

SELF-GOVERNMENT IN EUROPE AND CANADA:  
A COMPARISON OF SELECTED CASES

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## ABSTRACT

Efforts to clarify aboriginal rights in Canada have centred around the demand by aboriginal people for a constitutionally entrenched right to self-government but the substance and character of that form of government are not defined.

Comparative political studies have sought to identify possible features of self-government from other political systems. This study observes that in several European countries there are regions with high degrees of local autonomy then compares them to existing Canadian developments, endeavouring to see what might be learned. From Denmark, the Faroe Islands, and from the British Isles, the Isle of Man and Guernsey, are compared with the James Bay Cree (Quebec) and the Sechelt Band (British Columbia) self-governments and the proposed Territory of Nunavut in Canada.

Material was gathered from the literature, from telephone interviews with administrators in the three European jurisdictions, and from personal interviews in Canada.

The nascent Canadian experience with self-government includes many of the features of self-government in the European cases and leads to some optimism. Important issues in Canada such as the multitude of cases and the paucity of resources in some aboriginal communities require further study.

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## CHAPTER I

### INTRODUCTION

#### A. Background

Since the 1960s Canada has sought, through several initiatives, to restructure fundamentally its relationship with its aboriginal population. Out of a complex national dialogue the concept of self-government has emerged as the dominant suggestion for that reorientation. Perhaps its earliest expression was from aboriginal leader George Manuel who wrote in 1974 that "The way to end the condition of unilateral dependence and begin the long march to the Fourth World is through home rule."<sup>1</sup>

By the early 1980s self-government had become the central topic on the aboriginal agenda. In 1984, in the second of four constitutional conferences, aboriginal leaders sought to have the aboriginal right to self-government written into the constitution. The subject further dominated the 1985 and 1987 conferences. In the end, no agreement was reached. Aboriginal leaders wanted an "inherent right" to self-government recognized

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<sup>1</sup>George Manuel and Michael Posluns, The Fourth World: An Indian Reality (New York: The Free Press (Macmillan Publishing), 1974, p. 217. The concept of the fourth world is that indigenous people who have become enclaves in the new European based societies as a result of European colonial expansion retain an independent identity and spirit analogous to the post-colonial people of the third world.

and entrenched but several provincial premiers would not accept such a general right and demanded instead that the specific nature of self-government be set out. Two major difficulties have confronted the premiers' request: first has been the unwillingness of aboriginal leaders to define what they or their communities mean by self-government and, second has been the lack of existing examples in Canada that might serve as points of departure for further discussion.

The failure to define aboriginal government in practical terms has been observed by numerous students of the subject. Sally Weaver has referred to it as a 'value notion' and described it as "...an unarticulated, vaguely conceptualized ideology or philosophy."<sup>2</sup> Roger Gibbins and Rick Ponting similarly point out that "...the literature on aboriginal self-government in the Canadian context is sparse. It is rich in eloquent rhetoric and philosophy but largely lacking in rigorous analysis and specific, concrete proposals."<sup>3</sup> Others have tried to find some order among the generalized ideas in the various proposals and points of view. David Hawkes, in asking what aboriginal self-government means, has reviewed several current ideas and established a classification system for them. However, beyond some

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<sup>2</sup>Sally Weaver, "Indian Government: A Concept in Need of a Definition," in Pathways to Self-Determination: Canadian Indians and the Canadian State, eds. Leroy Little Bear, Menno Boldt, and J. Anthony Long (Toronto: University of Toronto Press, 1984), p. 65.

<sup>3</sup>Roger Gibbins and J. Rick Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada," in The Politics of Gender, Ethnicity, and Language in Canada, eds. Alan Cairns and Cynthia Williams (Toronto: University of Toronto Press, 1986), p. 174.



conclusions about their broad outline he appears to have found no detailed proposals.<sup>4</sup>

In an effort to compensate for the absence of detailed proposals or existing examples in Canada other researchers have looked to other countries, notably the United States, Australia, and Norway,<sup>5</sup> to observe efforts to deal with similar issues. Still others have noted that the historic processes that overwhelmed aboriginal people in Canada were the same as those that led to European colonization in Asia, Africa, and the Pacific. They have gone on to inquire into the decolonization process and the emergence of modern nation states in these areas of the world.<sup>6</sup> While these comparisons can yield valuable insights into the relationship between dominant societies and aboriginal enclaves or into the establishment of new governments particularly in micro-states, there are shortcomings with both these approaches. In the case of aboriginal governments in other European-based societies, these governments are, in many respects, no further articulated

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<sup>4</sup>See David C. Hawkes, Aboriginal Self-Government: What Does it Mean? Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1985a.

<sup>5</sup>See for example: Douglas Sanders, Aboriginal Self-Government in the United States (Background Paper Number 5). Kingston, Ont.: Institute of Intergovernmental Relations, 1985.; Bradford W. Morse, Aboriginal Self-Government in Australia and Canada (Background Paper Number 4). Kingston, Ont.: Institute of Intergovernmental Relations, 1984.; Dyck, Noel, ed. Indigenous Peoples and the Nation-State: Fourth World in Canada. Australia and Norway. St. John's, Nfld.: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985.

<sup>6</sup>Of particular interest here is George Manuel's association with Tanzania -- see his Fourth World (chapter 9, especially pp. 244-9). See also Gibbins and Ponting's references to Pacific Island countries in Cairns and Williams eds. pp. cit. pp. 232-3; also Douglas Sanders, "Aboriginal Rights: The Search for Recognition in International Law," in The Quest for Justice: Aboriginal Peoples and Aboriginal Rights. eds. Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985a).

and developed than is the situation in Canada<sup>7</sup> so that the consequences of policies and practices are not yet fully revealed. With newly independent states in Africa or the Pacific there is the fundamental fact that as independent states no other government retains a legal, pragmatic, or moral obligation to ensure their good governance. The critical relationship between the dominant and the subordinate that characterizes communities aspiring to self-government in Canada is absent in these newly independent states.

It is a common qualifier that the insight provided by political comparisons is limited by the differences between polities. However, it is suggested here that a category of self-governments that suffers from neither of the limitations mentioned above are those that exist within the constitutional framework of several European states. There are seven such examples, all islands or island groups, which have varying degrees of local autonomy.<sup>8</sup>

A comparative study of some of these political communities can provide several benefits to the understanding of choices available as political solutions in Canada. Gibbins and Ponting have enumerated some of the benefits which would result from comparative analysis thus: "[f]irst, it would

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<sup>7</sup>See Douglas Sanders, Aboriginal Self-Government in the United States (Background Paper Number 5) (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1985), pp. 54,60; also Bradford W. Morse, op. cit. pp. 84-5, 109.

<sup>8</sup>These are: Faroe Islands (Denmark)

Isle of Man (British Isles)

Channel Islands (British Isles) Corsica (France)

The Canary Islands (Spain)

The Azores (Portugal)

The Aland (pronounced O-land) Islands (Finland)

Source: Allan McArtney, ed., Islands of Europe. (Edinburgh: Unit for the Study of Government in Scotland, Open University of Scotland, 1984).

sensitize Canadians to a large inventory of institutional innovations.... Second, it could loosen the bonds of ethnocentrism which have restricted Canadian debate on aboriginal self-government. ... Third, it could demonstrate that significant institutional change can occur without the aboriginal [or self-governing] tail wagging the non-aboriginal [or central government] dog."<sup>9</sup>

On a more abstract level this view is supported by Arend Lijphart who asserts that "...descriptive case studies do have great utility as basic data-gathering operations and can thus contribute indirectly to theory-building."<sup>10</sup> Consistent with Lijphart's approach, this paper, while presenting descriptive material and answering questions of immediate relevance to Canada also endeavours to establish some definitive characteristics of self-government.

## **B. Subjects of the Comparison**

The European subjects of the comparison to follow are the Faroe Islands, the Isle of Man, and Guernsey, with an additional special reference to Sark.<sup>11</sup>

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<sup>9</sup>Gibbins and Ponting in Cairns and Williams pp. cit., p. 231.

<sup>10</sup>Arend Lijphart, "Comparative Politics and the Comparative Method," American Political Science Review 65 (September 1971), p. 691.

<sup>11</sup>The Channel Islands comprise four self-governing communities: Guernsey, Jersey, Alderney, and Sark. Guernsey and Jersey are independent of each other while Alderney and Sark have a relationship with Guernsey somewhat analogous to the relationship which Guernsey has with the United Kingdom, of which none of these islands is a part.

The present analysis would become very complicated, with little gain in insight, if it attempted to deal with the various relationships in the archipelago. The work will concentrate therefore on Geurnsey, with special reference to Sark.

The Faroes were, until 1948, a county of Denmark but with the passage in that year of the "Home Rule" Act they achieved self-governing status. The Isle of Man and Geurnsey have a special relationship with the British Crown that dates back to the medieval period. They are not part of the United Kingdom (UK), though that country retains consitutional responsibility for the "good government" of the islands and the Privy Council (not the House of Commons) can overrule the local legislatures.<sup>12</sup>

The three Canadian examples comprise of two Indian groups for whom specific self-government legislation has been passed thus far and the Inuit proposal for Nunavut, a self-governing territory in the eastern Arctic. The Indian groups are the Cree-Naskapi of Quebec<sup>13</sup> and the Sechelt of British Columbia. Though legislation has not established the proposed territory of Nunavut the federal government has given its agreement in principle<sup>14</sup> and considerable detail has been worked out on the powers and activities of its government.

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It would not be possible to understand Sark's status without also describing Guernsey so Guernsey rather than Sark has been chosen as the principal example. However Sark, with a population of about 550 and a land area of approximately 1200 hectares, is comparable in size to many aboriginal communities in Canada and therefore deserves special attention.

<sup>12</sup>Royal Commission on the Constitution (UK), (London: Her Majesty's Stationery Office, 1973), p. 410.

<sup>13</sup>The James Bay and Northern Quebec Agreement, which gives certain measures of self-government to the Quebec Cree, includes the Inuit of northern Quebec. They will not be dealt with in this paper.

<sup>14</sup>Nunavut Constitutional Forum, Building Nunavut (1983), p. 5. This commitment was made by the previous government and there is now less optimism that it will take place. (See Peter Jull, "Building Nunavut: A Story of Inuit Self-Government," The Northern Review 1 (Summer 1988): 59-72.)

## C. Objectives of the Analysis

This analysis will examine the salient features of self-government in the European cases and compare and contrast them to the situation in Canada. Since the European cases studied have had self-government of relatively long-standing and have been "successful" inasmuch as they have satisfied local needs without damaging the integrity or stability of the central government, they can assist in answering questions that Canadians may have about self-government.

In general, it can be asked what the features of self-government are and, given the stability of the European cases, whether self-government might similarly "succeed" in Canada. Such lessons can be broadly subdivided into those in which Canada can be reassured in its approach to self-government and those in which there are new ideas and insights that might be acquired.

Several specific questions about the prospects and opportunities of self-government in Canada are answered in this comparison. These questions relate to the nature of central authority, the management of conflict, the nature of citizenship for members of the self-governing community as well as for the members of the larger society, participation in federal and provincial franchise, the fiscal independence of self-governing bodies, the nature of local versus federal and provincial taxation, the efficiency of governments in small communities, and the means available to self-governing communities to protect their values and interest.

## **CHAPTER II**

### **THE CONTENTS OF THE COMPARISON**

In the absence of an authoritative definition of self-government, the concept will be taken to mean for present purposes, a level of government which has powers delegated from the central government; are not constitutionally entrenched but which are usually established in special legislation and embody an contract of sorts between the central government and the self-governing community; and whose powers are broader than those commonly given to municipalities and may extend to participation in foreign relations.

In order to compare cases of self-government between Canada and Europe it is necessary first to delimit the topic according to the proposed areas of study and those topics which will not be addressed.

