

## THE INDIAN ACT

### EVOLUTION, OVERVIEW AND OPTIONS FOR AMENDMENT AND TRANSITION

I am often asked whether it would be better to change the existing Indian Act or to eliminate it entirely. Will we still need the Indian Act once our right to self-government is recognized and our treaties are implemented? I believe we will need some federal legislation to make clear the obligations the federal government bears towards First Nations peoples. This is radically different from an Indian Act that continues to allow a minister and some bureaucrats to tell people who they are, what they can do, or how they must live. That arrangement is a colonial relic. We would all like to see it disappear. But we would like to see the government fulfil its responsibilities to us, not shirk them by repealing the Indian Act and pretending that is the end of their obligations to First Peoples.

- Ovide Mercredi -

In The Rapids: Navigating the Future of First Nations (page 95)

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**FINAL REPORT**

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**PART I: Evolution of Indian Policy and Legislation**  
**A. INTRODUCTION:THE PARADOX OF THE INDIAN ACT**

In 1990, Tom Siddon, the Minister of Indian Affairs at the time, noted that "real change" was impossible under the Indian Act because the Act was "obsolete and fails to address the needs, aspirations or capabilities of Indian communities."<sup>1</sup> This is still true, largely because the Indian Act is Victorian legislation in a conceptual as well as a historical sense.

The first Indian Act was passed in 1876, but its legislative precursors may be traced back to 1839 - a mere two years after Queen Victoria ascended the British throne. Through a series of subsequent amendments the Act had acquired its present form in a conceptual sense by the 1880s, well before Queen Victoria's death in 1901. John Leslie has examined the formative pre-Confederation years of Canadian Indian policy development and agrees that in many ways the dead hand of a past philosophy continues to reach into the present:

The central philosophical assumptions and policies of modern Canadian Indian administration were shaped in the Canadas during the four decades prior to Confederation. Instrumental in this process were six government commissions of inquiry which devised, evaluated, and modified a programme for Indian advancement and civilization based on treaties, reserves, religious conversion, and agricultural instruction. Though not apparent at the time, the series of investigative reports created a corporate memory for the Indian department and established a policy framework for dealing with Native peoples and issues. The approach became entrenched, like the department itself, and remained virtually unchanged and unchallenged until 1969, when the federal government issued its white paper on Indian policy.<sup>2</sup>

Although sometimes clothing these Victorian conceptions in modern language, the current Indian Act is thus, paradoxically, the Indian Act of 1876 and its precursors in most important

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<sup>1</sup> The Hon. Tom Siddon in Lands, Revenues and Trusts Review: Phase II Report (Ottawa: Ministry of Supply and Services Canada, 1990) preface, "Message From the Minister".

<sup>2</sup> John Leslie, Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian Department (Ottawa: Treaties and Historical Research Centre, DIAND, 1985) at 185. The author sums up his general conclusions as follows (at ii):

Following the War of 1812, the traditional strategic value of Indian warriors to British regular forces and Canadian militia declined immediately. Concurrent with this development, British Imperial officials sought to reduce the annual costs of Indian administration in the Canadas. The search for an ameliorative, yet economical Indian policy, prompted six formal government inquiries into Indian administration and social conditions between 1828 and 1858. The successive reports, evolving in content, sophistication and scope, created a corporate memory for the Indian department and were the main instruments of an early Indian policy review process which saw a programme for Indian civilization and advancement devised, evaluated, modified and reiterated in the four decades prior to Confederation. The philosophical principles and practices enunciated by these six inquiries were adopted by the new Dominion government and applied to native peoples in other regions of Canada. The legacy of these reports for Canadian Indian policy has been so enduring that, only recently, has the Federal government attempted to break from the long-standing view of Native peoples and society established before Confederation.

respects. Related to the Victorian nature of the Act is the central paradox of Canadian Indian policy as described by Wayne Daugherty: "On the one hand, it continued the protective or guardianship policy of the colonial period; on the other, it proposed to assimilate the Indian, hopefully on the basis of equality, into the mainstream society."<sup>3</sup> In the current constitutional era this paradox is often expressed in terms of "special status" versus "equality". From the liberal perspective of most Canadian political and legal thinking, it is a difficult intellectual paradigm from which to escape.

As will be shown in this paper, this paradox of "protective assimilation" appears and reappears in one form or another throughout the history of Canadian Indian policy development. It has led to a corresponding paradox on the Indian side of the equation in the form of an overall attitude of ambivalence towards the protective paternalism implied by the historic federal role. In this context Sally Weaver has referred to "the century old ambiguity that Indians have felt about the Indian Act - their resentment of its constraints and yet their dependence on it for the special rights provided."<sup>4</sup> Indian representatives have never spoken with one voice regarding the merits of repealing the Indian Act, nor have they advanced a consistent or universally held position regarding potential amendments or processes for opting out of it.

At the time that formal Indian policy was beginning to be articulated it reflected the notion of Crown protection of Indians and their lands. Originally expressed as the requirement to keep Indian lands separate from other Crown and settled lands, it evolved into the reserve system, the premise of which was that it was a temporary "halfway house" for Indians who would eventually be fully integrated into the larger Canadian society upon becoming civilized or advanced. Ironically, however, in these physically isolated "laboratories of civilization" Indians were able to resist the forces of settlement and cultural assimilation. Although traditional culture, especially language and religion, was greatly weakened and sometimes almost completely destroyed, Indian resistance to assimilation has endured. The paradox is that the forms through which that resistance has been maintained are not necessarily traditional Indian forms; often they are structures and processes forced upon Indians through the civilizing and assimilating measures making up historic Indian policy.

These forms and structures were never intended to be maintained by self-conscious and subsisting Indian communities - they were attempts to impose non-Indian structures on Indians as a teaching device and were supposed to disappear as Indians left the reserves to join the dominant society. The elective band council is a good example. Intended as a way of teaching Indians the political ways of the larger Canadian society and of undermining the authority of the traditional leaders and customary processes, it has apparently succeeded in both goals without destroying

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<sup>3</sup> Wayne Daugherty and Dennis Madill Indian Government under Indian Act Legislation 1868-1951 (Ottawa: DIAND Treaties and Historical Research Branch, 1980 1st ed.) per Wayne Daugherty at 1.

<sup>4</sup> Sally Weaver, Making Canadian Indian Policy: The Hidden Agenda 1968-1970 (Toronto: Univ. of Toronto Press, 1981) at 19.

Indian communities in the manner intended. In many cases the authority of elective chiefs and other influential leaders was actually strengthened by the reserve system, as they were often the only people to whom non-Indian bureaucrats would listen, or with whom they would deal.

However, as noted by the authors of the Hawthorn Report this did not necessarily lead to full acceptance of the band council system by the community:

Many Indians did not perceive their communities as viable bodies.... and continued to orient themselves to family, extended kinship or other groupings that either cut across the residential communities or were but one of several segments within it....

Where interest was shown in local government it was frequently dissipated by the lack of real power to make meaningful decisions at the local level. With the elaboration of rules and regulations designed to protect Indian interests, as then defined, very many matters had to be sanctioned by the Indian Affairs Branch. There was a paucity of important matters about which decisions could be made by Indians in their communities. Band councils persisted in Indian communities, not because they were perceived as responding to important local government needs, but because the government insisted on dealing through them...<sup>5</sup>

The result today is that many measures designed to eradicate Indian identity have become part of modern Indian life. However, these measures are not universally accepted in Indian communities and, as a result, there is a division in opinion and even factionalism, often along family and kinship lines. It is difficult for outsiders to assess which structure is the one on which to base reform proposals, since there may be many competing factions and power structures, ranging from the "traditional" to the "modern." There may, in addition, be other groups of people on and off the reserve who complain that the band council does not represent them or their interests. These may be people to whom the federal government owes a particular fiduciary obligation, thereby making it morally and politically difficult and legally perilous to ignore their interests. In this latter regard, Indian women and the complex of issues ranging from the effect on them of legislated discrimination to issues of spousal and sexual abuse offer a particularly compelling example of persons who do not always view Indian Act band council government as their own. For them, and for other groups, band councils may, in fact, be sources of oppression.

In the same way, other features of the reserve system such as certificates of possession granting individuals local reserve property rights have often replaced traditional ways of holding lands. Moreover, a class system in which powerful families dominate band economic and political life appears to have emerged on some reserves. Present measures designed to restore to Indians pre-contact self-governing powers, therefore, must take account of the acquired rights and the protections contained in these Indian Act structures and processes, notwithstanding the

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<sup>5</sup> A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies, H.B. Hawthorn ed. (Ottawa: Indian Affairs Branch 1966) vol. 2, at 176-77. Hereinafter the Hawthorn Report.

paradoxical way in which many have been acquired, and notwithstanding their lack of universal acceptance. This is a serious obstacle to reform.

Furthermore, and underlying the entire question of reform, is the fact that the Indian Act is federal legislation in which Indians have had no significant input. It was passed by Parliament and has been maintained to rationalize and facilitate the administration of "Indians and lands reserved for the Indians" under section 91(24) of the Constitution Act, 1867. It was in this sense for the original convenience of government and not of the Indians to whom it was directed. This is demonstrated graphically by the history of amendments over the years, almost all of which were more in response to non-Indian political and administrative pressures than to the desires of Indians actually living under the authority of the Indian Act and its regulations.

Moreover, the Indian Act ignores the treaties existing at the time it was enacted in 1876 as well as those concluded after that date. It is almost as if they and the perspective they offer on relations between Indian and non-Indian societies do not exist. This failure to refer to treaty promises and to attempt to harmonize them with its provisions speaks volumes about the outlook of the drafters and administrators of the Indian Act. From its beginnings, therefore, the Indian Act has reflected a non-Indian perspective. Indians were rarely consulted prior to the 1940s, and, when they were, their views were invariably discounted or reinterpreted by government officials and forced into the categories of thought with which they were most familiar. In short, the Act reflects a non-Indian perspective and philosophy from beginning to end. In this same vein it is also largely a male perspective, and has been since the beginning.

As a result of the historically based nature of the evolution of Canadian Indian policy and the fact that Indians have constantly stressed the historical injustices to which they have been subjected through the Indian Act and the denial of their Aboriginal, treaty and civil rights, a historical approach has been adopted in this paper. Historical events, earlier commissions of inquiry, parliamentary committee investigations and political imperatives have all had a hand to play in the shape of the current version of the Act. Placing them in historical context will therefore not only shed light on current practices and provisions, but will also better permit an assessment in terms of present imperatives for reform.

It is highly unlikely that the Indian Act can be adapted to the new political and constitutional reality of Canada and to a relationship based on equality. The Indian Act is based on the notion of guardianship or wardship. This implies the dominance of one partner over the other, the dominance of one perspective over the other. It is simply unknown whether the Indian Act perspective is large enough to embrace that of the Indian peoples to whom it has been applied. This will likely be the greatest challenge in maintaining or reforming the Act.

Before going on it should be noted that this paper has been prepared by a non-Aboriginal lawyer as an introductory overview of the Indian Act and its historical context. It is an internal document to stimulate more detailed research on particular problem areas and is largely based on published materials, often of a historical nature, most of which have been prepared by

non-Aboriginal commentators. In addition, it will often employ the terminology used in many of the materials and legislation under examination, notwithstanding that many of these terms are now avoided because of their perceived racist or sexist origins and overtones. Thus, for example, references will be to "Indian" or to "Indians" throughout, instead of using "First Nation" or the actual names by which various groups of Aboriginal people refer to themselves. Moreover, terms found in legislation such as "bands" will also be used since these are the actual legal terms in which many measures were conceived and executed, including, of course, the Indian Act itself. These terms are still in use in the modern version of the Act.

## B. STUDY LIMITATIONS AND CONTINUING CONSTITUTIONAL ISSUES

A full consideration of the Indian Act, of past and present reform proposals and initiatives and of options for future progress is an undertaking that, in significant ways, is beyond the scope of this paper.

In the first place, the Indian Act is a broad topic. Passed under Parliament's apparently plenary authority under Constitution Act, 1867 section 91(24), "Indians, and Lands reserved for the Indians," the Indian Act deals with Indians literally from the cradle to the grave. It covers issues ranging from how one is born or naturalized into "Indian" status to how to administer the possessions of an Indian upon death and almost everything in between. This is not only an enormous field of law, engaging principles of property, estates and administrative law, and taxation, among others, it is one that is replete with inconsistencies and with ongoing legal and constitutional challenges.

This is also an area where gaps in the law have been filled by practices that are difficult to assess in terms of their potential constitutionality or even their simple legality within the narrower compass of the Act. A good example is the practice of individual band members with a valid interest in band lands who enter into direct commercial transactions with non-Indians such as crop-sharing arrangements outside the framework of the Act. There are no easily applicable legal principles to protect all the interests involved, yet the practice may be widespread and, from some vantage points, even desirable.

In second place, the Indian Act is a piece of legislation: it is a law. As such, it engages political and constitutional as well as more narrowly legal considerations. From the political perspective, it raises the profound issue of one society legislating for another - an issue that is dealt with in international contexts in the context of colonialism. Since 1945, the illegitimacy of one society regulating the affairs of another is generally accepted as a norm of international law. And yet in Canada, the dominant society continues to legislate for persons recognized and defined as "Indians" under constitutional authority. In this regard many Indians argue that they are "peoples" in the sense in which the term is used in international law. As such, it is argued that they are immune from or protected against such one-sided measures and that therefore the whole Act

should be repealed.

Other Indian representatives, however, are less inclined to deny the legitimacy of federal legislation and the protection it offers and appear reluctant to embrace so wide-ranging a view of their status in international law. They appear to accept to varying degrees the legitimacy of their inclusion within the Canadian state, and press for more substantial domestic recognition of their special constitutional status. A full examination of this dimension of the debate cannot be undertaken here, although ramifications of the apparent split in views will obviously affect any assessment of reform proposals since any federal remedial legislation will still require the dominant society to legislate for another society.

Thirdly, from a domestic constitutional perspective many important questions remain unanswered in relation to the Indian Act. For example, the precise limits of Parliament's authority under Constitution Act, 1867 section 91(24) are unknown even now. This authority has been referred to above as "apparently plenary" in the sense of "apparently full, entire or without subject matter limitation" (as opposed to "apparently absolute"<sup>6</sup>). If the authority is plenary, it would mean that Parliament could legislate for "Indians" and "Lands reserved for the Indians" in areas otherwise under provincial constitutional authority and that the provinces could not challenge such assertions of federal power. This is essentially the position in legal theory in the United States regarding Congressional power over Indians vis-à-vis state regulatory authority.<sup>7</sup>

In a case concerned with whether the special laws on Indian estates in the Indian Act violated the Canadian Bill Of Rights as discrimination on the base of race, the wills and estates provisions were upheld as valid federal legislation,<sup>8</sup> notwithstanding that the provisions dealt with off-reserve property as well. This holding lends support to the view maintained by Professor Hogg and others that Parliament, if it wished, could pass laws for Indians in areas normally outside areas of federal competency (thereby excluding competing provincial constitutional authority) so long as the legislation was characterizable as being in relation to Indians and "rationally related to intelligible Indian policies."<sup>9</sup>

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<sup>6</sup> Black's Law Dictionary (4th ed., 1968: St. Paul, West Publishing Co.) at 1313 defines "plenary" as follows: "Full, entire, complete, absolute, unqualified."

<sup>7</sup> Congressional power over Indian affairs has been judicially held to be plenary, apparently in the sense of absolute as well as complete: United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The power was implied from necessity: it did not flow not from the United States Constitution, but, rather, from the dependent status of Indian tribes as wards of the federal government. Thus, it was political, being based on the nation to nation relationship between the tribes and the federal government and therefore beyond judicial review. Modern cases have held, however, that Congressional power is not absolute. It is subject to some constitutional strictures such as the need for Congressional legislation to be "rationally tied" to Congress' unique trust responsibilities towards Indians: Morton v. Mancari, 417 U.S. 535 (1974).

<sup>8</sup> A.G. v. Canard, [1976] 1 S.C.R. 170.

<sup>9</sup> Peter Hogg, Constitutional Law of Canada (Toronto: Carswell, 3rd ed. 1992) 27-5.

Whether this means that Parliament could totally occupy the field of "Indians" and "Lands reserved for the Indians" is an open question, since this would appear to make Indian reserves "federal enclaves" similar to federal reservations in most parts of the United States.<sup>10</sup> The Supreme Court of Canada has rejected the federal enclave theory<sup>11</sup> and has further held that general provincial legislation may regulate Indians on and off-reserve under normal principles of constitutional interpretation, subject to certain exclusionary rules.<sup>12</sup> Thus, for purposes of the special relationship reflected by section 91(24), Indians are a federal legislative responsibility; whereas for purposes of the ordinary incidents of life in the province unrelated to the federal responsibility, Indians are provincial residents.

Since the publication of the legal opinion on federal and provincial jurisdiction over Indians in the Hawthorn Report<sup>13</sup> in 1966 the trend therefore has been to view "Indians" as a "double aspect" constitutional subject matter<sup>14</sup> and to extend various provincial services to them on the basis that they are provincial citizens as well as a federal subject matter and the possessors of special constitutional status ("citizens plus" in the Hawthorn Report language). Of course, the success of this effort has depended in practical terms on the willingness of the particular province concerned to adopt this view of the Constitution, since this would mean they have financial responsibility for Indians as provincial residents.

In this connection it is important to note that Parliament has never legislated to the full extent of its apparent authority over the territory referred to as "Lands reserved for the Indians" in the broad sense of the Royal Proclamation of 1763.<sup>15</sup> The term "Lands" has been viewed narrowly and restricted to reserves under the Indian Act. Nor has Parliament legislated for all those who potentially fall within the constitutional category of "Indians". Instead two separate groups of "Indians" have been created for administrative purposes: those recognized as (status) Indians and

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<sup>10</sup> Federally recognized tribes on federal trust land are in theory exclusively subject to Congressional legislation on the basis that Congress has "preempted" competing state laws that would otherwise apply. This is the modern interpretation of the original Supreme Court holding in Worcester v. Georgia, 31 U.S. 515 (1832).

<sup>11</sup> Cardinal v. A.G. Alberta, [1974] S.C.R. 695.

<sup>12</sup> Dick v. R., [1985] 2 S.C.R. 309.

<sup>13</sup> Supra note 5 at 211-54 (vol. 1). This opinion anticipated the conclusions of the Supreme Court in Dick v. The Queen, ibid., regarding the effect of section 87 (now 88) of the Indian Act.

<sup>14</sup> Hodge v. The Queen (1883) 9 A.C. 117 per Lord Peacock at 130: "The principle... is, that subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91."

<sup>15</sup> In Saint Catherine's Milling v. The Queen, (1889) 14 A.C. 46 (P.C.) Lord Watson for the Privy Council stated (at 59) with regard to the term "Lands reserved for the Indians" in section 91(24) that it went beyond the Indian reserves referred to in the Ontario statutes because "the words actually used are, according to their natural meaning, sufficient to include all lands reserved upon any terms or conditions, for Indian occupation."

registered as such under the Indian Act, and those (non-status) not so recognized. Only the former are viewed by the federal government as within Parliament's legislative authority over "Indians".

Nonetheless, Parliament has regularly altered the boundaries between the two groups by changing the definition of "Indian" under the Indian Act, thereby demonstrating that it can legislate for those persons referred to as "non-status Indians" and "Metis" when it so wishes, simply by bringing them within the definition of "Indian". It can be argued that Parliament's shifting and unclear policies in regard to its constitutional mandate under section 91(24) have been deliberate attempts to reduce its financial and administrative responsibilities towards "Indians" rather than to fulfil them.<sup>16</sup>

What this means in practice is that it is difficult to know in the abstract whether and to what extent Parliament could occupy the field of "Indians" and "Lands reserved for the Indians" to preempt provincial regulatory authority. The practice has been, therefore, to attempt to negotiate in a tripartite way in areas where regulatory conflict would be most likely to arise. This is the case with the Community Based Self-Government Program, for example, the guidelines for which indicate the federal view that some areas are out of bounds for bilateral negotiations. Thus, the constitutional uncertainty over the extent of federal constitutional authority makes it difficult fully to assess reform proposals such as those put forward by the Penner Committee<sup>17</sup> in 1983 that called for federal occupation of the field under Constitution Act, 1867 section 91(24) followed by almost immediate withdrawal in favour of First Nations' jurisdiction.

In a related way, the criteria upon which Parliament bases its assertion of jurisdiction over "Indians" remain unclear. In the United States, by way of contrast, federal authority over Indians is described as flowing from the political nature of the relationship between the federal government and the tribes. Federal authority is not therefore in theory based in the first instance on race. Thus Congress will rely on tribal membership criteria as the basis of its assertion of power.<sup>18</sup> The

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<sup>16</sup> Arguments to this effect are set out in Bradford Morse and John Giokas Do The Métis Fall Within Section 91(24) of the Constitution Act, 1867 in Royal Commission on Aboriginal Peoples Aboriginal Self-Government: Legal and Constitutional Issues (Minister of Supply and Services Canada, 1995) 140.

<sup>17</sup> Parliament of Canada, Special Committee on Indian Self-Government, Indian Self-Government in Canada (Ottawa: Ministry of Supply and Services, 1983) at 59. It was chaired by Liberal Keith Penner. Hereinafter the Penner Report.

<sup>18</sup> The United States courts have consistently recognized that determining its own membership is one of the most basic powers of an Indian tribe. A notorious example of the exercise of this power is Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49 in which the children of Julia Martinez were disqualified from pueblo membership under a tribal ordinance that discriminated against the children of women who married outside the tribe. The children of Santa Clara men who married outside the tribal community were not penalized. The federal courts refused to overturn this ordinance even though on its face it was contrary to the guarantee of "equal protection of the laws" in Title 1 of the Indian Civil Rights Act of 1968 (Pub. L. No. 90-284, 82 Stat. 77, codified at 25 U.S.C. ss. 1301-03) that was applied by Congress to tribal governments. In the absence of Congressional intent to subject tribal government under the Indian Civil Rights Act to federal court supervision, tribal sovereign immunity coupled with the tribal right to determine its own

courts require, in addition, that federal legislation be "rationally tied" to the discharge the unique trust responsibilities of Congress for Indians.<sup>19</sup>

In Canada the issue has never been dealt with in a definitive way. Parliament's power to differentiate between categories of Indians has been addressed in only two Supreme Court decisions: in 1974 in A.G. Canada v. Lavell; Isaac v. Bedard by Ritchie J. who showed great deference to parliamentary authority in this area but without discussing the basis for the exercise of that authority.<sup>20</sup> The issue was considered by Beetz J. two years later in A.G. Canada v. Canard

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membership meant that this issue was one for the tribal courts to resolve.

Julia Martinez' husband was also an Indian (Navajo), the children were by then adults, all spoke the Santa Clara language (Tewa) and lived in the Santa Clara Pueblo. This ordinance deprived the children of tribal political, residency and inheritance rights in much the same way as section 12(1)(b) of the Indian Act would have done in the Canadian context. The cruel irony is, however, that this was done in the Santa Clara context by the tribe. For an analysis of the Martinez Case see Carla Cristofferson, "Tribal Courts Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act" [1990] 101 Yale Law Journal 169.

For purposes of programs and services delivered through the Bureau of Indian Affairs, however, an "Indian" must not only be a member of a federally recognized tribe and living on or near a reservation, but must also be of at least 1/4th Indian blood. In order to qualify for federal monies all tribes have long ago adopted blood quantum requirements for membership. See Jyotpaul Chaudhari, "American Indian Policy: An Overview" in Vine Deloria ed. American Indian policy in the Twentieth Century (Norman: Univ. of Oklahoma Press 1985) 15 at 20-22.

<sup>19</sup> See note 7, supra.

<sup>20</sup> [1974] S.C.R. 1349 at 1359:

In my opinion, the exclusive legislative authority vested in Parliament could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for the Indians."

The two cases joined at the Supreme Court were brought by women who had lost Indian status automatically pursuant to section 12(1)(b) of the Indian Act upon their marriages to non-Indians. They argued that this provision of the Act discriminated against them on the basis of sex, thereby denying them equality "before the law" contrary to section 1(b) of the Canadian Bill of Rights. In finding for the majority (5-4) that there was no impermissible discrimination, Ritchie J. distinguished R. v. Drybones ([1970] S.C.R. 282) as follows (at 1372) on the basis that, as a criminal law matter, the Indian Act:

... could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of section 12(1)(b) of the Indian Act. (emphasis added).

