"Dangling Participants: Is the Kelowna Accord Constitutionally Binding as a Federal-Provincial Agreement?"

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The Kelowna Accord was the result of significant negotiations between the federal government, provincial and territorial governments, and national Aboriginal organizations. The Accord was signed just hours before the Martin Liberal government fell in November, 2005. During the 2006 federal election period, the Harper Conservatives suggested they may follow through on the Kelowna commitment. However, the Harper Conservative minority government has not to date implemented the terms of the Kelowna Accord. This paper examines the extent to which the Kelowna Accord can be considered constitutionally binding both from a legal perspective and from the perspective of convention.

The paper relies on three sets of criteria to address the question of whether the Kelowna Accord is a binding federal-provincial agreement. First, we examine whether the Accord can be considered legally binding, in the context of three criteria developed by Johanne Poirier. Second, we assess the extent to which the Kelowna Accord addresses the four democratic factors noted by Gordon DiGiacomo. Then we draw on the three questions of the Supreme Court Patriation reference [1981] to discuss the extent to which the Accord is politically binding by convention. To enhance understanding, we have also reviewed several documents including the verbatim transcript of the November 24-25, 2005 meeting and the committee hearings for Bill C292, "An act to implement the Kelowna Accord."

Our analysis that involves consideration of three sets of criteria suggests that the Kelowna Accord cannot be considered legally binding yet it is politically binding by convention. We briefly discuss the implications of this for federalism and Canadian democracy.

2.0 Background: The Kelowna Accord

The Kelowna Accord is a ten year commitment to close the gap in the quality of life between Aboriginal Peoples and other Canadians. The Accord was the outcome of three sets of meetings held in September, 2004, May, 2005, and November, 2005. The meeting of First Ministers and National Aboriginal Leaders held November 24 and 25, 2005 at Kelowna, British Columbia, fulfilled a commitment made at the September 2004 Special Meeting of First Ministers and National Aboriginal Leaders to "convene a meeting dedicated to Aboriginal issues, including the key determinants of health" (Kelowna Accord).

The Kelowna Accord consists of four key areas: (1) education (2) housing (3) health, and (4) a new relationship. The parties to the agreement include the Federal Government, the 10 provincial governments, and National Aboriginal organizations. The Prime Minister, ten Premiers, three territorial leaders, National Chief Phil Fontaine, President of the Metis National Council Clement Chartier, Chief of the Congress of Aboriginal Peoples Dwight Doery, Native Women's Association of Canada's Ms. Beverly Jacobs were in attendance at the meeting. As noted by several of the Premiers including the Honourable Ralph Klein, Chair of the Council of the Federation at the time, Premiers met with Aboriginal leaders in their respective provinces prior to the meeting. Quebec

Premier Jean Charest met with Aboriginal leaders in his province prior to the meeting and in his speech to the meeting explained their reasons for choosing not to attend. He noted that the Chiefs of the Assembly of First Nations of Quebec and Labrador and the Quebec Native Women's Association chose not to attend the meeting due to their concern that the Federal government may be abdicating its responsibilities through creating tripartite agreements.

Many of the Premiers and National Aboriginal Leaders called the meeting "historic" and noted that others may react with cynicism. Pat Binns of Prince Edward Island explained, "When all is said is done, this will be the modern test of our nationhood and its federalist underpinnings" (Canadian Intergovernmental Conference Secretariat 2005b) British Columbia's Gordon Campbell likened the meeting to "a seat at the Table of Confederation" for Aboriginal peoples (Ibid). Ms. Beverly Jacobs of the Native Women's Association of Canada called it a "historic day" noting, "This is the first time that Aboriginal women are sitting at this table" (Ibid.)

In addition to commitments regarding education, housing, health and a new relationship, the parties to the agreement agreed to measure their progress in meeting their goals using broad indicators and "more specific measures and targets" to be "developed at regional and sub-regional levels" (Kelowna Accord, p.2). Moreover, they committed to several principles as to how they would work together. One of these principles was to adopt a distinctions-based approach. Such an approach recognizes and respects, "the diverse and unique history, traditions, cultures and rights of the Aboriginal peoples of Canada which includes the Indian, Inuit, and Metis peoples of Canada." The parties to the Accord specifically noted its inclusiveness of "all Aboriginal peoples, who may reside on reserves or settlements, in rural or urban areas, or northern and Arctic regions" (Kelowna Accord, p.1).

Education is one of four areas addressed by the Kelowna Accord. Specifically, the parties to the agreement aim "to improve all Aboriginal learners' educational experiences and to increase the number of secondary school graduates" (Kelowna Accord, p.4) to "close the gap" by 2016. The educational goals require "effective working relationships between the public education systems and First Nations schools on reserve or pursuant to self-government and sectoral agreements." With respect to public education systems, all parties are committed to "improving the educational outcomes of all Aboriginal learners" through initiatives that include collaborations, support to families, early detection of learning disabilities, curriculum development, increasing the number of qualified Aboriginal teachers, and gathering data to inform decisions and measure performance. The Government of Canada is committed to supporting these initiatives while respecting provincial/territorial jurisdiction in education.

Housing is a second area of focus of the Accord and is viewed as an important component "to ensuring positive outcomes for First Nations, Inuit, Metis and their communities." (Kelowna Accord). In addition to the connection between housing and health and social outcomes, housing is also viewed as an area of economic opportunity that may provide employment for Aboriginal Peoples. According to the parties to the Kelowna Accord, the goal of "affordable, stable and good quality housing" requires a "re-thinking [of] current approaches" and must involve aboriginal peoples in the process. Aiming to work pursuant to self-government agreements as well as to work collaboratively for housing needs in the off reserve and non-reserve context, the Government of Canada, provinces and territories and First Nations, Inuit and Metis will support new housing initiatives, examine government policies that may impede housing development, support housing assistance, support housing solutions for Aboriginal women, share housing expertise to support capacity development, and increase opportunities for skills training, apprenticeships, employment

and business development in housing related areas. The Accord explains that "innovative Aboriginal housing agreements" will be developed through "regional-based discussions recognizing differing circumstances and existing relationships." Reductions in levels of core housing need serve as the measure of progress in this area. Core housing need as defined by the Canada Mortgage and Housing Corporation includes three aspects: affordability, suitability, and adequacy.