#### **A. What is Being Compared**

The following six topics, with some important sub-categories, were selected from the many that appear in the literature as the ones of greatest salience.

i) Objectives of Self-Government

The aspirations of the self-governing community will be identified and examined to determine whether the goals of self-government are fulfilled by the powers and responsibilities that it has been granted.

ii) Legislatures, Structures, and Representation

The structure of the legislatures, rules for the selection of official positions, and the role and selection of central government or officials will be examined. These matters indicate the degree to which a community is self-governing, the nature of its membership, and the solutions to some of its specific administrative problems.

iii) Powers of Self-Government

The powers of self-governing bodies will be listed to illustrate the range of those powers and the extent to which a community may govern itself and the degree to which control is retained by the central government.

iv) Citizenship

Questions of whether national citizenship is weakened by the existence of self-government and whether there is a competition for loyalty are central to the debate about self-government. Without attempting to construct an authoritative definition of citizenship this study addresses such aspects as legislative responsibility for citizenship, the authoritative and symbolic nature of passports, the ambit of civil rights legislation, the ease of movement, economic and political participation in all parts of the national realm, and the opportunity to receive benefits from the state.

v) Fiscal Relations

This category of comparison is essentially concerned with central government subsidies to self-governing bodies and the extent of control that each government has in how those monies are spent.

vi) Constitutional Relations

To distinguish self-government from sovereign independence or the constitutional sovereignty of a federal unit this analysis seeks the location of the ultimate constitutional authority for each of the cases considered. In addition, to reveal the nature of the relationship between central government and self-governing body, the means for settling disputes is examined.

## **B. What is Not Being Compared**

There are many topics which relate to self-government proposals in Canada. Many are beyond the scope of this paper. Particular note is made of the following four, however, as one commonly in the public debate but which will not be addressed here.

i) Aboriginality

The emphasis of this comparison is on government -- its powers, loyalties, constitutions, and its other features -- and not on aboriginality. In the Canadian context aboriginality occupies a major portion of the national discussion on self-government since it is aboriginal people who seek control of their own communities. The subject of aboriginality however encompasses a wide range of topics such as traditional forms of government, compatability between traditional aboriginal philosophies and that of liberal democracy, the legal-constitutional basis for aboriginal claims and the relationship between



dominant and minority ethnic groups. This analysis will concentrate on the civil character of self-government and consider aboriginal features only as they distinctly affect the principles of self-government.

ii)           The Aboriginal Diaspora

Large numbers of Metis and non-status Indians are without a land base and at present have little prospect of acquiring one. Nevertheless they too have been included in self-government discussions. Some imaginative proposals have been put forward for types of self-government to address their particular situation but at present serious proposals for self-government relate only to those groups with a land base. Since this analysis addresses three Canadian groups who do have a land base its content and conclusions will be limited to self-government ideas as only they relate to such groups. Proposals relating to Metis and non-status Indians will therefore not be included.

iii)           Sovereign Independence

In keeping with the proposed definition of self-government at the opening of this chapter, this discussion will not include ideas of sovereign independence. Although some of Canada's aboriginal leaders seek sovereignty for their communities this paper will not attempt to examine the relationship between sovereign micro-states and their neighbours.

iv)           Economic Viability

An area of frequent concern in the discussion of self-government is the economic viability of small communities attempting to manage their own affairs. This is an enormous topic and although it is intricately related to the

problem of self-government it is outside the scope of this study and must be reserved for further research. Some inferences relevant to this topic may be drawn in the discussions of fiscal relations between self-governing bodies and central governments that follow. However, those discussions are meant to reveal aspects of the political and constitutional relationship between these governments and not to conjoin the discussion of economic viability. It may be sufficient to note that none of the Canadian aboriginal communities reviewed are currently economically viable and that all are recipients of various subsidies from the federal government.

### **C. Differences in the Subject Cases**

In the ideal comparative study the countries being compared would be similar in all characteristics except the features one seeks to study. As Lijphart suggests, such cases "...offer particularly good opportunities for the application of the comparative method because they allow the establishment of relationships among a few variables while many other variables are controlled."<sup>15</sup> In practice however cases for study do not fall neatly into conformity with the method.

In this study several important variations must be kept in mind. One of these differences is that the European examples are all islands or island groups whereas the Canadian ones are almost all contained within the main body of Canada's land mass. While islands may present special circumstances that facilitate self-government, the questions to be addressed in the present analysis, such as the nature of citizenship, constitutional

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<sup>15</sup>Lijphart, *op. cit.*, p. 687.

relationships and the extent of powers are not immediately dependent on the insular character of the territory.

A second important difference between the Canadian and European cases is population. As the following table shows the European populations are considerably larger than the Canadian ones.

Population size

### POPULATIONS

(Approximate)

<b>Europe</b>		<b>Canada</b>	
Faroe Islands	45,000	Sechelt Band	500
Geurnsey	58,000	Nunavut	15,000
Isle of Man	65,000	Cree-Neskapi	10,500

Population size can affect the potential economic viability of the self-governing community can influence the costeffectiveness of administration and service delivery. Some Canadian studies have suggested minimum sizes<sup>16</sup> that correspond to the populations of the European cases, suggesting that the Canadian cases are too small to be efficiently self-governed. While this issue may be the threshold on which self-government will stumble there is some evidence to suggest that cooperative arrangements with other governments and contracting of services to the private sector allow for efficient service delivery even in very small communities. This topic requires separate attention and can be only partially addressed here. The island of Sark, although not a principal case for this study, will be discussed in order

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<sup>16</sup>See Hawthorn, H.B., et al. A Survey of the Contemporary Indians in Canada. Chapter XIV "Indian Local Government" (Ottawa: Report submitted to the Honourable Arthur Laing, Minister of Indian Affairs and Northern Development, 1966), pp. 263-93; also Alan Cairns, "Aboriginal Self-Government and Citizenship," (unpublished paper, 1987), pp. 23-4.

to provide a limited comparison with Sechelt. The essential question with respect to self-government, however, is whether the home or the central government should decide how to allocate local budgets.

In Canada there are almost six hundred aboriginal groups that could seek some degree of self-government and which would require some form of structured liaison between themselves and the central government. In Denmark there are but two such groups<sup>17</sup> while in Britain there are five. The complexity of the relationships between the central government and the self-governing groups in Canada will therefore be considerably greater.

Another difference between Canada and the European nations under consideration is that the latter are both unitary states while Canada is a federation. This also complicates the situation in Canada and means that self-governing communities must deal with provincial governments as well as with the federal government.

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<sup>17</sup>The Faroe Islands and Greenland are both self-governing parts of the Kingdom of Denmark.

## CHAPTER III: THE EUROPEAN CASES

### A. THE FAROE ISLANDS (DENMARK)

The Faroe Islands, situated in the North Atlantic Ocean north of Scotland and between Norway and Iceland, are about 1400 square kilometres in area and are surrounded by a 200 nautical mile exclusive economic zone. The current population is approximately 45,000. The islands were settled by Norsemen in about the ninth century A.D. At first these settlers had an independent free state but they later fell under Norwegian and finally Danish rule. Except for some Danish traders, the archipelago was mostly ignored and the population retained its distinctive language, the medieval Norse system of land tenure, and in some limited respects, its original parliament as a local council.

The modern history of the islands begins with the Danish constitution of 1849 when the ancient parliament, which had been abolished in 1816, was revived as a county council.<sup>18</sup>

Throughout the second half of the nineteenth century and the first half of the twentieth Faroese nationalism developed as the language came to be

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<sup>18</sup>Arni Olafsson, "The Faroe Islands," in Islands of Europe, ed. Allan Macartney (Edinburgh: Unit for the Study of Government in Scotland, Open University of Scotland, 1984), p. 26.

written, a small literature developed, and political parties grew to contest the local elections as well as the election of Faroese members to the Danish parliament.

During World War II, when metropolitan Denmark was occupied by German forces, the internal government was left entirely to the local authorities by the British who established a small garrison to defend the islands. After the war the Faroese leadership was reluctant to return to the pre-war relationship with Denmark and wanted a greater degree of autonomy. While Denmark preferred the old constitutional order it was prepared to negotiate a new arrangement with the Faroese and constitutional discussions began in January 1946. After strong disagreement among the local Faroese parties, an inconclusive referendum, and elections for the local legislature in which no party was a clear winner, it was concluded that "...while the Faroese wanted a larger measure of home rule than the Danes had hitherto been willing to offer them, they did not want complete secession from Denmark."<sup>19</sup> This decision led to the Faroe Islands becoming "...a self- governing community within the Danish kingdom..." by the "Home Rule" Act of March 1948.<sup>20</sup>

The Faroes legislature is elected by adult suffrage on a proportional representation basis for four years. The number of seats varies from 27 to 32 in order to reflect more accurately the proportional strength of the parties. The legislature then elects the head of government and the "cabinet."<sup>21</sup>

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<sup>19</sup>John F. West, Faroe: The Emergence of a Nation (London: C. Hurst & Co., 1972), p. 190.

<sup>20</sup>Ibid., p. 191.

<sup>21</sup>Olafsson in Macartney, op. cit., p. 30.

The "Home Rule" Act provides for at least two Faroes members to be elected to the Danish parliament. On matters affecting the Faroes but still within Danish control all proposed legislation must be approved by the Faroes legislature before being promulgated. Danish government interests on the Faroes are represented by a state commissioner<sup>22</sup> who has considerably less power than the previous governor. The state commissioner is a Danish person appointed by the Danish Prime Minister without consultation with the Faroese. Faroese interests are also taken into account in foreign relations by the requirement in the "Home Rule" Act to have a Faroese representative in the Ministry of Foreign Affairs for participation in international negotiations, such as fisheries or trade, which may affect the Faroes.<sup>23</sup>

The Act also provides for a mechanism to settle disputes that may arise between the Faroese and the Danish governments. This procedure would involve a commission comprising two members appointed by each the Danish government and the Faroese government and three High Court judges. If the four government members cannot reach agreement, the three judicial members will decide the issue.<sup>24</sup>

The basic principle of the "Home Rule" Act is that local matters are within the competence of the local popularly elected legislature. The Act sets out two lists of matters for consideration as "local," List A and List B. List A consists of affairs which are clearly local and may be transferred to Faroese

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<sup>22</sup>West, op. cit., p. 192.

<sup>23</sup>Arni Olafsson, pers. comm.

<sup>24</sup>West, op. cit., p. 191.

jurisdiction at the request of either the Faroese legislature or the Danish government. Powers and responsibilities not explicitly mentioned in the "Home Rule" Act cannot be transferred and remain within the control of the Danish government. These include defence, foreign relations, the courts, civil rights, civil and criminal law, and monetary matters (although Faroese bank notes, interchangeable with Danish notes, are circulated in the islands).<sup>25</sup> The following list provided by John West illustrates the areas of responsibility from List A which the Faroese government took over as soon as the legislation was passed the:

1. Local constitutional arrangements.
2. Municipal and parish council affairs.
3. Housing regulations and fire brigades.
4. Pharmacy.
5. Labour, employment, and apprenticeship regulations.
6. Direct and indirect taxation.
7. [Government revenue] other than from taxation.
8. Harbour dues.
9. Archives, libraries, and museums.
10. Preservation of buildings and of the countryside.
11. Communications, including the telephone system, but excluding the post and telegraph systems; and the electrical supply.
12. Agricultural affairs; fishing within territorial waters.
13. Licensing of theatres and cinemas, entertainments; public subscriptions; wreck (sic); lost property; poisons; explosives, weapons.

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<sup>25</sup>Olafsson, *op. cit.*, p. 29.



14. Regulations concerning food supplies, price control, rationing, regulations concerning intoxicants; trade regulations; registration of ships; insurance; and various miscellaneous trade functions.
15. Public trustee's office; publication of laws; tourism, regulations concerning printed matter; regulations concerning local time; rights of equality between men and women; the folk high school; the school of navigation.<sup>26</sup>

List B contains matters in which there is a joint interest and which can only be transferred after further negotiations. West provides the following selection from this list:

1. The established church;
2. The police;
3. Mineral resources, radio and aviation;
4. Administration of Crown lands;
5. The control of imports and exports.