No one quite knows what this passage means, but it may refer to the fact that Indian women have a choice regarding whom they marry so that section 12(1)(b) does not become a factor for Indian women as a necessary result of being an Indian woman. This dubious rationale seems to be an elaborate form of point-missing and has convinced few legal scholars. In any event, the case is usually cited for the proposition that Parliament may discriminate against certain classes of people, in the context of the Canadian Bill of Rights at least, in the pursuit of otherwise valid federal

where he declared that the classification was essentially racial.

The British North America Act...by using the word 'Indians' in s. 91(24) creates a racial classification and refers to a special group for whom it contemplates the possibility of special treatment. It does not define the expression "Indian". This parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values...or of legislative history.<sup>21</sup>

Thus, it appears from the limited evidence available as if Parliament could legislate for anyone of "Indian" race - meaning that blood quantum (and inevitably kinship) might be the determining factor. Ethnological Indians (i.e. status and non-status Indians) are therefore federal subject matter "Indians", as are Inuit.<sup>22</sup> Does this mean that the Metis are also amenable to federal jurisdiction? There are many who argue that this is the case,<sup>23</sup> but the federal government resists this position.

Moreover, the advent of section 35 of the Constitution Act, 1982 recognizing and affirming Aboriginal and treaty rights in 1982 and the enunciation of the fiduciary obligation beginning in 1984<sup>24</sup> have cast a further pall of uncertainty over the entire area of section 91(24) federal powers. Under the Sparrow doctrine, federal legislative powers under section 91(24) continue, subject to the justification standard set out in that case.<sup>25</sup> One of the most important aspects of the decision was the judicial incorporation of the fiduciary relationship between the Crown and Aboriginal

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objectives. See Jack Woodward, Native Law (Toronto: Carswell, 1989) at 146.

<sup>21</sup> Supra, note 8 at 207.

<sup>22</sup> Confirmed by In the Matter of a Reference as to Whether the Term "Indians" in Head 24 of section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province Of Québec [1939] S.C.R. 104, commonly referred to as Re Eskimos.

<sup>23</sup> See Morse and Giokas, Do the Métis, supra note 16. Peter Hogg, supra note 9 also appears to agree at 27-4, n. 13.

<sup>24</sup> Guerin v. R., [1984] 2 S.C.R. 335.

<sup>25</sup> R. v. Sparrow, [1990] 1 S.C.R. 1075. Section 35 rights are not absolute, but may be limited under certain circumstances if the government action can be justified according to a three part test (at 1113-19) that is not necessarily exhaustive of the issue:

- (i) Is there a valid federal legislative objective such as conservation, the prevention of harm or some other "compelling and substantial" objective?
- (ii) Is the honour of the Crown maintained so as to respect the fiduciary relationship and give the proper priority to the Aboriginal or treaty right?
- (iii) Are there other issues to be considered in maintaining the honour of the Crown such as minimizing the infringement of the right, adequately compensating Aboriginal peoples in the case of expropriation and fully consulting them prior to infringing the right?

peoples as a guiding principle for interpretation of section 35 of the Constitution Act, 1982. The precise meaning of this development is as yet unclear. In a number of places the Court reaffirmed the special protective duty owed by the Crown to Aboriginal peoples, commenting that the relationship is "trust-like, rather than adversarial" and that "federal power must be reconciled with federal duty."<sup>26</sup>

This has led to much academic speculation about the precise limits of federal and provincial power vis-à-vis the rights referred to in section 35 and whether the federal government must now take an active role in protecting or even promoting section 35 rights. However, the federal government argues that section 35 actually restricts its power under section 91(24) since it can no longer pass legislation that conflicts with aboriginal and treaty rights. Ironically, this seems to be the one instance where the federal government views these protected rights widely. As a result, the emphasis on the necessity of provincial involvement in matters involving Indians has spread to areas other than treaties and land claims. Police and criminal justice initiatives with Indian Act bands, for example, are conducted on a tripartite basis.

In a similar way, the relationship of the Charter, not only to section 35 aboriginal and treaty rights, but also to the particular provisions of the Indian Act, is something of an unknown. Orthodox legal thinking holds that the Charter applies to all federal legislation. On this view, the shield or interpretive prism that section 25 represents has no application, being restricted to the rights guaranteed in section 35. A counter view, however, holds that the Indian Act is in some ways an expression of the section 35 protected rights, since the surrender provisions regarding land, for instance, merely put into legislative form a constitutional requirement. A variant of this argument would assert that, even if the rights enshrined in the Act are not those referred to in section 35, they are nonetheless "other rights or freedoms that pertain to the aboriginal peoples of Canada" as referred to in section 25. In either case, section 25 would apply to protect or alter the direct application of Charter values to many processes under the Indian Act. Obviously, the resolution of this controversy has ramifications in terms of assessing or proposing reforms to the Indian Act.

The uncertainties are multiplied if one views section 35 Aboriginal and treaty rights as containing the inherent right of self-government as well. If so, and following the reasoning in Sparrow, the question would naturally arise as to the extent to which the elective band council system has extinguished or merely regulated those inherent powers. In the United States a somewhat similar question arose in the context of the Indian Reorganization Act of 1934.<sup>27</sup> The

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<sup>26</sup> Ibid at 1108 and 1109. For a discussion of the fiduciary obligation in general see J.R. Maurice Gautreau, "Demystifying the Fiduciary Mystique", Vol. 68, No. 1 Can. B. Rev. 1 (March, 1989). For a discussion of the fiduciary obligation in the context of Aboriginal law, see Michael Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law", Vol. 27, No. 1 U.B.C. L. Rev. 19 (1993).

<sup>27</sup> Ch. 576, 48 Stat. 984, codified at 25 U.S.C. ss 461-479. The Indian Reorganization Act was a watershed event in American Indian policy development, even though it was and remains a controversial piece of legislation. Aside from the loan fund (available only to tribes that opted into the Act) there were provisions for the following:

issue was the power that a tribe could exercise under section 16 of that Act where it provided a list of tribal government powers following the phrase "In addition to the powers vested in any Indian tribe or tribal council by existing law".

In short, the question was whether the tribes, by coming under this legislation, were restricted to delegated federal powers, or whether they could make laws under their inherent tribal powers. A federal government legal opinion confirmed the latter.<sup>28</sup> Thus, tribal inherent powers were seen as having not only survived the passage of time since contact and, in particular, the early reservation period during which tribal self-government was in abeyance, they were not affected by a tribe's opting into the structure of the Indian Reorganization Act. Given the differences between Canadian and U.S. legal theory it is difficult to predict that a Canadian court would adopt similar reasoning to hold that the Indian Act governance structures had not affected inherent tribal or band powers. Nonetheless, it is an intriguing possibility that is gaining currency in legal and political circles.

Finally, the relationship between the Indian Act and the treaties remains unexplored. The Indian Act virtually ignores treaties. Yet treaties represent the primary means by whereby enormous portions of Canada's present land mass were acquired for the modern Canadian state.

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- (1) tribal self-government, including the right to assert inherent sovereign powers, to employ legal counsel (subject to approval by the Secretary of the Interior), to negotiate with the federal and state governments, and to see federal tribal budget submissions prior to it going to Congress;
  - (2) the right to incorporate with tribal property remaining free from mortgage, seizure for debt etc.;
  - (3) Indian preference for Bureau of Indian Affairs jobs despite any formal deficiencies in qualifications;
  - (4) the ending of the allotment policy and the indefinite extension of the trust period for already allotted lands (see note 79 infra regarding allotment).

The development, provisions and aftermath of the Indian Reorganization Act are described in detail in Vine Deloria jr. and Clifford Lytle, The Nations Within: the Past and Future of American Indian Sovereignty (New York: Pantheon Books, 1984).

<sup>28</sup> U.S. Department of the Interior, "Powers of Indian Tribes," Opinions of the Solicitor: Indian Affairs (Washington, D.C.: U.S. Government Printing Office, 1946) p. 445. The opinion concluded (at 447) that "those powers which are lawfully vested in Indian tribes are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."

At the time it was issued, this opinion was almost revolutionary in its implications (although few people realized it) for it accomplished what the often stormy and acrimonious Congressional and Senate hearings on the draft bill had been unable to do: acknowledge the nation status and continuing viability of Indian tribes after up to 75 years during which most tribal governments had ceased functioning except as arms of the Bureau of Indian Affairs. Vine Deloria Jr. and Clifford Lytle comment in this connection that "Modern tribal sovereignty thus begins with this opinion...": The Nations Within, supra note 27 at 160.

The treaties imply a nation to nation relationship in which Parliament may not legislate for treaty Indian nations without their informed consent in those important areas reserved by them for their sovereign jurisdiction. The Indian Act simply assumes parliamentary jurisdiction, with the only significant limits prior to 1982 being the fact of provincial constitutional authority in certain areas. It is unclear in the modern era how these two contrasting visions of the limits of Parliament's authority are to be reconciled.

The uncertainties, political, constitutional and otherwise could be multiplied. The point is, however, that no study of the Indian Act can be considered complete if it fails to deal with them.

But, due to constraints of time and space, this study cannot do so except in passing. It will therefore, in general be policy oriented and will raise more issues than it can resolve with a view to providing a contextual framework for more focused policy proposals in particular areas.

## C. THE DEVELOPMENT OF INDIAN POLICY<sup>29</sup>

The following outline is presented to put the modern Indian Act in a historical context and to demonstrate that many of current administrative attitudes and practices as well as the provisions of today's version of the Act have antecedents with deep roots in Canadian and earlier colonial history. Thus "updating" comments will be provided throughout indicating the extent to which measures proposed by commissions of inquiry or adopted for purposes unrelated to a concern for the future viability of Indian communities continue to be reflected in the current version of the Indian Act. Occasional reference will also be made to Indian policy in the United States wherever it appears that such information might be helpful to shed additional light on the Canadian experience.

### (1) Special Status

At the outset it should be noted that although section 35 of the Constitution Act, 1982 is the most well known constitutional reference to the special constitutional status of "Indians" in Canada, prior to 1982 that special status was already reflected in a number of other constitutional documents. Aside from the reference in section 91(24) of the Constitution Act, 1867 to Parliament's authority over "Indians and Lands reserved for the Indians", there are references to "Indians" or "Indian title" or other privileges associated with being Indian in the following documents:<sup>30</sup>

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<sup>29</sup> This outline is based for the most part on the following accounts of the evolution of the Indian Act and related colonial and post-colonial policies:

- \* Wayne Daugherty, Dennis Madill Indian Government, *supra* note 3;
- \* Olive P. Dickason, Canada's First Nations: A History of Founding Peoples From Earliest Times (Toronto: McLelland and Stewart, 1992);
- \* Kathleen Jamieson, Indian Women and the Law in Canada: Citizens Minus (Ottawa: Supply and Services Canada, 1978);
- \* Helping Indians to Help Themselves - A Committee to Investigate Itself, The 1951 Indian Act Consultation Process, Ian Johnson (Ottawa: Treaties and Historical Research Centre, DIAND, 1984);
- \* The Historical Development of the Indian Act, John Leslie and Ron Maguire (eds.), (Ottawa: Treaties and Historical Research Centre, DIAND, 2nd ed. 1978);
- \* John Leslie, Commissions of Inquiry, *supra* note 2;
- \* John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department" in Canadian Historical Association, Historical Papers 1982, 31.
- \* J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989);
- \* John S. Milloy, A Historical Overview of Indian-Government Relations 1755-1940 (Ottawa: Department of Indian Affairs and Northern Development, 1992);
- \* John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in Sweet Promises: A Reader on Indian-White Relations in Canada, J.R. Miller (ed.), (Toronto: University of Toronto Press, 1991) 145;
- \* John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Sweet Promises, *ibid*, 127.

<sup>30</sup> The list is drawn from Douglas Sanders "The Rights of the Aboriginal Peoples of Canada", [1983] 61 Can. B. Rev. 314 at 316.

- the Royal Proclamation of 1763,
- the Manitoba Act 1870,
- the Rupert's Land and Northwest Territory Order (1870),
- the British Columbia Terms of Union (1871),
- the Ontario Boundaries Extension Act (1912),
- the Quebec Boundaries Extension Act (1912), and
- the Constitution Act, 1930.

Treaties, since 1982 at least, are also constitutional documents reflecting the special status of those who signed them with the Crown. There are so many such references in documented Canadian history, in fact, that the P  pin-Robarts Task Force on Canadian Unity stated in 1979 that "native people as a people have enjoyed a special legal status from the time of Confederation, and, indeed, since well before Confederation."<sup>31</sup>

Prior to the Royal Proclamation of 1763 official policy was for the governors of colonial governments to manage diplomatic, military and economic relations of all kinds with Indian nations.<sup>32</sup> Toward the end of the 17th century it had become apparent to the British Imperial authorities that the land hunger of local settler populations had been a major cause in inciting Indian nations to go to war against colonies such as New England and Virginia. One way of avoiding such incidents was to assure Indian nations of their territory against local colonial populations. Another way was to seek to convert tribal nations to a value system rooted in "civilized" Christian values.<sup>33</sup>

The goal of protection of Indians and their lands (for military purposes) is considered to have endured until some time after the War of 1812, with civilization gradually emerging as a separate goal thereafter. Assimilation as a separate goal began to emerge between the late 1850s and late 1860s. Although these three goals and the policies associated with them may conveniently be assigned to particular time periods, there was a considerable degree of overlap because of the evolutionary nature of Crown-Indian relations. Hindsight adds an intellectual clarity that was not necessarily present at the time in question.

It is also clear that there is a logical connection between the goals. Having collected and separated Indians from the settlers, it was almost inevitable that they would come to be seen in the

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<sup>31</sup> A Future Together (Ottawa, Minister of Supply and Services, 1979) at 56.

<sup>32</sup> See, for example, the roles of the governors of the English eastern seaboard states as described in Francis Jennings, The Ambiguous Iroquois Empire (New York: W.W. Norton & Co., 1984).

<sup>33</sup> Early Imperial British legislation to this effect from 1670 calls upon the colonial governors to "take care that none of our subjects nor any of their servants do in any way harm them ...[and] to consider how the Indians and slaves may be best instructed and invited to the Christian religion...": reproduced in The Historical Development of the Indian Act, *supra* note 29 at 3.

way that De Tocqueville describes:

Isolated within their own country, the Indians have come to form a little colony of unwelcome foreigners in the midst of a numerous and dominating people.<sup>34</sup>

A similar image of Indian reserves appears in the Hawthorn Report in 1966, but with a different emphasis.<sup>35</sup> But whereas in the United States described by De Tocqueville the official impulse was to remove Indians to Oklahoma territory, at that time far from non-Indian settlement, in Canada there was a different philosophy at work. To the missionary and humanitarian impulses of the time, these islands of "primitive" societies were ripe less for removal than for social experimentation in "advancement". From that philosophical stance it was a short step to the next stage in the social, cultural and economic "evolution" of Indians: full participation in the dominant and surrounding society as equals. In short, Indians were to lose their special status in the name of equality - a theme to which Indian policy has explicitly turned more than once over the course of Canadian history.

## (2) Protection

Two principles that weave their way through the history of Indian policy<sup>36</sup> begin to emerge from the still varied colonial practices around the mid-1700s: supervision and separation. To encourage the alliances with Indian nations upon which British military (and trading) success depended, superintendents were appointed to deal directly with them on behalf of the Crown - to supervise the nation to nation relationship. In carrying out this role, the superintendents attempted to ensure that settlers did not encroach upon Indian lands. They also distributed "presents" as annual symbols of the treaty relationship between Great Britain and its allied tribal

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<sup>34</sup> Alexis de Tocqueville, Democracy in America (translated by George Lawrence) J.P. Mayer ed. (New York: Harper & Row, 1988) at 334.

<sup>35</sup> The Hawthorn Report, *supra* note 5 at 344 (vol. 1): "A quarter of a century ago Indian reserves existed in lonely splendour as isolated federal islands surrounded by provincial territory. "

<sup>36</sup> The following abridged account is largely confined to what is now Ontario and Quebec. Although official inquiries into Indian affairs were carried out in New Brunswick, Nova Scotia and Prince Edward Island, and while efforts were made to protect and to civilize the Indians there, the situation was in those colonies was somewhat different. Never protected by Imperial authorities to the same extent as the "western" Indians, the relatively small Maritime Indian population was scattered and isolated and, after 1848, so decimated by epidemics as to be considered on the road to virtual extinction. Indian administration was decentralized and had no Indian department. There were therefore no allocations of Imperial monies for Indians and their needs. Reserves were established for Indians by colonial authorities as a result of their petition or their sorry circumstances rather than from the policy of a central authority. See, in regard to the history of the Maritime provinces, Leslie F.S. Upton, Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867 (Vancouver: University of British Columbia Press, 1979).

Indian policy development as such was therefore originally centred on the problems of central Canada, especially those of Upper Canada with its relatively large and non-Christian Indian population, many of whom still "wandered" over large expanses of territory and lived much as they had prior to contact.

nations. Thus, the superintendents tried to maintain a clear line between settled lands and Indian lands.<sup>37</sup> In these practices can be seen the forerunners of the system of Indian agents, treaty annuities and reserves upon which later Indian policy was based once the need for military alliances with the tribes waned after the War of 1812.

The Royal Proclamation of 1763 is taken to be the high water mark of royal protection. As a result of the ill feelings generated among Britain's Indian allies of encroachment and fraud by local settler populations, the Royal Proclamation of 1763 set out in rough outline a procedure whereby only the Crown could purchase Indian lands, and then only in an open and public fashion.<sup>38</sup> The Royal Proclamation of 1763 has been referred to as part of the "Imperial federalism" that Britain attempted to craft in the 18th century to "interrelate empire, colony and tribal nation."<sup>39</sup> In this sense, it provided a model for settler/Indian relations that, in theory, has endured to the present day. Three elements of the model are particularly significant:

- (1) centralized control of Indian land cessions;
- (2) apparently long term guarantees to Indians of their lands and resources, especially their harvesting rights; and
- (3) protection of Indian autonomy and self-governing status.<sup>40</sup>

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<sup>37</sup> The Indian Department was formally established in 1755 as an arm of the military, although prominent men such as Sir William Johnson had already been acting in a supervisory and diplomatic capacity with regard to Indian nations for some years prior to that on behalf of colonial governors. Robert A. Williams Jr. notes in this regard that the British authorities failed to adequately finance the operations of their Indian superintendents, thus obliging Sir William Johnson, for example, to finance his activities himself. Thus, Johnson turned to speculating in Indian lands to recoup his expenses and to acquire additional income which made him a wealthy man by the standards of the day: The American Indian in Western Legal Thought (Toronto: Oxford University Press, 1990) at 258.

<sup>38</sup> The most relevant parts of the Royal Proclamation (R.S.C. 1985, Appendix II, No.1) in this regard read as follows:

...the several Nations and Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them as their Hunting Grounds...

...but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians...

<sup>39</sup> Milloy, A Historical Overview, *supra* note 29 at 2. Another, less flattering view of the Royal Proclamation of 1763 is that it directly results from the "villainous doctrine" of discovery and is nothing more than the unilateral assertion of British sovereignty over self-governing indigenous nations and that it "was uniquely framed to dispossess Indians of their sovereignty and lands.": Menno Boldt, Surviving As Indians: The Challenge of Self-Government (Toronto: University of Toronto Press, 1993) at 3.

<sup>40</sup> These elements are drawn from the analysis of Robert Clinton, "The Proclamation of 1763: Colonial Prelude to

Although the third element must be inferred from the document, subsequent British Imperial, American and Canadian practice, primarily through the treaty-making process, appears to have put this matter beyond dispute. Not only has the Supreme Court of Canada adverted to the nation status of tribes in North America,<sup>41</sup> Canadian state practice as late as 1956 (well into the repressive Indian Act period) appears to confirm a continuing commitment to this view.<sup>42</sup>

Evidently, however, at some stage the Crown nonetheless did assert sovereignty over the "Nations and Tribes" referred to in the Proclamation. There are two poles to the debate concerning this assertion of sovereignty: that it had a restricted legal effect on pre-existing tribal sovereign powers;<sup>43</sup> or, that it was effective to extinguish them in law.<sup>44</sup> The constitutional and political controversy over the legitimacy of that assertion and the extent to which inherent and original tribal sovereign powers continued into the modern era will not be resolved here. But whatever view one adopts, there can be no question that Indian tribes and bands in what is now Canada did gradually succumb to Crown pressure and did fall under Crown political and legislative authority, voluntarily or otherwise at one point or another. Professor Slattery sums up this process as follows:

Native Canadians could not, however, remain immune forever to European domination. Over several centuries, and after long periods of alliance and trade, they succumbed piecemeal to the Crown's pressure to accept its authority, usually only when their economic fortunes and military capacity had waned, and in the shadow of the growing power of the settler communities. The pattern differed from area to area, but generally the government gained control only in the nineteenth or twentieth centuries. In some cases, Indian groups signed formal treaties ostensibly acknowledging the Crown's sovereignty, receiving in turn assurances of protection. In others the process was more informal and haphazard, and

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Two Centuries of Federal-State Conflict Over the Management of Indian Affairs", [1989] 69 Boston University Law Review 329 at 357-58.

<sup>41</sup> R. v. Sioui, [1990] 1 S.C.R. 1025. The Court cited the American Supreme Court decision in Worcester v. Georgia (supra note 10) to the effect that treaties between European nations and Indian tribes were akin to international agreements, concluding (at 1053) that with respect to Indian tribes in Canada it was "good policy to maintain relations with them very close to those maintained between sovereign nations."

<sup>42</sup> Douglas Sanders reports that the last document negotiated as a treaty was in 1956 (Adhesion to Treaty 6, Copy of Treaty No. 6 (1957), p. 32) in "The Renewal of Indian Special Status" in A. Bayefsky and M. Eberts (eds.) Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell 1985) 529 at 530.

<sup>43</sup> Such that the inherent self-governing powers were then "recognized and affirmed" through section 35 of the Constitution Act, 1982, so as to achieve some degree of constitutional protection as an unextinguished aboriginal or treaty right.

<sup>44</sup> Based ultimately on the discovery doctrine or some variant of it. For a description of the discovery doctrine see note 627 infra.

was accompanied by varying degrees of native resistance and protest. Even today, significant opposition to the legitimacy of the Crown's rule has continued among native groups.<sup>45</sup>

### (3) Civilization

#### (a) Early Experiments and Commissions of Inquiry

In the early 1800s, following the decline in military importance of the eastern tribes, and with the initial and generally willing assistance of most Indian communities in the southern portion of Upper Canada, the original British goal of preserving Indian traditional life expanded to include the notion of "civilization", teaching Indians how to cope with Euro-Canadians on Euro-Canadian terms. Part of the impetus for the civilizing policy came from missionary and humanitarian societies, part from the sheer pressure on Indian lands being exerted by non-Indian settler populations, part from the "progressive" cast of mind of new civilian Indian department bureaucrats in Upper Canada and part from the desire to reduce Crown expenditures for treaty "presents," annuities and the other costs associated with maintaining Indians as military allies.

Thus, in the 1820s the Imperial Colonial Office began to question the continued existence of the Indian Department, especially the financial outlays associated with it. At the same time other more liberal and philanthropic voices called for a new policy of uplifting Indians from their poor social condition. In fact, a relatively successful effort at civilizing the Mississaugas of the Credit River was already under way at that time under the auspices of the Methodists. Nonetheless, the original and dominant motivation for the development of a new Indian policy was what has been referred to as "Imperial financial retrenchment,"<sup>46</sup> a theme that recurs throughout the history of Indian policy development right up to the present (with, for example, the Neilsen Task Force Report on federal government programs<sup>47</sup>).

In the face of these social and financial pressures, the first official inquiry into Indian conditions was commissioned. The resultant Darling Report<sup>48</sup> of 1828 was the first to outline a policy based on establishing Indians in fixed locations where they could be educated, converted to Christianity and transformed into farmers. This approach was heavily influenced by the ongoing experiment with the Mississaugas, itself inspired by earlier ideas including those supplied by Indian themselves.<sup>49</sup> The establishment of Indian reserves for these purposes was not a new idea in any

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<sup>45</sup> Brian Slattery, "Understanding Aboriginal Rights", [1987] 66 Canadian Bar Review 727 at 734.

<sup>46</sup> John Leslie, Commissions of Inquiry, *supra* note 2 at 10.

<sup>47</sup> Canada, Study Team Report to the Task Force on Program Review, Improved Program Delivery: Indians and Natives (Ottawa: Ministry of Supply and Services, 1986).

<sup>48</sup> It was prepared by Major General H.C. Darling, military secretary to the Governor General, later Chief Superintendent of Indian Affairs for Upper Canada.