A third area of focus for the Kelowna Accord is health. At a September 2004 meeting the First Ministers and National Aboriginal Leaders agreed to collaborate to create a "blueprint to improve the health status of all Aboriginal peoples" (Kelowna Accord, p.8). The agreement notes the need for all parties to work together to achieve the goal of closing the gap in health status. The section of the Kelowna Accord that addresses health explains that initiatives and plans will be developed and that these investments build on the $700 million committed at the September meeting. Possible areas of focus for the plans include mental health, suicide and addictions, nutrition and food security, diabetes prevention and treatment, public health, continuing care, telehealth and maternal, child and youth health. Select indicators will be used to measure progress.

The fourth main component of the Kelowna Accord is developing a new relationship. Throughout the agreement, this relationship in evidenced by references to collaboration, tripartite agreements, re-thinking current approaches, involving Aboriginal peoples and by the establishment of some institutions. The institutions mentioned in the Accord include multilateral forums for First Nations, Inuit, and Metis, an Inuit Housing Institute, and a Metis Nation Housing Institute.

The Accord addresses economic opportunities in addition to the four components. It includes areas such as economic infrastructure, training and skills development, connectivity, improving the regulatory environment, resource development and business development. Moreover, "regionally based strategic frames" can help to facilitate "effective economic opportunity partnerships and relationships among all parties (i.e. federal/provincial/territorial governments, Aboriginal communities and institutions, and the private sector). The parties to the agreement agree to "initiate regional distinctions-based processes, which are inclusive of all Aboriginal peoples" along with governments and private sector representatives to "identify economic opportunity strategies" (Kelowna Accord, p.7).

In addition to the agreement on the Kelowna Accord, a tripartite agreement involving the Government of Canada, the government of British Columbia, and the Leadership Council representing the First Nations of British Columbia was signed on November 25, 2005. This side agreement known as the Transformative Change Accord was formatted for signatures and signed by all three levels of government. Two documents preceded the meeting and include "First Nations – Federal Crown Political Accord" and "The New Relationship." The purpose of the Transformative Change Accord is "to bring together the Government of British Columbia, First Nations and the Government of Canada to achieve the goals of closing the social and economic gap between First Nations and other British Columbians over the next ten years." Furthermore, "this Accord respects the agreement reached on November 25th and sets out how the parties intend to implement it in British Columbia."

The Kelowna Accord was agreed to on November 25th by the federal, provincial, territorial and National Aboriginal leaders but was not formatted for signatures. The agreement occurred just days before the Martin Liberal government lost a confidence vote and an election was called. The election resulted in a change in government from Liberal to Conservative under Stephen Harper as Prime Minister. During the election, Jim Prentice stated that the terms of the Kelowna Accord would be followed if the Conservatives won (CBC News, 11 January, 2006). Meanwhile, another future

Conservative cabinet minister, Monte Solberg, stated the commitments would not be kept as they were "crafted at the last moment on the back of a napkin on the eve of an election" (Ibid.) By spring, the Conservatives had not included Kelowna among their spending commitments and instead stated they had no intention of following through on what they viewed as last-minute commitments. Moreover, the Conservatives also suggested that the Kelowna Accord did not constitute a "national consensus" as aboriginal leaders from Quebec did not take part (CBC News, 2 June, 2006).

Aboriginal leaders expressed their disappointment that the Conservatives appeared unwilling to implement the Kelowna Accord. For example, the Metis National Council told a House of Commons committee examining Bill C292 that "Kelowna represents so much more than a concrete plan for closing the socio-economic gap between Aboriginal peoples and other Canadians. It represents hope, trust, respect and compromise." They also said that the government's failure to live up to the agreement was a result of their "wooden heart and wooden smile". The Western Premiers met in June 2006 and expressed their desire for the federal government to follow through on this historic commitment. In particular, British Columbia's Premier Gordon Campbell explained,

> I characterized [the Kelowna Accord] as Canada's 'moment of truth'…It was our chance to end the disparities in health, education, housing and economic opportunity. All first ministers rose to that moment of truth alongside Canada's Aboriginal leaders to undertake that challenge. Having made that extraordinary national commitment, any unilateral reversal will invite consequences that only make us poorer as a nation. (Office of the BC Premier, May 4, 2006)

In order to open the debate to a wider audience including the legislature, Paul Martin introduced a private member's bill entitled the Kelowna Implementation Act. Bill C292 made it through the House of Commons and is currently before the Senate. The success of Bill C292, which is normally unusual for Private Members' Business, puts the Kelowna Accord on a direct collision course with government priorities and executive federalism. Its sister bill, C288, the Kyoto Implementation Act has created an unusual degree of resentment and scare tactics from the executive branch. The government seems to resent the notion that the legislative branch can alter its agenda and priorities especially when it affirms policy positions that the cabinet sees as discredited from the previous regime. Unlike the environment, however, the Kelowna Implementation Act has not managed to elicit the same kind of supportive public and media interest. While the 2007 budget addressed environmental issues, Aboriginal ones were almost completely ignored. Phil Fontaine suggested that the 2007 budget just perpetuates misery.

3.0 Binding Federal-Provincial Agreement: Considering the Criteria

3.1 Johanne Poirier's Criteria

In light of the current government's decision not to implement the Kelowna Accord, we ask to what extent the terms of the Accord can be considered binding. The question of whether the agreement is binding splits into two smaller questions. First, whether the Kelowna Accord is legally binding, and second, whether it is binding by political convention. Interestingly, the answer to each question depends on very similar criteria. First and foremost, what were the intentions of the parties involved? Did they intend their agreement to be binding? According to Johanne Poirier, the legal

status of an intergovernmental agreement (IGA) depends on three criteria (Poirier, 434).1 These are three broad criteria which can be used to determine the intentions of the parties to the agreement, relative to whether they created a legal obligation. The first of these criteria has to do with the sort of language employed. The second looks at what dispute resolution mechanisms are specified by the agreement (if any). The third criterion looks at the consequences or actions of parties since the agreement was concluded; have affected parties behaved as though they thought the agreement would be carried out when it in fact was not?

Language in the Agreement

The first dimension of legal analysis begins with the language used in the agreement itself. Certain words will suggest a more contractual agreement relative to other words which will signify an agreement in principle, but without contractual obligation. Poirier notes that "aspirational" language is less likely to be interpreted to create a binding agreement than "contractual jargon," or more imperative language. For instance, use of the word "shall" as opposed to "will" becomes meaningful. Generally, where an agreement states that something "shall" be done, it suggests a legal undertaking, "although this is only a guideline." In the Kelowna Accord, the word "shall" does not appear at all. The word "will" appears 74 times. In the Kelowna Accord, the word "intend" appears once, within "intended." It appears in reference to efforts by Health Ministers, Aboriginal Affairs Ministers and National Aboriginal Leaders to develop a Blueprint on Aboriginal Health which were "intended" to lead to concrete initiatives. The word "agree," or different forms thereof (agreed, agreement), appears 47 times. Similarly, the side agreement to the Kelowna Accord, the Transformative Change Accord, can be considered from the viewpoint of the language used. It uses the word "shall" one time, and the word "intend" three times with the word "agree" (including agreement) appearing 14 times.

