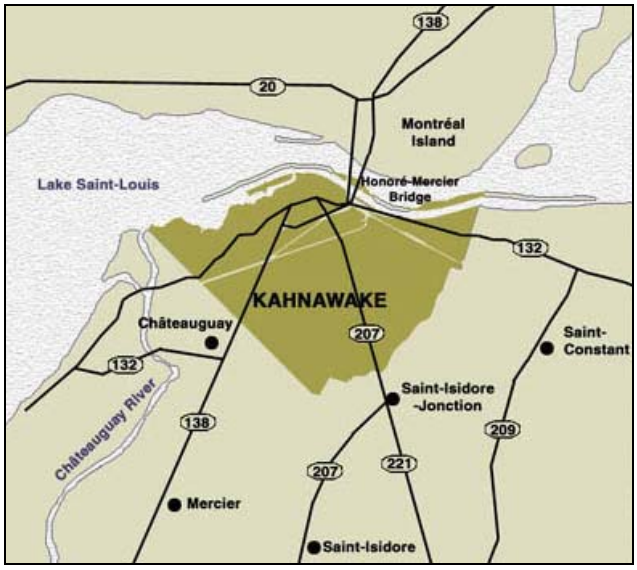
Appendix B

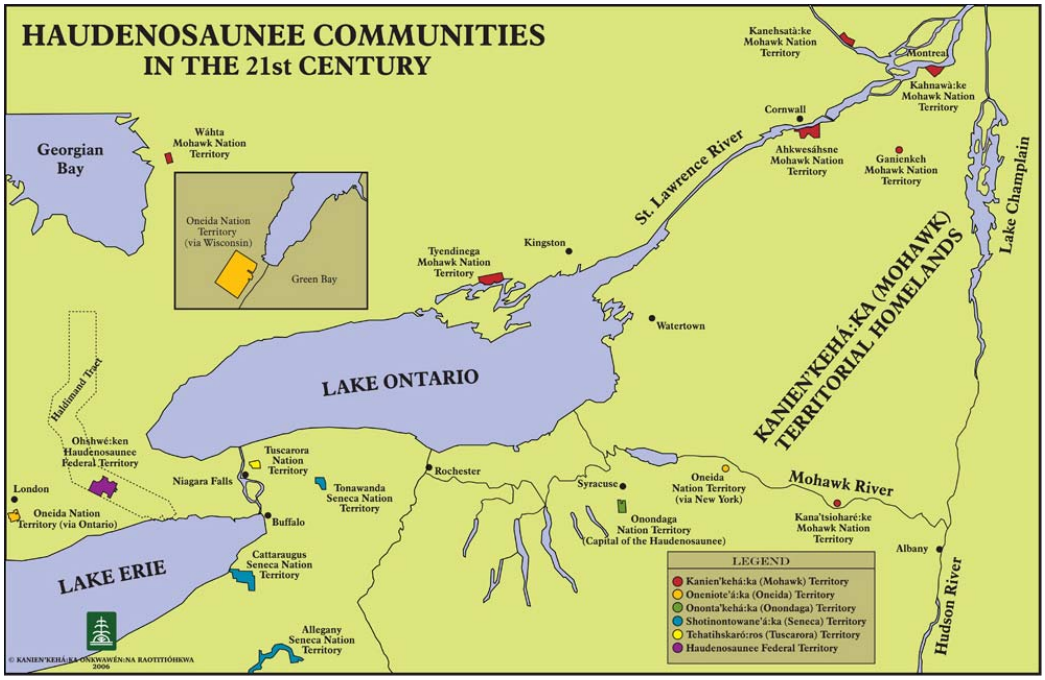
Eeyou Istchee: the James Bay Cree Territories

Source: Grand Council of the Crees (2003)

Appendix C

Kahnawá:ke and Kanien'kehá:ka Territories





Source: http://www.kahnawakelonghouse.com