The Faroes government has, since 1948, taken over control of local broadcasting and import and export control.<sup>27</sup> In 1976 the postal service passed to local control and the Faroes currently issues its own postage stamps.<sup>28</sup> In addition Faroese became the official language of the islands although Danish is also taught in schools. The Faroe Islands also has its own flag which is flown on all Faroes government buildings and on Faroes registered ships at sea, while the Danish flag is flown on Danish government buildings on the islands.<sup>29</sup>

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<sup>26</sup>West, op. cit., pp. 199-200.

<sup>27</sup>Ibid.

<sup>28</sup>Olafsson, op. cit., p. 35.

<sup>29</sup>West, op. cit., p. 197.

Although foreign relations remain among the Danish government's powers there are two important areas where the Faroes government has been able to expand its influence. One is the subject of membership in the European Community (EC). When Denmark entered the EC in 1973, its membership did not include the Faroes. In 1974 the Faroes government declared that it would not accept Danish authority to include the Faroes in the EC at a later date. The Danish government accepted this position and a special trade arrangement was subsequently struck between the Faroes and the EC. The Faroese government's reluctance to join the EC is based on its desire to protect the islands' fishery resources which otherwise would have been managed according to the common EC policy. By the existing arrangement the Faroes have access to Danish markets separately from the common EC tariff and retain independent control of their fishery and other local matters, such as labour legislation.<sup>30</sup>

The other area of foreign relations where the Faroese government has extended its influence also concerns the fishery. Control over a maritime exclusive economic zone was established in two stages, first to twelve-miles and later to the current 200 nautical miles. Although initiated by the Faroese, these extensions were made under the authority of the Danish government. This has also led to the participation of the Faroes government, in cooperation with the Danish, in international fisheries treaties with the EC, the Soviet Union, and the United States. The Faroes regularly attends international fishery conventions for the North Atlantic. Faroese people are

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<sup>30</sup>Arni Olafsson, "Facts about Denmark: The Faroe Islands," pamphlet published by the Royal Danish Ministry of Foreign Affairs, Copenhagen, 1987, p. 10.

full citizens of Denmark and have the right to move freely and take up residence and employment in metropolitan Denmark. While there is a single Danish passport, those issued in the Faroes have the words "Faroe Islands" and "Faroese" in addition to the words "Denmark" and "Danish."<sup>31</sup> This distinction is based on geography rather than on identity, however, as individuals normally resident in the Faroes will receive a regular Danish passport if it is issued in metropolitan Denmark.<sup>32</sup>

Features of the mobility of Faroes residents suggest a relatively seamless concept of citizenship. For example a student going to university in Denmark is not required to pay costs different from those paid by other Danish citizens nor is the Faroes government expected to compensate the Danish education ministry. A similar arrangement used to apply to specialized medical treatment but a new agreement will require the Faroes government to reimburse the Danish health ministry for these services.

As pointed out above, the courts remain exclusively under Danish jurisdiction as do civil and criminal law. Moreover, prisoners with sentences longer than six months are incarcerated in metropolitan Denmark.<sup>33</sup> Nevertheless, there is a separate legal code in the islands for land tenure which derives from the Faroes medieval Norwegian heritage. Commercial law is frequently different from that of the rest of the country as this matter is within the Faroes government's jurisdiction.

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<sup>31</sup>West, *op. cit.*, p. 193.

<sup>32</sup>Olafsson, *pers. comm.*

<sup>33</sup>*Ibid.*

The "Home Rule" Act established that in those areas of local competence for which the Faroes government chooses to legislate it is to be responsible for all expenses. In practice however the Danish government has continued to subsidize Faroese administration since 1948. Over this period the subsidy has been at a consistent level of approximately 30% of the Faroes government budget and about 12% of the local gross domestic product. Originally the subsidy was administered by allocating funds to specific budget items. Now, however, subsidy funding is allocated in the form of a block grant which is at the disposal of the Faroes government. The grant increases according to an index of inflation. Although one of the Danish political parties has tried to raise the issue of this continuing subsidy it has not generated significant attention in the public debate.<sup>34</sup>

Although the Faroes remain constitutionally part of the Kingdom of Denmark and in some areas of jurisdiction authority remains with the Danish government, there is some uncertainty about the constitutional position of the "Home Rule" Act, which is an ordinary act of the Danish parliament. That body would, therefore, have the theoretical prerogative of changing it without consultation with the Faroese. On the other hand, the preamble to the Act is worded in such a way that negotiations may be required before any changes can be made. Complicating the issue even more is the Danish constitution itself, which defines Denmark as a unitary state. It is, nevertheless, definitely Danish government policy to honour the spirit of the Act and to ensure that consultation and negotiations occur at all necessary points. Evidence of this approach is found in the fact that the

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<sup>34</sup>Ibid.

disputes settlement mechanism established in the Act has never been used in the forty years of the Act's existence.

## **B. Guernsey and Sark (Channel Islands -- British Isles)**

Guernsey and Sark are two of the Channel Islands, a small archipelago which lies within 30 kilometres of the coast of France and 130 kilometres from England. Guernsey is 63 square kilometres in extent and currently has a population of approximately 58,000. Sark is considerably smaller, being 13 square kilometres in area and having a population between 550 and 600.

The islands were part of the Duchy of Normandy when William the Conqueror invaded England in 1066. After the English were driven from continental Normandy in 1204 the islands remained loyal to the English crown and are the only surviving part of the ancient Duchy. There are two separate Bailiwicks, that of Jersey and of Guernsey, each with a Lieutenant Governor representing the British crown, and each having an independent relationship with the monarchy and its government in London. The Bailiwick of Guernsey is slightly the smaller of the two and includes the islands of Alderney and Sark each of which, in turn, has its own legislature, limited judiciary powers, and through the Lieutenant Governor on Guernsey an independent relationship with the United Kingdom (UK). Alderney and Sark also have a partially dependent relationship with the States (legislature) of Guernsey.<sup>35</sup>

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<sup>35</sup>United Kingdom, Royal Commission of the Constitution (London: Her Majesty's Stationery Office, 1973), p. 408.

The constitution and powers of the States of Guernsey are the product of its independent evolution out of its original status as part of the Duchy of Normandy. These powers are neither conferred, devolved nor delegated from the UK. The prerogatives of the States as separate from England or the UK have been repeatedly confirmed as in the 1559 Charter of Queen Elizabeth I and such Acts of the UK Parliament as those in 1714, 1876, and 1952.<sup>36</sup> In 1973 the UK Royal Commission on the Constitution found that the existing relationships were by and large satisfactory.

Unlike self-governing communities whose powers have been granted relatively recently it is meaningless to talk about the objectives of self-government for Guernsey. It has never been constitutionally part of England or the UK and its own constitution has grown and evolved over the past eight centuries to meet its own needs and conditions. Much the same can be said for Sark except that the initial permanent settlement of the island was on the instructions of Queen Elizabeth I in order to prevent the island being used as a haven for pirates. The islands are conscious of their distinctiveness and while loyal to the Crown jealously strive to preserve their autonomy.

Guernsey's government is a complex mixture of ancient forms and modern practices. The UK Royal Commission (1973) said of governments of the Channel Islands and the Isle of Man that they were

...unique and not capable of description by any of the usual categories of political science. [They were] full of anomalies,

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<sup>36</sup>Ernest Shanks, "The Channel Islands," in Islands of Europe, ed. Allan Macartney (Edinburgh: Unit for the Study of Government in Scotland, Open University of Scotland, 1984), p. 73.

peculiarities and anachronisms, which even those who work the system find it hard to define precisely.<sup>37</sup>

The States, or legislature, is headed by the Bailiff, who is appointed by the Queen, and comprises twelve Conseillers elected by an electoral college, thirty-three popularly elected People's Deputies, one representative from each of the ten parish councils and two representatives from Alderney<sup>38</sup> (but none from Sark).<sup>39</sup> Rather than a cabinet, a series of committees, chaired by members of the States, administer the island.

Sark has its own assembly called the Chief Pleas. It is headed by the hereditary Seigneur and contains in addition his or her deputy, the Seneschal, the forty hereditary tenants from the original land grants, and twelve popularly elected People's Deputies.<sup>40</sup> As in Guernsey the administration is conducted through committees. The Queen's formal representative on the islands is the Lieutenant Governor. The Bailiff is also appointed by the Queen, as are the Attorney-General and the Solicitor-General. While the Bailiff may have the casting vote in the legislature the latter two may not vote, though they can sit.<sup>41</sup> Channel Islanders do not vote in UK elections nor do they send representatives to the UK Parliament.

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<sup>37</sup>Royal Commission, p. 441.

<sup>38</sup>Alderney was evacuated during World War II and occupied by the German army. After the war the island had to be rebuilt, the costs for which were assumed by Guernsey. As well Guernsey provided some social services. For these reasons Alderney has representation in the States of Guernsey. See Shanks op. cit., pp. 78-9.

<sup>39</sup>Shanks, op. cit., pp. 76-7.

<sup>40</sup>Ibid., p. 80.

<sup>41</sup>Ibid., p. 76.

Guernsey has legislative powers in all areas of law, including criminal law, and control of administration and social services for matters within her borders. Notwithstanding this autonomy, all bills of the Guernsey and Sark legislatures, except local ordinances, must be reviewed by the Privy Council in London and receive royal assent. The islands' contact with the UK government is through the Home Office which also directs all communication with the Privy Council. The Home Secretary is the Privy Councillor responsible for relations between the UK and the islands.<sup>42</sup> Although Guernsey has its own courts the highest court of appeal remains the Judicial Committee of the Privy Council in London. Defence and foreign relations also remain within the exclusive jurisdiction of the UK.

Although Guernsey has powers in such areas as education, health and criminal justice, there are extensive cooperative links with the UK. The school curriculum is borrowed from or modelled on UK curricula and UK text books are used. Guernsey school graduates may go on to university in the UK although the Guernsey government compensates the UK treasury for the cost. Criminals incarcerated for longer than six months are also sent to the UK, a service for which Guernsey also pays. In health matters there is a reciprocal agreement whereby the many UK tourists to Guernsey may receive health care on the island and Guernsey residents in the UK have similar access to health service.

Sark has a similar range of powers except that Guernsey legislates for it on criminal matters. Bills go to the Privy Council for review and royal assent while local ordinances may be overruled by Guernsey. The

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<sup>42</sup>Royal Commission, p. 408.



administrative and social services on Sark are modest and many medical, educational, and judiciary services are provided by Guernsey.<sup>43</sup>

As a result of views expressed to there was a proposal for to resolve disputes that may arise with the Channel Islands or the Isle of Man. There is no formal mechanism to resolve disputes that might arise between Guernsey and the UK. The Royal Commission proposed a Council of the Islands as such a measure in 1973. The proposal was not adopted, however. The proposed council would have had a chair and two other independent members with the UK government and the island government collectively appointing each as many as six members.<sup>44</sup>

Although foreign relations are indisputably a prerogative of the UK, the islands have an important influence in affairs which may affect their domestic interests. This is particularly the case where the division between matters of domestic and foreign concern is not as clear as it once was. Multilateral agreements, which in many cases require that domestic legislation be brought into line with the terms of a particular agreement, have blurred the line between the UK's non-interference in Guernsey affairs and its prerogatives in foreign relations. The most important such agreement is the Treaty of Rome, the basis of the European Community (EC), which requires that all its terms apply to all European territories for whose external relations its members are responsible. The several self-governing islands around Britain's shores were concerned about the effect entry to the EC would have on their autonomy and their economies. Throughout their

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<sup>43</sup>There is a one-room school and a one-person jail. There is no hospital on Sark.

<sup>44</sup>Royal Commission, p. 459.

negotiations with the EC the United Kingdom consulted with the islands and, although island representatives were not included in the UK delegations, the concerns of the islands were presented and eventually a special arrangement was made for the Channel Islands and the Isle of Man whereby the common external tariff and the free movement of industrial and agricultural goods would conform to the Treaty of Rome while the movement of persons and capital and the harmonization of taxation and social policy would not.<sup>45</sup> This is only one of many examples where the UK government has consulted island governments when international treaties might affect them.