On the first question of the issue of language, the Kelowna Accord has a mixed character. In some sections, the agreement uses somewhat vague and "aspirational" language. At other times, it is clear and borders on contractual. In both the preamble and the conclusion of the agreement, an emphasis is placed on immediate action, and that the agreement represents a "commitment" by all parties to the agreement. These sections and the language therein suggest an intention to be "bound" by the agreement, which also suggests that it is legally binding. However, in other sections, the accord utilizes more aspirational language. It includes promises to meet in the future, and to develop collaboration. In so doing, it takes on more of the character of a plan or a roadmap, and does not appear to suggest that any parties can be legally held to mere intentions on principle, or on future discussions. The assessment of any agreement may place emphasis on the two sections mentioned,

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1 It should be noted that some scholars do not believe that IGAs can be legally binding except under the most specific of circumstances. See Martin Papillon and Richard Simeon, "The Weakest Link?" in Peter J. Meekison, Hamish Telford, and Harvey Lazar. *Canada - The State of the Federation 2002 - Reconsidering the Institutions of Canadian Federalism*, (Kingston: McGill-Queen's University Press, 2004) p. 131: "Most [IGAs] embody genuine commitments by all parties. But they are not formally binding or judicially enforceable," and Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, (Toronto: Oxford University Press, 1991) p. 115: "Few of these types of agreements would appear to fulfil the requirements of a legal contract." Heard notes that the primary reason an IGA would fail to qualify is on the basis of intention to create a legally binding contract (or lack thereof).

specifically, a preamble and a conclusion. Typically, the preamble will be the section that lays out the intentions and sets the tone for the rest of the document; the conclusion is important for establishing the bottom line, or what all of the preceding sections really mean. It is common sense to pay close attention to how a document, begins and how it ends. The Kelowna Accord concludes with a very strong statement of commitment that all the parties to the agreement will take immediate action. One could assert that the preamble and conclusion of the Kelowna Accord should be given greater weight in assessing the language criterion, and thus that the agreement is legally binding on this basis. However, one could equally assert that the character of the majority of the language in the agreement should be taken as definitive. The preamble and concluding sections constitute only a small portion of the document, compared to the body of the agreement. Overall, there is more aspirational language in the agreement than imperative language.

The Transformative Change Accord is of a similar character. However, language used to describe its purpose by the Premier of British Columbia suggests it may be binding:

> This tri-partite agreement stands as a binding declaration of our mutual resolve to act upon the vision and commitment of all first ministers and national Aboriginal leaders, as set out in the Kelowna Agreement (British Columbia, Aboriginal Relations and Reconciliation).

This first criterion regarding the language of the Kelowna Accord is not definitive, since there are no standard rules for drafting IGAs so that they are legally binding or not. Overall, the language is ambiguous, as a basis for assessing whether the agreement was intended to be legally binding. It is impossible to clearly conclude that the agreement or the side agreement is either legally binding, or not legally binding on the basis of the sort of language used in the agreement. However, the language criterion should be understood concurrently with the other factors which need to be considered to assess the agreement's status as legally binding or not. One of the other factors may shed light into the intentions, and provide a basis for examining particular language in the agreement.

Dispute Resolution Mechanisms

The second question arising from Johanne Poirier's criteria involves consideration of dispute resolution mechanisms. Neither the Kelowna Accord nor the Transformative Change Accord includes any specific dispute mechanism. Again, this presents us with ambiguity as to whether it was intended to be legally binding. If the accord had provided that disputes would be referred to an arbitration body that was non-legal, this would be a clue at least suggesting that the parties did not mean for it to be enforceable in the courts (at least not immediately). If the Accord had specified that disputes would be taken to a provincial court or to the federal court, that would have been a clear sign that they intended it to be legally binding. As the Accord is silent on the question, however, this can be interpreted either way. One can read the absence of the courts from the Accord as an indication that the agreement had nothing to do with the courts. However, one could equally reasonably claim that in not mentioning the law courts, the parties assumed that disputes would be resolved in the courts, as the courts are the regular institutional mechanism by which disputes between contracting parties are resolved.

Subsequent Conduct by Affected Parties

The third criterion offered by Poirier involves subsequent conduct by affected parties. If the

parties to the accord carried on as though they were fulfilling obligations, and or as though they expected others' obligations to them to be fulfilled, then this could serve as an indication that they felt the other parties in the agreement were bound to carry out their parts. Relying on the provisions of the agreement would suggest that it was considered binding. "Courts may be more inclined to find that an agreement is binding between parties if one of them has relied on it to its detriment" (Poirier, 433). This is something of a results-oriented model of judicial decision-making, and it presents some difficulties. A party can act as though they believed that an agreement was binding when they in fact knew it was not, merely in order to give the impression that the agreement was binding. This would be the extreme of Machiavellian politics to play for the courts, and it is outside the realm of reasonable consideration to believe that any of the actors in Kelowna were even aware of this criterion, let alone that they would attempt to manipulate it for advantage. The courts assume above-board operation to be the norm. On this criterion, one would look for any indications subsequent to the agreement that the parties believed the agreement to be binding. First of all, did any of the parties to the agreement say anything to suggest that they thought it was binding? Statements, cited both above and below, by many of the principal actors such as Paul Martin, Gordon Campbell, and Phil Fontaine among others could be interpreted as such indicators. Their comments are somewhat ambiguous, and should be taken with a grain of salt, since, if taken as political rhetoric, they would be a better indication of posturing for an election or for public recognition than of actual genuine expectations. This is not intended as cynical; rather, what is consistent is the ambiguous character of the Kelowna Accord's status as a binding agreement. It is only prudent to consider the comments of actors in the context of the character of the agreement they produced. It would be negligent not to consider that statements made after the agreement was concluded, and after the Martin government had lost the confidence of the House of Commons, might be made for political purposes and so not be reliable indicators of genuine intentions. So the question really depends on what has been done by the parties to fulfill the agreement; actions always speak louder than words in the eyes of the court. Has any work proceeded? Has ground been broken for new buildings? Have materials been bought, or contractors hired? Have any of the meetings the agreement provides for taken place?