<sup>49</sup> For example, Leslie (Commissions of Inquiry, *supra* note 2) reports (at 6) that the chief of the Six Nations had

event. Reserves were already a long standing feature of Indian policy in Québec, the first having been created at Sillery in 1637 so that "Indians could be taught the Catholic catechism, farming techniques and other useful trades..."<sup>50</sup>

Thus, the plan was submitted to the Treasury and was approved in 1830 on the condition that it not increase costs. It began to go forward with the establishment of reserves in southern Ontario for this purpose. At about the same time, the Indian department was split into two separate offices, one for Upper and the other for Lower Canada, with only the latter still under military supervision.

While this experiments in southern Ontario were going on, another, entirely different sort of experiment was being conducted by Upper Canada Lt. Governor Sir Francis Bond Head. After visiting every Indian village in Upper Canada where civilizing efforts were in being conducted, he had concluded that Indians could not be civilized and were doomed to die out eventually. His idea was to relocate Indians to Manitoulin Island where they could continue a traditional lifestyle, an approach similar to the contemporaneous federal policy in the United States to remove the "Five Civilized Tribes" to Indian territory.<sup>51</sup>

Thus, in the 1830s the overlap between the earlier goal of protection and the new goal of civilization saw two distinct policy initiatives in operation at the same time. By the end of the decade, both experiments had largely collapsed: Bond Head's because of Indian fears about ultimate British intentions regarding protection of their land and other rights coupled with the anger of the churches and the humanitarian societies; Darling's because of the Indian reluctance to give up entirely their traditional harvesting economies, bureaucratic heavy-handedness in implementing the policy, conflicts between the Methodist and Catholic churches and local settler

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written to the British and Foreign Bible Society in 1808 recommending just such a program and that these ideas subsequently influenced the direction taken by the experiment with the Mississaugas.

<sup>50</sup> Native Rights in Canada, Peter A. Cumming and Neil H. Mickenberg eds., (Toronto: General Publishing Co., 2nd ed. 1972) at 80.

<sup>51</sup> In Bond Head's view the Indians were doomed to extinction and this was to his mind the most humane way of allowing them to finish out their days. This was a widely held view in many quarters at that time. De Tocqueville (Democracy in America, *supra* note 34 at 326), for example, discounted the possibility that civilization would save Indians in the United States, expressing a view he reports as held by the majority of American statesmen:

I think that the Indian race is doomed to perish, and I cannot prevent myself from thinking that on the day when the Europeans shall be established on the coasts of the Pacific Ocean, it will cease to exist.

The removal of the Creek, Choctaw, Chickasaw, Cherokee and Seminole tribes from the southeastern United States to Oklahoma territory occurred during the 1830s. In total, 67 tribes were eventually forced to accept reservations there. For a brief account see Felix Cohen's Handbook of Federal Indian Law, R. Strickland et al eds. (Charlottesville: The Michie Company Law Publishers, 1982) at 78-92. The classic study of removal is Grant Foreman, Indian Removal: The Emigration of the Five Civilized Tribes (Norman: Univ. of Oklahoma Press, 1932).

pressure for Indian lands in southern Ontario and subsequent encroachments and trespasses.

In the late 1830s three other reports came out in response to the policy vacuum.<sup>52</sup> Each repudiated the approach taken by Bond Head and generally supported that outlined in the earlier Darling Report. That policy was endorsed in a communication from the Colonial secretary, Lord Glenelg, to the Governor General and the new Lt. Governor of Upper Canada:

"Wandering Indians" were to be settled on land; those who were settled had to become farmers. Indians were to be given a sense of permanency on their improved lands, with the title to their reserve locations assured under the great Seal of the province. As well, reserve land would be protected from creditors and would be alienable only with the consent of the Governor General, principal Chief, and resident missionary. Since Indian education was also a basic aspect of Indian civilization every encouragement was to be given to missionaries and instructions were to be issued to Indian department officials to cooperate with them.<sup>53</sup>

This was, in essence, the civilizing policy. In keeping with the need to protect Indian lands against trespass and damage from the rapidly growing settler population, in 1839 the Crown Lands Protection Act was passed in Upper Canada classifying "the lands appropriated for the residence of certain Indian Tribes"<sup>54</sup> as Crown lands. Although this was not Indian land legislation *per se*, it did constitute the Crown as the formal guardian of Indian lands, thereby solidifying the important element of protection.

All officials were aware, however, that more needed to be done. The slow progress of the new partnership in civilization between Indians and colonial officials had led to a "growing impatience on the part of government that Indians live up to their end of the bargain."<sup>55</sup> Political events delayed Indian reforms, although yet another report on Indian administration was prepared during this time as part of a general inquiry into government operations in Upper Canada.<sup>56</sup>

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<sup>52</sup> One from the Lower Canada Executive Committee in 1837 chaired by William Smith, another from the British Aborigines Protection Society, also in 1837, and the third from the Upper Canada Macauley Commission in 1839. They were largely in response to Imperial demands for status reports regarding the progress of the civilizing program. The first and third reports are discussed in some detail in Leslie, Commissions of Inquiry, *supra* note 2 at pages 40-45 and 47-56 respectively.

<sup>53</sup> John Leslie, "The Bagot Commission", *supra* note 29 at 37.

<sup>54</sup> An Act for the Protection of the Lands of the Crown in this Province from Trespass and Injury R.S.U.C. 1792-1840 (1839, c. 15.)

<sup>55</sup> John Leslie, Commissions of Inquiry, *supra* note 2 at 60.

<sup>56</sup> Legislative Assembly Committee No. 4 looked into Indian department operations as a result of the Durham Report which had criticized the Family Compact in Upper Canada and had exposed deficiencies in governmental administration. This report is reviewed in Leslie, Commissions of Inquiry, *ibid* at 73-80.

### (b) The Bagot Commission

In 1842 the most well-known and influential Indian inquiry in this period was established by Governor-General Sir Charles Bagot. It reported in 1844. In keeping with the financial concerns expressed by the Imperial Colonial Office, the Bagot Commission evaluated each element of its inquiry in terms of its cost effectiveness and efficiency with respect to the civilizing program. Generally the commissioners found that there were serious problems with squatters on Indian lands, poor records of land sales or leases, inept official administration of band funds, that the wildlife necessary for a subsistence lifestyle were fast disappearing from settled areas, and that Indians were generally suffering from alcohol abuse.

To combat the competing Indian policy objectives and the fact that different strategies were being followed in different colonies,<sup>57</sup> the Commission recommended the centralization of control over Indian matters in the colonies and reaffirmed Indian possessory rights in their lands and their right to compensation for land surrenders. To combat settler encroachments and trespassing, the surveying of reserves and the public announcement of reserve boundaries were recommended. Illegal timber cutting was to be eliminated by a timber licensing system. Indians were to be encouraged to take up farming and other trades and were to be given the training and tools required for this purpose. Boarding schools were recommended as a way of countering the "negative" effects on young Indians of exposure to their parents' more traditional Indian values. In this same vein, banks were to be established on reserves and Christianity encouraged.

In terms of land, the commissioners saw the "peculiar" and possessory nature of Indian title as antithetical to full citizenship because it kept Indians sheltered from the political franchise, statutory labour, taxation, and debt liability. Indian were therefore to be encouraged to adopt individual ownership of plots of land instead of traditional communal ownership, with a proper registry system established to keep track of transactions regarding these plots. Indians were also to be permitted and indeed encouraged to buy and sell their land among themselves as a way of learning more about the freehold land tenure system and to promote a spirit of free enterprise. They would not be able to sell their land to non-Indians, however.

Crown financial obligations were to be reduced by taking a census of all resident Indians in the province so as to prepare band lists to be kept by officials. No additions could be made without official approval, and only "listed" Indians would be entitled to the annual "presents". The following classes of persons would not be eligible to receive presents: mixed blood persons and their descendants (unless adopted by the band as "Indians"); Indian women married to white men and their children; and Indian children educated in industrial schools. The relationship of these

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<sup>57</sup> Olive Dickason in Canada's First Nations, supra note 29 at 248 notes that under the direction of the Colonial Office in London the concept of regional approaches was formalized during the late 1840s and throughout the 1850s. In the Maritimes it was a policy of "insulating" Indians from settlers, in Upper and lower Canada it was "amalgamation", in Rupert's Land and the Northwest, it was support of Hudson's Bay Co. policies.

recommendations to the current status and band system requires no explanation.

The commissioners were also opposed in principle to the idea of an Indian department because it tended in their view to breed dependency. However, in the interim until it could be dispensed with, it was recommended that the two branches be reunited under a chief clerk who would be situated in the seat of government where the Governor General could more easily scrutinize its operations. This, as John Leslie observes, led to yet another of the many paradoxes in the area of Indian policy:

Ironically, the Bagot Commissioners' report was intended as a blueprint to reduce operational costs and make Indian people less reliant on government; but in practice, the report became a cornerstone in the evolution and development of a costly, permanent and expanded Indian department which would increasingly regulate and control the daily lives of native people in Canada for years to come.<sup>58</sup>

Although Indians were generally initially in favour of the education proposals, once the assimilationist flavour of the program became evident to them opposition increased. Indians were generally opposed to restricting or eliminating treaty presents, partly because of the symbolism of the ceremony, partly because of the growing dependence of many bands on them.<sup>59</sup> There was, in addition, strong Indian resistance to the notion of individual allotment of reserve lands.

There can be no question that the Bagot Commission recommended a far reaching and ambitious program that is still in operation today. In this regard J.R. Miller notes that it "laid down many of the key elements of colonial policy that would govern Indian affairs up to and beyond Confederation."<sup>60</sup> John Leslie makes a similar observation, concluding that in these and other ways the Bagot Commission Report "provides a distant echo of subsequent legislation in later decades..."<sup>61</sup>

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<sup>58</sup> John Leslie, "The Bagot Commission", *supra* note 29 at 52.

<sup>59</sup> In fact, treaty annuities were maintained in the Robinson-Huron and Robinson-Superior treaties subsequently negotiated with the bands along Lakes Huron and Superior in 1850.

<sup>60</sup> *Skyscrapers Hide the Heavens*, *supra* note 29 at 104.

<sup>61</sup> Leslie, *Commissions of Inquiry*, *supra* note 2 at 91. It is fairly easy to see in the Bagot Commission's recommendations the seeds of many of the policies that emerged in subsequent Indian legislation. Centralized control subsequently became a reality in section 91(24) of the *Constitution Act, 1867*. Reaffirmation of Indian possessory title led to the surrender provisions in the *Indian Act* that continue to mirror the procedures set out originally in the *Royal Proclamation of 1763*. Reserves now have clear and defined boundaries, and a land registry system for interests in reserve land is maintained in Ottawa. Individual plots of land are a feature of life on many reserves in the form of certificates of possession and occupation respectively. Timber licensing schemes were introduced and have been retained in the current *Act* via the Minister's authority to permit timber cutting on reserve lands, but now with band consent. In the same way, official Indian policy was to encourage farming, with the current provisions allowing the Minister to operate farms on reserve being a mere distant echo of what at one time was the primary element of Indian policy. Boarding and trade schools were established subsequently, with the Minister being given the power to compel

### (c) Early Indian Land Legislation

In order to facilitate the approach recommended by the Bagot Commission and to deal with the threat to Indian lands posed by settlers, legislation was passed in 1850 in Upper and in Lower Canada specifically directed to protecting Indian reserve lands.<sup>62</sup> It became an offence to deal directly with Indians for their lands, trespass on Indian lands was formally forbidden, Indian lands were made exempt from taxation and seizure for debts and payment was authorized for damage suffered to Indian lands as a result of public works like railways.

Significantly, in Lower Canada the legislation provided for a commissioner of Indian lands whose control over leasing and rentals was absolute. Having established reserves, it now became necessary to determine eligibility to live on them. Thus, for the first time in Canadian history, "Indian" was defined for purposes of residency on the protected reserve land. "Indians" for these purposes were all persons of Indian blood as well as all those, male or female, married to such persons.<sup>63</sup>

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attendance - a power he retains in the current Act. Banks were not created on reserve. Nonetheless, in the 1930s a loan fund administered by Indian Affairs officials was established for Indians and has been retained in the modern Act. Although a census as such was not undertaken, a similar effect was produced by in the form of definitions of "Indian" that began to appear in legislation a mere six years after the Bagot Commission Report and which culminated in the comprehensive listing of Indians on a general register with the 1951 Indian Act. Thus, the "census" notion continues in the distinction between status and non-status Indians and the maintenance of an official Indian register in Ottawa. In the same way, the Bagot Commission recommendation to discontinue "presents" to Indian women marrying non-Indian men and to educated Indian children became policy in later provisions in the Indian Act in the form of Indian status and enfranchisement provisions.

<sup>62</sup> An Act for the better protection of the Lands and Property of the Indians of Lower Canada, S. Prov. C. 1850, c. 42; An Act for the protection of the Indians in Upper Canada from imposition, and the Property occupied or enjoyed by them from trespass and injury, S. Prov. C. 1850, c. 74.

<sup>63</sup> Ibid:

V. And for the purpose of determining any right of property, possession or occupation in or to any lands...the following classes of persons are and shall be considered as Indians...

First - All persons of Indian blood reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants;

Secondly - All persons intermarried with such Indians and residing amongst them, and the descendants of all such persons;

Thirdly - All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such;

Fourthly - All persons adopted in infancy by such Indians, and residing upon the land of such Tribe or Body of Indians, and their descendants;

Nonetheless, the precedent was established that non-Indians would henceforth determine how Indian land was to be used and who was to be considered an Indian. Both of these features of the Lower Canadian legislation were later reflected in the various versions of the Indian Act that followed.

The 1850 definition of Indian was narrowed in amendments in 1851,<sup>64</sup> so that non-Indian men who married Indian women would no longer acquire Indian status and with it the right to reside on reserve. The status of their Indian spouses and mixed-blood children was not affected. This was apparently to prevent non-Indian men from gaining access to reserve lands. However, the converse was not true, as non-Indian women who married Indian men would still be considered to be Indian and permitted to reside on reserve with their husbands. Thus, for the first time Indian status and residency rights began to be associated with the male line. Subsequent versions of the definition of "Indian" went back and forth on the question of whether non-Indian men could acquire Indian status through marriage. By the time the first comprehensive Indian Act was enacted in 1876, the rule that operated until 1985 excluding non-Indian men, their Indian spouses and their mixed-blood children had become accepted policy.<sup>65</sup>

#### (4) Assimilation

##### (a) Impatience With Civilization

With respect to the assimilative thrust to Indian policy of that period John Milloy comments that "the path from 1857 to 1869 was marked by a continuing quest for a more perfect developmental strategy in an atmosphere of escalating conflict involving native leaders and local civilizers, such as Indian agents and missionaries."<sup>66</sup> Thus, as with the earlier experiments with

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The Upper Canada legislation simply noted that the act applied to "Indians and those who may be intermarried with Indians:" section X, ibid.

<sup>64</sup> S. Prov. C. 1851, c.59, s. II.

<sup>65</sup> S.C. 1876, c. 18:

#### 3. The term Indian means

First. Any male person of Indian blood reputed to belong to a particular band;

Second. Any child of such person;

Third. Any woman who is or was lawfully married to such person.

Interestingly, the United States Congress would not attempt to regulate mixed marriages until 1888 with the passage of An Act in relation to marriage between white men and Indian women, U.S. Statutes at Large, 25:392, August 9, 1888, reported in Francis Prucha ed., Documents of United States Indian Policy (Lincoln: University of Nebraska Press, 2nd ed. 1990) at 176-77. Upon marriage to a white man, an Indian woman would become a United States citizen, but without losing tribal property rights. The white husband, however, was explicitly precluded from claiming any rights to tribal property, privileges or interests as a result of the marriage. The significance of this legislation is not great in modern times due to the judicial acknowledgment in the United States that tribal membership questions are for tribes to decide. See note 18 supra.

<sup>66</sup> Milloy, "The Early Indian Acts", supra note 29 at 147.

reserves in southern Ontario in the 1830s, little patience was shown with regard to the perceived slow rate of progress of the civilizing effort. In addition, many bands had by then made their opposition to the assimilationist boarding schools clear, since, as historian J.R. Miller notes, "they wanted only schooling, not a fundamental change in their way of life."<sup>67</sup>

In 1846 a new government in Britain brought into office a renewal of the financial retrenchment that had marked earlier policy initiatives. Imperial officials openly questioned the need for the continued existence of the Indian department as well as for the maintenance of the Indians through presents and annuities. Thus, in 1856 the Pennefather Commission was established to report upon "the best means of securing the future progress and civilization of the Indian tribes in Canada."<sup>68</sup>

Not surprisingly, the commissioners found that while things had changed significantly since the 1830s, this change was "the working out of a system of policy previously determined upon"<sup>69</sup> as opposed to a new policy direction by the British cabinet. The slow progress in civilization was blamed on the "apathy" and "unsettled habits" of the Indians rather than on any shortcomings in the policy or in its administration.<sup>70</sup> Interestingly, even then the Commission noted that while the Indian population was actually increasing, there was a tendency for Indians to leave the reserves to seek positions as labourers in the growing towns and cities.

Ultimately the commission made recommendations in the direction of complete assimilation that foreshadow the later termination policies in the United States and Canada). They called for allotting lands in future to individual Indians instead of creating communally held reserves (something that was subsequently done with regard to the Metis land grants in 1870<sup>71</sup> collecting smaller bands in a single reserve, consolidating the various pieces of Indian legislation, legislating the dismantling of tribal structures and eventually abolishing the Indian department itself once the civilizing efforts had borne fruit.

#### (b) The Gradual Civilization Act

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<sup>67</sup> J.R. Miller, Skyscrapers Hide the Heavens, *supra* note 29 at 107.

<sup>68</sup> The Historical Development of the Indian Act, *supra* note 29 at 28. R.T. Pennefather was the Superintendent General of the day and the chairman.

<sup>69</sup> Ibid.

<sup>70</sup> John Leslie, Commissions of Inquiry, *supra* note 2 at 138.

<sup>71</sup> See Morse and Giokas, "Do The Métis", *supra* note 16 for the argument that Métis fall within the definition of "Indian" in Constitution Act, 1867 section 91(24) so that any land grants to them qualify as "Lands reserved for the Indians" under the same section. See also Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Métis" [1991] 29 Osgoode Hall L.J. 457 where he states (at 470) that the provisions of the Manitoba Act granting land to Métis children "was a 'fast-track' version of the Indian enfranchisement legislation applied in eastern Canada."

Prior to the commission's final report, however, one of the most significant events in the evolution of Canadian Indian policy occurred, the passage in 1857 of the Gradual Civilization Act.<sup>72</sup> It applied to both Canadas. Its operating premise was that by eventually removing all legal distinctions between Indians and non-Indians through enfranchisement and by facilitating the acquisition of individual property by Indians, it would be possible in time to fully absorb them.

To be enfranchised under the Act an Indian had to be: male, over 21, able to read and write either English or French, reasonably well educated, free of debt, and of good moral character as determined by a commission of examiners.<sup>73</sup> The right to actually exercise the franchise depended upon meeting the requirements of the day in federal and provincial legislation in terms of property ownership. Thus there was no automatic right to vote. For Indians not yet able to meet these criteria, a three year qualifying period was allowed to permit them to acquire these attributes.

As an encouragement to enfranchise, the Superintendent-General of Indian Affairs could allot to the enfranchised Indian up to 50 acres of reserve land and a sum of money representing his share in the principal of the annuities and other band revenues. This land was to be held as a life estate only by the enfranchised person, but his children could inherit the land from him on his death and they would hold it in fee simple under provincial law. Enfranchisement was considered a privilege, as shown by the penalty of six months imprisonment for any Indian falsely representing himself as enfranchised.

The enfranchised male Indian would not only receive his share of reserve lands and moneys, but would also continue to live within the reserve boundaries, albeit not as an "Indian." Presumably, his example was expected to encourage others to seek a similar privilege. An enfranchised man's wife and children would automatically be enfranchised with him, and would equally receive their shares of band annuities and moneys but could not receive a share of reserve lands independently. Where the enfranchised male died leaving a widow, she was barred from receiving a life estate in his lands unless there were no children or other descendants to receive the fee simple according to provincial inheritance laws.

The provisions in this Gradual Civilization Act for voluntary enfranchisement remained virtually unchanged through successive acts and amendments until recently.<sup>74</sup>

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<sup>72</sup> An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, S.C. 1857, c. 6.

<sup>73</sup> S. III.

<sup>74</sup> Subsequent versions of this legislation provided that reserve land allotted to an enfranchised Indian came with rights of inheritance: An Act respecting Civilization and Enfranchisement of Certain Indians, C.S.C. 1859, c. 9, s. 13. Compulsory enfranchisement for any Indian who became a doctor, lawyer, teacher or clergyman was introduced in the Indian Act in 1876: S.C. 1876, c. 18, s. 86. The first Indian Act also extended enfranchisement to "any unmarried woman" - one of the few examples of sexual equality in the Act: Ibid. Four years later an amendment removed the involuntary element: S.C. 1880, c. 28, s. 99. In 1884 another amendment removed the right of the band to refuse to

The enfranchisement policy, however, was a failure. Only one Indian enfranchised between 1857 and the passage of the first Indian Act in 1876.<sup>75</sup> Indians protested the provisions of the Gradual Civilization Act and petitioned for its repeal. In addition, Indian bands individually also refused to fund schools whose goals were assimilative, refused the annual band census, and even refused to permit their reserves to be surveyed or to allot the 50 acres required for enfranchisement. John Milloy notes that in this regard there was a fairly unified and general Indian position:

Civilization, which they might define as the revitalization of their traditional culture within an agricultural context, they would have; assimilation, the total abandonment of their cultures, they would not. The policy of civilization, particularly as it was now centred on enfranchisement, was destined to founder on the rocks of tribal nationalism.<sup>76</sup>

The passage of this Act was a watershed event in the long history on Indian policy-making in Canada. In many ways, the Gradual Civilization Act and the response generated by it may be viewed as precursors to the later 1969 White Paper termination policy in terms of souring Indian/government relations and engendering mutual suspicion. Its impact was profound in at least seven ways:<sup>77</sup>

First, it created a major inconsistency regarding the protection of Indian land by allowing the allotment of reserve land without going through the procedure set out in the Royal Proclamation of 1763. The whole intent of that document had been to confirm the principle of Indian control and to exclude local legislatures as well as individuals from interfering with Indian held lands. In this Act, however, reserve lands could be reduced without the necessity of a public and formal surrender or of compensation to the band. Thus, no longer would reserve land be exclusively controlled by tribal governments. This precedent was followed up in provisions in later versions of the Indian Act allowing, for example, expropriation and leasing of reserve lands without band consent.

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consent to enfranchisement or to refuse to allot the required land: S.C. 1884, c. 27, s. 16. Further amendments in 1918 made it possible for Indians living off-reserve to enfranchise: S.C. 1918, c. 18, s. 6. The most drastic change occurred in 1920, however, when the Act was amended to once again allow compulsory enfranchisement of Indians: S.C. 1919-1920, c. 50, s. 3. This provision was repealed two years later: S.C. 1922, c. 26, s. 1. It was then reintroduced in modified form in 1933: S.C. 1932-1933, c. 42, s. 7. It was retained until the major revision of the Act in 1951. A modified form of compulsory enfranchisement was introduced in 1951: S.C. 1951, c. 29, s. 108(1). This was retained until 1961: S.C. 1960-1961, c. 9, s. 1. Compulsory enfranchisement of Indian women who married non-native, Metis or unregistered Indian men was introduced in 1951: S.C. 1951, c. 29, s. 108(2). It was retained until repealed in 1985 by Bill C-31: R.S.C. 1985 (1st supp) c.32, s. 20.

<sup>75</sup> Skyscrapers Hide the Heavens, *supra* note 29 at 114. In fact, less than 500 persons were enfranchised between 1857 and 1940: Milloy, A Historical Overview, *supra* note 29 at 108.

<sup>76</sup> "The Early Indian Acts", *supra* note 29 at 149.

<sup>77</sup> John Milloy discusses the first three impacts, *ibid.*, at 147-48.