The concept of citizenship for Guernsey is complex. The residents are subject to the nationality and citizenship legislation of the UK although they are separately described as "citizens of the UK, Islands, and Colonies" (emphasis added).<sup>46</sup> They may carry separate passports which are issued by the Lieutenant Governor on Guernsey. These passports are, however, indistinguishable in format and symbols from a UK passport and are distinct only in having words identifying Guernsey as the point of issue.<sup>47</sup> As noted earlier, Guernsey residents do not vote in UK elections nor send representatives to the UK Parliament. Neither do they pay taxes to the UK treasury nor receive direct benefits from it. On the other hand they can

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<sup>45</sup>Ibid., pp. 415-20, 463.

<sup>46</sup>David Kermode, "The Isle of Man," in Islands of Europe, ed. Allan Macartney (Edinburgh: Unit for the Study of Government in Scotland, Open University of Scotland, 1984), p. 43.

<sup>47</sup>The Guernsey passport is issued by the Lieutenant Governor in the same manner as they are in the Isle of Man. The information here is an extension of that received for the Isle of Man.

travel freely to the UK and take up residence or employment and receive social benefits there. This freedom of movement is relatively skewed however as Guernsey has both residence and employment restrictions that enable it to control the inflow of migrants.<sup>48</sup> On Sark a prospective immigrant must get a licence from the Siegneur to reside on the island.<sup>49</sup>

Fiscally, both Guernsey and Sark are completely independent and self-supporting, receiving no funding or grants from the UK government. Only in an indirect sense does the UK financially assist the islands by providing for defence and international representation for which the Channel Islands make no financial contribution.<sup>50</sup> The constitutional position of the islands is that they are "...dependencies of the Crown; they are neither part of the UK nor colonies."<sup>51</sup> As the surviving part of the Duchy of Normandy they owe allegiance to the Sovereign as the formal successor to the Duke of Normandy. Communication between the Crown and the islands is through the Privy Council and not through the UK Parliament. However, the Crown retains, by constitutional convention, ultimate authority to ensure the "good government" of the islands. Although it cannot be said whether a constitutional convention has lapsed until it has been tested, it was argued by some of the speakers who appeared before the Royal Commission (1973) that this power had been forfeited for lack of use. The Home Office argued in reply that the power remained the prerogative of the Crown. However this

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<sup>48</sup>"Government of Guernsey, pamphlet entitled "Information for Prospective Residents."

<sup>49</sup>Shanks, *op. cit.*, p. 80.

<sup>50</sup>*Royal Commission*, p. 462.

<sup>51</sup>*Ibid.*, p. 408.

matter is not a difficulty since relations between the governments and their respective communities is harmonious and has not required intervention or such mediation measures as the proposed Council of the Islands.

### **C. The Isle of Man (British Isles)**

The Isle of Man lies in the Irish Sea midway between England and Ireland. The island is 572 square kilometres in size and currently has a population of 66,000. The island was part of medieval Norse and Scottish kingdoms until it passed into the control of the English crown in the fourteenth century. For almost four hundred years it was ruled by the Earls of Derby and the Dukes of Atholl until power was revested in the Crown in the nineteenth century. Throughout its long history as part of various kingdoms it has always had some delegated authority and been able to manage some of its own affairs.<sup>52</sup> However, it was in 1866 when the modern self-governing nature of the island began with an act of the UK Parliament separating Manx<sup>53</sup> and UK revenues.<sup>54</sup> While this was followed by a series of devolutionary acts, the pace of the transfer of powers increased in 1958 and afterwards.<sup>55</sup>

The Isle of Man government has actively campaigned for increased devolution of powers. In the nineteenth century its ambitions were to have greater control over its own expenditures but as its level of legislative

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<sup>52</sup>Kermode in A. Macartney, ed. op. cit., p. 43.

<sup>53</sup>For the Isle of Man, "Manx" is the adjective. "Mann" can also be used as a noun to denote the island.

<sup>54</sup>Royal Commission, p. 410.

<sup>55</sup>Kermode, op. cit., pp.46-9.

competence increased and its economy became more complex as a result, it has sought wider powers, particularly in economic matters, and increased authority for the local executive. Of all the submissions from the self-governing islands to the 1973 Royal Commission, that from the Manx government requested the greatest changes to the existing situation.

The Isle of Man's parliament, the bicameral Tynwald Court, is of Norse origin and dates from the tenth century. The upper chamber, the Legislative Council, has changed in recent years from one consisting of appointed members to one wherein the majority of members are elected from the lower chamber. This change illustrates not only an increase in representative government but also a movement away from government by royal appointments toward greater control by the island's residents. The lower house, the House of Keys, with 24 members, is popularly elected. There is no party system on the island although some parties, mostly ineffectual, do exist.<sup>56</sup> There are four crown appointments to the island's government: a Lieutenant Governor, the Attorney-General, and two High Court judges (or Deemsters).<sup>57</sup> The Lieutenant Governor's role has become increasingly symbolic with the recent passage of a series of constitution acts for the Isle of Man.<sup>58</sup> At present he can give royal assent to certain domestic items which would previously have been referred to the Privy council through the Home Office in London, as is the case for Guernsey. The Isle of Man does not

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<sup>56</sup>Ibid., p. 46.

<sup>57</sup>Royal Commission, p.410.

<sup>58</sup>Kermode, op. cit., p. 47.

participate in UK elections and does not send representatives to the UK Parliament.

Unlike governments whose powers have been delegated by one or two legislative acts, Tynwald's powers have accumulated through many successive pieces of legislation since 1866. Therefore its powers cannot be precisely delineated although some broad categories can be listed to indicate the range of self-governing ability the island community has. Briefly, it can be said that the island government has full control of all domestic matters. This control extends to include some items which have overseas implications such as the registration of merchant shipping and the promotion of international banking facilities on the island. A list of areas of local jurisdiction includes the following:

education

police

civil service

harbours

local government

post office

local broadcasting

courts

labour, employment

customs, excise

land administration

shipping

direct and indirect taxation

roads, motor vehicles, transport

public health and hospitals

criminal, civil, commercial and financial law<sup>59</sup>

The legal system is separate from that of the UK; the island has an indigenous common law and a separate bar. Although there is a high court on the island, the highest court of appeal is the Judicial Committee of the Privy Council.<sup>60</sup>

In the exercise of its powers the Isle of Man government's departments work closely with their UK counterparts in many areas. For example the Manx Department of Education meets with UK educators on a regular basis and participates in the development of programmes, sometimes borrowing ideas and using UK materials while nevertheless setting its own policies. The Manx department does however contract with UK school inspectors for the provision of services on Mann.<sup>61</sup> For university education, Manx students leave the island and, usually, go to the UK. Since they are not UK residents the Isle of Man government pays the UK at the rate per student charged for foreign students. In other areas, specialists are contracted from the UK, especially in health matters.<sup>62</sup> In addition there is a reciprocal agreement by which residents of the UK or the Isle of Man may receive health services from

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<sup>59</sup>This list has been inferred from sources listed in the bibliography. Some were the subject of direct interviews with Isle of Man Government officials.

<sup>60</sup>Kermode, *op. cit.*, p. 45.

<sup>61</sup>Gordon Baker, Deputy Director, Department of Education, Isle of Man Government, pers. comm.

<sup>62</sup>Isle of Man Government, pamphlet entitled "Health Services."

the other jurisdiction while travelling or residing there.<sup>63</sup> With respect to the high court, a UK judge is on occasion "borrowed" to sit on cases of appeal which one of the local Deemsters is not permitted to hear.<sup>64</sup> These are only a few of many examples of the close relationship with the UK in the provision of services, though in each area policy is set by Tynwald. The Isle of Man government also contracts to the private sector as in the case with economics and development where a private firm has a long standing contract with the government.<sup>65</sup>

The powers which the UK retains with respect to the Isle of Man are over defence, foreign relations, nationality legislation and the constitutional relationship. The island is also covered by UK currency regulations, a matter of some concern to its growing financial sector.<sup>66</sup>

In foreign relations the UK consults the government of the Isle of Man on treaties and other international agreements which might affect Manx domestic interests. The accession of the UK to the European Community is perhaps the most important of these. The Isle of Man benefits from the same arrangement as Guernsey and is therefore not included in the EC, having only an agreement on trade in industrial and agricultural products and on some aspects of the common external tariff.<sup>67</sup>

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<sup>63</sup>Mr. Jones, Department of Health, Isle of Man Government, pers. comm.

<sup>64</sup>Office of Chief Registrar, Isle of Man Government, pers. comm.

<sup>65</sup>Kermode, *op. cit.*, p. 50.

<sup>66</sup>*Ibid.*, pp. 56-7.

<sup>67</sup>Royal Commission, p. 463.



Although changes were made to royal assent functions in 1980, transferring some of them to the Lieutenant Governor, many remain with the Privy Council especially for those items which may have implications beyond the boundaries and local interest of the Isle of Man.

For the settlement of disputes there exists the Standing Committee on the Common Interests of the Isle of Man and the United Kingdom. It has three members appointed by Tynwald and three by the UK government plus a joint secretariat. It is a forum for discussion and negotiation rather than a body with judicial or enforcement powers.

As pointed out, the UK is responsible for nationality and citizenship legislation since Isle of Man residents are included in the legislation as citizens of the "islands." However, they do not vote or otherwise participate in UK politics, they do not pay taxes to the UK treasury, nor are they automatically eligible for state-financed benefits in the UK. They can, however, move freely to the UK, take up residence and employment and readily receive state benefits.

Movement in the other direction is restricted however. While a UK citizen may move relatively easily to the Isle of Man he may not take up employment without a work permit, the criteria for which are long term residency or qualifications based upon ancestry.<sup>68</sup> In order to vote a new resident must have been on the island for one year and in order to hold political office, for three years.<sup>69</sup> Manx residents can carry an Isle of Man

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<sup>68</sup>Isle of Man Government, pamphlet entitled "Employment: Control of Employment Acts 1975, 1978, and 1983."

<sup>69</sup>Christine Morton, Common Market Officer, Isle of Man Government, pers. comm.

passport although, as in the case of Guernsey, it resembles the British passport in format and symbols.<sup>70</sup>

The Isle of Man is entirely self-supporting financially; it does not receive subsidies or other funding from the UK. Unlike Guernsey, however, Mann does make an annual contribution to the UK to pay its share of expenditures for defence and international representation. This contribution does not fully cover the per capita share, however,<sup>71</sup> so there remains a small implicit subsidy from the UK.

In its constitutional relationship with the UK, the Isle of Man is a "dependency of the Crown" as are the Channel Islands. Although it was for a time closely governed by the UK government it remained directly associated with the Crown and has never been constitutionally part of the UK. The Crown remains responsible for the "good government" of the island and could, theoretically, intervene in the affairs of the island. This remains true for Manx legislation which the UK has the constitutional power to overrule.

The single example since World War II in which Manx legislation has been overruled is when, in the 1960's, the Isle of Man endeavoured to establish a powerful commercial radio broadcasting station which would transmit to the UK. The UK not only refused to allow the passage of the Manx bill but also, in its own legislation, prevented the Isle of Man from

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<sup>70</sup>Passport Official, Isle of Man Government, pers. comm.

<sup>71</sup>Royal Commission, p. 412. It was reported in the Commission's report that the Isle of Man contributed 4.50 Pounds per capita while the UK population contribute 57.00 Pounds per capita. These data would pre-date the Commission's 1973 report and therefore may not apply to the current situation. Recent data are not available.

pursuing other options to broadcast beyond its borders.<sup>72</sup> Apart from this incident relations between the two governments are congenial. This is attested by the fact that the Standing Committee on the Common Interests of the Isle of Man and the United Kingdom, which was set up to have semi-annual meetings, has found this frequency to be unnecessary.<sup>73</sup>

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<sup>72</sup>D.G. Kermode, Devolution at Work: A Case Study of the Isle of Man (Westmead, Hampshire: Saxon House Teakfield Ltd., 1979), pp. 60-3.

<sup>73</sup>Royal Commission, p.434.