Perhaps most significantly, one of Kelowna's subsequent trilateral agreements has been concluded, between the federal government, the British Columbia government, and the B.C. First Nations Leadership Council. Immediately following the Kelowna Accord's negotiation, these parties signed the Transformative Change Accord (TC Accord). The TC Accord was negotiated and arrived at under the structure provided for by the Kelowna Accord. As such, it appears to serve as persuasive evidence that the actors involved held good faith expectations that the terms of Kelowna would be met. Unlike Kelowna, the TC Accord was formatted for signature and was signed by executive delegates of the three levels of government, including the Prime Minister and Premier.

3.2 Gordon DiGiacomo's Criteria

While our analysis is ambiguous on whether the Kelowna Accord can be viewed as legally binding, its status as binding by convention may depend on certain democratic characteristics. In addition to the three criteria offered by Johanne Poirier, we consider a second set of criteria. Gordon DiGiacomo's criteria focus on the democratic legitimacy of an IGA. This is a central consideration as the legitimacy of IGA's conducted solely by executive federalism has been the subject of a great deal of academic and popular skepticism. Presumably, an IGA that fails to meet a standard of democratic legitimacy will lack the same degree of popular consent as one that does. DiGiacomo

distills his tests of the democratic content of IGA's from Robert Putnam, The Democratic Audit conducted by the Centre for Canadian Studies at Mount Allison University, and from papers by Jennifer Smith, Richard Simeon and David Cameron.

DiGiacomo's four criteria include responsiveness, effectiveness, participation, and transparency and accountability.2 He writes that responsiveness is a tool to determine if an IGA is responsive to citizens' demands or concerns. The central question here is; who does that IGA respond to?3 The effectiveness test is used to determine whether or not the IGA accomplishes something for citizens. Participation refers to the degree to which citizens are involved in policy development. Finally, was the IGA conducted in a transparent and accountable manner?4

DiGiacomo's democratic criteria are particularly useful in evaluating an agreement like the Kelowna Accord as it differs, at least in part, from typical IGAs in a number of important ways. These criteria are also particularly useful as the debate surrounding the imperative to follow through on the Kelowna Accord is largely a democratic one. Namely, it is through Canada's democratic mechanisms of government that this issue will ultimately be resolved or flounder. The government's lack of action and the legislature's request for action (Bill C-292) are both informed by democratic considerations or an appeal to the electorate.

Responsiveness

DiGiacomo's first democratic criterion is responsiveness. To what extent is the Kelowna Accord responsive to citizens' demands or concerns? The Kelowna Accord can be viewed as responsive to Aboriginal peoples and the provinces. Its mode of conduct within an executive federalism forum may make it appear somewhat less responsive. Also, the Kelowna Accord has come under attack for not being representative of all aboriginal peoples though it has inclusiveness as a goal. On the criterion of responsiveness, the Kelowna Accord may again be understood to be somewhat ambiguous.

The Kelowna Accord is responsive to the needs of Aboriginal People (used in the broadest sense to include Inuit, Metis, Status and non-status Indians, reserve and off-reserve Peoples). Canada's Aboriginal People have traditionally suffered from a number of problems which are dramatically more exaggerated than with other Canadians, including, poverty, alcohol and drug abuse, high incidences of incarceration, diabetes, depression, arthritis, poor living conditions and lower educational attainment. These conditions have been exacerbated by social dislocation, discrimination and marginalization. Upon the conclusion of a First Minister's meeting in Kelowna in November 2005, Phil Fontaine and the Assembly of First Nations released an uncharacteristically glowing press release which stated in part: "The fact that the Prime Minister and the First Ministers sat with the First Peoples of this land to engage in a real discussion on our issues and our agenda, our inherent Aboriginal and Treaty rights, is in itself historic," stated National Chief Fontaine. "But, more importantly, we are making history by taking the first steps towards creating a new Canada and forging a new Federation; a Federation where the First Peoples of this land enjoy the same quality of life as other Canadians; where we control the decisions that affect our lives; where we give life to the spirit and intent of the

2 DiGiacomo, The Democratic Content of Intergovernmental Agreements in Canada, pp 14 and 15.
3 Ibid, p. 14.
4 Ibid, p. 15.

Treaties and full expression to our inherent rights."5 The press release goes on to state that First Nations have “called for a series of First Ministers Meetings to develop and implement action plans to help eliminate First Nations poverty and improve the quality of life for Canada’s First People’s.”6

The Kelowna Accord is also responsive to the concerns of Provincial Premiers. For example, Gordon Campbell of British Columbia stated at the First Minister’s meeting: “For me, this meeting is about facing up to the failings of the past and the real needs of the present. [It's] not to find fault or to cast blame but to find new paths to a brighter future… We have an obligation to build on the legal framework of our Constitution, to extend the same rights, entitlements, and range of opportunities to aboriginal Canadians that are available to all Canadians, on and off reserve or treaty lands.”7 The Premiers welcomed Kelowna openly. Their motivation may have been to secure an infusion of additional money to deal with Aboriginal housing, health and education concerns or from a genuine desire to assist Aboriginal citizens or a mixture of both but the Accord responded to the Premiers need as well.

The degree to which the Kelowna Accord could not be considered responsive is due in part to executive federalism. Namely, can the Prime Minister and Canada’s governments, along with the executive representation from a variety of Aboriginal organizations’ truly represent the needs of Canada’s First Peoples? While this concern is valid, short of a referendum, the Kelowna Process was the most open one conceivable by including so many stakeholder groups at the table.

Kelowna has come under a degree of criticism as not being representative of all of Canada. Canada’s current Minister of Indian Affairs and Northern Development, Jim Prentice, stated in the House of Commons that “The Kelowna accord also did not reflect any sort of process that involved all of Canada. The province of Quebec, as represented by the Assembly of First Nations' regional chief for Quebec and Labrador, Ghislain Picard, did not participate in the process and did not take part in Kelowna. It does not reflect a Canadian consensus.”8 It is important to note that the Premier of Quebec participated in the Kelowna Accord process and consulted with Aboriginal peoples in his province prior to attending the Kelowna meeting.