Second, The Act marked a clear change in Indian policy. Whereas the conscious attempt to create Christian, civilized and financially self-supporting Indian communities did not necessarily threaten the promise to respect tribal political autonomy contained in the Royal Proclamation of 1763, the new policy did. John Milloy has described this legislation as "a step closer to drastically re-structuring Imperial-Native relations."<sup>78</sup> In this legislation, "civilization" was code for the eradication of Indian nations and communities. This would happen as a function of the gradual enfranchisement of the entire population and the erosion of the protected land base. Enfranchisement was thus a strategy devised for getting around the tribal councils that were increasingly hostile to the civilizing effort. This policy may have been inspired by similar efforts in the United States where allotments were used as a method of terminating tribal existence.<sup>79</sup>

Third, the new policy created a political crisis in colonial-Indian relations in Canada. The formerly progressive and cooperative relationship between band councils and civilizers such as missionaries and humanitarian Indian agents broke down in acrimony and political action by Indians to see this Act repealed. Milloy notes that the refusal of Indians to comply and the government's refusal to rescind the policy meant that "[a]ccord was replaced by opposition; allies were now enemies."<sup>80</sup> "The government's response, in turn, was to slide further from protection

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<sup>78</sup> Milloy, A Historical Overview, supra note 29 at 40.

<sup>79</sup> The editors of Felix Cohen's Handbook, supra note 51 describe allotment (at 128) as a way that reformers conceived to teach Indians the value of private property and to free "surplus" Indian land for non-Indian settlement. Allotment in that country had a long history that was presumably familiar to Canadian policy makers. That long history is briefly described (at 129-30) "as a method of terminating tribal existence." Many of the proponents of allotment sincerely believed that breaking up communal land holding patterns would help Indians to "progress" and would ultimately be to their long term economic benefit. Other advocates of allotment simply wanted access to federally protected Indian lands.

The major allotment initiative in the United States occurred in 1887 with the passage of the General Allotment Act (25 U.S.C. ss. 331-34, 339, 341, 342, 349, 354, 381) [the Dawes Act]. It provided for compulsory allotment of farm-sized tracts of reservation land to individual heads of families, single persons over 18 and orphans under 18. Allotment of communally held tribal lands was to be followed by a 25 year period during which the land would be held in trust by the federal government. Following the expiry of the trust period, the allottee would receive fee simple title, become a citizen of the United States and be subject to state or territorial laws.

Subsequent legislation abridged that trust period and much Indian land was lost to non-Indians. Thus, until allotment was formally ended by the Indian Reorganization Act of 1934 (supra note 27), Indian lands fell from 133 million acres to 48 million. Much of the remaining Indian land was agriculturally marginal. The trust period of allotted land still in the possession of Indians has now been extended indefinitely with the United States continuing to hold the land for the entire beneficial interest of the allottees. However, since individual allotments may be willed or passed on intestacy, many are now in the hands of multiple beneficiaries. These "fractional allotments" render productive use difficult if not impossible due to the large number of consent required for purposes such as leasing etc. The often scandalous history of the Dawes Act allotment process is described in Janet A. McDonnell, The Dispossession of the American Indian: 1887-1934 (Bloomington: University of Indiana Press, 1991).

<sup>80</sup> Milloy, "The Early Indian Acts", supra note 29 at 149.

towards compulsion" according to J.R. Miller.<sup>81</sup>

Fourth, the Gradual Civilization Act was also a further step down the road of non-Indians determining who was entitled to be considered an "Indian". The 1850 Lower Canada legislation had begun this process by defining "Indian" for reserve residency purposes.<sup>82</sup> This new legislation set in motion a process of enfranchisement where additional persons of Indian blood and culture could be removed from the status of Indian. In these two pieces of legislation, therefore, can be seen the beginning of the process of replacing the natural, community-based and self-identification approach towards determining group membership by a purely legal approach controlled by non-Indians.

Fifth, the Act continued and reinforced the emerging sexist orientation of the definitions of "Indian" in the earlier legislation already described since enfranchisement of a man automatically enfranchised his wife and children. The consequences for the wife could be devastating, since she not only lost her connection to her community, but also lost the right to regain it except through re-marrying another man with Indian status. Eventually, this injustice would lead to domestic challenges to these provisions<sup>83</sup> and to international disapproval of this aspect of Canada's Indian policy.<sup>84</sup>

Sixth, the tone and goals of the Gradual Civilization Act, especially the enfranchisement provisions that asserted the presumed superiority of Euro-Canadian cultural traits, also set in motion a process of devaluing and undermining Indian identity and cultural values. The full respect of the dominant society would henceforth be accorded only to Indians who renounced their communities, cultures and languages. It was in this respect the beginning of a psychological assault on Indian identity that would be augmented by the later Indian Act prohibitions on other cultural practices that, along with the missionary and educating effort, would result in what one chief has referred to as getting Indians "to accept the negative views that whites have of them."<sup>85</sup>

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<sup>81</sup> Skyscrapers Hide the Heavens, *supra* note 29 at 114.

<sup>82</sup> Supra note 63.

<sup>83</sup> A.G. Canada v. Lavell; Isaac v. Bedard, *supra* note 20.

<sup>84</sup> Canada was criticized in Lovelace v. Canada, [1981] 2 H.R.L.J 158, 68 I.L.R. 17. The decision was made by the Human Rights Committee (established pursuant to the International Covenant on Civil and Political Rights to which Canada is a signatory). Under the Optional Protocol to the Covenant, individual complaints may be brought to the Committee. The automatic loss of Indian status due to the effect of former s.12(1)(b) of the Indian Act was held by the Committee to deprive Sandra Lovelace of the cultural benefits of living in an Indian community. The rationale for the Indian Act provision denying her the right to live in the Indian community was not found to be reasonable or necessary to preserve the identity of the tribe.

<sup>85</sup> Chief Oscar Lathlin of The Pas, quoted in The Winnipeg Free Press, October 14, 1988, cited in Helen Buckley, Why Indian Programs Failed: A Brief to the Royal Commission On Aboriginal People (sic) (Ottawa: June 1993) at 7.

Seventh, the Gradual Civilization Act also unwittingly reinforced the central paradox of Canadian Indian policy that has seen reserves endure, rather than wither away as intended, primarily because of the hurdles imposed on Indians in connection with the whole enfranchisement policy:

The paradox that was to become and remain a characteristic of Canada's Indian policy was given a firm foundation in this act... Thus, the legislation to remove all distinctions between Indians and Euro-Canadians actually established them. In fact, it set standards for acceptance that many, if not most, white colonials could not meet, for few of them were literate, free of debt, and of high moral character. The 'civilized' Indian would have to be more 'civilized' than the Euro-Canadian.<sup>86</sup>

### (c) End of Imperial Federalism

Between the passage of this Act and Confederation there were a number of events and acts that cemented the change in Imperial Indian policy including in 1858 the ending of treaty "presents" (the symbols of the Imperial alliance system with the tribal nations) and the passage of the Indian Lands Act of 1860. It transferred authority for Indians and Indian lands to the Colonial legislature and formalized the procedure for surrendering Indian land in terms reflective of the procedure set out in the Royal Proclamation of 1763.<sup>87</sup> However, it also signified the end of the era that John Milloy has described as "Imperial federalism":

For native nations the passage of the act was of the greatest consequence for it heralded a new phase in native-white constitutional arrangements. The British withdrawal and the Canadian assumption of responsibility brought to an end their place in the three-way Imperial federal system so purposefully constructed in 1763 and so strictly maintained by Imperial administrators thereafter. It was a constitutional place that had signified the recognition of their interests and rights and, moreover, an Imperial determination to protect and guarantee them.... It was clear by 1858 that the Imperial government was no longer prepared to continue an intervening, mediating role between colonist and native community.<sup>88</sup>

Indians in the Canadas who were aware of the transfer of responsibility for Indian Affairs from the Imperial Crown to the Province of Canada were generally opposed to it, preferring to manage their own affairs than to be managed by the colonial government which they distrusted and feared: "The Imperial Gov't is unwilling to find us officers as formerly and withdraw wholly its protection we deem that there is sufficient intelligence in our midst to manage our own affairs."<sup>89</sup>

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<sup>86</sup> Tobias, "Protection, Civilization, Assimilation", supra note 29 at 130.

<sup>87</sup> An Act respecting the Management of Indian Lands and Property, S.C. 1860, c. 151, s.4.

<sup>88</sup> Milloy, A Historical Overview, supra note 29 at 59.

<sup>89</sup> Statements of Indian leaders contained in communication from D. Thorburn to R. Pennefather, October 13, 1858

From this point on, the authorities entrusted with managing relations with the Indians of Canada could no longer be accurately described as disinterested or neutral. They were "local" in a political as well as in a geographic sense. In practice this meant that their decisions came to reflect less the attempt to balance Aboriginal and non-Aboriginal interests that had characterized much of British Imperial management of Indian affairs than the direct or indirect acquisition of dominance over Indian nations to the direct benefit of the non-Indian settler society that would ultimately emerge in 1867. The British Parliamentary Select Committee on Aborigines in its 1837 report had predicted such a development and had advised against it, but Parliament had ignored the warning.<sup>90</sup>

### **(5) Indian Policy Coalesces: Minors or White Men**

#### **(a) The Gradual Enfranchisement Act**

At Confederation, the Secretary of State became the Superintendent-General of Indian Affairs and, in 1868, acquired control over Indian lands and funds through An Act providing for the organization of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance Lands. This was the first national legislation to deal with Indian matters, consolidating much of the previous decade's land protection legislation. The definition of "Indian" was finalized on a patrilineal model, excluding non-Indian men who married Indian women, but including non-Indian women who married Indian men.<sup>91</sup> Thus the Lower Canada rule of 1851 became national policy.

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in Public Archives of Canada, Record Group 10, vol. 245, Part I, Resident Agent and Secretary of Indian Affairs Letterbooks. See also John S. Milloy, "A Historical Overview of Indian-Government Relations 1755-1940," unpublished paper prepared for the Department of Indian Affairs and Northern Development, December 7, 1992 at 61.

<sup>90</sup> Report of the Select Committee of the House of Commons on the Aborigines of the British Settlement, British Parl. Papers "Aborigines," Vol. 2, p. 77, cited in Richard Bartlett, Subjugation, Self-Management, and Self-Government of Aboriginal Lands and Resources (Kingston: Institute of Intergovernmental Relations, Queen's University, 1986) at 27:

The protection of the Aborigines...is not a trust which could conveniently be confined to the local Legislatures. In proportion as those bodies are qualified for the right discharge of their functions, they will be unfit for the performance of this office, for a local legislature, if properly constituted, should partake largely in the interest, and represent the feelings of settled opinions of the great mass of people for whom they act. But the settlers in almost every Colony, having either disputes to adjust with the native Tribes, or claims to urge against them, the Representative body is virtually a party, and, therefore, ought not to be the judge in such controversies; ...we therefore advise, that, as far as possible, the Aborigines be withdrawn from its control.

Very similar language was used fifty years later in United States v. Kagama, supra note 7, the leading United States Supreme Court decision justifying Congressional plenary power over Indians as a way of preserving them from the local settler populations (at 384):

They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies.

<sup>91</sup> S.C. 1868, c. 42, s.15.

One year later what had been implicit in the Gradual Civilization Act of 1857 was made explicit with the passage of the Gradual Enfranchisement Act.<sup>92</sup> It marked the formal adoption by Parliament of the goal of assimilation. And, as the following passage from an official report states, it also marked the first concerted attempt to prepare Indians for "responsible government":

The Acts framed in the years 1868 and 1869, relating to Indian affairs, were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing, for a limited period, members of bands to manage as a Council, local matters - that intelligent and educated men, recognized as chiefs, should carry out the wishes of the male members of mature years in each band, who should be fairly represented in the conduct of their internal affairs.

Thus establishing a responsible, for an irresponsible system, this provision, by law was designed to pave the way to the establishment of simple municipal institutions.<sup>93</sup>

Aside from the enfranchisement provisions which have been described earlier, the most notable features of this act were the following provisions (all of which were later incorporated into the Indian Act):

- instituting a system of individual property holding on those reserves (that had already been subdivided into lots) through a "location ticket" to be obtained from the Superintendent-General;
- permitting the imposition of the "three year" elective system for chiefs and councillors on bands chosen by the Governor in Council (with no indication of the basis upon which the system might be imposed on a band), with election terms and conditions to be determined by the Superintendent-General;
- limiting the powers of such elected councils to a list of relatively minor matters, all subject to confirmation by the Governor in Council. The elective band council could make municipal style by-laws for: public health; order and decorum at public assemblies; repression of "intemperance and profligacy"; preventing trespass by cattle; maintaining roads, bridges, ditches and fences; constructing and repairing schools and other public buildings; and establishing pounds and appointing pound keepers, but with no power to

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<sup>92</sup> An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extent the provisions of the Act 31st Victoria, chapter 42, S.C. 1869, c. 6.

<sup>93</sup> "Annual Report of the Indian Branch of the Department of the Secretary of State for the Provinces" (Canada, Sessional Papers, No. 23 (1871) at 4. Cited in Richard Bartlett, The Indian Act of Canada (2d ed.) (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 18. As will be seen, the emphasis on preparing Indians for municipal style government would carry through to the modern era as shown by the recommendations of the 1967 Hawthorn Report, as well as by the 1986 federal Community Based Self-Government process.

- enforce them;
- providing that only male Indians 21 years of age and over could vote in band elections, thereby effectively removing Indian women from political life;
  - providing (for the first time) that an Indian woman who married a non-Indian man would lose Indian status and band membership, as would any children of that marriage;
  - providing for an Indian woman who married an Indian from another band and any children from that marriage to become members of the husband's band;
  - providing that an enfranchised Indian man could draw up a will regarding his land in favour of his children (but not his wife) in accordance with provincial law; and
  - defining "Indian" (for purposes of Indian moneys) for the only time in Canadian history) in terms of blood quantum.<sup>94</sup>

Originally designed for the more "advanced" Indians of Ontario and Québec, this legislation was later extended to Manitoba and British Columbia and eventually to all of Canada. With these provisions Parliament entered a new and definitive phase regarding Indian policy, apparently determined to recast Indians politically. Whereas the earlier Gradual Civilization Act interfered only with tribal land holding patterns, this legislation permitted interference with tribal self-government itself. John Milloy comments that from then on "federal control of on-reserve governmental systems became the essence of Canadian-Indian constitutional relations."<sup>95</sup>

The arbitrary elective band council measures had been taken in response to the failure of the earlier pre-confederation legislation to effect their civilizing and enfranchising functions, with the official analysis focusing on the opposition of the traditional Indian governments.<sup>96</sup> Thus, these measures were clearly seen by the government as a way of bringing recalcitrant traditional Indian governments to heel by seeing to their elimination or control.

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<sup>94</sup> 4. In the division among the members of the tribe, band or body of Indians, of any annuity money, interest money or rents, no person of less than one-fourth Indian blood, born after the passing of this Act, shall be deemed entitled to share in any annuity etc...

<sup>95</sup> Milloy, "The Early Indian Acts", supra note 29 at 151.

<sup>96</sup> Milloy, ibid (at 150) states in this regard as follows:

The department's analysis of the failure of enfranchisement came quickly. The fault was directly attributable to Indian leaders, who had, after all, stated openly, as had the Six Nations' Council, that they were "wholly averse to their people taking the advantages offered" by the act. The chiefs were pictured, perhaps quite accurately, as using the traditional authority of their office to dissuade their members from volunteering for enfranchisement.

The Victorian era sexism that had been bubbling beneath the surface was now apparent, and would remain a feature of Canadian Indian policy until relatively recently. Indian women could not vote in band council elections in their own communities. If they married an Indian man from another band they lost membership in their home communities. If they married a non-Indian man, they lost Indian status, membership in their Indian community and the right to transmit Indian status to their children of that marriage. If they married an Indian man who became enfranchised they lost status, membership, treaty annuity rights and the right to inherit his property if he died.

As Kathleen Jamieson has noted, institutionalizing inequality within the Victorian sexual hierarchy that was being grafted onto Indian communities "ensured for Indian women in the mid-nineteenth centuries a very special place at the bottom of this hierarchical structure."<sup>97</sup> The manifest unfairness of these provisions led to Indian complaints that, like most Indian protests up until modern times, were ignored or reinterpreted by government officials to suit their operating premises. For example, the Grand Council of Ontario and Québec Indians wanted the provision concerning marrying out amended so that "Indian women may have the privilege of marrying when and whom they please without subjecting themselves to exclusion or expulsion from the tribe."<sup>98</sup> The provision remained unchanged and was carried forward into the subsequently enacted Indian Act.

#### (b) The Indian Act of 1876 and 1880

In the decade of the 1870s, Canada grew by the addition of Manitoba, British Columbia and Prince Edward Island as provinces, and by the conclusion of treaties 1 to 7 with the tribes of western Canada. In addition, in 1874 federal legislation extended the existing Indian laws of the new Dominion to Manitoba and British Columbia. That legislation also widened earlier prohibitions on selling alcohol to Indians to make it an offence punishable by imprisonment for an Indian to be found "in a state of intoxication" - with further punishment possible for refusal to name the supplier of the alcohol.<sup>99</sup>

In the midst of the treaty-making process going on in western Canada, the first Indian Act<sup>100</sup> as such, that of 1876, was passed as a consolidation of previous Indian legislation. Indian policy

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<sup>97</sup> Kathleen Jamieson, Indian Women, *supra* note 29 at 5.

<sup>98</sup> Public Archives of Canada, Record Group 10, "Red Series" vol. 1934, file 3541, June 1872. See John Leslie and Ron Maguire, The Historical Development, *supra* note 29 at 54.

<sup>99</sup> S.C. 1874, c. 21. This was, of course, the precursor to the similar liquor prohibitions in succeeding versions of the Indian Act that were eventually struck down in R. v. Drybones ( *supra* note 20) in 1969 for infringing the Canadian Bill of Rights.

<sup>100</sup> An Act to amend and consolidate the laws respecting Indians S.C. 1876, c. 18.

was now clear and was expressed in the alternative by the Minister of the Interior when the draft Act was introduced in Parliament: "the Indians must either be treated as minors or as white men."<sup>101</sup> There was to be no middle road. Thus, the 1876 "Annual Report of the Department of the Interior" followed up on this theme in the following terms:

...our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. The soundness of this principle I cannot admit. On the contrary, I am firmly persuaded that the true interests of the aborigines and of the State alike require that every effort should be made to aid the red man in lifting himself out of his condition of tutelage and dependence, and that it is clearly our wisdom and our duty, through education and other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.<sup>102</sup>

Importantly, this new Act made no reference to the treaties already in existence nor to those being negotiated at the time it was passed. This omission continues in the present version of the Act. Nonetheless, as Leslie and Maguire point out, the Indian Act "created a framework of Indian legislation that remains fundamentally intact today".<sup>103</sup> Through its legislated control over Indian political structures, land holding patterns and resource development, Parliament finally acquired all the levers it believed it needed to complete the unfinished policies it had inherited from its colonial predecessors. Thus, according to John Milloy, the new Act reiterated in stronger form the "political formula of 1869...that Indians would lose control of every aspect of their corporate existence".<sup>104</sup>

In general, the 1876 Act offered little that was different from what had gone before, although it was much more complex and detailed, covering the reserves "with a blizzard of Parliamentary regulation designed to infiltrate every crevice of native life and reform it on the

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<sup>101</sup> David laird, House of Commons Debates, 3rd. session, 3rd. Parl., 1876, 933, reported in The Historical Development of the Indian Act, supra note 29 at 60. The approach of treating Indians as minors was, of course, official policy in the United States, the basis of which can be found in the leading Supreme Court case, Worcester v. Georgia, supra note 10, where the relation of the tribes to the United States is described (at 17) as resembling "that of a ward to his guardian." That phrase was enlarged upon and used as justification for the imposition of unrestricted federal power over the internal affairs of the tribes in United States v. Kagama, supra note 7 at 383-84:

These Indian tribes are the wards of the nation. They are communities dependent on the United States....From their very weakness and helplessness...there arises the duty of protection, and with it the power.

<sup>102</sup> Canada, "Annual Report of the Department of the Interior", No. 9 in Sessional Papers (1876) at xii-xiii, cited in Bartlett, The Indian Act, supra note 93 at 2.

<sup>103</sup> The Historical Development of the Indian Act, supra note 29 at 60.

<sup>104</sup> Milloy, "The Early Indian Acts", supra note 29 at 151.

desired white model.<sup>105</sup> New definitions were added at the outset to cover terms such as "band", "reserve" etc, in terms reflective of the Victorian paternalism already described. As with earlier acts, an "Indian" had to be someone "of Indian blood" or a non-Indian woman married to an Indian man.<sup>106</sup> Most of the exclusionary and sexist provisions already described earlier thus found themselves incorporated into this first Indian Act in one form or another.

Most of the protective features of earlier legislation were brought forward and made clear. For example, no one other than an "Indian of the band" could live on or use reserve lands without license from the Superintendent General.<sup>107</sup> In addition, there was to be no taxation on real and personal property on a reserve, no liens on Indian property, and no seizure of Indian property or moneys for a debt.<sup>108</sup>

It was also made clear that the three year elective band council system carried over from the earlier Gradual Enfranchisement Act, although still imposable by the Governor in Council, was not to interfere with traditional or "life" chiefs who would be allowed to continue in office (but without power).<sup>109</sup> This was the beginning of the distinction between elective and custom band councils that exists in the modern Act. Although official policy was to apply the new elective system only upon request, the Indian agents and other officials worked diligently to encourage such requests.

Elected chiefs under the three year elective system could be deposed by the Governor in Council for "dishonesty, intemperance, immorality or incompetency" - with none of the terms defined.<sup>110</sup> In this Act it was also made clear, reflecting the norms of Canadian society, that only male Indians over 21 could vote in band elections.<sup>111</sup> There was no requirement that the vote be by secret ballot, however. The 1876 Act repeated (with one new power) the list of band council by-law making powers in the earlier Gradual Enfranchisement Act, but they were still subject to Governor in Council confirmation.<sup>112</sup> As with that earlier Act, there was no power to enforce these by-laws.

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<sup>105</sup> Milloy, A Historical Overview, *supra* note 29 at 99.

<sup>106</sup> Supra note 65.

<sup>107</sup> Ibid, ss. 11,12.

<sup>108</sup> Ibid, ss. 64, 66, 68, 69.

<sup>109</sup> Ibid, s. 62.

<sup>110</sup> Ibid. This was also carried over from the earlier Gradual Enfranchisement Act.

<sup>111</sup> Ibid, s. 61.

<sup>112</sup> Ibid, s. 63.

To foster individualism, the Superintendent-General could now order the reserve to be surveyed into lots and could require that band members obtain location tickets for individual plots from him.<sup>113</sup> Where an Indian holding a location ticket died intestate, provision was made for division of his property between his wife and children, with their possession to be confirmed by a subsequent location ticket issued by the Superintendent General.<sup>114</sup>

The enfranchisement provisions continued as described earlier, with mandatory enfranchisement for Indians who acquired higher education and extension of the privilege of enfranchisement to women.<sup>115</sup> The liquor offenses from earlier legislation were imported into the new Act and supplemented by a prohibition on the simple possession of intoxicants by an Indian on reserve.<sup>116</sup>

Although the Indian Act of 1876 applied throughout Canada, the bands of the west were excluded from many provisions<sup>117</sup> (such as the elective band council system) because they were viewed as insufficiently advanced for these measures in the estimation of government officials. Where the band was not officially under either the Indian Act (or the later Indian Advancement Act of 1884), the Indian Affairs Department allowed Indians to hold elections under the close supervision of the local Indian agent. This was a similar practice to that employed by Indian agents in the United States.<sup>118</sup> In British Columbia the department often followed customary or traditional practice, while in the prairies the election practices were akin to appointments by the agent, since it was he who would usually initiate and control the entire procedure. In such cases, the agents would attempt to follow the Indian Act model and limit terms to three years.

Despite the opportunity to opt into the elective system, "eastern Indians who were to be the beneficiaries of the act rejected it, for they knew that if they adopted the elective system, the

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<sup>113</sup> Ibid, ss. 5, 6.

<sup>114</sup> Ibid, s. 9.

<sup>115</sup> Supra note 74.

<sup>116</sup> Supra, note 65.

<sup>117</sup> Ibid, s. 94.