## CHAPTER IV

### THE CANADIAN CASES

#### A. The James Bay Cree (Quebec)

The Cree are the largest Indian group in Canada, inhabiting an area ranging from central Quebec to central Alberta. While some of them experienced profound cultural change with the arrival of Europeans, others have maintained many of their traditional economic and cultural ways despite the proximity of Euro-Canadian society. The latter was the case with the James Bay Cree living along the James and Hudson Bay coasts of Quebec and along rivers draining from the interior. There are eight Cree bands consisting of a population of about 10,000.

When, in 1971, the Quebec government announced its intention to build the James Bay Power Project the Cree objected on the grounds that the project would have substantial effects on their way of life and possibly on their ability to provide for themselves.<sup>74</sup> Initially they were ignored by the Quebec government, but after a series of court battles and a long set of negotiations the Cree and the Quebec government signed the James Bay and

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<sup>74</sup>The Cree do not get all of their food from traditional sources but several studies suggest that well over half is "country food." For an accessible discussion see Richard F. Salisbury, A Homeland For The Cree: Regional Development in James Bay 1971-1981 (Kingston and Montreal: McGill-Queen's University Press, 1986), pp. 19-28.

Northern Quebec Agreement (the "Agreement") in November 1975.<sup>75</sup> This document gave the Cree extensive rights to use certain lands and resources, guarantees for the protection of those lands, and important opportunities to manage their own affairs.<sup>76</sup> For the Quebec Cree, who had signed no treaty with British or Canadian authorities and who mostly had not been granted reserve lands under the Indian Act,<sup>77</sup> this agreement catapulted them into the forefront of the development of self-government in Canada.

Although modest political changes had been occurring among the Cree since the 1940s it was their opposition to the James Bay Project which rapidly forged a new political structure and a degree of public participation that had not existed before. Prior to 1971 the eight bands that constitute the Quebec Cree community had very little contact or communication with each other and band councils were relatively powerless.<sup>78</sup> By 1974, however the Cree had left the province-wide Indians of Quebec Association, and had formed the independent Grand Council of the Crees of Quebec (GCCP) to

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<sup>75</sup>The James Bay and Northern Quebec Agreement included the Inuit of northern Quebec who participated with the Cree through the judicial and negotiations process. A similar agreement, the Northeast Quebec Agreement, was signed between the Naskapi Band and the Quebec government in 1978.

<sup>76</sup>See Billy Diamond, "Aboriginal Rights: The James Bay Experience," in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, eds. Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985a), pp. 265-285.

<sup>77</sup>James O'Reilly, "Self-Government Under the James Bay and Northern Quebec Agreement and the Cree-Naskapi (of Quebec) Act," unpublished paper presented to the conference First Nations' Government Structures and Powers at the University of British Columbia. May 5 - 6, 1988.

<sup>78</sup>Richard F. Salisbury, A Homeland For The Cree: Regional Development in James Bay 1971-1981 (Kingston and Montreal: McGill-Queen's University Press, 1986), pp. 28-51, especially pp. 28-34.

represent their interests to the Quebec government. Also, whereas the Cree lacked an experienced cadre of negotiators and administrators in 1971 and had to rely heavily on consultants at first, they were, by the early 1980s, able to handle all but the most technical of issues within their own organizations.<sup>79</sup>

Thus the hydroelectric project was the immediate cause for the Cree's political action, but it was the experience gained through their opposition to it which galvanized them into seeking even broader protections for their communities on their own terms. What they wanted was

...the preservation and protection of [their] traditional way of life; certain modifications to the project to minimize the negative ecological effects; suitable land, hunting, fishing, and trapping rights; control of [their] own institutions; adequate monetary compensation; and participation in the development of the territory.<sup>80</sup>

These objectives formed the basis of the negotiations which led to the signing of the Agreement and to the several pieces of federal and Quebec legislation which followed.

The Agreement first of all specified three categories of land for the use of the eight Cree bands. The first, over which the relevant bands have virtually complete control of resources and activities, comprises 7,350 square

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<sup>79</sup>See Ignatius E. La Rusic, et al., Negotiation A Way Of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement (Ottawa: Department of Indian Affairs and Northern Development, 1979), Section 1 (pp. 1-32) "Organizing for Survival" for a detailed account of the development of the Cree Regional Authority and the role of consultants.

<sup>80</sup>Billy Diamond, "Aboriginal Rights: The James Bay Experience," in The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, eds. Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985a), p. 280.

kilometres.<sup>81</sup> The second category, on which the bands have the exclusive right to fish, hunt, and trap, contains 65,000 square kilometres.<sup>82</sup> Further special, though not exclusive, rights to hunt, fish, and trap establish most of the rest of central-northern Quebec as the third category.

Two levels of Cree government were established by the Agreement. One, at the band level, consists of an elected chief and councillors. The other, at the regional level, resembles a federation comprising the eight bands.<sup>83</sup> Elections are contested and occasionally involve opposing points of view though not actual factions or parties. The term of office is decided by each band and written into its by-laws. The administration of the bands is conducted by committees which include the councillors. There are, at the regional level of government, ten organizations reflecting different areas of political, administrative or functional responsibility. The central organization, the Grand Council, an intervillage political forum, embodies the feelings of Cree political unity. Its members are the eight elected band chiefs and one other member elected directly from each band to the Council.<sup>84</sup> Although it is a political organization, it provided regional administrative functions until these activities were taken over by the Cree Regional Authority (CRA). The central administrative organ is then the CRA which

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<sup>81</sup>Ignatius E. La Rusic, et al., Negotiation A Way Of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement (Ottawa: Department of Indian Affairs and Northern Development, 1979), p. vii.

<sup>82</sup>Canadian Encyclopedia (Edmonton: Hurtig, 1985), entry on "James Bay Agreement."

<sup>83</sup>La Rusic, op. cit., p. 32.

<sup>84</sup>Salisbury, op. cit., p. 65.

provides a variety of services to the member communities. There are in addition a regional school board and a health board and six independent agencies such as the Housing Corporation and the Trappers' Association. The CRA has no authority over these boards and agencies, but programmes are coordinated by interlocking directorships among all ten organizations.

One of the most important boards, not only for its financial function but because it involves federal and provincial government representatives, is the Board of Compensation which manages the financial assets derived from the compensation which was part of the James Bay and Northern Quebec Agreement. The Board consists of two members elected from each band, three appointed by the CRA, and two non-Cree, one from the federal government and the other from Quebec.<sup>85</sup>

With respect to participation in federal and provincial politics the Cree continue to be represented in the Quebec National Assembly and the House of Commons by members of those legislatures.

The Cree-Naskapi Commission, established by federal legislation, is for the investigation of and reporting on complaints brought before it. It has three members appointed by the federal government on the recommendation of the Cree Regional Authority and the Naskapi Band. It has no powers of enforcement so it is not strictly a disputes settlement mechanism.<sup>86</sup>

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<sup>85</sup>La Rusic, *op. cit.*, pp. 32-8.

<sup>86</sup>Cree-Naskaoi (of Quebec) Act, sections 157-172.



The governmental powers acquired as a result of the Agreement are authorized in the Cree-Naskaoi (of Quebec) Act.<sup>87</sup> It should be noted that this legislation takes precedence over both provincial laws of general application and the federal Indian Act<sup>88</sup> and that it thereby gives the Cree councils substantial authority in those areas covered by it.

The powers specified in the Act are in the following areas:

1. administration of band affairs;
2. regulation of buildings, their construction and management;
3. administration of health and hygiene;
4. maintenance of public order and safety including fire departments, firearms control, prohibition of alcohol;
5. protection of the environment and prevention of pollution;
6. definition and control of nuisances;
7. taxation for local purposes;
8. establishment and maintenance of local services;
9. construction of roads and management of traffic and transport;
10. operation of businesses;
11. management of parks and recreation;
12. authority over access to and residence on band lands;
13. planning for land and resource use;
14. control over soapstone deposits and rights to forest resources in addition to fishing, hunting, and trapping rights;

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<sup>87</sup>The federal legislation deals with both groups but they are easily separable within the Act so the Naskapi need not be considered along with the Cree.

<sup>88</sup>Cree-Naskaoi (of Quebec) Act, sections 4,5.

15. authority over testate and intestate succession;
16. control of local police;
17. administration of justice.<sup>89</sup>

Cree powers with respect to education and health, other than public health, are through school and hospital boards under Quebec provincial jurisdiction and as such are no different from those of non-Cree communities in the province. Nevertheless control of these boards gives them substantial influence in designing curricula, locating buildings, and setting standards including those controlling the teaching of Cree language and traditions. The Cree language is co-equal with English and French in the writing of Cree self-government legislation and in the administration of Cree affairs.<sup>90</sup>

The Crees remain Canadian citizens in all the legal senses: they are covered by Canadian nationality legislation, they have the right to carry a Canadian passport, they remain protected by the Charter of Rights and Freedoms and they have the freedom to move to other parts of the country and take up employment and residence. Full citizenship rights are skewed in favour of the Cree, however, since they can move freely throughout Canada while controlling access to and residency on Cree lands with respect to other Canadians. This control does not extend to power over public officials in the discharge of their duties however.<sup>91</sup>

Funding for the Cree comes from monies which are part of the compensation for the surrender of lands under the Agreement and other

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<sup>89</sup>Ibid., sections 45, 46, 48, 101, 105, 109, 173, and 194.

<sup>90</sup>Ibid., sections 31, 32.

<sup>91</sup>Cree-Naskapi (of Quebec) Act, section 105.

funds which come as annual payments from the federal and Quebec governments.<sup>92</sup> According to the settlement of a recent funding dispute monies will be issued in block form with allowance for increases based on population growth and inflation.<sup>93</sup>

The constitutional position of the James Bay Cree, Quebec Inuit and the Naskapi who signed agreements in 1975 and 1978 may be different from all other among aboriginal groups in Canada. Billy Diamond, former Grand Chief of the Grand Council of the Cree (of Quebec) argues that since the Agreement was signed in 1975 and included provision for self-government, section 35 of the Constitution Act (1982), which recognizes and affirms "existing" rights, affirms Cree self-government.<sup>94</sup> While the legal arguments that such a point would involve are beyond the scope of this paper, it remains possible that self-government for the Cree may have a special constitutional position and be immune from or highly resistant to changes initiated by the federal or Quebec governments. On the other hand, because the Cree do not have the power, under the terms of the Agreement, to change unilaterally their own terms of government, they will remain part of Canada, with Canadian citizenship, and subject to relevant Canadian laws and the judicial system.

The federal government and the Cree recently experienced two years of tense relations over funding promised by the federal government. Although a report critical of the federal position by the Cree-Naskapi Commission may

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<sup>92</sup>Diamond in Boldt and Long, op. cit., p. 282.

<sup>93</sup>Globe and Mail (National Edition), July 13, 1988, p. A3.

<sup>94</sup>Diamond in Boldt and Long, op. cit., p. 285.

have contributed to resolving the matter <sup>95</sup>it is clear that the existing mechanism is insufficient for settling major disputes.

## **B. The Sechelt Band (British Columbia)**

The Sechelt Indians are a linguistic subdivision of the broader ethnic group of Coast Salish people on the mainland coast of British Columbia and live a few miles northwest of Vancouver. Before the arrival of Europeans the Sechelt lived in four communities of, perhaps, several thousand people<sup>96</sup> providing for themselves with resources from the land. Decimated by disease and overwhelmed by European society in the nineteenth century, the Indians were confined to land reserves that were a small fraction of their traditional territories. They now number about 700 of whom about 500 live on Sechelt Band lands. These lands covers about 1000 hectares in 33 parcels. Control over their affairs was taken away from them by successive pieces of legislation which undermined their culture and prevented them from pursuing their own political interests.

In the early 1950s changes in government policy permitted Indian political organizations in B.C. to increase efforts to pursue what they believed to be their aboriginal rights.<sup>97</sup> One of these was to be self-governing. The

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<sup>95</sup>Globe and Mail, loc. cit.