Some parliamentarians have also suggested that the main thing Kelowna tried to represent was the desire of Prime Minister Martin and the government to have a positive legacy. Rod Bruinooge, a Conservative Member of Parliament summed up this position in his questioning of the former Prime Minister during the House committee hearing on C-292 by stating “Mr. Martin, are you pursuing this as a legacy item, perhaps due to the fact that the only legacy it seems you have is the fact that your nemesis served you up a rather large political grenade in terms of the sponsorship scandal? Is this something that you're attempting to use as a legacy item?”9 While these concerns may be politically motivated, they contain at least some element of truth. Nevertheless, the process leading up to the Kelowna Accord was generally more responsive and representative than previous IGAs and made a concerted effort to address a long standing problem. It should also be noted that each provincial Premier met with provincial

5 http://www.afn.ca/article.asp?id=1988
6 Ibid.
7 http://www.news.gov.bc.ca/default.asp?st=11
8 House of Commons, Hansard, June 2, 2006.
9 http://cmte.parl.gc.ca/Content/HOC/committee/391/aano/evidence/ev2499050/aanoev25-e.htm#Int-1770234

Aboriginal organizations before attending the historic Kelowna meetings. The Kelowna meetings that took place in November 2005 were preceded by significant efforts by provincial premiers, in particular, Gordon Campbell, to achieve some kind of consensus around the steps to be taken to close the gap between Aboriginal peoples and their fellow Canadians.

Effectiveness

DiGiacomo's second criterion of effectiveness focuses on whether or not something is accomplished for citizens. On this criterion the Kelowna Accord must be considered highly ineffective, as it was never implemented. The central question of effectiveness is that of what has been accomplished. In practical terms, the answer to this question is that nothing directed under Kelowna has been accomplished; thus its effectiveness is not in doubt, it is certain that the agreement has been very ineffective.

The status of the Transformative Change Accord may suggest that insofar as that agreement was concluded under the rubric provided by Kelowna, that Kelowna has accomplished something and thus been effective on the limited sphere of operations specified in the province of British Columbia. Nevertheless, the TC Accord's calls for additional meetings and additional agreements to take place also create the difficulty of assessing its effectiveness, and suggests that to date, we cannot find the TC Accord to have been effective. The TC Accord may be rendered less effective, or ineffective, by Kelowna's failure to be implemented.

Unfortunately, these speculative questions are not particularly fruitful; it is impossible to assess with any certainty what the impact of the Accord *would* have been if it had been enacted. However, one can conclude from the universally positive comments made at the meetings and in subsequent public statements, that the previous federal government, the provinces, and Canada's Aboriginal leadership would argue that this accord could have made a significant impact on the lives of Aboriginal People in Canada.

Participation

DiGiacomo's third criterion focuses on participation, specifically the degree to which citizens are involved in policy development. While some political commentators have stated that the Kelowna Accord was a last minute deal conducted on the back of a napkin, that characterization seems to be unfair. The Kelowna Accord was the culmination of a number of consultations, First Ministers Meetings, and consultations which occurred over a two year period. It certainly provided for more participatory opportunities than a traditional IGA concluded as the result of pure executive federalism. In addition to the usual Premiers and federal government representatives, Canada's Aboriginal leadership was invited to participate actively in the process. They were also consulted actively. During a meeting of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Phil Fontaine stated "Beginning in early 2004, with the first round table meeting, first nations tabled specific action plans on key issues. These plans were refined through our own national policy forums and chiefs assemblies, as well as in meetings with governments. Our work was formally tabled, which led to our inclusion at the first ministers meeting on health in the fall of 2004. Indeed, I personally, on behalf of First Nations governments, in July of 2005 issued a ten-year challenge

to close the gap in living conditions."10 Fontaine indicated that Aboriginal People participated from the Accord's initial stages and created their own policy development processes to include their membership. His sentiments were also reflected in statements made by Mary Simon, President of the Inuit Tapiriit Katami who stated: "Regrettably, a number of myths have arisen in relation to Kelowna, including the myth that the entire accord was somehow conjured up in a back room in the absence of facts, figures, or reasons. This is not true. The accord and the blueprints associated with the accord were the product of a multi-year, multi-party effort that featured a lively, intensive, and informed discussion of options and priorities."11 Ms. Rosemary McPherson of the Métis National Council made a similar argument and also suggested that participation was sought actively from members outside of the executive of these organizations: "Kelowna represents the culmination of over eighteen months of dedicated consultation and efforts that involved all levels of government in Canada, including aboriginal ones. More importantly, it involved the engagement of front-line workers, youth, community leaders, experts, and practitioners in order to bring forward the best ideas and solutions to begin to close the gap between aboriginal people and other Canadians."12

While it is clear that the Kelowna process involved formal and informal mechanisms to include participation from Aboriginal Groups and their members which expanded the participatory mandate of more traditional executive federalism, additional groups have stated that the process was inadequate and did not go far enough. They have commented that Aboriginal people who live off-reserve or in urban areas were largely ignored by the Kelowna process.

Furthermore, some suggest that the process limited participation by focusing on Aboriginal elites. Chief Patrick Brazeau of the Congress of Aboriginal Peoples told the House committee studying Bill C-292 that: "We ask this, since, based on this evidence, it is clear that the Kelowna process was not about inclusion. It was not about recognition and accommodation. It was about considering hundreds of thousands of people, including me, who don't live on these small tracts of land called reserves, as less important than others who do. In my view, Kelowna provided false hope for grassroots people, people with real needs, while enriching organizations and the aboriginal elitist groups."13 Ms. Vera Pawis Tabobondung, President of the National Association of Friendship Centres echoed some of Chief Brazeau's concerns "The agreements failed to adequately deal with the 50% of first nations, Métis, and Inuit people who live in urban areas. The agreements would not provide the programming and resources necessary to meaningfully impact the issues our clients face every day." She went on to say: "Despite being the largest aboriginal service to the infrastructure in Canada, we were afforded no opportunity to provide policy advice or insight into matters considered. During the round tables, we were forced into a distinction-based conversation on how the Métis Nation should address lifelong learning, develop their housing stock, or define and demonstrate accountability. No space was provided in the dialogue for a broader urban aboriginal conversation on how to address education needs, what housing services are required, what level of jurisdiction is responsible for these areas, what is the role of representative bodies, what is the role of service providers. Indeed, a historic

10 House of Commons, Evidence, Standing Committee on Aboriginal Affairs and Northern Development, November 21, 2006.
11 Ibid.
12 Ibid.
13 Ibid., November 23, 2006.

opportunity was lost. Not only were we not afforded an opportunity to participate in the dialogue, we were not even able to submit reports for consideration."14

While the Kelowna Accord process allowed for substantial participation by Aboriginal Peoples, some groups were left out. The process appears to be respectful of participation, if imperfect. Phil Fontaine commented on the concerns of some Aboriginal groups that felt left out "The choice of some first nations not to be at Kelowna has also been misrepresented. In fact, the criticism from some first nations was that Kelowna did not go nearly far enough, but almost all first nations agreed to support the outcomes as minimum requirements."15