<sup>118</sup> The practice on American reservations was for the Indian agent to call the tribe together or, at least, to call the most influential chiefs to meet with him, at which time he would attempt to persuade them to organize themselves through a tribal council to which he could delegate some of his functions. Although some tribal councils might reflect past tribal structures or subdivisions, they would be compelled to be constituted and operated via western democratic principles. Usually the Indian agent would select "progressive" Indian leaders for tribal posts and would oversee tribal council operations with a firm hand. In this practice can be seen the beginnings of the split between traditional and modern factions that bedevils tribal politics today on many American reservations. The transition from traditional to modern tribal governments is described in the chapter entitled "The Evolution of Tribal Government" in Vine Deloria, jr. and Clifford M. Lytle, American Indians, American Justice (Austin: University of Texas Press 1983).

superintendent general would have not only supervisory and veto power over band decisions, but also, according to the provisions of the act, he could force the band council to concern itself with issues with which it did not wish to deal.<sup>119</sup> Only one band is known to have adopted the elective system at the time.<sup>120</sup>

In 1879 band councils finally got the power to enforce their by-laws with the passage of an amendment allowing the imposition of a fine (\$30) or a jail term (30 days) for by-law infractions.<sup>121</sup> There was no provision for a hearing, however, before punishment was imposed. This was rectified one year later by requiring that proceedings be taken before a justice of the peace in the ordinary way prior to the imposition of any punishment.<sup>122</sup> What this meant was that proceedings regarding reserve events had to be taken off-reserve in non-Indian towns where justices of the peace could be found. The provision for the imposition of punishment continues in the present Act. Where there is no local justice of the peace, it is still difficult for band councils to enforce their by-laws for the same reasons.

The 1880 consolidation created a new Department of Indian Affairs to replace the Indian Branch of the Department of the Interior to manage Indian administration and to see to the appointment of local Indian agents.<sup>123</sup> In this vein, the 1880 Act also introduced a new provision denying to band governments the power to decide how moneys from the sale of their lands or other resources would be spent.<sup>124</sup> The Governor in Council thereby took the power to decide how to manage Indian moneys, and has retained this power down to the present.

Where the elective system was imposed, the new Act removed the right of traditional or "life" chiefs to continue: henceforth they would have to stand for election in the ordinary way despite tribal or band traditions.<sup>125</sup> Madill notes that this provision marked "a significant transition" regarding the authority of chiefs and councils, and that henceforth "[t]he elected band council was regarded as the means to destroy the last remains of the traditional political system".<sup>126</sup>

Aside from these few changes, the 1880 Act reflected its 1876 predecessor and was the

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<sup>119</sup> Tobias, "Protection, Civilization, Assimilation", supra note 29 at 133.

<sup>120</sup> The Mississauga Band by Order-in-Council in 1877: Daugherty, Indian Government, supra note 3 at 4.

<sup>121</sup> S.C. 1879, c. 34, s. 4.

<sup>122</sup> S.C. 1880, c. 28, s. 74.

<sup>123</sup> Ibid, s. 7.

<sup>124</sup> Ibid, ss. 70, 71.

<sup>125</sup> Ibid, s. 72.

<sup>126</sup> Madill, Indian Government, supra note 3 at 11.

model upon which all succeeding versions were erected.

## (6) The High Water Mark of Assimilation Policy

### (a) Undermining Traditional Culture

Although as Leslie and Maguire note "[t]he basic framework of the 1880 Indian Act remained the same until 1951,"<sup>127</sup> amendments continued to be brought forward with great regularity, usually to deal with unanticipated matters of a minor nature but with no intent to alter basic assimilation policy.

Thus, in 1881, the administration of non-Indian Canadian justice was formally brought to Indian reserves by making officers of the Indian department *ex officio* justices of the peace and by extending to the reserves the jurisdiction of magistrates in towns and cities.<sup>128</sup> This helped correct one aspect of the problem of enforcing band council by-laws referred to above, since there was now in theory a forum on reserve for disposing of these matters.

More importantly, though, the new Department of Indian Affairs now had authority to enforce its own "civilizing" regulations. Something similar was occurring on reservations in the western United States at around the same time.<sup>129</sup> The next year agents were given the same powers as those accorded to police and stipendiary magistrates under the Indian Act,<sup>130</sup> thereby extending their powers considerably. In 1884, yet another set of amendments allowed Indian agents acting

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<sup>127</sup> The Historical Development of the Indian Act, *supra* note 29 at 79.

<sup>128</sup> S.C. 1881, c. 17, s. 12.

<sup>129</sup> So called Courts of Indian Offenses were established on reservations in the United States in 1883 under the administrative authority of the Secretary of the Interior Henry Teller to eliminate what he described as "savage rites and heathenish practices". These "courts" were little more than extensions of the authority of Indian agents who typically acted as judges or arranged for trusted and "progressive" Indians to assume this function. Their original instructions were to repress such tribal practices as "the sun dance, scalp dance...plural marriage...influence of the medicine men...[and] the very general custom of destroying or distributing his property on the death of a member of his family...": Annual report of the Secretary of the Interior, November 1, 1883, partly reproduced in Francis Prucha ed., Documents, *supra* note 65 at 160-162.

These courts never had legislative sanction and were ultimately upheld on the doubtful theory that they were "mere educational and disciplinary instrumentalities": United States v. Clapox, 35 F. 575 (D.C. Or. 1888) at 576. The Dawes Act allotment policy (see note 79 *supra*) increased the need for these courts because allotment had broken up traditional family and kinship systems and with them customary methods of dispute resolution. The origins of these courts are tied up with the creation of Indian police forces on the reservations and are described in William T. Hagan, Indian Police and Judges (Lincoln: University of Nebraska Press, 1980). At one time, two-thirds of the American reservations had these courts. They have now been replaced for the most part by modern tribal courts created under the Indian Reorganization Act of 1934 (*supra* note 27).

<sup>130</sup> S.C. 1882, c. 30, s. 3.

as justices of the peace to conduct their trials wherever "it is considered by him conducive to the ends of justice."<sup>131</sup> Presumably, this would allow him to conduct trials off-reserve as well. In addition, those same amendments apparently extended the authority of Indian agent/justices of the peace beyond Indian Act matters to "any other matter affecting Indians."<sup>132</sup> Given that the Criminal Code had not yet been enacted, this presumably included all civil and criminal matters generally - a considerable amount of jurisdictional territory for a non-legally trained civil servant. This was corrected in 1886 to limit their jurisdiction to Indian Act matters.<sup>133</sup>

Criminal jurisdiction was given to Indian agents over Indians committing certain sexual offenses in 1890 in An Act respecting offenses against public morals and public convenience.<sup>134</sup> Following enactment of a comprehensive Criminal Code in 1892, agents lost this aspect of their criminal law authority over Indians, but it was restored to them in 1894 along with jurisdiction over two other criminal matters: unenfranchised Indian women prostitutes, and inciting "three or more Indians, non-treaty Indians, or halfbreeds" to breach the peace or to make "riotous" or "threatening demands" on a civil servant.<sup>135</sup> Vagrancy was added in 1893.<sup>136</sup> The jurisdiction of Indian Act justices of the peace still extends over some criminal matters in section 107 of the current Act, although Indian agents (whose functions have been discontinued since the 1960s) are no longer appointed to these positions.<sup>137</sup>

In describing the evolution of these provisions, the authors of the Manitoba Report do not mince their words in comparing the relatively more oppressive Canadian approach to bringing non-Indian justice to Indians with that employed on reservations in the United States:<sup>138</sup>

The Americans also sought from the outset to use the court system as a "civilizing" tool to foster their values and beliefs in substitution for traditional law and governmental structures. It was felt that this was accomplished best through the hand-picking of individual tribal members to be appointed as judges under the supervision of the Bureau of Indian Affairs

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<sup>131</sup> S.C. 1884, c. 27 s. 22.

<sup>132</sup> Ibid, s. 23.

<sup>133</sup> R.S.C. 1886, c. 43, s. 117.

<sup>134</sup> S.C. 1890, c. 29, s.9.

<sup>135</sup> Criminal Code, S.C. 1892, c.29, ss. 98, 190.

<sup>136</sup> Ibid, s. 98.

<sup>137</sup> There are only a half-dozen Indian Act justices of the peace operating today under section 107. No new appointments are being made, nor are any contemplated: Report of the Aboriginal Justice Inquiry of Manitoba (Province of Manitoba, 1991) (vol. 1) at 308, based on interviews with federal officials.

<sup>138</sup> See note 129 supra.

Indian agents. The Canadian approach was much more oppressive. All Indian agents automatically were granted judicial authority to buttress their other powers, with the result that they could not only lodge a complaint with the police, but they could direct that a prosecution be conducted and then sit in judgment of it. Except as accused, Aboriginal persons were excluded from the process.<sup>139</sup>

Returning to the 1881 amendments to the Indian Act, other provisions aimed at teaching western Indians the proper commercial values by prohibiting the sale of their agricultural produce except in conformity with official regulations.<sup>140</sup> This was to prevent their exchange or barter for things that the agents did not consider worthwhile for them, including alcohol. These prohibitions were retained in successive versions of the Act and extended in 1941 to all Indians in Canada regarding the sale of furs and wild animals.<sup>141</sup>

Further amendments in 1884 prohibited the "Potlatch" and the "Tamanawas" dance.<sup>142</sup> This was a significant development in Indian policy because it went farther than imposing non-Indian forms on traditional Indian governance or land holding practices - it was a direct attack on Indian culture. It has been called "a landmark amendment for it represents the first in a long series of attempts by Parliament to protect Indians from themselves as well as from unscrupulous 'whites.'"<sup>143</sup> Similar attacks on tribal culture were occurring in the United States about the same time.<sup>144</sup> Further amendments prohibiting traditional dances and customs followed later.<sup>145</sup> British Columbia Provincial Court Judge Scow has commented that these measures were highly destructive to the culture of his people, the Kwakiutl of Vancouver Island:

The Indian Act did a very destructive thing in outlawing the ceremonials. This provision of the Indian Act was in place for close to 75 years and what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came to

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<sup>139</sup> Manitoba Report, *supra* note 137 at 303-04.

<sup>140</sup> S.C. 1881, c. 17, ss. 1, 2.

<sup>141</sup> S.C. 1940-41, c. 19, s. 1.

<sup>142</sup> S.C. 1884, c. 28, s. 3.

<sup>143</sup> The Historical Development of the Indian Act, *supra* note 29 at 82.

<sup>144</sup> See note 129, *supra*.

<sup>145</sup> S.C. 1895, c. 35, s. 6 prohibiting certain dances, including the Blackfoot Sun Dance and the Cree and Saulteaux Thirst Dance; S.C. 1914, c. 35, s. 8 prohibiting western Indians from participating without official permission in "aboriginal costume" off-reserve in a "dance, show, exhibition, stampede or pageant"; S.C. 1933, c. 42, s. 10 deleting requirement of "aboriginal costume" in prohibition.

this country. We had a system that worked for us. We respected each other. We had ways of dealing with disputes. We did not have institutions like the courts that we are talking about now. We did not have the massive bureaucracies that are in place today that we have to go through in order to get some kind of recognition and some kind of resolution.<sup>146</sup>

The same amendments in 1884 permitted the drawing up of a will - but only by Indians holding reserve land by location ticket. The property could only pass to his family or to certain relatives, and then only with the consent of the band. The widow was eligible to receive her share only if she were of "good moral character" and still living with the deceased at the time of death.<sup>147</sup>

The Superintendent also acquired additional powers, including the power to override band council refusal to consent to the enfranchisement of an Indian otherwise qualified,<sup>148</sup> and to annul the election of a chief found guilty of "fraud or gross irregularity" in the election. In such a case he could also recommend the prohibition of such a person from standing for election for six years.<sup>149</sup> This provision was to counter the practice of many bands that had been brought under the Indian Act elective system of simply electing their traditional leaders.

In the same set of amendments was a provision giving the Governor in Council power to permit the sale, lease or alienation of land held by a probationer enfranchisee (i.e. before the three year probation period was up).<sup>150</sup> In short, Parliament made it clear once again that in certain circumstances band consent in accordance with the Royal proclamation of 1763 was unnecessary in order to carve up reserve lands.

#### (b) The Indian Advancement Act

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<sup>146</sup> Transcript of the RCAP Justice Round Table (Ottawa, November 25-27, 1992, day two) page 345. Despite the fact that the anti-Potlatch provisions sometimes had the desired effect, as Judge Scow's comments indicate, there is evidence that in many cases they were viewed by agents as unenforceable and were not vigorously pursued except for brief periods. No one was jailed for potlatching until 1920, for example. Much of the anti-potlatching impetus came from Christian converts among the west coast tribes rather than from government officials. Something similar appears to have been the case regarding the Sun Dance and the Thirst Dance of the prairie Indians. For a brief review of the anti-Potlatch, anti-dance period see J.R. Miller, "Owen Glendower, Hotspur, and Canadian Indian Policy," in Sweet Promises: A Reader on Indian-White Relations in Canada, J.R. Miller (ed.)(Toronto, University of Toronto Press, 1991), 327-332.

<sup>147</sup> S.C. 1884, c. 27, s. 5.

<sup>148</sup> Ibid, s. 16, although the probationer enfranchisee would still need band consent to get the original location ticket to his individual allotment prior to seeking enfranchisement.

<sup>149</sup> Ibid, s. 9.

<sup>150</sup> Ibid, s. 17.

The most significant event of 1884, however, was the passage of the Indian Advancement Act. The full title is indicative of its purpose: An Act for conferring certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers.<sup>151</sup> This legislation was specifically designed for the eastern Indians and gave the Governor in Council power to force them to adopt its provisions regarding "one year" elective band councils specifically designed along a municipal government model.

There was to be no "chief" elected by the eligible (adult male) electorate; instead the elected band councillors would select one among them to be "chief councillor". For these purposes, the reserve was to be divided into electoral districts to have a relatively equal number of voters. Those provisions went farther than those in the Indian Act by extending the powers of band councils in areas such as public health and by enabling band councils to tax the real property of all band members.

In addition, and somewhat paradoxically if the goal was to train Indians for self-government, the Superintendent-General (typically through the local Indian agent) acquired vastly enlarged powers to direct all aspects of the elections and to call, participate in and adjourn band council meetings. In short, the Act provided for "directed civilization,"<sup>152</sup> permitting the Indian agent to control the political affairs of every "advanced" band. Although some Manitoba bands expressed interest in coming into the scheme of the Act, and a few in British Columbia actually did<sup>153</sup>, most bands refused to bring themselves within the Indian Advancement Act.<sup>154</sup>

The following year Parliament passed the Electoral Franchise Act<sup>155</sup> regarding federal elections. Prior to that, federal elections were governed by provincial electoral law. Henceforth a male Indian could vote so long as he could meet the qualification of occupying real property worth at least \$50. For these purposes, reserve land held individually through location ticket would qualify. The Liberals vigorously opposed the original bill in 1885 because it would have permitted Indians in the west "to go from the scalping party to the polls"<sup>156</sup> and were able to get an amendment restricting the Electoral Franchise Act to the eastern Indians. The Electoral Franchise Act was eventually repealed in 1898 by a Liberal controlled Parliament in favour of allowing

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<sup>151</sup> S.C. 1884, c. 28.

<sup>152</sup> Tobias, "Protection, Civilization, Assimilation", supra note 29 at 134.

<sup>153</sup> In Manitoba The Pas, Cumberland, and St. Peter's bands; in British Columbia the Cowichan (1886), Kincolith (1886), Metlekatla (1889), and Port Simpson (1894) bands.

<sup>154</sup> Daugherty, Indian Government, supra note 3 at 18.

<sup>155</sup> S.C. 1885, c. 40. The material for this paragraph is drawn primarily from Richard Bartlett, "Citizens Minus: Indians and the Right to Vote", 44 Saskatchewan Law Review (1980) 163.

<sup>156</sup> The Honourable David Mills, Liberal member and former Minister of Indian Affairs, House of Commons Debates, April 30, 1885, p. 1484, reported in Bartlett, "Citizens Minus", ibid at 169.

provincial electoral laws to govern the federal franchise again.<sup>157</sup>

It was during this period that the pass system was instituted without legislative sanction in the prairies to prevent Indians from leaving their reserves and thereby inhibit their mobility. By the time the Electoral Franchise Act was repealed the pass system had fallen largely into disuse due to official reluctance at the operational level to enforce what the RCMP viewed as an unenforceable and possibly illegal measure. There is considerable evidence, however, that senior federal officials nonetheless encouraged Indian agents to use the system as a device for intimidating prairie Indians and thereby better controlling them. Barron reports as follows in this regard:

As it turned out, the pass system proved to be a less than effective way of restricting Indian movement. The problem was, that lacking legislative sanction, the pass system could not be enforced in law. To get around this, Indian Affairs simply assumed an air of authority and attempted to enforce the system by other means within its power. In some cases, rations and other "privileges" were withheld from those who refused to comply with pass regulations, but the most effective approach was to have the police arrest those found off the reserve without passes and, where possible, prosecute them either for trespass under the Indian Act or for vagrancy under the Criminal Code.<sup>158</sup>

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<sup>157</sup> The provincial legislation either prohibited Indians from voting at all or imposed property requirements that they could not meet if they lived on reserve. When the property qualification was dropped and universal male suffrage was adopted in the late nineteenth and early twentieth centuries in the provinces (this happened at different times, depending on the province concerned: See Bartlett, Citizens Minus, *supra* note 155 at 183-84) many provinces passed legislation explicitly to exclude Indians. The provincial franchise was then re-extended to Indians at different times, depending on the province concerned: British Columbia in 1949; Manitoba in 1952; Ontario in 1954; Saskatchewan in 1960; Prince Edward Island and New Brunswick in 1963; Alberta in 1965; and, finally, Québec in 1969. Indians in Nova Scotia were apparently never prevented from voting in provincial elections after the adoption of universal male suffrage. Newfoundland did not enter Confederation until 1949 and was therefore not subject to the Indian Act until then. Until the Miawpukek Band of Conne River was recognized by the federal government in 1985, there were no status Indians in the province; therefore no occasion had ever arisen to prevent Indian from voting in provincial elections. Inuit were specifically excluded from the federal franchise in 1934 but had the vote restored to them without qualification in 1950.

<sup>158</sup> F.L. Barron, "The Indian Pass System in the Canadian West, 1882-1935," 21 Prairie Forum (spring 1988) 25 at 34-35. Under the pass system, prairie Indians were only supposed to be able to leave their reserves upon the issuance of a written pass from the local Indian agent. The agent would often act on the advice of the farm instructor. Although it was official policy on the prairies, there was never any legislative basis for the policy. Apparently it arose as a result of informal discussions by government officials in the early 1880s in response to the threat that the Cree Indians in Saskatchewan in particular would forge a pan-Indian alliance against Canadian authorities. There was also some concern with frequent crossings by Indians in Canada into the United States for unknown purposes.

The pass system was maintained through the 1880s but had fallen into general disuse by the 1890s, although it was occasionally used in various parts of the prairies into the twentieth century. The RCMP disliked enforcing the pass system because of their fear that, if challenged, it would be found by the courts to be illegal and would bring all of their law enforcement efforts into disrepute. The pass system was studied by a commission from South Africa in 1902.

The pass system should be read against the backdrop of the other attempts to interfere with Indian cultural life as it was intended not only to prevent Indian politicians from conspiring with each other, but also to discourage parents from visiting their children in residential schools off-reserve and to provide agents with greater authority to prevent

While the Electoral Franchise Act was in operation, an amendment to the Indian Advancement Act in 1886 strengthened the control of government officials over elections for band council positions by giving the deciding vote to the presiding official (usually the Indian agent) where there was a tie.<sup>159</sup> In 1887, Sir John A. Macdonald confirmed the policy of assimilation in the House of Commons when he stated that the "great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion."<sup>160</sup>

In keeping with this sentiment, an amendment to the Indian Act in 1887 permitted the Superintendent General to "determine who is or who is not a member of any band of Indians" with his decision on the matter appealable only to the Governor in Council.<sup>161</sup> Evidently, this power would ensure that those not eligible for band membership could more easily be removed from the reserve. This provision was retained through to the 1951 amendments when it passed to the Registrar. Since the 1985 amendments, this power is with the Registrar or with the band itself where it has taken control of its membership.<sup>162</sup>

#### (c) Increasing Government Control

Further amendments to the Indian Act in 1894 increased the authority of the Superintendent-General in internal band matters. In the area of wills and estates, for example, the validity of an Indian will was to be on the sole authority of the Superintendent-General, deleting the requirement for band council approval.<sup>163</sup> In the same way, the band was no longer to have a say in whether non-Indians could reside upon or use reserve lands - the sole authority for this was that of the Superintendent-General.<sup>164</sup>

The Superintendent-General also acquired the power to lease reserve land held by

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plains Indians from participating in ceremonies and dances on distant reserves.: J.R. Miller, "Owen Glendower," supra note 160 at 327.

<sup>159</sup> The Indian Advancement Act, R.S.C. 1886, c. 44, s. 5.

<sup>160</sup> Canada, Sessional Papers, "Return to an Order of the House of Commons, May 2, 1887, (no. 20b) at 37; reported in Milloy, A Historical Overview, supra note 29 at 110.

<sup>161</sup> S.C. 1887, c. 33, s.1.

<sup>162</sup> Under section 10, a band may take control of its own membership. Control of Indian status, however, remains with the Registrar under section 5.

<sup>163</sup> S.C. 1894, c. 32, s. 1. The property of married Indian women dying intestate was dealt with for the first time as well; it was to follow the same rules as that of intestate males: ibid.

<sup>164</sup> Ibid., s. 2.

physically disabled Indians, widows and orphans as well as others who could not cultivate their lands, once again without the requirement of band approval.<sup>165</sup> Unlike the case of the earlier amendments on this topic in 1884, these persons were not in the process of seeking enfranchisement - which might have provided a principled justification for departing from the surrender provisions outlined in the Royal proclamation of 1763. Leslie and Maguire comment that "this amendment enabled the Superintendent-General to lease reserve lands without band consent, which had not always been forthcoming in the past."<sup>166</sup> The next year saw further amendments permitting the leasing of the reserve lands of any Indian who applied to the Superintendent-General for such a lease, once again with no requirement for band consent.<sup>167</sup>

As already mentioned, the power of local Indian agents was also increased in 1894, particularly in the provision making them ex officio justices of the peace for Indian Act offenses as well as certain provisions of the Criminal Code.<sup>168</sup> In addition, new provisions gave the Governor in Council power to compel school attendance by Indian children, by "arrest and conveyance to school, and detention there"<sup>169</sup> if necessary, and gave the additional power to establish industrial or boarding schools and to commit Indian children to such schools until they reached the age of eighteen. These provisions were, of course, the precursors to the education sections (114-122) of the present Act.

To speed up the process of assimilation, the number of bands under the three year Indian Act elective system was increased in 1894 by Order-in-Council to include a total of 55 bands in Ontario, Quebec and New Brunswick. Four years later the list was expanded to include all the bands in Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island. Only a few bands in these provinces were excepted from its operation, two because they had popular traditional systems, and two because were already under the one year elective system of the Indian Advancement Act.<sup>170</sup>

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<sup>165</sup> Ibid, s. 3.

<sup>166</sup> The Historical Development of the Indian Act, supra note 29 at 96.

<sup>167</sup> S.C. 1895, c. 35, s. 1.

<sup>168</sup> See text at notes 128-39 supra.

<sup>169</sup> S.C. 1894, c. 32, s. 11.

<sup>170</sup> Daugherty, Indian Government, supra note 3 states (at 6) that the Six Nations of Brantford and the Oneidas of the Thames retained their traditional system, while the Mississaugas and the Caughnawagas remained under the more far-reaching provisions of the Indian Advancement Act. In addition, by Indian Branch policy the Indians of Treaty Three (the Northwest Angle) remained outside the Indian Act elective system because they were not considered sufficiently advanced.

The Six Nations were the last band in Canada to be brought under the Indian Advancement Act, by Order-in-Council P.C. 1629 in 1924 following a flawed (the traditional chiefs refused to appear before the inquiry) one man Royal Commission inquiry into their traditional form of government the year before. The corresponding

Thus, by the turn of the century there were four systems of band government in operation across Canada: the three year Indian Act elective band council system; the one year Indian Advancement Act elective system; hereditary/traditional systems used by the Six Nations of Brantford and by some bands in British Columbia; and the election/appointment system in the prairies where the band was under neither the Indian Act nor the Indian Advancement Act system.

Prior to the 1951 Indian Act revisions, 185 bands were operating under the Indian Act system, 9 had adopted, voluntarily or otherwise, the Indian Advancement Act system, while 400 were operating under hereditary/traditional systems or the non-legislative elective system of the prairies.<sup>171</sup>

The 1906 consolidation of the Indian Act<sup>172</sup> was extremely long and detailed - 195 sections - nearly twice as many as the original Act of 1876. The additional provisions reflected the emphasis on civilization and enfranchisement that had overtaken policy-making over the years, with the Indian Advancement Act incorporated almost unchanged as Part II of the Indian Act (where it would remain unchanged until repealed in 1951).