<sup>96</sup>Pre-contact population estimates are subject to doubt and revision. For a discussion on B.C. populations before the arrival of Europeans see Wilson Duff, The Indian History of British Columbia Volume 1: The Impact of the White Man (Victoria: Provincial Museum of Natural History & Anthropology, 1964), pp. 38-45.

<sup>97</sup>See Leslie C. Kopas, Political Action of the Indians of British Columbia (unpublished M.A. thesis, University of British Columbia, 1972), Chapter X, pp. 129-36, especially p. 134.

Sechelt first formed an alliance with several other bands in the early 1970s to campaign for self-government and later pursued the same issue independently. Through the 1970s and into the 1980s Indian political concerns were in the forefront of national issues in such matters as the 1969 White Paper, the patriation of the constitution, the House of Commons Special Committee on Indian Self-Government (the Penner Report) and the constitutional conferences. However, it was not until the Minister of Indian Affairs and Northern Development personally accepted, in 1984, the concept of self-government that progress was made, after nearly two decades of effort, toward the Sechelt Indian Band Self-Government Act which was then passed in May 1986.

The pursuit of self-government has its roots in the Indians' awareness that they once managed their own affairs and their belief that they have an ancestral right to continue to do so. For the Sechelt this meant control of the land and finances of their Band. Many parcels of Sechelt Band land are tiny but some have economically valuable resources. Under the Indian Act it was difficult or impossible to realize this economic potential. Moreover it was officials of the federal government rather than those of the Sechelt Band who made the decisions.

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<sup>98</sup>The Sechelt, Musqueam, Squamish, Kamloops, and Westbank Bands formed a group called the Alliance. In 1981 the Alliance, with the B.C. Union of Indian Chiefs, wrote The Report of the Local Government Committee Respecting Indian Local Government in British Columbia. Its members all had one characteristic in common, they all abutted non-Indian municipalities. Sechelt chose to take advantage of that and selected Option 4 of the Report for its model of self-government. (Chief Thomas Paul, pers. comm.)

<sup>99</sup>W. Graham Allen, "Sechelt Indian Self-Government" (unpublished paper presented to the conference First Nations' Government Structures and Powers at the University of British Columbia. May 5 - 6, 1988), p. 6.

The Sechelt Indian Band Self-Government Act essentially establishes two governments. The first is the Sechelt Indian Band Council which is the governing body<sup>100</sup> of the Sechelt Indian Band and is responsible for managing Band affairs including the development of Band lands. The second is the Sechelt Indian Government District Council,<sup>101</sup> which is a municipal government for both Indian and non-Indian residents of Sechelt lands. The distinction between the two bodies is that the Band Council is the government for Sechelt Indians regardless of where they live, within limits,<sup>102</sup> whereas the District Council is the government for the territory of the Sechelt lands and those who live on them, including non-Indians.

The members of the Band Council are by law also the members of the District Council. Band Councillors are Sechelt Indians and are elected by Band members, also Sechelt Indians, so that non-Indians neither sit on nor elect the District Council. Instead non-Indians elect an Advisory Council. Although this body advises the District Council, it has no authoritative decision-making power of its own nor is its advice binding on the District Council. This arrangement was established so that the Sechelt Indians could retain control over their own affairs as Indians and over Band lands without fear of that control being diluted should they become a minority on their own land. Non-Indians, however, would have some formal representation on matters that affected them as residents on Sechelt lands.<sup>103</sup>

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<sup>100</sup>Sechelt Indian Band Self-Government Act, section 8.

<sup>101</sup>*Ibid.*, section 17.

<sup>102</sup>Some Sechelt Band members live in adjacent non-Indian communities but are otherwise fully included in the Band.

<sup>103</sup>Graham Allen, pers. comm.

The Band Council has one chief and four concillors elected by the band electors<sup>104</sup> The administrative structure consists of committees, each of which has a council member at the chair. A small administrative, clerical, and technical staff<sup>105</sup> handles the business of both the Band and the District Council. The Advisory Council has five members. For an initial period its members are appointed by the British Columbia government but these will later be elected by the non-Indian residents of Sechelt lands. The law applying to these elections will be Sechelt self-government legislation and elected members will be remunerated by the Sechelt Indian Government District.<sup>106</sup>

There is no structured procedure to settle disputes. They will be handled by direct negotiation between the Sechelt Band and the office of the Minister of Indian Affairs and Northern Development. Relations with the provincial government are similarly conducted in the form of negotiations through the Attorney-General's ministry.<sup>107</sup>

The Sechelt Indian Band Self-Government Act provides legislative powers to the Band Council over the management of the following matters:

- (a) access to and residence on Sechelt lands;
- (b) zoning and land use planning in respect of Sechelt lands;
- (c) expropriation, for community purposes, of interests in Sechelt lands by the Band;

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<sup>104</sup>The Sechelt Band Constitution specifies that there shall be one council member for each 120 band members.

<sup>105</sup>The technical staff are for public works (4) and salmon enhancement (4 or 5).

<sup>106</sup>Thomas Paul, pers. comm.

<sup>107</sup>Ibid.

- (d) the use, construction, maintenance, repair and demolition of buildings and structures on Sechelt lands;
- (e) taxation, for local purposes, of interests in Sechelt lands, and of occupants and tenants of Sechelt lands in respect of their interests in those lands, including assessment, collection and enforcement procedures and appeals relating thereto;
- (f) the administration and management of property belonging to the Band;
- (g) education of Band members on Sechelt lands;
- (h) social and welfare services with respect to Band members, including, without restricting their generality of the foregoing, the custody and placement of children of Band members;
- (i) health services on Sechelt lands;
- (j) the preservation and management of natural resources on Sechelt lands;
- (k) the preservation, protection, and management of fur-bearing animals, fish and game on Sechelt lands;
- (l) public order and safety on Sechelt lands;
- (m) the construction, maintenance and management of roads and regulation of traffic on Sechelt lands;
- (n) the operation of businesses, professions and trades on Sechelt lands;
- (o) the prohibition of the sale, barter, supply, manufacture or possession of intoxicants on Sechelt lands and any exceptions to a prohibition of possession;
- (p) ...the imposition on summary conviction of fines or imprisonment [not to exceed two thousand dollars or six months] for the contravention of any law made by the Band government;
- (q) the devolution, by testate or intestate succession, of real property of Band members on Sechelt lands and personal property of Band members ordinarily resident on Sechelt lands;
- (r) financial administration of the Band;



- (s) the conduct of Band elections and referenda;
- (t) the creation of administrative bodies and agencies to assist in the administration of the affairs of the Band; and
- (u) matters related to the good government of the Band, its members or Sechelt lands.<sup>108</sup>

The District Council is defined as a "legal entity" which allows it to enter contracts, borrow money, hold property, and be sued. To facilitate the delivery of municipal services, which are not covered by the federal legislation, to both Indian and non-Indian residents of Sechelt lands the British Columbia government has passed legislation to allow the District Council to participate in provincial government services available to municipalities.<sup>109</sup>

As the Sechelt Indian Band Self-Government has only recently been created and because its administrative resources are limited, many of its powers have not yet received full attention. Some aspects of the federal legislation are currently important merely because they allow the Sechelt government to apply British Columbia provincial legislation instead of being bound under the Indian Act to federal legislation. This is the case with succession, for example, where B.C. legislation now applies to Sechelt Indians.<sup>110</sup> In other matters British Columbia law has simply been adopted into Sechelt legislation. This is the case for noise control, building codes, traffic control, and property taxation.<sup>111</sup>

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<sup>108</sup>Sechelt Indian Band Self-Government Act, section 14.

<sup>109</sup>See Bill 4, Sechelt Indian Government District Enabling Act.

<sup>110</sup>Some details remain to be worked out such as what is meant by "resident" since Band members will sometimes be absent for long periods.

<sup>111</sup>Thomas Paul, pers. comm.

In several areas of administration and service delivery the Sechelt Band participates in or contracts to other governments or the private sector in the surrounding non-Indian community. For example, Sechelt Band children attend schools run by the local school district which is under provincial jurisdiction, and Band home owners are taxed by the Band Council at provincially established local school rates. To facilitate education in Indian traditions the Sechelt Band government is negotiating the placement of a native studies programme in the local school curriculum, to be funded by the Sechelt Band self-government, and available to all students. On the other hand, special Sechelt language education would be provided separately on Band lands at Band expense...<sup>112</sup> In health matters the Sechelt government has jurisdiction over public health matters on its lands but hospital services are provided by the regional (ie. provincial) hospital.<sup>113</sup>

Enforcement of Sechelt laws is either conducted by other jurisdictions or contracted to the private sector (as is the case with building inspection, for example). In particular the provincial police<sup>114</sup> provide police services, including the enforcement of Sechelt laws. The provincial court system will be used to hear and adjudicate on Sechelt laws.

Nothing in the Sechelt self-government legislation limits the full inclusion of Band members in Canadian citizenship, nor do the Sechelt people seek to be excluded from Canadian citizenship or to have a separate

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<sup>112</sup>Ibid.

<sup>113</sup>The Sechelt District Hospital is located on land sold to the hospital for \$1.00 by the Sechelt Indian Band and is surrounded by Band land.

<sup>114</sup>Police are a provincial jurisdiction. The RCMP are rented by the provincial government from the federal government.

citizenship status. The Charter of Rights and Freedoms will apply to Sechelt Indians, they will carry Canadian passports, be bound by Canadian international treaties, vote, pay taxes, and have access to Canadian legal, social, and educational rights.

Membership in the Sechelt Band, and the rights of participation that membership entails, is restricted to people of Sechelt Indian ancestry except that members of other Indian bands can, by marriage or adoption, become members. Non-Indians can become members if 75% of the Band approves of their membership in referendum.<sup>115</sup> These membership criteria are less strict than formerly, when under the Indian Act non-Indians could not become Band members.

Under the Indian Act Indian bands were told how to spend monies allocated to them by the federal government and were required to submit detailed audits of their budgets to the department responsible. To the Sechelt Band government however the monies are now transferred as a block. The earlier funding level is maintained in real per capita terms; that is, the block is increased according to inflation and population increases. Though an audit is no longer required some funds are specified as being restricted to social assistance and education. There are no plans to discontinue funding the Sechelt Indian Band self-government but provision for quinquennial renegotiation<sup>116</sup> does permit the federal government to change its contribution to Band funds in future.

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<sup>115</sup>Sechelt Band Constitution, sections 1-7.

<sup>116</sup>Thomas Paul, pers. comm.

The Sechelt Indian Band Self-Government Act is not a constitutional document and therefore has not changed the constitutional position of the Sechelt Indian Band. Moreover the federal responsibility for Indians and Indian lands as defined under section 91(24) of the Constitution Act (1867) has not been diminished by this legislation. Its principal effect is to remove the Sechelt Band from the authority of the Indian Act. Indeed major changes within Sechelt self-government, such as amendments to its constitution, must be approved by the Governor in Council.

As this self-government is relatively new it is premature to assess its relations with the federal and provincial governments. Nevertheless several recent positive symbolic action, such as signing ceremonies, have taken place.

### **C. Nunavut (Northwest Territories)**

Nunavut means "our land" in Inuktitut, the language of the Inuit, the people of the eastern Arctic. It refers to what remains, at present, a proposal for self-government in the Inuit homeland. The basis of the proposal is that the present Northwest Territories (NWT) be divided into two new units such that the eastern (and northern) part would become the Territory of Nunavut. The government of Nunavut would, at least initially, be modelled on the current government of the Northwest Territories. Based on current boundary proposals Nunavut would be about 1.7 to 2.0 million square kilometres in area and the population would be between 13,500 and 20,000.<sup>117</sup>

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<sup>117</sup>M. Whittington and Sheila Macpherson, Division of the N.W.T.: Administrative Structures For Nunavut. (Yellowknife: Legislative Assembly of the Northwest Territories, 1983), pp. 2-4.