Transparency and Accountability

DiGiacomo's final criteria include transparency and accountability. To what extent was the IGA conducted in a transparent and accountable manner? Again, we note some ambiguity. It is the case that the meetings leading up to the Kelowna Accord were not conducted in a closed or secretive manner. Many Aboriginal groups were consulted openly over a period of at least a year prior to the agreement. Phil Fontaine described the process to the House committee studying bill C292, "There was also a question about a lack of accountability in the targets associated with Kelowna. Here again there are clear facts. An extensive set of indicators to measure progress was discussed through a working group process in a draft report table. Commitments were made through a joint accountability initiative. In fact, there were to be specific resources dedicated to ensuring accountability and the pursuit of indicators."16

There are, however, some transparency questions that are typically unaddressed by this process. Obviously a meeting of provincial premiers, federal officials and Aboriginal leadership which occurred out of the public eye does not achieve an optimal degree of transparency. Suggestions have been made that certain groups were shunted to the side and the process did not include any obvious mechanism for average citizens (other than through their elected executives) or ordinary Members of Parliament to contribute. The process was not, however, completely shut off. In a number of speeches and statements, Jim Prentice, then an ordinary Member of Parliament, stated that he attended some of the meetings but he did not appear to participate.

The Kelowna Accord has also been criticized for the manner and timing of its announcement. Since the Kelowna Accord was not presented as a formal agreement but instead as a series of public statements, its format leads to a degree of confusion and imprecision. Similarly, the Kelowna Accord was finalized in the last days of the mandate of Prime Minister Martin leading some commentators to assert that it was squeezed in at the last minute and hurried. The timing of the Kelowna announcement was less than ideal as it allowed for little, or no, time for public or parliamentary debate prior to the dissolution of parliament. However, the lifespans of minority governments are notoriously difficult to anticipate.

The text of the Kelowna Accord stands up well to the accountability test as it includes agreement to hold continuing multilateral forums between the federal and provincial governments and Aboriginal organizations to review process and performance. Outcomes appear to be targeted. Mary Simon of the Inuit Tapiriit Kanatami said that "…the Kelowna agreement

14 Ibid.
15 Ibid., November 21, 2006.
16 Ibid.

committed to solid blueprints for achieving progress in the critical areas of health, education, and housing."17 She also stated that "…the Kelowna accord committed to the achievement of targeted outcomes and allowed for a high level of accountability to the public in the measurement of progress towards those outcomes."18

Again, though, we must find that the Kelowna process is ambiguous on this criterion as these statements will remain impossible to verify as long as Kelowna remains unimplemented. While the agreement is structured with significant measures of accountability, the Accord cannot ultimately be considered to score particularly high on the criterion of accountability if one of its participants can renege on commitments under the agreement without repercussions.

3.3 Patriation Reference Questions

While assessing the legal and democratic status of the Kelowna Accord may not yield a satisfactorily definitive finding as to whether it should be considered legally binding, it may be more productive to ask whether the agreement should be considered politically binding on the basis of a convention that forbids a government from unilaterally canceling or reneging on an IGA. That is the third major question under examination here. An understanding of political conventions must consider the Supreme Court of Canada's analysis of the requirements for establishing a convention in the *Patriation Reference,* 1981.

The question of whether the agreement is binding as a convention, depends in a large degree similarly on the intention. The Court noted that "the requirements for establishing a convention bear some resemblance with those which apply to customary law." The Court then considered three questions from Sir W. Ivor Jennings, *The Law and the Constitution*. The first of Jennings' questions deals with precedents. What are the precedents that we would take for an IGA to be considered something that a provincial or federal government simply does not unilaterally decide not to live up to? Immediately, this question poses a difficulty. The Kelowna Accord has been described as "historic" and "unique." If Kelowna is unprecedented, how can we determine any relevant precedents? The task, though perhaps difficult, is not impossible. While Kelowna was historic and ground-breaking in many ways, it was produced through consultation driven by the predominant federal practice of the day in Canada, intergovernmental meetings between federal and provincial first ministers and cabinet ministers. As such, it has something of the character of other agreements arrived at by the same process. Generally, these agreements are followed by all parties to them; cases of one party unilaterally extricating itself from an IGA, or even amending it, are rare.

The Canada Assistance Plan (CAP) is the best known case where this occurred, and was considered in the courts, through reference cases. CAP is the most relevant and on point precedent, even if it does not line up perfectly with Kelowna in its form. Kelowna was a multi-lateral agreement, and included third parties, namely the leaders of Aboriginal groups. The CAP was a series of bi-lateral agreements between the federal government and individual provinces. In that case, however, the federal government unilaterally modified the funding formula provided for in some of those bi-lateral agreements. However, the funding formula itself was not *in* any of the agreements themselves, but in the federal statute. The Supreme Court found that the federal government (or a provincial government, for that matter) could take the action it did, in accordance with the doctrine of parliamentary sovereignty. Poirier notes dryly that "the irony is that it was a

17 Ibid.
18 Ibid.

contracting executive that was tabling the Act that unilaterally modified the federal contribution." (435). The irony in the case of Kelowna is that the executive has not tabled anything. In fact, the executive has taken unilateral action, apart from the legislature, and thus, apart from parliament. What makes this ironic is that ordinarily in Canada, the executive dominates the legislature, and parliamentary sovereignty in form really means executive, cabinet, or prime ministerial sovereignty in practice. However, Paul Martin's minority government (which concluded Kelowna) has been replaced by Stephen Harper's minority government. The question becomes modified, then; not whether there is a convention against unilaterally withdrawing from an IGA, but whether there is a convention against doing so *without* legislative action explicitly extricating a government, or modifying an agreement, and the answer from CAP appears to be yes.

What was at issue in the CAP reference was that the federal government, through legislative action, unilaterally changed its contribution to the Canada Assistance Plan, which was an intergovernmental agreement. But the agreement did not specify the formula for determining federal contributions; in fact, the formula was left to be determined by the federal government. Since the spending formula was not in the agreement itself, the parties had to know that it would be subject to unilateral amendment by the level of government which had the authority to legislate it. The Kelowna Accord differs significantly on this dimension; the contribution formula is very specific and is contained in the agreement. One could not unreasonably infer that the specificity of the funding formula was undertaken to avoid precisely the difficulties that the governments experienced with the CAP.