In retrospect, Leslie and Maguire confirm that the legislative trend of the legislation and amendments that culminated in the 1906 consolidation had been in one direction: "the Government had increased its influence over Indian moral behaviour, means of livelihood, land resources and capital funds, and had effected little legislation which gave Indians more control over their own affairs."<sup>173</sup>

Paradoxically, however, by the time the 1906 consolidation of the Indian Act was prepared, the possibility of the gradual civilization and advancement of Indians as a social theory had peaked. As Tobias notes, measures to date were being viewed sceptically as "many had come to regard the reserves as preventing assimilation, and to believe that the existence of reserves was a check on the

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provisions of the revised Indian Act of 1951 were applied to the Six Nations in 1951 by Order in Council PC 6015. The application of the Act to them was challenged in Logan v. Styres (1959) 20 D.L.R. (2d) 416 (Ont. H.C.) where it was upheld. The fact situation in this case involved a surrender of land under the Indian Act where only 53 out of 3600 eligible electors voted, with the remainder refusing to accept the legitimacy of the governing structure of the Act. The surrender was upheld by the Court, having been accepted by what was considered a majority under the Act: 30-23.

The designation of the Six Nations Confederacy as a "band" under the Act was subsequently challenged but upheld on appeal in Davey v. Isaac (1977) 77 D.L.R. (3d) 481 (S.C.C.). In this case the supporters of the traditional Confederacy had locked the council house on reserve, thereby preventing the elected band council from operating.

The Six Nations' history in this regard is reviewed by Darlene Johnston, "The Quest of the Six Nations' Confederacy for Self-Determination," 44 University of Toronto Faculty Law Review 1 (1986).

<sup>171</sup> Daugherty, Indian Government, *supra* note 3 at 74.

<sup>172</sup> R.S.C. 1906, c. 81.

<sup>173</sup> The Historical Development of the Indian Act, *supra* note 29 at 104.

economic development and growth of areas where they were located.<sup>174</sup>

## (7) Government Control Consolidated

### (a) Decline of Band Council Power

Policy development after the turn of the century entered a new phase as the country attempted to come to terms with the impact of massive immigration and the effects of the First World War. Even more than before, detail replaced broad policy; special acts and particular and detailed amendments to the Indian Act would henceforth dominate the policy horizon. The major growth in the power of the government to direct internal band matters had occurred by then and future amendments would be directed at strengthening the gains already made in directing internal band matters. Ian Johnson notes trenchantly that during this period "band councils became mere consultative bodies to decision makers in the Department of Indian Affairs."<sup>175</sup>

During this period, public authorities acquired powers of expropriation of reserve land without benefit of surrender. In 1911, for example, there were two amendments to the Indian Act: any company, municipality or other authority with statutory expropriation power could expropriate reserve lands without Governor in Council authorization for public works; and, an application could be made to a judge to have a reserve within or adjoining a municipality of at least 8000 people moved without band consent or surrender if a judge found on application that it was "expedient" to do so.<sup>176</sup> Prior to that amendment, Parliament had passed special legislation to deal with such matters.<sup>177</sup>

These two provisions were referred to by Indians as the "Oliver Act." They were passed into law despite Parliament's knowledge that its implementation could lead to a breach of treaty rights and arose in the context of a general desire among federal officials to reduce generally the size of many Indian reserves in order to promote development. The Minister of the Interior, Frank Oliver, dealt with the issue as follows:

For while we believe that the Indian having a certain treaty right is entitled ordinarily to stand upon that right and get the benefit of it, yet we believe that there are certain circumstances and conditions in which the Indian by standing on his treaty rights does himself an ultimate injury, as well as does an injury to the white people, whose interests are brought into immediate conjunction with the interests of the Indians.<sup>178</sup>

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<sup>174</sup> Tobias, "Protection, Civilization, Assimilation", supra note 29 at 136.

<sup>175</sup> Ian Johnson, Helping Indians, supra note 29 at 13.

<sup>176</sup> S.C. 1911, c. 14, s. 1, 2.

<sup>177</sup> For example, An Act Respecting the Songhees Indian Reserve, S.C. 1911, c. 24.

<sup>178</sup> Parliament of Canada, House of Commons Debates, 1910-1911, Vol. IV, col. 7827: Indian Act Amendment Bill, April 26, 1911. See Leslie and Maguire, The Historical Development, supra note 29 at 109.

The trend of other amendments shows a vast increase in the powers available to the Superintendent-General. In 1914, for example, he received the authority to make health regulations that would prevail over competing band council by-laws.<sup>179</sup> This was the precursor to the current power of the Governor in Council in section 73 of the Act to make a wide range of regulations that will override band council by-laws in the same area.

In 1918 the Superintendent-General's power to lease reserve lands without a surrender was widened to include any uncultivated lands if the purpose was for cultivation or grazing.<sup>180</sup> This was intended to permit the department to deal directly with the relatively large areas of western reserves that were not being used the way Department of Indian Affairs officials believed they should be.

In 1919 he was given authority to allocate location tickets directly to Indian war veterans without band council consent.<sup>181</sup>

In 1920 the Governor in Council power to compel school attendance of Indian children was transferred to the Superintendent-General.<sup>182</sup> That same set of amendments enabled him to recommend the compulsory enfranchisement of qualified Indians.<sup>183</sup> In the same vein, the provision allowing band councils to decide whether an Indian woman who lost status for marrying a non-Indian should receive her annuity or a lump sum settlement regarding band moneys was changed. To facilitate severing of the woman's ties with the reserve community, the decision was henceforth to be solely that of the Superintendent-General.<sup>184</sup>

In a 1927 amendment the Superintendent-General acquired a powerful new weapon in his arsenal - the right to require that anyone soliciting funds for Indian legal claims obtain a licence from him beforehand.<sup>185</sup> Although one explanation offered is that this was to prevent American attorneys from soliciting funds from Iroquois Confederacy members residing in Canada,<sup>186</sup> the effect was to impede Indians all across Canada, and especially in British Columbia, from acquiring legal assistance in prosecuting their land claims until this clause was repealed in 1951. The

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<sup>179</sup> S.C. 1914, c. 35, s. 6.

<sup>180</sup> S.C. 1918, c. 26, s. 4.

<sup>181</sup> S.C. 1919, c. 56, s. 3.

<sup>182</sup> S.C. 1919-20, c. 50, s. 1.

<sup>183</sup> Ibid, s. 3.

<sup>184</sup> Ibid, s. 3.

<sup>185</sup> S.C. 1926-27, c. 32, s. 6.

<sup>186</sup> The Historical Development of the Indian Act, supra note 29 at 120.

existence of this clause goes some way to explaining why the settlement of Indian land claims has been so long delayed in Canada.

Another amendment in 1927 permitted the Superintendent-General to regulate the operation of pool rooms, dance halls and other places of amusement on reserves.<sup>187</sup>

The 1927 version of the Act offered little that was new, being a mere consolidation of previous provisions.<sup>188</sup> However, in 1930, another set of amendments to the Indian Act made it an offence for a poolroom owner or operator to allow an Indian into the poolroom who has been found by a court "by inordinate frequenting of a poolroom either on or off an Indian reserve misspends or wastes his time or means to the detriment of himself, his family or household...".<sup>189</sup> Thus, Indian access to pool rooms on and off reserve became a policy concern of federal officials.

In 1933 the power of the Indian agents was reinforced by an administrative directive requiring that all Indian complaints and inquiries be directed to the Indian Affairs Branch via the local agent.<sup>190</sup> This produced the paradoxical situation of band complaints about their agents having to be directed to Ottawa by the very agents complained about. Three years later amendments to the Act gave power to the Indian agents to cast the deciding vote in band council elections in the event of a tie, and to preside at and direct band council meetings.<sup>191</sup>

In 1936 the Superintendent-General was enabled to pass further regulations dealing with listed areas, including regulations incorporating by reference provincial laws.<sup>192</sup> Leslie and Maguire comment that "[e]ssentially, the Superintendent-General acquired the power to existing provincial laws to reserves as he saw fit."<sup>193</sup> This was the beginning of a trend in favour of enlarging the jurisdiction of the provinces over Indians that continues today and is reflected most strongly in section 88 of the Act.

That same year, Indian Affairs was transferred from the Ministry of the Interior to Mines and Resources<sup>194</sup> and two years later, amendments gave the Superintendent-General the power to

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<sup>187</sup> Supra note 188, s. 2.

<sup>188</sup> R.S.C. 1927, c. 98.

<sup>189</sup> S.C. 1930, c. 25, s. 16.

<sup>190</sup> The Hawthorn Report, supra note 5 at 364 (vol. 1).

<sup>191</sup> S.C. 1936, c. 20, s. 4.

<sup>192</sup> Ibid, s. 2.

<sup>193</sup> The Historical Development of the Indian Act, supra note 29 at 126.

<sup>194</sup> An Act respecting the Department of Mines and Resources, S.C. 1936, c. 33.

give mining or prospecting leases on reserve land, once again without benefit of surrender or band consent.<sup>195</sup>

Also in 1938, a provision was made for a "revolving fund" for loans to bands to buy materials and equipment for farming etc.<sup>196</sup> That provision, modified, continues in the present Act.<sup>197</sup>

#### (b) Need For New Policy

While the measures enacted during the period after 1900 were important in their own right, it cannot be said that they broke new policy ground. Compulsory enfranchisement, further breaking down the reserve lands protection through leasing and expropriation powers and allowing provincial laws to apply on reserve seemed more a habitual continuation of the assimilation policies of the 1800s rather than any energetic policy thrust.

One explanation for this relative lack of policy focuses on the awareness in government that past policies of civilization and assimilation had failed, a failure that was compounded by the diversion of official attention from Indian policy during the Depression and the war years. Far from vanishing through enfranchisement and assimilation, Indians were increasing in numbers, and existing reserves with their limited resources were more and more unable to support the growing numbers - a problem compounded by the depressed market for products such as fish and furs on which the Indian economy had depended.

By the 1940s it had become abundantly clear that Indian affairs were in disarray. The agricultural policy had failed and many bands were barely surviving economically. Since the turn of the century many western bands had been surviving through casual labour on non-Indian farms or in non-Indian businesses. The war provided enhanced off-reserve employment prospects for Indian labourers and many individuals continued the tradition of leaving to find work, but never returned. This was the beginning of the movement of Aboriginal persons in relatively large numbers into urban environments (that became an influx by the 1960s). The failure of reserve education meant that few of them were well prepared for off-reserve conditions and came to form a marginal labour pool in an unfamiliar and usually unfriendly environment.

John Milloy notes that on the reserves at that time there was a growing feeling of having been left behind as "many communities were, in a sense, under seige with a feeling of being both

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<sup>195</sup> S.C. 1938, c. 31, s. 1.

<sup>196</sup> Ibid, s. 2.

<sup>197</sup> This provision may have been inspired by a similar one in the American Indian Reorganization Act of 1934 (supra note 27, section 10). That is the only feature of the Indian Reorganization Act that found its way into Canadian Indian policy.

locked into reserves and locked out of access to off-reserve resources."<sup>198</sup> These off-reserve resources, of course, were under provincial control, meaning that in many ways the economic fate of Indian reserve communities was more and more in the hands of the provinces. This was an especially hard blow for prairie Indians whose treaty rights had not been adequately protected by the federal government when control over natural resources had been transferred to the provinces in 1930. More and more, Indians on reserve were running afoul of provincial hunting, fishing and trespass regulations on lands adjoining their reserves.

Bands across Canada were also following different practices with regard to essential cornerstones of existing Indian policy such as band councils and individual allotment of reserve lands. For example, bands operating under hereditary or traditional councils were availing themselves of the statutory powers of the three year or the one year elective systems despite being outside the Indian Act in this respect. In other cases, bands such as the Caughnawaga and Six Nations used a system of land holding outside the location ticket system, and insisted that it be recognized by the Indian Affairs branch.

An internal Indian Affairs Branch review had been undertaken in 1937, but had come to nothing. By the mid-1940s, Branch officials were concerned enough to request political assistance from a special House of Commons post-war reconstruction committee. Indian spokesmen were also applying political pressure of a sort, and at the urging of Indian activist Andrew Paull, petitioned the federal government to review the Indian Act, Indian administration and reserve conditions more generally. Shortly thereafter, the North American Indian Brotherhood was formed as a national lobby group on Indian issues. It called for action in the following areas: restoration of treaty rights, improvements in Indian education, economic development assistance, protection of Indian harvesting rights, continuing income tax exemption, exemption from compulsory military service, extension of social welfare benefits to reserves, direct Indian election of members of Parliament<sup>199</sup>

In 1946, a personnel change in the Indian Affairs Branch led to a change in internal policy regarding the relationship between Branch officials and Indians, with more emphasis to be placed on cooperation and consultation. In 1946, there were around 125,000 Indians with 2,200 reserves<sup>200</sup> and public awareness of their existence was becoming a political fact of life in Canada. Changes in Indian policy were in the air.

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<sup>198</sup> Milloy, A Historical Overview, *supra* note 29 at 146.

<sup>199</sup> Reported in John Leslie, "A Historical Survey of Indian Government Relations, 1940-1970", (DIAND Claims and Historical Research Centre, prepared for the Royal Commission on Aboriginal Peoples, December, 1993) at 3-6.

<sup>200</sup> Ibid at 6.

**(8) The 1951 Indian Act**  
**(a) Joint Committee Hearings**

The end of the Second World War and the creation of the United Nations unleashed a national mood of egalitarianism and a growing interest in individual rights. As one member of the subsequently established parliamentary Joint Committee noted: "Parliament and the country is 'human rights' conscious."<sup>201</sup>

This national mood coincided with public awareness of the strong contribution of Indian servicemen to the Canadian war effort and of their domestic lack of citizenship and other privileges. Fostered by the active support of veteran's organizations, churches and other citizens groups, Tobias notes that "public interest in Indian affairs was awakened to an unprecedented degree" and a royal commission of inquiry was called for to revise the Indian Act and put an end to what was increasingly viewed as discriminatory legislation.<sup>202</sup>

In response, the government of the day established a joint Senate/Commons committee to examine the general administration of Indian affairs, and more particularly, to look at the following topics:

- 1) treaty rights and obligations;
- 2) band membership;
- 3) Indian liability to pay taxes;
- 4) voluntary and involuntary enfranchisement;
- 5) Indian eligibility to vote in federal elections;
- 6) non-Indian encroachment on reserves;
- 7) the operation of Indian day and residential schools;
- 8) "Any other matter or thing pertaining to the social and economic status of Indians and their advancement which...should be incorporated in the revised Act."<sup>203</sup>

The failure of the Joint Committee mandate to refer to issues of importance to Indians such as self-government and the limited power of band councils, band accounts and funding more generally as well as the relationship of Indian reserve communities to the provinces is revealing of the egalitarian thrust to the Committee's inquiries. The individual members of the Joint Committee came to the proceedings with a decided bent in this direction. Co-chairman, D.F. Brown, for example, commented as follows early in the first year of hearings:

And I believe that it is a purpose of this Committee to recommend eventually some means

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<sup>201</sup> John Blackmore, Social Credit Member, C.P, House of Commons Debates, Minutes and Proceedings of the Special Parliamentary Committee 1947, at 1673, reported in The Historical Development of the Indian Act, *supra* note 29 at 133.

<sup>202</sup> Tobias, "Protection, Civilization, Assimilation", *supra* note 29 at 139.

<sup>203</sup> Reported in Johnson, Helping Indians, *supra* note 29 at 16.

whereby Indians have rights and obligations equal to those of all other Canadians. There should be no difference in my mind, or anybody else's mind, as to what we are, because we are all Canadians.<sup>204</sup>

A similar mood was evident in the United States at the same time.<sup>205</sup> In Canada, the Joint Committee members decided as a matter of "settled policy" to hear first and foremost from government officials and experts, particularly Indian branch officials. Early on, however, they made an exception by hearing Andrew Paull, then president of the newly formed North American Indian Brotherhood, and a long time activist for Indian rights in British Columbia. His testimony was dramatic. Noting that the Joint Committee was not the independent royal commission that Indians and others had been calling for, he also stressed the lack of Indian representatives on the committee and the fact that the Joint Committee mandate did not include the issues of greatest concern to Indians.

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<sup>204</sup> Minutes and Proceedings of the Special Parliamentary Committee 1946 at 744, reported in Johnson, ibid at 17.

<sup>205</sup> At that time the Senate Civil Service Committee was examining the Acting Commissioner of Indian Affairs, William Zimmerman, on the issue on unnecessary federal employees. The reported tone of the hearings was egalitarian in the extreme, and focused on the discriminatory effect of the special laws governing Indians in the United States. The Committee members appeared to find this to be unacceptable in view of what they saw as the "progress" made by Indians through their experience as part of the American war effort. One member, Senator Dennis Chavez of New Mexico, is reported to have made the following statement in this regard:

Thousands upon thousands went into the war. They learned to fight. They learned to take care of themselves. They learned to brush their teeth. They learned to wash. They learned to eat and it is a shame the way Indians are treated in the United States of America.

Hearings, Officers and Employees of the Federal Government, 76, Senate Committee on Civil Service, 80th Congress, 1st session (1947), reported in Russell Lawrence Barsh, James Youngblood Henderson, The Road: Indian Tribes and Political Liberty (Berkeley: University of California Press, 1980) at 123.

The U.S. Senate Committee ultimately forced Zimmerman to prepare a list of tribes ready for absorption into American life as individual state citizens. This list was later used for purposes of completely terminating the federal relationship with 109 federally recognized tribes and bands via House Concurrent Resolution 108 of 1953: August 1, 1953, U.S. Statutes at Large, 67:B132, reproduced in Prucha, Documents of United States Indian Policy, supra note 65 at 233:

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges as are applicable to other citizens of the United States and to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship.

Vine Deloria has referred to this resolution as "the first shot of the great twentieth century Indian war...": Vine Deloria Jr., Custer Died for Your Sins: An Indian Manifesto (New York: Avon Books 1970) at 68. The history and ramifications of the termination policy are discussed in Donald L. Fixico, Termination and Relocation: Federal Indian Policy, 1945-1960 (Albuquerque: Univ. of New Mexico Press, 1986).

Moreover, as a matter of the guiding philosophy for Indian policy, Paull challenged the Joint Committee to decide from which perspective it would deal with Indians: as wards or citizens. In his view, the answer to this question would determine the committee's ultimate response to other issues surrounding the overall relationship between Indians and the federal government. In a similar way he focused on Canada's abandonment of the nation to nation relationship of equality embodied by the treaties, and on the lack of meaningful self-government on reserves.

In his brief he made a number of particular recommendations that have since become familiar including: ending the Indian branch's power to determine band membership; continuing exemption from taxation as a treaty right; abolishing denominational schools on reserve; decentralizing the Indian branch and generally hiring more Indians in administrative capacities; empowering band councils to act as local government, including the power to police the reserve; and granting the right to vote in federal elections, with the possibility of electing their own Indian members to the House of Commons. The most important thing, however, was "to lift up the morale of the Indians in Canada"<sup>206</sup> by allowing Indians a greater degree of control over their own lives free of government interference. The few submissions that came in from Indians that year were generally in the same vein<sup>207</sup>, including one that called for changing the name of the Act to the "Native Canadian Act".<sup>208</sup>

Following Paull's testimony, a motion to permit five Indian observers drawn from across Canada was defeated (with significant adverse publicity in the press), although the Joint Committee did move that it would welcome "any person interested" to open committee meetings. In stark contrast to the testimony of Paull and of other Indian leaders (such as Magistrate and former brigadier Oliver Martin, an enfranchised Indian originally from the Six Nations reserve who also called for enlarged self-government powers and for a separate department of Indian Affairs) was that of Diamond Jenness, noted anthropologist and senior federal civil servant.

Jenness' comments focused less on the Indian Act than on the reserve system as the aspect of Indian policy that in his view most impeded Indians from attaining equality with non-Indians in Canadian society. He proposed a twenty-five year plan "to abolish, gradually but rapidly, the separate political and social status of Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on an equal footing".<sup>209</sup> The plan called for placing Indian children in provincial schools; delivering social services to Indians in the ordinary way, primarily by the

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<sup>206</sup> Minutes and Proceedings 1946, at 427, reported in Johnson, Helping Indians, *supra* note 29 at 21.

<sup>207</sup> Although a number of chiefs from British Columbia apparently informed the department that they did not want Paull speaking for them and that they supported the Indian Act as it was.

<sup>208</sup> The United Native Farmer's Organization of the Stahlo tribe of Sardis, B.C., reported in The Historical Development of the Indian Act, *supra* note 29 at 136.

<sup>209</sup> Diamond Jenness, "Plan for Liquidating Canada's Indian problem Within Twenty-Five Years", Minutes and Proceedings 1947 at 310, reported in Johnson, *supra* note 29 at 24.

provinces; having a committee study reserves across Canada with a view to abolishing them and enfranchising the inhabitants; and improving education for Indians in the north.

It is reported that the Joint Committee received the report very favourably, but, as Ian Johnson notes, "the fact that the Committee had had no contact with Indians and Indian views was becoming increasingly obvious."<sup>210</sup> John Leslie comments in connection with the non-Indian testimony in general that "[t]he theme of Christian stewardship and the notion that non-Indians knew what was best for Indian people permeated official testimony."<sup>211</sup>

From the beginning Indians had attempted to make themselves heard, sometimes with great difficulty as there is evidence that the Indian branch refused many of them access to band funds for this purpose.<sup>212</sup> Thus most Indian evidence is in the form of letters to the Committee, although several Indian bands and associations did manage to appear in person. Importantly, "[t]his marked the first systematic effort by government to consult with Indians."<sup>213</sup>

The Indian submissions were varied, covering a broad range of issues and expressing a variety of political philosophies. Many submissions, especially those of the Iroquois communities in Ontario and Quebec and the prairie bands focused on the nation to nation relationship and on the sanctity of treaties. In this vein, the representatives from Akwesasne and Kahnawake called for the repeal of the Indian Act. Other groups accepted the general legitimacy of the Indian Act scheme, but called for increased band council powers and a much reduced role for the Indian branch. Still others appeared to accept the Act to a greater extent and focused on incremental changes to particular provisions. Ian Johnson has noted, however, that "[t]here is no record that these submissions were discussed by the Committee."<sup>214</sup>

The range of views expressed makes it impossible to speak of a single Indian position on the many issues canvassed in the briefs. There was a consistent focus, however, on fundamental questions of the political relationship between Indians and the federal government such as respect for treaties and aboriginal rights and an end to the domination of reserve life by government bureaucrats.<sup>215</sup> The Hawthorn Committee Report of 1966 strongly supports the latter part of this

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<sup>210</sup> Johnson, Helping Indians, supra note 29 at 25.

<sup>211</sup> "A Historical Survey", supra note 199 at 12.

<sup>212</sup> Ibid.

<sup>213</sup> The Historical Development of the Indian Act, supra note 29 at 135. Only one past inquiry, that of the Lower Canada Executive Committee of 1836-37 is known to have systematically sought out Indian views, and then only on the issue of discontinuing the "presents" system.

<sup>214</sup> Johnson, Helping Indians, supra note 29 at 26.

<sup>215</sup> Ian Johnson has concluded (Ibid at 31):

The most widely held opinion among Indians and their supporters was that self-government was a fundamental first step

assessment, noting "virtual Indian unanimity on the subject of an increased degree of local autonomy and self-government for bands."<sup>216</sup>

John Leslie notes that the majority of Indian submissions outlined deplorable reserve conditions; a lack of, or substandard, social services on reserves; an inadequate land base for a viable economy; second-rate Indian education; too little band governing autonomy due to Branch bureaucratic control; frustration with the lack of respect for treaty rights; and a desire to settle treaty-related and other land claims.<sup>217</sup> Johnson's review of the briefs<sup>218</sup> indicates in addition a variety of particular concerns and recommendations such as:

- criticism of the conflict of interest in which the Superintendent-General found himself in his dual role as representative of Indians and as agent of the Crown;
- a recommendation for a new and separate department of Indian affairs;
- a call for a standing parliamentary committee on Native affairs;
- a proposal for an Indian bill of rights;
- recommendations for elected Indian members in Parliament and the provincial legislatures;
- concern with the confusion in roles between the federal and provincial governments regarding service delivery at the band level;
- a desire for better administration of Indian moneys and more band control of their own finances;
- condemnation of residential schools in favour of day schools operating with a provincial curriculum;
- opposition to enfranchisement;
- calls for equality between Indian men and women in band affairs;

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towards acknowledging the treaty relationship between Indians and the Crown and toward resolving the administrative and social problems on reserve. Coupled with expressions of support for self-government and for greater power and autonomy for chiefs and councils, were criticisms of the Indian agents and calls for limits on their authority.