The political history of the NWT began in earnest in 1951 when elected members first sat on the administrative council which until then had been the preserve of federal government officials in Ottawa. It was not until 1966, however, that the people of the eastern Arctic could elect council members. Finally, in 1975, the territorial council became a fully representative body and came to be called the legislative assembly.<sup>118</sup>

Along with the growth of representative government there was a devolution of responsibility for various government programs. The Territorial government is now responsible for social services, education, small businesses and renewable resources.<sup>119</sup> In spite of the development of representative and responsible government the NWT remains legally and constitutionally subordinate to the federal government as the Northwest Territories Act is an act of the federal Parliament and cannot be changed by the territorial legislature. Moreover, territorial legislation can be disallowed by the federal government.<sup>120</sup>

In the 1970s, in response to pressure from southerners to develop the potential mineral and petroleum resources of the NWT, the Inuit sought to have greater control over developments and the Inuit Tapirisat of Canada, an Inuit political organization, signed an agreement-in-principle with the

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<sup>118</sup>Michael S. Whittington, "Political and Constitutional Development in the NWT and Yukon: The Issues and the Interests" in The North, ed. Michael S. Whittington (Toronto: University of Toronto Press, 1985), pp. 68-70.

<sup>119</sup>*Ibid.*, p. 70.

<sup>120</sup>Gurston Dacks, "The Aboriginal Peoples and the Government of the Northwest Territories" in Governments in Conflict? Provinces and Indian Nations in Canada, eds. J. Anthony Long and Menno Boldt (Toronto: University of Toronto Press, 1988), p. 223.

Government of Canada to preserve the Inuit way of life and to give them a role in the making of decisions affecting the Arctic.<sup>121</sup> This agreement foundered eventually on the contentious points of extinguishment of Inuit claims and failure to guarantee political rights.

In 1982 a plebiscite held in the NWT supported a proposed division of the territory. The NWT government then sponsored two groups, the Western Constitutional Forum and the Nunavut Constitutional Forum (NCF), to develop proposals for new governments in the western and the eastern Arctic respectively.<sup>122</sup> In 1985 these two forums reached an agreement to divide the NWT. The proposed Principles of Implementation for the agreement revived several of the ideas of the earlier agreement-in-principle and reflect the basis of the Inuit objectives as follows:

- a) Nunavut...has a particular obligation to structure its institutions so as to reflect Inuit culture....
- b) The development of a...regional authority... reflecting the strength of community life...[in] Nunavut...and the need for a strong Nunavut government...is a priority.
- c) A policy making Inuktitut an official language of Nunavut...is essential.
- d) Decentralisation of administrative centres so as to spread both the benefits and impacts of public sector development has been agreed.
- e) The assurance of full human rights within Nunavut...[has been] proposed.

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<sup>121</sup>Agreement in Principle agreement-in-Principle as to The Settlement of Inuit Land Claims in the Northwest Territories Between the Government of Canada and the Inuit Taqiriat of Canada, February 27, 1976, pp. iv,14-22.

<sup>122</sup>Peter Jull, "Building Nunavut: A Story of Inuit SelfGovernment." The Northern Review 1 (Summer 1988): p. 63.

- f) The establishment of a functional federal-Nunavut working relationship...in respect of ocean areas is required.
- g) The contribution and role of the Inuit to Canada's Arctic sovereignty interests... should be acknowledged in the Nunavut constitution.
- h) A suitable preamble to a Nunavut constitution highlighting the principles of conservation and wise management or the arctic environment and resources...should be prepared.<sup>123</sup>

In spite of this developing set of principles for Nunavut Territory and other efforts made toward its creation, including an agreement with the federal government, Nunavut has not been created because the two forums have been unable to reach a boundary agreement.

The NCF proposes an assembly of 25 members with special emphasis on representation with respect to on four regions of the territory as well as on other population features. There is currently one Member of Parliament sent to Ottawa from this region and this representation would continue. The Nunavut proposal suggests that the federally appointed commissioner, who formally occupies the top executive post, would play a large and central role in the initial stages of the Nunavut government but eventually the position would become strictly symbolic as is the case with provincial Lieutenant-Governors. In addition, mechanisms for the control of government are proposed such as a Bill of Rights, an Auditor-General, conflict of interest legislation and an independent judiciary.<sup>124</sup>

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<sup>123</sup>Northern Perspective, "Boundary and Constitutional Agreement for the Implementation of Division of the Northwest Territories between the Western Constitutional Forum and the Nunavut Constitutional Forum," Supplement to January-April 1987, Part III #2.

<sup>124</sup>Nunavut Constitutional Forum, Building Nunavut (1983), p. 17.

Since Nunavut is to be modelled on the existing NWT government the following list of current responsibilities illustrates the range of affairs over which local powers would be available to Nunavut.<sup>125</sup>

1. Economic Development and Tourism: apprenticeship and industrial training; employment development; planning and resource development (liaison with federal government activities); tourism promotion; territorial parks; small and medium sized business development.
2. Education: elementary and secondary schools; adult literacy; lifeskills training; vocational, technical, and business education; development of native language programs; teacher certification; curriculum development.
3. Health: health insurance administration; long range health personnel planning.
4. Justice and Public Services:
  - A) Justice: legal services and legislative drafting to departments and Executive Council; legal aid program; maintenance of legal registries; administration of Police Services Agreement.
  - B) Public Services: consumer services; museums; public safety; libraries; mining inspection services.
5. Local Government: development of local government; community planning; training in community administration; operation of community airports; community recreation programs; lands management.
6. Housing - Northwest Territories Housing Corporation: provision of rental housing; programs for home ownership.
7. Public Works: construction and maintenance of Territorial government buildings; real estate management services; highways.
8. Renewable Resources: wildlife and habitat management, liaison with land use planning; research; pollution control; dangerous goods and chemicals.

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<sup>125</sup>Some of Nunavut's responsibilities would be modest in content since, for example there is currently only one secondary school in the eastern Arctic and only one short highway.



9. Social Services: child welfare services; programs for aged and handicapped; alcohol and drug abuse; financial assistance for the needy; correctional programs; jails.<sup>126</sup>

The Nunavut proposal recognizes that control of the land and resource base is vital in order that the new territory have effective control of its revenues and expenditures. Control of these resources and protection of the arctic environment are central to the Nunavut idea. However, the NCF acknowledges the national importance of northern oil and gas resources and proposes that the federal government retain control of them while giving Nunavut certain responsibilities, a share of the revenues and options to participate in their development. Responsibility for minerals would remain with the federal government for the near future and be transferred to Nunavut gradually.

Other areas of responsibility included in the Nunavut proposal are language, customary law, and social policy. Language policy is an important part of the cultural protection and social policy objectives of the Inuit and would involve making Inuktitut the official language along with English and French. The application of Inuit customary law to some areas of administration, to family law, and to disputes settlement is another means of protecting cultural traditions and ensuring the development of Inuit social policy.<sup>127</sup> Finally, the NCF argues that the entire Nunavut proposal is a social policy issue since it would give the Inuit the opportunity to develop their own programmes rather than being required to fit into those built on

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<sup>126</sup>Nunavut Constitutional Forum, *op. cit.*, pp. 103-309.

<sup>127</sup>*Ibid.*, p. 28.

southern models and it would give them control over the pace and nature of social change in their communities.

While the immediate proposal is to establish Nunavut as a territory, the long term objective is to develop Nunavut toward provincial status. To do this, powers would be increasingly delegated from the federal government. The limit of these powers would be those available to the provinces as set out in the Constitution.

The federal government jurisdiction in foreign relations is not in question. However the Inuit have already participated in Canadian delegations to provide technical expertise at international whaling conventions and at the United Nations on matters concerning northern peoples.<sup>128</sup> In addition they have a special position with respect to Canada's claim to sovereignty in the Arctic archipelago. What role a Nunavut Territorial government might play in Canada's efforts to pursue its claims remains to be seen but as Canada rests its claim partly on the residence of its Inuit citizens in the region, a territorial government reflecting Inuit interests could add legitimacy to Canada's position.

There is no single procedure for the settlement of disputes between the NWT and the federal government and none has been proposed for Nunavut. At present disputes may be handled through discussion between the NWT and federal governments, in the courts,<sup>129</sup> or by the representation of the

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<sup>128</sup>Ibid., pp. 42-3.

<sup>129</sup>The judicial route for disputes settlement was tried by the NWT Government when it attempted to challenge the constitutionality of the Meech Lake Accord. The court's decision was unsatisfactory to the NWT.

NWT Members of Parliament. Given the nature of the proposal these mechanisms can be expected to continue to be available to Nunavut.

Nunavut would have a "public government" in which ethnic or aboriginal ancestry is not a criterion for political participation. To protect the Inuit character of the Nunavut government, however, a residency requirement of three years has been proposed to ensure that new residents establish a commitment to Nunavut before they can vote or hold office. Since Inuit currently comprise about 85% of the proposed territory's population they would, especially with the aid of the residency requirement, be able to control the Nunavut government for some time into the future.

This proposal does not diminish any of the concepts of Canadian citizenship. Inuit will continue to be full citizens of Canada in all ways: the federal government will continue to have legislative authority over citizenship, the Inuit will carry Canadian passports, vote, pay taxes, be subject to the Charter of Rights and Freedoms, and be able to move to other parts of Canada and receive social, education, and health benefits, subject to provincial waiting periods. Other Canadians will have "citizenship" rights in Nunavut, except as limited by the residency requirement.<sup>130</sup>

The federal government, which currently subsidizes the NWT by a variety of methods, has expressed its support in principle for Nunavut and has offered, separately, to provide monies in block-funding form such that the territories would have maximum control over their budgets.<sup>131</sup> Similar

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<sup>130</sup>The Nunavut constitutional Forum recognizes that the three year residency requirement may conflict with the Charter of Rights and Freedoms. See Building Nunavut p. 17.

<sup>131</sup>Nunavut Constitutional Forum, op. cit., p. 13.

financial arrangements may be anticipated to continue in the new territory unless and until such time as local revenue could provide for the local budget.

Constitutionally Nunavut would, as is the case with the NWT, continue to be subject to the federal government's will. The federal government would continue to be able to disallow Nunavut legislation, to appoint a commissioner, to increase or decrease his power, and to grant or withhold delegated powers. The constitutional relationship between Nunavut and the provinces would be through the federal government. Even ordinary administrative contact between the NWT Government and the provinces currently requires federal approval, something the Ottawa government is often reluctant to give.<sup>132</sup> Finally, to meet the long-term aspirations for provincial status a constitutional amendment is required which would directly involve the provinces in any discussion of the future status of Nunavut Territory.

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<sup>132</sup>Ibid., p.40.

## CHAPTER V

### CONCLUSIONS

The examination of the European cases illustrates several areas in which Canada might learn about the nature and characteristics of self-government. At the same time it is important to recognize that the broad issues of self-government in Canada are diverse and intricately complex. Not all the issues can be addressed by reviewing these European jurisdictions. In general the experiences of these European cases does not suggest a means to resolve the current impasse in Canada for the further treatment of aboriginal rights, including the right to self-government, in the constitution. In addition the Canadian situation is complicated by nearly six hundred aboriginal communities which could have varying degrees of self-government. Intergovernmental relations between the federal and provincial governments on the one hand and self-governing communities on the other presents a special problem for Canada, one that does not confront Denmark or the United Kingdom.

The comparison of the European examples of self-government with the specific Canadian cases does, however, suggest several similarities from which some conclusions about the nature of self-government and some of the features that might contribute to its successful implementation. Where the specific self-governing situations most differ is that in Canada the range of powers of self-government is narrower and the ability to influence external

events is more limited. To this extent Canada's introduction of self-government reserves powers and opportunities for the central government and largely maintains the status quo. This comparison enables some optimism for self-government in Canada as well as suggesting several features that might contribute to its further development.

The following eight topics review features that have been successful in these European examples and then compares the Canadian experience for each item. In general it is seen that self-government in Canada either closely resembles the situation in these European cases or is more limited in its autonomy. Only in boundary maintenance, that is control over access to the lands of the self-governing community and membership in that community, is the situation notably stronger in Canada.