The provincial governments rested their case in the CAP reference on the doctrine of legitimate expectations; that is, that they had a legitimate expectation that they would be protected from unilateral amendment. The Supreme Court rejects this argument, stating that parliamentary sovereignty is inviolate. However, the Court emphasizes the *legislative* process; that parliamentary sovereignty relies on parliament, the legislative body, not merely the executive acting in council. "Before the Court of Appeal, the federal government had admitted that it could only challenge an intergovernmental agreement through a legislative instrument … If the federal government could get out of its obligations, it had to do so by legislative means." (Poirier, 435) Ordinarily, this distinction is irrelevant, because in Canada's parliamentary system, government is executive dominated. Where a prime minister has a compliant majority in the House of Commons, his power is virtually unchecked. But we are not dealing with "ordinarily" and we are not dealing with "virtually." We are dealing with the circumstances following Kelowna, where the prime minister has only minority government status. If a prime minister with a sitting majority is basically unfettered, because of responsible government, then that system features the possibility of the scenario where a prime minister without a sitting majority is *checked* by responsible government. This is why in *Wells v. Newfoundland* the Court held that the Crown had to go through the legislature to extricate themselves from a contract. Parliamentary sovereignty is not properly understood without responsible government, and responsible government is circumvented if the executive extricates itself from a Crown contract without legislative approval. In *Wells v. Newfoundland*, the Court considered the notion of compensation for broken contracts. The Court acknowledged that nothing prevents the legislature from violating the terms of a contract (here taking an IGA as a contract). The legislature can even claim that parliamentary sovereignty permits them to do so without compensating the party or parties who are damaged by their violation; but the Court ruled that the legislature would then have to pass "a very clearly worded statute" doing so. If Stephen Harper were to table an Act to withdraw from the Kelowna Accord, it is very likely that the legislature would not

permit him to do so. Harper has neatly circumvented parliamentary sovereignty, and in so doing, appears to have violated a little-known facet of a fundamental parliamentary convention.

Nevertheless, this is on the basis of only one of three questions. The second question, however, is very familiar: What were the beliefs of the actors in the precedents? That they were binding themselves? The answer appears to be yes, at least by the convention of the doctrines of parliamentary sovereignty. Insofar as the delegates of the federal and provincial governments were present at the negotiations in Kelowna as representatives of parliamentary governments, then they must see themselves as bound by the rules of the system of parliamentary government. Parliamentary sovereignty does not permit the executive to act without responsibility to the legislature; parliamentary sovereignty depends on a fiction that the parliament represents every man, woman, and child in the state. That fiction is carried out by the buckle that binds the executive to the legislature, and that buckle is responsible government. The doctrine of parliamentary sovereignty demands that the actions and agreements concluded be considered in their intentions to be binding; that is, binding in this sense means subject to overview by the parliament. More specifically, though, did the participants at Kelowna believe they were creating a politically binding agreement? This question has already been considered above to some extent. In the context of understanding IGAs as politically binding by convention, evidence seems to suggest that they would. In his analysis of political conventions in Canada, Andrew Heard finds the existence of a convention supported by the understanding or intentions of the contracting parties. "There appears to be a firm expectation that a government will observe its intergovernmental commitments. I would suggest that there is an important constitutional convention regulating federal-provincial negotiations that is analogous to one of the basic rules of international law and diplomacy; *pacta sunt servanda,* agreements are to be kept" (Heard, 116).

The third question from the Patriation reference is, what is the reason for the practice? We find here that the reason for the expectation that governments will not unilaterally amend or cancel IGAs is likely the same reason the Supreme Court found there to be a convention in the case of the *Patriation reference,* namely, the federal principle in Canada. We assume that it was to make federalism work in the era after we had dispensed with watertight compartments. If federalism in Canada is practiced to a greater and greater degree through cooperation or collaboration, there must be some reliability of agreements between the two levels of government. Any departure from a strictly dual federalist interpretation of the constitution will create a greater possibility of friction between the levels of government, and one must be careful to guard against one citizenship being subordinated to another; unless nominal federalism, or a loose confederation or league of states, is the desired outcome. It appears logical to rely on the major mechanism of democratic accountability inherent in our system of government, parliamentary sovereignty, to enforce this balance. Additionally, any erosion of the importance of parliamentary sovereignty constitutes an alarming abdication of intrastate accountability. Although we do operate under (some would say endure) a system of executive dominated government, one does not leave all questions including budgets and policy to the executive in council.

We must add a further criterion to those already considered. The practical consequences of the brief history of the Kelowna Accord will ultimately decide whether it can be considered a binding agreement. If, after all is said and done, there are no consequences for the failure to fulfill the agreement other than that social and economic problems for aboriginals persist and an academic paper is presented at a social sciences conference, then in a very important sense, perhaps the most important sense, the Kelowna Accord will have to be judged not to have been binding. This is the

bottom-line on Kelowna, so to speak. If no party will hold the Harper government accountable for reneging on an IGA, then the agreement cannot be considered binding. If the government is not, after all is said and done, "bound," then it would be misleading to call the agreement binding. This is a somewhat Machiavellian standard of politics, but it is important to the reality of the situation.

The story is not entirely concluded. The fate of Bill C-292 will weigh in on whether the parliament holds the Prime Minister accountable, and thus, bound in a meaningful political sense to the commitments of Kelowna. Let us consider what that might entail. If Bill C-292 fails, then it certainly appears that the Harper government will not have to live up to the Kelowna Accord. If Bill C-292 passes, two outcomes are possible. First, the government may enact the spending Kelowna requires. This would be a good indication that Kelowna can be considered binding. However, Bill C-292 is a private member's bill, and has the character of telling the executive to perform some action. If the executive does not perform that action, there is really only one sanction available to the legislature to hold the executive accountable: a confidence vote in the House of Commons. This does not appear to be a step that the legislature is willing to take in order to hold the Harper government to the Kelowna commitments. If the government ignored Bill C-292's calls to action and no confidence vote was lost, then Kelowna could scarcely be considered binding. If the government ignored the Bill, and fell on a confidence vote, then Kelowna would have to be considered binding. As it stands, these are highly speculative criteria by which to judge the Kelowna Accord's status. This variable is not fixed; predictions about when the government might fall on a confidence vote are not reliable.

4.0 Discussion/Conclusion

This paper began by considering the difficult birth, short life, and possibly the death of the Kelowna Accord. Looking at the question of whether it is legally binding, the answer is not clear. Evidence exists both to suggest that it is, and that it is not. This ambiguity that we find across three sets of criteria including the legal aspects of Johanne Poirier, the democratic considerations of Gordon DiGiacomo, and the Patriation Reference questions would seem to suggest that the Accord is not legally binding. As to whether it is politically binding, there is a good deal of evidence to suggest that it should be considered so. Along these lines, Mary Simon of the Inuit Tapiritt Kanatami told the committee hearing on Bill C-292:

> It has been argued that the Kelowna Accord can be discarded because it was not signed, but that is misleading. Everyone at Kelowna understood that commitments made at Kelowna were not intended to constitute a legal contract, but everyone believed the commitments carried great political and moral authority and momentum.