<sup>216</sup> Supra note 5 at 292. (vol.1).

<sup>217</sup> "A Historical Survey", supra note 199 at 8-10.

<sup>218</sup> Helping Indians, supra note 29.

- recommendations for band control of membership, the ending of the involuntary enfranchisement of women who "married out" and for the re-admission to band membership of automatically enfranchised Indian women and illegitimate children of Indian blood;
- proposals for an end to reserve land expropriations and recommendations for greater band land management powers; and
- generally calls for an end to the many petty regulations such as, for example, the permit system requiring an Indian agent's permission to sell produce and livestock in the prairies.

Other submissions and testimony to the Joint Committee came not only from government officials, but also from missionaries, school teachers, doctors, social workers and scientists. Their briefs and views indicated an appalling situation on most reserves in comparison with Canadian society as a whole. The Indian reserve land base, for example, was shown to have shrunk to around five and a half million acres - less than 43 acres per Indian person. Indians still died in large numbers from diseases like tuberculosis that had by then virtually disappeared elsewhere in Canada. Indians also died from diseases such as measles, whooping cough, influenza and pneumonia at rates far in excess of those prevalent in non-Indian society. Doctors testified that Indians were malnourished, suffering from poor diets attributable to poverty, poor agricultural lands and diminishing access to natural food sources in the wilds.

Membership issues were not discussed in any detail until the final session of the Joint Committee in 1948. At the beginning of the proceedings in 1946, however, the only woman on the 33 member Joint Committee had drawn attention to the issue of Indian women who lost status through marrying out whose non-Indian husbands may have died or deserted them. Unable to regain status and band membership except through remarriage to an Indian, they were effectively neither "white" nor "Indian" and often left destitute. The director of the Indian Affairs Branch had no response to this issue, but his department did, as is shown by the following extract from a later Indian Branch submission to the Joint Committee:

... by the alteration of the definition of Indian by the Statute of 1876 the Dominion very substantially reduced the number of people for whose welfare it was responsible and by that action passed the responsibility on to the provinces for thousands of people, who, but for the statute of 1876, would have been federal responsibility for all time.<sup>219</sup>

The ultimate recommendation of the Joint Committee on membership followed this line of reasoning and called for a redefinition of "Indian" and a revision of the band lists in order that the money appropriated by Parliament "should not be spent for the benefit of persons who are not

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<sup>219</sup> Public Archives of Canada, Record Group 10577-127-33 vol. 1A, reported in Kathleen Jamieson, Indian Women, supra note 29 at 58.

legally members of an Indian band."<sup>220</sup> To correct the problem of Indian women who married out but who were then neither Indian nor White, the 1951 revision of the Indian Act would not only deny them Indian status upon marriage, but would also forcibly enfranchise them.

#### (b) Joint Committee Report

In 1948, giving little indication that it had heard or comprehended the views expressed by Indians to it, the Joint Committee declared that with respect to its proposed revisions to the Indian Act: "All proposed revisions are designed to make possible the gradual transition of Indians from wardship to citizenship and to help them to advance themselves."<sup>221</sup> In this vein, the Joint Committee made the following recommendations:<sup>222</sup>

1. The complete revision of every section of the Indian Act and the repeal of those sections that were outdated.
2. That the new Indian Act be designed to facilitate the gradual transition of the Indians from a position of wards to full citizenship. Therefore the Act should provide:
  - a. A political voice for Indian women in band affairs.
  - b. Bands with more self-government, greater responsibility, and more financial assistance.
  - c. Equal treatment of Indians and non-Indians in the matter of intoxicants.
  - d. That a band might incorporate as a [provincial] municipality.
  - e. That it might be a duty and responsibility of all officials dealing with Indians to assist them to attain the full rights and to assume the responsibilities of Canadian citizenship.
  - f. That the offence and penalty sections of the Indian Act be amended to conform with similar sections in the Criminal Code and other statutes.
3. Guidelines for future Indian policy were to be:
  - a. The establishment of a Claims Commission.

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<sup>220</sup> Proceedings of the Joint Committee 1946 at 186, reported in Jamieson, ibid.

<sup>221</sup> Canada, Special Joint Committee, Minutes of Proceedings, No. 5, Fourth Report (1948) at 186, cited in Bartlett, The Indian Act, supra note 93 at 6.

<sup>222</sup> Minutes and Proceedings 1948 at 186-90, reported in Johnson, Helping Indians, supra note 29 at 47.

- b. Redefinition of the meaning of "Indian" in the Act and the revision of Band Membership Lists.
- c. Taxation on income earned off-reserve should remain in effect.
- d. Easing of enfranchisement.
- e. Extension of the franchise to the Indian.
- f. Co-operation with the provinces in extending services to the Indian.
- g. Education of Indian children with non-Indians to prepare Indian children for assimilation.
- h. Appointment of a Select Standing Committee on Indian Affairs.
- i. Dominion-Provincial conferences to deal with co-operative measures in:
  - i) education
  - ii) health and social services
  - iii) fur conservation
  - iv) fish and game laws
  - v) liquor legislation
  - vi) tribal marriage customs

The gulf between the perspectives and philosophies of the bulk of the Indian testimony and those of the Joint Committee members is startling. In retrospect it appears to be nothing less than the difference between greater Indian self-government and the goal of complete assimilation. John Tobias concludes that the Joint Committee simply disagreed with past assimilation methods, preferring to turn the job over to the provinces:

In essence the joint committee approved the goal of Canada's previous Indian policy - assimilation - but disapproved some of the earlier methods to achieve it. They assumed that most of the work of civilization was virtually complete, and that therefore many of the protective features of earlier acts could be withdrawn and bands allowed more self-government and less governmental interference. Moreover, since assimilation was soon attainable, the guidelines for the new Indian policy and the new Indian Act stipulated that the Dominion government should begin turning over responsibilities for providing services to the provinces. In this way the barriers provided by the reserves and the Indians' special status under the Constitution would be further broken down and assimilation made all the easier. Thus the Indian and the Indian reserve were regarded as a transitory feature of Canadian society.<sup>223</sup>

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<sup>223</sup> Tobias, "Protection, Civilization, Assimilation", *supra* note 29 at 140.

(c) The New/Old Indian Act of 1951

In possible anticipation of the hoped for effect of this new variant of the assimilation policy, in 1949 responsibility for the Indian Branch passed to the Department of Citizenship and Immigration. Thus, when Bill 267 of 1950 was introduced, it was in the symbolic new context of citizenship, with the minister of the day stating that its goal was "the integration of the Indians into the general life and economy of the country" with recognition, however, "that during a temporary transition period...special treatment and legislation are necessary."<sup>224</sup>

That same year, amendments to the Dominion Elections Act<sup>225</sup> had given the federal vote to Indians willing to renounce their tax exemptions under the Indian Act and to Inuit without qualification. (All Indians, enfranchised or not, who lived off-reserve had already been given the federal vote in 1920, as had Indians who had served in Canada's wars<sup>226</sup>).

Unfortunately, no time was allowed for consultations with Indians prior to the introduction of Bill 267 and ultimately it was withdrawn in the face of Indian and Opposition complaints that it did not reflect many changes from earlier versions of the Indian Act. During a visit to the western provinces, the new minister learned from the Indians he consulted that they objected to the minister's discretionary powers over band operations and funds, his continuing power of forcible enfranchisement, lack of band control over band membership, and the failure to create a claims commission. Despite this, only the power of forcible enfranchisement would be changed in the next version of the bill.

A new bill was drafted and consultations arranged in Ottawa between February 28 and March 3, 1951 with nineteen Indian representatives drawn from across Canada. This was the first time in Canadian history that Indians had ever been involved in this type of consultation on the legislation affecting them. It is reported that unanimous consent was given to 103 sections of the bill, majority consent to 15 others, 6 were opposed by a majority and 2 were unanimously opposed (the tax exemption that Indians wanted widened, and the enfranchisement provision they wanted narrowed). The bill was then returned to a special Commons committee for further study and ultimately passed into law in June of that year as the long awaited and revised Indian Act of 1951.<sup>227</sup>

Ironically, and despite the precedent of Indian consultation, the ultimate product differed from its predecessors only in emphasis and actually closely resembled the original Indian Act of 1876. John Leslie agrees that not much had changed with this revision, observing with regard to

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<sup>224</sup> The Honourable Walter Harris, C.P. House of Commons Debates, 1950, vol. iv at 3938, reported in The Historical Development of the Indian Act, supra note 29 at 146.

<sup>225</sup> An Act to Amend the Dominion Elections Act, 1938 S.C. 1950, c. 35.

<sup>226</sup> Bartlett, "Citizens Minus", supra note 155 at 184-89.

<sup>227</sup> S.C. 1951, c. 29.

the new Act that "[i]ts principal novelty was a new definition of 'Indian.'<sup>228</sup> In comparing the 1876 and 1951 acts, John Tobias notes that:

In format, content, and intent they are quite similar. Both provide for a cooperative approach between government and Indians toward the goal of assimilation, although enfranchisement is made easier in the 1951 act by eliminating the testing period and requirement for location tickets or certificates of possession. However other provisions are virtually the same. The new act definitely differs from the Indian acts between 1880 and 1951, but only because it returned to the philosophy of the original act: civilization was to be encouraged but not directed or forced on the Indian people. Assimilation for all Indians was a goal that should be striven for without an abundance of tests or the compulsory aspects of the preceding acts.<sup>229</sup>

Thus, the new Act resembled the old Act in essential ways despite having been purged of many of the visibly harsher elements. The power of the Minister was reduced: in the old Act he could initiate action in 78 sections; that was now reduced to 26. However, as Leslie and Maguire note, the powers of the Minister and the Governor-in-Council remained "formidable", with administration of over half of the Act being at their discretion.<sup>230</sup>

Inuit (then referred to as "Eskimos") were explicitly excluded from the ambit of the new Act.<sup>231</sup>

Expropriation powers were significantly reduced and the prohibitions on dances etc. were dropped. Somewhat paradoxically, however, Indians in western Canada still needed official permission to sell their livestock and produce.<sup>232</sup>

Importantly, the definition of Indian and control of band membership remained in non-Indian hands, and the definitions were actually tightened up for fiscal reasons by introducing an "Indian Register" as a centralized record of those entitled to registration as an "Indian"<sup>233</sup> (and to the receipt of federal benefits). Prior to this development, federal government officials had kept treaty and interest distribution lists and band election, estates administration, band membership commutation and "half-breed" scrip records, but had attempted no comprehensive listing.

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<sup>228</sup> "A Historical Survey", supra note 199 at 15.

<sup>229</sup> Tobias, "Protection, Civilization, Assimilation", supra note 29 at 140.

<sup>230</sup> The Historical Development of the Indian Act, supra note 29 at 150-51.

<sup>231</sup> Supra note 227, s. 4.

<sup>232</sup> Ibid, s. 32.

<sup>233</sup> Ibid, s. 5.

The mention of "Indian blood" that had been a feature of the definition section since 1876 was replaced by the notion of "registration," with a strong bias in favour of descent through the male line.<sup>234</sup> The definition of Indian was thus made even more restrictive as far as women were concerned. A good example is the so-called "double mother" rule in section 12(1)(a)(iv) whereby a child lost Indian status at age 21 if his or her mother and grandmother had obtained their own status only through marriage. If one assumes that the mother and grandmother had no Indian blood to begin with, it is apparent that this is simply another way of stating the "one quarter blood rule that had been a feature of the Gradual Enfranchisement Act of 1857.<sup>235</sup>

However, the double mother rule applied to all women without Indian status under Canadian law. Thus it included those who might have been involuntarily enfranchised earlier, left off band lists through inadvertence or otherwise, or who were simply unable to qualify under the Indian Act despite being of Indian descent. A good example of the latter situation would obtain at the Mohawk reserve at Akwesasne if the mother and grandmother in question were both from the American side of the reserve. The 21 year old grandchild would lose Indian status in Canada automatically, even though he or she might be 100% Mohawk. The legal fiction involved in "Indian status" becomes evident in such cases.<sup>236</sup>

Enfranchisement was kept, although the involuntary element was weakened: henceforth the minister could enfranchise an Indian or a band only upon the advice of a committee that not only was the Indian or band qualified, but that it was also "desirable" - in which case the Indian or band would be deemed to have applied for enfranchisement.<sup>237</sup> For bands, only "more than fifty per cent of the electors of the band" were required to approve.<sup>238</sup> Only one band chose to enfranchise as a group using the voluntary enfranchisement procedures in the 1951 Indian Act.<sup>239</sup>

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<sup>234</sup> Ibid, s. 11.

<sup>235</sup> See note 94 supra.

<sup>236</sup> Kathleen Jamieson reports on the basis of interviews with federal bureaucrats that this provision was never enforced, Indian Women, supra note 29 at 60.

<sup>237</sup> Supra note 227, s. 112.

<sup>238</sup> Ibid, s. 111(2).

<sup>239</sup> In 1958 the members of the Michel Band of Alberta voluntarily renounced their Indian status in law, taking most of their reserve land in individual lots along with the proceeds of the sale of the remaining lands. The history of the Michel Band and the origins of the land claims (to which current status Indians descended from this band apparently do not have access) is set out in Bennett McCardle, "The Michel Band: A Short History", unpublished paper (Ottawa: Treaty and Aboriginal Rights Research of the Indian Association of Alberta, 1981). This paper may be obtained from the Assembly of First Nations.

The enfranchisement of this band solved one set of problems for Indian Affairs officials, since it meant that there would no longer be an entity to pursue land claims based on some doubtful reserve land transactions from the past. However, it caused problems for the descendants of the enfranchised band members, many of whom were returned to

Interestingly, the reference to unmarried women being able to enfranchise was dropped in favour of a reference to an "Indian." The wording of the section militates against reading the masculine as the feminine in this case because it goes on to talk about "the Indian and his wife and minor children."<sup>240</sup> Ironically, this may be one of the few instances when the conscious or unconscious sexism of the drafters of the Act actually benefitted Indian women who wished to retain their Indian status since this would also prevent them from being candidates for involuntary enfranchisement in the manner referred to above.

Although Indian women on reserve were henceforth able to vote and thereby participate in band political life to that extent, the discriminatory features of the old acts regarding Indian women who "married out" were actually strengthened. Formerly, an Indian woman who married a non-Indian man lost her Indian status and with it her right to hold or reside on reserve land and to pass on status to her children by that marriage. Despite that, if she had refused commutation of her band moneys benefits, she would have been able to retain her band membership and the right to participate in band money and treaty annuity distributions and could even have continued to reside on reserve for as long as no one chose to have her evicted.<sup>241</sup>

The 1951 amendments changed all this. Henceforth, such a woman would be enfranchised as of the date of her marriage to the non-Indian man by order of the Governor in Council.<sup>242</sup> This meant loss of status and band membership and with it the forced sale or disposal of any reserve lands she held.<sup>243</sup> She would receive a portion of any treaty moneys to which her band might have been entitled as well as one per capita share of the capital and revenue moneys held by the federal government for the band. These provisions were later upheld against an equality challenge under the Canadian Bill of Rights, despite their characterization by Mr. Justice

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status through the 1985 Indian Act amendments in Bill C-31. These people thus have Indian status now, but no band and no reserve to return to as a result of a decision taken nearly forty years ago in which they were not able to participate (because they did not have Indian status or band membership at that time). They have no standing now to pursue these land claims against the federal government, since under current specific claims policy, only chief and council of existing bands may apply to enter the negotiation process. The federal specific claims policy and its failure to address potential claims from Michel Band descendants is described in William B. Henderson, Derek T. Ground, "Survey of Aboriginal Land Claims" in 26 Ottawa L. Rev. 187 at 201-02 (1994).

<sup>240</sup> Supra note 227, s. 108(1).

<sup>241</sup> Thus, although such a woman was no longer an "Indian Act" Indian, she could continue to receive some of the benefits associated with Indian status in so far as band benefits were concerned. For these purposes, prior to 1951 it had been the practice in some Indian agencies to issue so called "red tickets" to these women to identify them as entitled to share in band and treaty moneys. This practice was ended by amendment to the Indian Act in 1956 whereby these women were paid out in a lump sum and in that way put in the same situation as other Indian women who married out: S.C. 1956, c. 40 s. 6(2).

<sup>242</sup> Supra note 227, s. 108(2).

<sup>243</sup> Ibid, s. 25.

Laskin (in dissent) as "statutory excommunication" and "statutory banishment" to which only Indian women were subjected.<sup>244</sup>

It is clear in retrospect that a double standard was at work here, since Indian men could not be forcibly enfranchised (except by following the committee procedure referred to above), but Indian women could. The figures for enfranchisements between 1955 and 1975 (when forced enfranchisements of women were ended administratively) demonstrate this: 1,576 men voluntarily enfranchised (bringing with them 1090 wives and children); whereas 8,537 women were forcibly enfranchised along with 1974 of their children.<sup>245</sup>

In this regard, it is interesting to note the failure of the 1951 Act to refer to the children of women who were forcibly enfranchised after marrying out. Prior to 1956 such children were (erroneously) enfranchised as well. In 1956 further Indian Act amendments restored status to those children. However, by those same amendments "all or any" of her children could henceforth be enfranchised with her.<sup>246</sup> In practice, Kathleen Jamieson reports that her off-reserve children would usually be enfranchised, while those of her children living on reserve would generally be permitted to retain their Indian status.<sup>247</sup> Ominously, however, the 1956 amendments also permitted challenges to the illegitimate children of an Indian woman if it could be shown that the father was not an Indian.<sup>248</sup> Thus, the double standard enforced by the 1951 status rules was reinforced, since there was no corresponding challenge provision regarding the illegitimate children of Indian men.

Estates administration was simplified in the 1951 Act to bring it more in line with provincial law. However, where Indian women who married out were forcibly enfranchised, they also lost the right not only to possess reserve land, but also to inherit it.<sup>249</sup> In such cases, the lands would be sold to an "Indian" and the proceeds forwarded to the enfranchised woman, even if she had divorced or been widowed prior to inheriting the lands. This latter situation led to a challenge in the Ontario courts by Yvonne Bedard, a mother of two who returned to her reserve to live in the house willed to her by her mother following her separation from her non-Indian husband. Eventually, her case was joined to that of Jeannette Lavell who was challenging the her legislated loss of Indian status following her marriage to a non-Indian. After having won their cases at lower

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<sup>244</sup> A.G. Canada v. Lavell, Isaac v. Bedard, *supra* note 20 at 1386.

<sup>245</sup> These figures are drawn from statistics obtained from the Department of Indian Affairs and reproduced in Kathleen Jamieson, Indian Women, *supra* note 29 at 64.

<sup>246</sup> An Act to amend the Indian Act, S.C. 1956, c. 40 cl. 26.

<sup>247</sup> Indian Women, *supra* note 29 at 62.

<sup>248</sup> An Act to Amend the Indian Act, S.C. 1956, c. 40, s. 3(2).

<sup>249</sup> Supra note 227, ss. 25, 46(1)(d).

levels, they lost at the Supreme Court of Canada.<sup>250</sup>

Part II of the pre-1951 Indian Act, the former Indian Advancement Act was dropped, with some elements incorporated into the provisions on band council powers. As before, the Minister could impose the elective system (now two years) on a band.<sup>251</sup> Band council powers were still minor, but bands that had reached "an advanced stage of development" could acquire additional ones such as local taxation powers.<sup>252</sup>

One of the most significant changes, however, concerned the new section 87 (now section 88) incorporating by reference provincial laws of general application, subject to contrary provisions in treaties and in the Indian Act, its regulations and other federal legislation. Henceforth, and in keeping with the tone and recommendations of the Joint Committee hearings, the provinces were to have a more prominent role to play regarding the laws in operation on Indian reserves.

It is interesting to note that at about the same time the United States Congress derogated from the exclusivity of federal protection of Indians by explicitly granting civil and criminal jurisdiction over them via Public Law 280 of 1953 to states that wished to assume it.<sup>253</sup> Barsh and Henderson note that "P.L. 280 reflected a decision to make the states, rather than the bureau [of Indian Affairs], change agents through ... the 'civilizing function of law'".<sup>254</sup> The record of debate in Canada regarding section 87 of the Indian Act is almost nonexistent, but the motivation may have been similar.

Significantly, the 1951 revision also reinforced the prohibition on Indian intoxication that had a feature of the Indian Act since the beginning by making it an offence for an Indian either to be in possession of intoxicants or to be intoxicated, and whether on or off a reserve.<sup>255</sup> These powers were replaced in 1985 by powers granted to the band council to regulate these alcohol

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<sup>250</sup> A.G. Canada v. Lavell; Isaac v. Bedard, *supra* note 20.

<sup>251</sup> *Supra* note 227, s. 73.

<sup>252</sup> *Ibid*, s. 82.

<sup>253</sup> Public Law 280 (Act of August 15 1953, c. 505 now codified as amended at 25 U.S.C. 1321-22) is the most pervasive federal grant of jurisdiction over Indians in Indian country. It divided states into three categories with specific provisions regarding how each category might gain civil and criminal jurisdiction over Indian tribes. Outright jurisdiction was granted to six states (Wisconsin, Minnesota, Nebraska, Oregon, California and to Alaska upon its gaining of statehood in 1958). Public Law 280 has led to real confusion in many states concerning which law applies to whom and where in Indian country and has required the courts to resolve the many controversies that have been spawned by this vague grant of jurisdiction. Public Law 280 and its effects are discussed in detail in Deloria and Lytle, American Indians, *supra* note 118 at 175-77.

<sup>254</sup> Barsh and Henderson, The Road, *supra* note 205 at 130.

<sup>255</sup> *Supra* note 227, ss. 94, 96.

questions themselves.<sup>256</sup>

In retrospect, little was accomplished by the 1946-48 Joint Committee process beyond revealing fundamental differences in perspective between Indians and the government, nowhere more starkly than with regard to self-government and Aboriginal and treaty rights. John Milloy expresses it well:

The members of the Joint Committee were invited by native leaders to restructure the Indian Act to reflect such a new partnership. They would, of course, fail to do so.<sup>257</sup>

Despite the unprecedented opportunity given to Indians to share their views, the joint committee largely ignored them.<sup>258</sup> In consequence, the Indian Act of 1951 is the Indian Act of 1876 in many ways. It is also essentially the Indian Act of 1994 in so far as the majority of provisions are concerned. The amendments that have been made subsequently have been extremely detailed and intended largely to clear up earlier drafting errors or to clarify administrative practices. With the arguable exception of those made in 1985, none offers a departure from the prevailing philosophy of the new/old Act, and that philosophy is still with us.

#### (d) The 1959-61 Joint Committee Hearings

During the 1950s a number of the other recommendations of the 1946-48 Joint Committee were implemented. For example, a cooperative effort was undertaken with the provinces to extend provincial services to Indians. Instead of convening a federal-provincial conference as recommended, however, the federal government proceeded on a province by province basis, initially in the areas of education and child welfare.

The provinces also began to develop an awareness of Indian issues and to gather information on Indians. The growing movement of Indians to the cities was one reason, another was the increasing interest of academics and urban support groups such as the National Commission on the Indian (renamed the Indian-Eskimo Association of Canada in 1960) that sponsored conferences on Indian issues.<sup>259</sup>

During his legal career John Diefenbaker had become very interested in Indian issues and after his election as prime minister his government struck another joint parliamentary committee to

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<sup>256</sup> An Act To Amend The Indian Act, S.C. 1985, c. 27, ss. 16, 17. These by-law powers are now found in s. 85.1.

<sup>257</sup> Milloy, A Historical Overview, supra note 29 at 150.

<sup>258</sup> Perhaps J.R. Miller sums it up best in Skyscrapers Hide the Heavens, supra note 29 at 221: "If the hearings of the special committee from 1946 to 1948 were remarkable for the opportunity they gave the newly organized Indians to express their opinions, the subsequent legislation was notorious for the ways in which it ignored what they had said."