### **A. Maintenance of Central Authority**

An important observation about the European self-governing communities examined is that the central governments retain the ultimate constitutional authority. This has been most clearly stated with respect to Guernsey, Sark, and the Isle of Man in the Royal Commission (1973). It was also illustrated by the broadcasting issue in the Isle of Man. The point is a little less clear with the Faroes since changes in the terms of the "Home Rule" Act that could provide for intervention by Danish authorities may require approval from the Faroese before they would be legal. Priority of Danish central authority can, however, be inferred from the fact that such legislative prerogatives as civil rights and criminal law remain with the Danish parliament and the police and the courts remain under Danish authority. Moreover the Faroes are described as "part of the Kingdom of

Denmark" implying that the Kingdom retains authority over the whole. In addition residual powers remain with the central government. Finally the Faroes government cannot unilaterally change its own constitutional circumstances.

Another feature of central authority is that in all cases there is a single high court for both the self-governing and the metropolitan communities. In the Faroes the judicial system is explicitly retained as one of the areas of Danish government authority. In the two British cases the islands have jurisdiction over criminal and other types of law and over their own courts. However, the Judicial Committee of the Privy Council remains the highest court of appeal for island plaintiffs.

As with the central governments in the European cases, the central government in Canada retains ultimate constitutional and legislative control over self-governing bodies. Although the James Bay Cree self-government may be constitutionally entrenched under section 35, several important aspects of government, such as criminal law, the courts, and the Charter of Rights, remain unequivocally in the central domain. Similarly the Supreme Court continues to be the highest court for self-governing communities and the rest of Canada alike. Conceivably, that court would be required to adjudicate disputes between the legislation of a self-governing body and other Canadian legislation.

## **B. Disputes Settlement Mechanism**

Another feature of self-government in the European examples is the existence of or proposal for a disputes settlement mechanism. In the Faroese "Home Rule" Act there is provision for a commission whose decisions are

ultimately binding on both the Danish and the Faroese governments. There is also the Standing Committee on the Common Interests of the Isle of Man and the United Kingdom, although the decisions of this committee are not binding on the participating governments. The Council of the Islands proposed by the UK Royal Commission, though it was not implemented, would have been a similar forum for discussion and negotiation. Harmonious relations have generally characterized the relations between the central and home governments so that none of these mechanisms has been used. One of the more noteworthy differences between the European and the Canadian experiences is revealed in this area. In the only case where there is any form of disputes settlement mechanism, namely the Cree-Naskapi Commission, a conflict between the self-governing Crees and the federal government dragged on for two years despite the Commission's report. No disputes settlement mechanism has been implemented for the Sechelt Band self-government and none has been proposed for Nunavut.

While trust, effective communication, and negotiation have contributed to peaceful relations between home and central governments in the European cases the respective governments have prepared for the possibility of disputes. The record in Canada has not begun well and whether or not trust can be established a lesson might be learned from the European examples of disputes settlement mechanisms.

In the European cases major political issues such as the delegation of additional powers or the decision to remain outside the EC have been dealt with by intergovernmental negotiation not by the commissions set up to handle more specific problems. Parallel issues in Canada, such as land claims settlements and constitutional change, would, similarly, be dealt with



through negotiation between senior governments and aboriginal groups representing those interests rather than through a disputes settlement mechanism. Committees or commissions, perhaps a single commission, established as disputes settlement mechanisms are seen, therefore, as dealing with the contractual arrangements of self-government agreements rather than major political issues.

### **C. Citizenship**

A third aspect of self-government is the special character of citizenship. In the narrow legislative sense there is a single citizenship in each of the European examples in that the central government has jurisdiction over nationality and citizenship legislation. Passports include formal acknowledgement of the self-governing community of the bearer but in format and symbols reflect the national identity of the central government. Not all citizenship rights are uniform however. In the Channel Islands and the Isle of Man there is a differentiation between members of the island community and those of the UK in that the former have access and residence rights in the UK but the island governments may restrict access and residence to their own communities. This is not the case with the Faroe Islands, however, where discrimination on the basis of one's Faroese or Danish origins is expressly forbidden for both localities.

Citizens under both the home and the central government have essentially uniform protection under the prevailing standards of civil and constitutional rights. As one of the residual matters, civil rights remain clearly under the authority of the Danish government. The Isle of Man and Guernsey have legislative competence in the area of civil rights but

individuals can appeal cases to the Privy Council and ultimately to the European Human Rights Commission.<sup>133</sup>

In Canada citizenship legislation also remains within the jurisdiction of the federal government. Passports for Canadians in self-governing communities have no distinguishing features from other Canadian passports, in contrast to the situation in the European cases. Mobility and participation rights in Canada favour the members of self-governing communities in a way similar to the situation in Guernsey and the Isle of Man. Members of self-governing communities have full rights of mobility, residence and political participation in the larger Canadian community but can restrict, to their members, access and residence on their lands and participation in their politics. Moreover this restriction is based on an ancestral heritage, placing stricter limits on membership and access than is the case with the British islands.

This power further limits, in principle, the range of citizenship rights of other Canadians. In practice, however, self-government restrictions on membership and access occasion little change from the existing situation since non-aboriginal Canadians cannot readily, except by marriage, become members of aboriginal communities now. In addition, there is no automatic right of access to Indian reserves, as currently defined, for non-aboriginal Canadians. The principal effect of this feature of self-government in Canada is to extend greater powers to the self-governing community to determine its

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<sup>133</sup>Since the UK has responsibility for international treaties the islands are included under the UK's participation in the European Human Rights Convention.

own membership and limits the power of the federal government in this matter.

#### **D. Central Government Franchise**

A fourth item of self-government is the inclusion of members of the self-governing community in the central franchise. Both inclusion and exclusion are present in the European cases reviewed. While Faroe Islands residents send representatives to the Danish Parliament, Manx and Guernsey residents do not participate in UK politics. This means that the Faroese representatives in Copenhagen may sometimes be redundant in the sense that they are included in debates that will not affect their constituents. However, it also means that for some issues such as defense and foreign relations Manx and Guernsey residents have no direct representation in the parliament which legislates on their behalf. The relationship between Sark and Guernsey is similar in that the States of Guernsey have certain powers with respect to Sark yet the latter has no representation in the Guernsey legislature.

In Canada self-government does not preclude either federal or provincial franchise. In this respect it resembles the Faroese situation rather than that of the Isle of Man and the Channel Islands. The inclusion of members of self-governing communities in these franchises in Canada means that their legislative representation may have some redundancy since the representatives will, from time to time, address issues for the broader political community for which the self-governing body has separate jurisdiction.

## **E. Fiscal Independence**

A fifth characteristic of self-government in the European cases examined is local control of the financial resources. This is true not only for the self-financing governments of the Isle of Man, Guernsey, and Sark but also for the Faroe Islands, which, though they continue to receive funds from metropolitan Denmark, have full control over all financial resources.

The three Canadian self-governing communities reviewed also receive or are scheduled to receive funds from the central government in block form which allows them control over the allocation of monies and services to their members. For the Cree self-government the financial arrangement is somewhat more complex than for the others because of its association with the Quebec government concerning certain services such as those handled by the Cree School Board and the Cree Regional Health Board. Although these boards have a high degree of control they remain individually responsible to the provincial government for financial management.

## **F. Central Government Taxation**

A sixth aspect of self-government in all the European cases examined is the freedom from central government taxation. These governments have control over local direct and indirect taxation including import and export duties. In the case of Guernsey, suggestion has been made by the UK that it be permitted to place a levy on island residents to cover the proportionate cost of defense and international representation. This suggestion was successfully resisted by the States of Guernsey on the grounds that the UK did not have the right to legislate taxes for the island. Guernsey offered to

make occasional contributions to help the UK defray its expenses for these matters but that such payments would be on a voluntary basis<sup>134</sup>

Arrangements regarding the powers to tax is not clear in Canada. Under the Indian Act income earned on Indian lands by Indians is not taxed, nor is Indian land, while taxation powers with respect to non-Indians on Indian land has not been clarified. For a range of other taxes, such as excise taxes, the general situation is at best unresolved.<sup>135</sup> Whereas in the European cases the power to impose direct and indirect taxes rests with the self-governing body, in Canada there is not yet a clear pattern or set of principles to assess.

## **G. The Burden of Government**

A seventh item of self-government in these European examples is that self-government in small communities does not necessarily impose an increased financial burden on its members. The situation is complicated in Canada, however, by the existence of a wide variety of communities potentially seeking self-government. Although there are no established criteria to determine whether a community has the capacity to govern itself, it is probable that those which are very small, are in remote locations, or have a shortage of appropriately skilled personnel would be unable to govern themselves effectively. Self-government may be more feasible for those communities with larger populations, close to urban centres, and with a modernized population. In these latter instances the lessons to be learned

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<sup>134</sup>Royal Commission, p.

<sup>135</sup>For example, there is a long standing dispute of the Quebec government's application of excise taxes on the Caughnawaga reserve.

from the European examples, which are generally larger than the Canadian ones, will be appropriate.

In the European cases the home governments have taken advantage of the administrative economies of scale which exist in the larger neighbouring community by emulating and borrowing policies and materials, and by contracting certain services. It may be that some communities simply decide to forgo certain services. This has happened for example in the Faroe Islands which does not have an unemployment insurance program and on Sark, which, by banning motor vehicles, has a low budget for road construction and maintenance.

Since self-governing bodies are of relatively recent origin in Canada it is difficult to say at this point what extra burdens the requirements of government or the diseconomies of scale in small governments impose on the financial and human resources of the respective communities. The use of contracting to other jurisdictions and to the private sector and participation with other governments suggests that some economies of scale can be acquired and limited human resources may be applied efficiently when a small management staff is used to supervise a broad group of contracts.

## **H. Protection of Local Interests**

An eighth feature of self-government in the European cases is the extent to which they are able to protect local values and interests. The most significant aspect of this is their ability, and the cooperation of the respective central governments, to remain outside the European Community while negotiating a separate trading arrangement with it. In the British islands cases the local governments are able to control migration to the islands while

in the Faroes the government can promote local values such as language and culture. In addition all three governments examined have control over some important political symbols such as flags and postal services.

The underlying principle of protecting local interests and values is also the motivation, among its aspirants, for self-government in Canada although the means are considerably attenuated. It is extremely unlikely for instance that a Canadian self-governing community could exempt itself from the Canada-U.S. Free Trade Ageement. Flags, with more than local recognition, postal services, or specific recognition in passports are also unlikely for self-governing communities in the Canadian context. However, control over matters of internal government, control over education, the use of indigenous languages, and local management of financial and other economic resources demonstrate how Canadian self-governing communities can protect local values and interests.

There are several lessons that Canada can learn from this comparison. Primarily it can be learned that self-government may provide a means by which specialized communities can be governed. It can also be seen that Canada might go further toward satisfying the self-government aspirations of some of its citizens without endangering the nation's stability. Some specific matters relate directly to the Canadian debate and to Canada's experience. First, some small communities may be able to manage many of their own affairs through cooperation and contracting with the larger neighbouring community. Second, a binding disputes settlement mechanism might prevent protracted administrative disagreements and improve the prospects for stability in self-governing communities. Finally, the federal and provincial franchises are often taken to be inviolable in Canada but the

experience of the British islands illustrates that an encompassing franchise may not be necessary to either good government or smooth intergovernmental relations.

There remain, however, several important questions in the Canadian debate on self-government that need further attention. First, communities potentially seeking self-government in Canada occupy a wide range of characteristics that could help or hinder them in their ability to govern themselves. Further investigation into the workable features of self-government will be necessary before it can be known which Canadian communities are realistic candidates for self-government in the manner examined in this paper. Second, included in the previous requirement is the need to consider, in a rigorous manner, the nature of the economies of scale in small governments in order to establish the likely costs that might be born by them. Third, the complexity of intergovernmental relations among federal, provincial, and several hundred self-governing communities is a special feature of the Canadian situation which is not illuminated by comparisons with other countries. Finally, none of the European cases of self-government that were examined are constitutionally entrenched. Since the issue of entrenchment remains a central issue on the agenda of aboriginal politics in Canada it too remains an issue that must be addressed independently.



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