Practical considerations will ultimately rule the day as they often do. On this criterion, Kelowna will be considered binding if the Harper government is forced to live up to it, and will be not be considered binding if it is not. More specifically, we look at whether reneging on Kelowna constitutes the violation of a political convention in Canada, and we conclude that it does. The questions that remain are of the consequences of the violation of that convention.

If a convention is violated, what is the outcome? Is the convention weakened or possibly rendered irrelevant? What if the convention is violated once, but only once? What if the convention is violated, and no one reacts to it? Is this the death of a convention, silent rather than violent? It may be that the violation of what we assert here to be an important convention in

Canadian politics is really the violation of an irrelevant convention; it depends entirely on the measure of relevance or importance.

Conventions have played an important part of the evolution of Canada's parliamentary democracy. The gradual change from the sovereignty of Kings to the sovereignty of the cabinet has occurred, in large part, as a result of convention. Convention has also dictated important frameworks for the management of federalism, such as First Minister's Conferences. Convention also dictates that it is in the best interest of provinces and the federal government to adhere to deals which are struck, especially unanimous ones. The Kelowna Accord received the unanimous, and sometimes enthusiastic, support of all the provinces and the federal government. Its informal legitimacy was further enhanced by the strong, but not universal, approval and participation of Canada's Aboriginal community. The Kelowna Accord was not purely an exercise in executive federalism. Convention would suggest that if the federal government is unwilling to live up to an agreement of this nature, many other agreements could be violated. Usually the provinces are eager defenders of these agreements and are not concerned with using their voice, and those of their electorate, to hold the federal government's feet to the fire. In fact, the current Prime Minister has been an outspoken advocate for provincial responsibility. However, the chorus of protest on Kelowna has been somewhat muted. Why have the provinces not been more concerned with the Harper government's failure to carry through on Kelowna? The premier of the province that did conclude one of the trilateral agreements provided for in the framework of Kelowna, Gordon Campbell of British Columbia expressed his chagrin publicly and emphatically, in May 2006. In June 2006, the Western Premiers collectively called on the federal government to fulfill its obligations under Kelowna. Premier Campbell has continued to insist that something be done about the Kelowna Accord. For all that, these have merely been words, calls for action. Words without action to back them are ultimately hollow. Apart from these words, however, the provinces appear to be content to have let the issue drop. It may be that they view the Harper government's refusal to live up to Kelowna as legitimate, given that Prime Minister Martin entered into the deal mere days before his minority government fell. It may also be that the Premiers would not push the issue of Kelowna too much with the Harper government while in the midst of negotiating a new arrangement of transfer payments; it might be politically expedient for the provinces to simply allow Kelowna to fade to black. The force of convention has been weak. Conventions are often said not to be worth the paper they are not written on. Politically, the passage of Bill C292 would be embarrassing but ultimately not effective in the short to medium term.

A difficult question is whether or not the Kelowna Accord will live or die in the hands of the electorate. While many voters are sympathetic, Kelowna does not seem to be a major issue, especially in light of the public's interest in other issues such as the environment. There seems to be a moral dimension to this process that requires further attention. When the provinces and the federal government, Canada's Aboriginal people and the majority of Members of Parliament and Senators all ask for a process to be followed, that should be difficult to ignore especially when dealing with a founding People who have ultimately become a minority. A government should not need to be forced or compelled into tackling Aboriginal concerns especially when the support is there to do so vigorously. We assert for a variety of reasons that it is important that any party to an IGA such as Kelowna fulfill their obligations under the agreement; but we appear, on the level of practical politics, to be in the minority. After all, if the public is apathetic to the violation of the convention, is that not the ultimate standard of importance? Leave the

public aside for the moment, even the principal participants to the Kelowna Accord have done relatively little aside from a minimum of initial, informal protest against the federal government's stated intentions not to carry through with obligations under the agreement, and the subsequent promised inaction.

What have been the consequences of the Harper government's position? Practically, programs that were to have begun to provide assistance to aboriginal peoples in Canada have not been undertaken. The many social and economic problems Kelowna was designed to address persist. Politically, it appears there have been no consequences of note. Federal-provincial relations have not broken down over the Kelowna Accord's failure. Provincial governments continue to enter into IGAs with the federal government apparently with every expectation that the agreements will be fulfilled. Canadian executive interstate federalism is operating as well as could realistically be anticipated. The outcome-oriented standards for assessing political facts are unsatisfactory, and for good reason. The failure of the Kelowna Accord should raise the question of what recourse is available to any party to an IGA who feels that another contracting party has breached the deal.

So what can be done? One or all of the provinces could submit a reference case to the Supreme Court asking if the Kelowna Accord is binding. British Columbia may have the best case because of the existence of the Transformative Change Accord. A reference case might draw attention to the existence of the convention. It could also result in a different answer than expected and is therefore a somewhat risky proposition. With provinces likely to be risk averse, this is not likely to occur. A second possibility involves Aboriginal Peoples in their role as a third party. National Aboriginal Organizations could launch a suit demanding that the government follow through on its stated commitments to them as a third party to an intergovernmental agreement. In this case, the Kelowna Implementation Bill may become an important piece of evidence suggesting that the legislature believes that commitments made at Kelowna should be kept. While neither of these options can force the federal government to follow through, the latter option may result in damages for the plaintiffs, in this case, Aboriginal peoples, and serve a somewhat similar function.

The processes by which IGAs are reached in Canada may be (though are not necessarily) transparent and inclusive, and these are important contributing factors to the overall democratic character of the process and the resulting agreement, but the accountability of IGAs will ultimately only be enforceable through the democratic mechanisms of parliamentary democracy. The experience of Kelowna is enough to suggest that these mechanisms are not sufficient to enforce the IGAs. Rosemary McPherson of the Metis National Council made a presentation to the Bill C-292 committee hearings including this statement which aptly exposes the problems with not following through on commitments:

> If Aboriginal people cannot rely on the implementation of a written document that was agreed to by consensus by every order of government in this country on national television, what can we actually rely on? The honour of the Crown must mean something. If it does not, where does that leave us? More litigation, more political posturing, a lost generation of hope. This is not in anyone's interest.

We could ask what could be done to make the process more enforceable, and thus, more accountable, and more specific language directed to determining whether an agreement is binding in IGAs would certainly be one method. It may be, however, that the process of

executive interstate federalism so prevalent in Canada is fundamentally flawed in its lack of accountability such that it merely contributes to or illustrates the democratic shortfalls in Canadian politics.

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