<sup>259</sup> These developments are outlined in Leslie, "A Historical Survey", supra note 199 at 20-26.

examine the Indian Act. The mandate included "the authority to investigate and report upon Indian administration in general, and, in particular, on the social and economic status of Indians."<sup>260</sup>

By then the influx of Indians to the cities was pronounced enough that the Federation of Mayors and Municipalities, in a harbinger of things to come in federal-provincial relations, called upon the Joint Committee to require that the federal government assume the increased costs for aid, hospitals and prisons.<sup>261</sup>

An Indian Branch document, A Review of Branch Activities, 1948-58 was submitted to the Joint Committee outlining progress made since the last joint committee report. After noting the various initiatives in progress with the provinces on sharing or transferring programs, the document indicates that by 1959 344 bands were using the elective system under the Act, and 22 bands were sufficiently "advanced" to have been given power over the raising and expenditure of band funds.<sup>262</sup>

More interestingly, enfranchisement figures were given that showed a vastly increased number of forced enfranchisements since 1951. For example, in the entire period between 1876 and 1948 there had been 4,102 enfranchisements, while since the restrictive provisions of the new Act had been in place, there had been an additional 6,301.<sup>263</sup> As mentioned above,<sup>264</sup> the figures for forced enfranchisements would continue to grow until 1975 when forced enfranchisements were suspended. Although taken as a sign of progress, these figures reflect for the most part the effect of the marriage provisions whereby Indian women who "married out" and their descendants lost status through automatic enfranchisement.

One of the co-chairs of the Joint Committee was Senator James Gladstone, a Blood Indian from Alberta. At that time, it will be recalled, status Indians on reserve could not vote in federal elections. In any event, as John Leslie reports, the whole exercise was reminiscent of the earlier one from 1946-48:

To a great extent the 1959-61 hearings were a repeat of those of the previous decade, particularly from the standpoint of presenting an Indian agenda. Virtually all Indian submissions, whether from an association or band council, reiterated long standing concerns with reserve conditions, administrative red tape, land claims, violation of treaties, and unsettled aboriginal land title issues.

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<sup>260</sup> Reported in Leslie, ibid at 29.

<sup>261</sup> Reported in the Hawthorn Report, supra note 5 at 301-02 (vol. 1).

<sup>262</sup> Leslie, "A Historical Survey", supra note 199 at 32.

<sup>263</sup> Ibid.

<sup>264</sup> See text at note 245 supra.

For Indian people, solutions to long standing problems remained the same: increased Indian self-government; access to economic development loans; less Branch interference in local issues; establishment of a Standing Committee to hear the Indian viewpoint on a regular basis; and, creation of a claims commission.<sup>265</sup>

As with the earlier Joint Committee, this one had a decidedly egalitarian bent in the direction of assimilation of Indians into mainstream Canadian society. This is well illustrated by the following extract from its final report:

The time is now fast approaching when the Indian people can assume the full responsibility and accept the benefit of full participation as Canadian citizens. Your Committee has kept this in mind in presenting its recommendations which are designed to provide sufficient flexibility to meet the varying stages of development of the Indians during the transition period.<sup>266</sup>

The Joint Committee reported in 1961, recommending, among other things greater equality of opportunity and access to services for Indians, the transfer of education and social services to the provinces, the imposition of taxes on reserve, more social research, more community planning and development studies, a formal federal-provincial conference to begin the transfer of social services to the provinces, the establishment of a claims commission, Indian advisory boards at all levels, and the striking of another parliamentary committee to investigate Indian conditions in seven years. Only one significant Indian Act amendment came out of this exercise: in 1961 this form of compulsory enfranchisement was finally eliminated from the Act.<sup>267</sup> The "marrying out" forced enfranchisement provisions were kept until 1985.

As will be seen, a number of the Joint Committee's recommendations were followed up in the 1960s, largely because they coincided with the existing goals of the Indian Affairs Branch. Thus a reserve community development program was established in 1964, more economic development aid for bands eventually became available; national and regional Indian advisory bodies were set up in 1965 and more information on social and economic conditions was acquired through two reports in 1967, one on Indian justice and the other on general Indian conditions.

The release of the 1959-61 Joint Committee report aroused some public interest, following as it did on the heels of the grant of the federal franchise to Indians in 1960. By this time the resurgence in official and public interest in Indians and the general social awareness of minority civil rights issues coincided to produce what George Manuel, former national chief of the National Indian Brotherhood/Assembly of First Nations has described as the "rediscovery" of Indians in the

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<sup>265</sup> Leslie, "A Historical Survey," supra note 199 at 34.

<sup>266</sup> Canada, Joint Committee of the Senate and the House of Commons on Indian Affairs, Minutes and Proceedings, No. 16, at 605; reported in Richard Bartlett, The Indian Act, supra note 93 at 7.

<sup>267</sup> S.C. 1960-61, c. 9, s. 1.

1960s:

It was the decade in which we were rediscovered.... As in the earlier discoveries of European history, we knew where we were all the time. It was the explorer who was lost.<sup>268</sup>

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<sup>268</sup> George Manual and Michael Posluns, The Fourth World: An Indian Reality (Collier-MacMillan Canada Ltd., Don Mills, 1974) at 156. According to Manual and Posluns, there were three waves of explorers in the 1960s: alienated youth, anthropologists, and government consultants.

## (9) Decade of Rediscovery

### (a) New Initiatives

In the 1960s broad public interest in reforms to the Indian Act was aroused by a number of factors: public interest in the 1959-61 Joint Committee hearings on Indian affairs; the personal and interest of Prime Minister Diefenbaker in Indians and in the north; the 1960 grant of citizenship to all status Indians; and the growing public awareness of the poor socio-economic conditions on Indian reserves. All these elements were accentuated by publicity concerning the civil rights movement in the United States and by the egalitarian mood of the times combined to produce a decade of social experiments, information gathering and consultation to solve what was increasingly described as the "Indian problem".

One solution to the problem was the decision to give greater attention to Indians by separating the Indian Affairs Branch from the Department of Citizenship and Immigration in 1966 to create the Department of Indian Affairs and Northern Development.<sup>269</sup>

In the face of mounting criticism of the poor socio-economic conditions of most reserves, the process of attempting to involve the provinces in providing social services to Indians intensified. The closing of reserve residential schools in favour of provincial schools was already well under way by then, having begun in 1949 with the first efforts to enter into agreements with local school boards to take Indian children into provincial schools. Later, this initiative was supported by federal-provincial cost sharing agreements negotiated under pressure from the provinces. By the mid 1960s, 44% of Indian children were in provincial schools, as compared with 7% only 25 years earlier.<sup>270</sup> In the related area of child welfare, by the mid 1960s the federal and provincial governments began entering into agreements whereby provincial child welfare agencies assumed jurisdiction over Indian reserves - the now well-known "sixties scoop" of Indian children placed under provincial care and removed from their reserve homes.<sup>271</sup>

In 1963, for the first time in Canadian history, the question of Indian administration was placed on the agenda of a federal-provincial conference. Subsequently the Indian Affairs Branch formed a federal-provincial relations office to promote shared cost agreements on program administration with the provinces and the next year the Minister called a special federal-provincial conference to discuss service transfer issues formally with the provinces. At that conference the provinces agreed to the creation of federal-provincial coordinating committees to develop and coordinate programs for Indians on reserve.

However, the provinces were generally less interested than the Indian Affairs Branch in these committees. As the Hawthorn Committee subsequently reported, these committees

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<sup>269</sup> Government Organization Act 1966, S.C. 1966-67, c. 25.

<sup>270</sup> The Hawthorn Report, *supra* note 5 at 375 (vol. 1).

<sup>271</sup> The situation in Manitoba is illustrative of the process of provincial involvement and is described in Volume 1 of the Manitoba Report, *supra* note 139 at 518-27.

revealed a tendency to inaction, mainly because the regional Indian Affairs Branch officials had much less bargaining authority than their provincial counterparts. Thus, the federal civil servants could not negotiate agreements with any sense of finality, which often led the provincial officials "on occasion, to become irritated and distrustful of the apparent stalling of local members of the Indian Affairs Branch."<sup>272</sup>

Also in 1964, and in keeping with the national mood of grass roots community activism, the Branch established an Indian Community Development program, the goal of which was to develop better local problem solving capacity on the reserves and thereby to lessen bureaucratic involvement in Indian reserve life. The program was discontinued by the department less than three years later because departmental officials found it to be disruptive (mainly because bands began to clash openly with the local Indian agents). The different perspectives of the mainstream departmental officials and the community workers regarding their functions is brought out in the following statement by George Manual, one of the original community development officers:

Indian Affairs needed a corps of field workers who would be skilled in getting Indian people to solve the problems Indian Affairs had defined in a manner that was acceptable to the Department. What happened was something else.<sup>273</sup>

That "something else," of course, was a perceptible lessening of the sense of dependence felt by Indians on reserve that threatened the general control exercised by local Branch officials that in the name of civilizing and educating Indians had been part of official Canadian Indian policy for over 100 years. In addition, many of the established churches on reserves also resented the activist orientation of the young community development workers. Traditional Indian policy won the day and the community development experiment was abandoned at because of the threat to Indian Affairs Branch authority.

The Indian Affairs Branch had already started a tentative program in 1956 of funding some band councils to establish school committees. Since then, the Branch had slowly been attempting to devolve a number of program delivery functions to bands in the area of social assistance, child care, education in Branch schools and support for band council governments. Significantly, in 1968, Treasury Board formally approved the transfer of funds to bands for local band council governance purposes. This was a stimulant to the devolution process that gathered momentum in the following decade when core funding for band council government (1974) and block funding for social, economic development, housing and education purposes (1975) was approved by Treasury Board. Something similar had occurred in the United States beginning in the 1960s, although, as in Canada, in that case actual control of the programs remained largely with non-Indian bureaucrats.<sup>274</sup>

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<sup>272</sup> The Hawthorn Report, *supra* note 5 at 351 (vol. 1).

<sup>273</sup> Manual & Posluns, The Fourth World, *supra* note 268 at 129.

<sup>274</sup> In 1961, the U.S. Congress authorized the Area Redevelopment Administration [U.S. Statutes at Large, 75-47.]

While these experiments in local initiative and devolution were going on, the Canadian press and public were highly critical of the what was perceived as official neglect of Indians, especially in view of their relatively poor socio-economic conditions. In response, a number of studies were commissioned, the most well known being the Hawthorn Report,<sup>275</sup> the first volume of which came out in 1966. That same year, the Indian Eskimo Association produced the first scholarly treatment of Aboriginal law, later updated and reprinted as Native Rights in Canada<sup>276</sup> in 1970. It had a long section on the historical pattern of dealings with Aboriginal peoples that highlights the importance of the treaty-making process and the legal significance of treaties.

A report on Aboriginal justice issues commissioned by the Department of Indian Affairs, Indians and the Law,<sup>277</sup> was prepared in 1967. It noted, among other things, that Indians were disproportionately represented in the criminal justice system and did not receive adequate crime prevention, policing or aftercare services. Importantly, this report brought to light a growing Aboriginal sense of alienation from mainstream Canadian legal structures and related it to Canada's perceived failure to respect Aboriginal and treaty rights.<sup>278</sup>

(b) The Hawthorn Report  
(i) Provincial Jurisdiction

The Hawthorn Report, a general survey of Indian conditions, generated the most interest and had the most impact at the time, however. George Manuel commented subsequently that it not only produced a vast amount of useful information, but also that "[f]or the first time a public inquiry seriously considered what kind of commitment, financial and moral, would be required in relieving the poverty and suffering of Indian people."<sup>279</sup> The report was long on economic analysis and unflinching in noting that "economic development for Indians will require public expenditures

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(later renamed the Economic Development Administration) by which tribes were able to become sponsoring agencies on the same basis as counties and local governments for program delivery. According to Vine Deloria Jr. and Clifford Lytle, this was a "major breakthrough" and a "watershed event" because up until then tribes has always been the recipients of programs operated by outsiders: The Nations Within, *supra* note 27 at 196.

<sup>275</sup> *Supra* note 5.

<sup>276</sup> *Supra* note 50. The original version was prepared under the direction of Professor Douglas Sanders of the University of British Columbia.

<sup>277</sup> Indians and the Law, (Canadian Corrections Association, 1967). Dr. Gilbert Monture, a Mohawk, was chairman.

<sup>278</sup> For a review of the findings of this and subsequent Aboriginal justice inquiries and reports see John Giokas, "The Aboriginal Justice Reports: Everything Old is New Again" prepared for the Royal Commission on Aboriginal Peoples, March 1994.

<sup>279</sup> Manuel and Posluns, The Fourth World, *supra* note 268 at 163.

on their behalf in the hundreds of millions of dollars per annum over the foreseeable future."<sup>280</sup> Despite the fact that this report is rarely cited today, it would be wrong to underestimate its influence on subsequent policy development. Sally Weaver has reported that subsequent Department of Indian Affairs documents show that "the department saw the Hawthorn Report as 'an important point of reference in the conceptualization of policy.'<sup>281</sup>

For example, it is now widely accepted that Indians on reserve are provincial residents - provincial citizens in the words of the Hawthorn Report<sup>282</sup> - for many purposes not connected to their status as federal constitutional subject matters under section 91(24) of the Constitution Act, 1867. This view was confirmed by a line of cases culminating in Dick v. R.<sup>283</sup> In most respects, however, Dick merely paraphrases and reflects portions of the legal opinion in the Hawthorn Report where the authors argued that "the legal status of Indians ultimately relates to two levels of government in Canadian federalism...".<sup>284</sup> Prior to the publication of this opinion there was general acceptance of the opposite view, namely, that Indians on reserve were federal "wards" and therefore the exclusive responsibility of Parliament. The corollary was that provinces were constitutionally incapable of dealing with Indians prior to their enfranchisement.

The purpose of this opinion was to dispel the notion that the provinces could not deliver the normal range of social services to Indians which non-Indian Canadians were receiving. From this perspective, the Indian problem was viewed by the authors of the report as a function of evolving cooperative federalism, what they called the "fused federalism" implied by the system of conditional federal grants to the provinces.<sup>285</sup> Their assumptions and optimism regarding the provincial role is underlined by their stated belief that "the progressive incorporation of Indians into the provincial framework of law and services will continue at an accelerated pace."<sup>286</sup>

Despite the emphasis on growing provincial involvement in Indian reserve life, the Hawthorn Report did not accept the inevitability or desirability of assimilation - a policy goal they explicitly rejected. Instead they proposed the concept of "citizens plus" whereby, in addition to the ordinary rights and benefits to which all Canadians have access, the special rights of Indians as "charter members of the Canadian community" were to be respected.<sup>287</sup> The "charter rights" of

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<sup>280</sup> The Hawthorn Report, supra note 5 at 14 (vol. 1).

<sup>281</sup> Weaver, Making Canadian Indian Policy, supra note 4 at 79.

<sup>282</sup> Supra note 5 at 16 (Vol. 1).

<sup>283</sup> Supra note 12.

<sup>284</sup> The Hawthorn Report, supra note 5 at 211 (vol. 1).

<sup>285</sup> Ibid at 199.

<sup>286</sup> Ibid at 372.

<sup>287</sup> Ibid at 13.

Indians were ultimately ascribed to the fact that "the Indians were here first" and that "a series of bargains were made by the ancestors of the present generation of Indians and Whites" whereby in exchange for allowing non-Indian settlement of the lands, Indians would be guaranteed special status.<sup>288</sup>

#### (ii) Indian Municipal Self-Government

One important way in which the Hawthorn Report proposed to respect the special status of Indians was through a federal and provincial commitment "to find mechanisms and instrumentalities which will allow Indian communities to increase their control over local affairs."<sup>289</sup> The report is frank, however, in outlining the relative failure of the Indian Affairs Branch to promote such local control. The relationship between the Indian Affairs Branch and Indians is referred to as one of "internal colonialism", with the Branch described as a "quasi-colonial government"<sup>290</sup> that has been involved in a "holding operation"<sup>291</sup> rather than in promoting active Indian self-government. Moreover, despite over 100 years of band council experience, the limited and supervised nature of the powers available to bands meant that "it remains essentially true that most Indian communities are administered rather than self-governing."<sup>292</sup> Compounding the problem was the fact that many of the best and brightest often left the reserve for the greater economic opportunities of the cities, thereby depriving Indian communities of their potential future leaders.

The cure proposed was not simply to enhance local band self-governing powers, however, since "the small size of many Indian communities, their poverty, and the absence of developed administrative structures constitute basic limiting factors which preclude a high degree of local control."<sup>293</sup> A great deal of the Hawthorn Report is thus devoted to economic questions and focuses not only on the poverty of reserve communities, but also on factors such as their geographic and cultural isolation from mainstream Canadian commercial activities and their poor prognosis for economic development without massive assistance from the senior levels of government. Many are described as "almost totally devoid of the resources required to sustain existing and growing reserve populations," thus leading to the conclusion that for many of them there was "no long run future."<sup>294</sup> Economic development, therefore, was to be oriented more to education, vocational

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<sup>288</sup> Ibid at 396.

<sup>289</sup> Ibid at 264.

<sup>290</sup> Ibid at 368.

<sup>291</sup> Ibid at 367.

<sup>292</sup> Ibid at 270.

<sup>293</sup> Ibid at 295.

<sup>294</sup> Ibid at 296.

training and "techniques of mobility" with local resource development as a secondary priority since the goal was to train Indians primarily for the wage economy of larger Canadian society.<sup>295</sup>

In keeping with the emphasis on the provincial role, the report ultimately calls for self-government within a provincial municipal framework, while yet retaining the essential elements of Indian special status. The provincial framework was considered a more appropriate vehicle because of the support it could offer in terms of social service delivery, access to technical assistance, the opportunity for Indians to acquire skills in dealing directly with non-Indian government, overall provincial expertise in the problems of small, rural and under-developed communities, and, most importantly, the direct economic development assistance provinces could provide. The "vast cityward movement of Indians"<sup>296</sup> that was beginning to pick up steam in the 1960s also militated in favour of a provincial framework for reserve government so as to avoid federal and provincial overlap and duplication of services.

However, the effort to replace the federal with a provincial framework, while it was to be "deliberately and aggressively pursued," was to be "partial and ad hoc" and arrived at in a transitional, experimental and open-ended way.<sup>297</sup> In order not to inflame Indian distrust of the provinces and fear of jeopardizing their special relationship with the federal level, the "organizational, legal and political structure" of Indian communities was to be left within the Indian Act. The historic and treaty-reinforced federal role of protecting and managing Indian lands and moneys as well as exercising vigilance against the blind application of notions of formal equality to Indians were conceived of as remaining under federal responsibility. This was seen as the protection of the "plus" part of Indians status as "citizens plus."<sup>298</sup> Nonetheless, the overall goal of the transition process to provincial citizenship was to instil a new civic allegiance in Indians in terms of federalism:

A consequence of federalism is the existence of dual allegiance to both central and provincial governments. For historical reasons, Indians have been almost exclusively oriented to Ottawa. They have been living as if in a unitary state. The long run goal of present policy is to engender in Indians that duality of subjective civic identity which is a consequence of federalism and which non-Indians possess in varying degrees. The completion of this process will take time.<sup>299</sup>

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<sup>295</sup> Ibid at 13.

<sup>296</sup> Ibid at 12.

<sup>297</sup> Ibid at 301.

<sup>298</sup> Ibid at 395-97.

<sup>299</sup> Ibid at 349.

### (iii) Treaties Downgraded

The position of the federal government even then was that the extension of provincial services to reserve communities was to be only by consent of the community concerned. The authors of the Hawthorn Report carried this principle farther, calling for Indian consent to any changes in their overall relationship with the two levels of government.<sup>300</sup> Prior to this report the need for Indian consent to changes in Indian policy appears to have been honoured more in the breach than in the observance, as shown, for example, by the Joint Committee hearings of 1946-48 that have already been described. Interestingly, the Hawthorn Report did not find the requirement for Indian consent to be found in anything other than the desirability of not breaching faith with Indians and the need to allow negative Indian attitudes towards the provinces the time to change "as a result of cumulatively rewarding experiences with the provinces."<sup>301</sup>

Thus, despite its other merits, the Hawthorn Report, like the earlier report of the 1946-48 Joint Committee, generally shows that the authors had not accepted the legal and constitutional significance of treaties as such nor their importance to Indians as evidence of the historic agreement to share the lands. Throughout the Hawthorn Report the focus is on services and the most appropriate level of government for their delivery. Although acknowledging both the importance of the "Indian perception of the treaties as a basic items of self-identity" and that the failure of both levels of government to respect them was "a constant source of friction,"<sup>302</sup> the authors did not view treaties as such as being particularly important in their own right, largely because they seem to have adopted a "frozen rights" approach to the treaty guarantees:

It is worth repeating that the rights and privileges guaranteed by treaty to some Indians are insignificant in relation to both Indian needs and the positive role played by governments. The economic base of Indian existence will continue to diverge from the traditional dependence on game, fish and fur, and reserve centred activities. The claims of a socio-economic nature are unimportant when compared with the role which governments have assumed for the non-Indian population.<sup>303</sup>

The approach of the authors to treaties was therefore basically political: they were important because Indian insistence on them complicated Indian policy development and created ill will between Indians and both levels of government. This difficulty would have to be carefully managed because of the symbolic importance of treaties to Indians but not because of any legal or constitutional obligations represented by them or because they had to be taken into consideration in developing policy. From this perspective it was easy for the authors to conclude that it was the Indian Act and federal constitutional powers under section 91(24) that were the primary, if not the

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<sup>300</sup> Ibid at 16.

<sup>301</sup> Ibid at 349.

<sup>302</sup> Ibid at 248.

<sup>303</sup> Ibid at 247.

sole determinants of federal policy obligations.<sup>304</sup>

#### (iv) Federal Government Role

In order to manage the treaty problem and the experimental approach to integrating Indian reserves into the provincial framework, the Hawthorn Report called for the development of better methods of consulting Indians. The report acknowledges both the historic failure of the Indian Affairs Branch to develop effective lines of communication with Indians and the relative lack of representative national Indian organizations capable of responding to policy proposals. Hence the call for encouragement for Indian organizations, despite the fact that "Indian leaders and spokesmen may make unjustifiably hostile and critical statements about the Branch."<sup>305</sup> At the time this recommendation was made the Branch was involved in a regional and national consultation experiment that will be described below, but which ended in failure. Ultimately, of course, a strong Indian organization, the National Indian Brotherhood, was formed and began to receive regular financial support beginning in 1971.

The Indian Affairs Branch was also urged to change its role within the federal government apparatus and to begin to act as an advocate for Indians. It was recommended that the Branch become the "national conscience to see that social and economic equality is achieved between Indians and Whites."<sup>306</sup> To the extent that the Department of Indian Affairs is now charged with and carries out the federal fiduciary obligation to Indians this recommendation can be seen to have borne fruit in many respects. In a related way, the establishment of an independent Indian Progress Agency was also recommended so that annual progress reports could be delivered to Parliament on the extent to which the goals of this report were being met in four key areas: education, economic, legal including the delivery of services to Indians, and social conditions. This function is now performed to some extent by parliamentary committees and by the Canadian Human Rights Commission.

#### (v) Dual Orientation of Band Government

One of the great strengths of the Hawthorn Report was the strong and unsentimental analysis of reserve conditions it contained, one component of which was an examination of the nature of the community itself. In non-Indian communities community links are voluntary, conditional and severable without penalty since community membership is a function of individuals freely choosing their place of residence. Given the high degree of mobility, there is no requirement of property ownership or kinship links and community membership. In Indian communities, on the other hand, the interaction between the requirements of status, band

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<sup>304</sup> Ibid at 247-48.

<sup>305</sup> Ibid at 382.

<sup>306</sup> Ibid at 13.

membership and reserve land ownership restrictions means that community links are determined largely by birthright, are enforced by membership in a special legal category in which there was "no necessary coincidence between Indian status and Indian ancestry"<sup>307</sup> and are inextricably tied to communal holding of land (and the resources and moneys derived from it). This is, of course, because reserve lands are held in trust by the federal Crown for "the use and benefit" of bands, irrespective of where the members of those band reside. At that time, only status Indians could be band members.

The complications inherent in the coincidence of status, band membership and reserve residency requirements mean that there is a "double aspect of band membership and community membership" that "pervades and confuses band council activities."<sup>308</sup> The double aspect lies in the two distinct facets of a band. On the one hand it is the entity the individual members of which possess certain assets in common in the form of land, resources and moneys. On the other hand, it is the local community requiring government services. These two aspects or facets do not necessarily coincide since not all band members live on reserve. The Indian band is thus a "frozen" community in the sense that its size is limited by ascribed (birth), legal (status requirements), and demographic (many must leave to find work) factors that militate against all band members residing on the reserve. While the local reserve community requiring government services cannot be larger than the band, the band in the corporate sense of "stake holders" in band assets can certainly be larger than the community.

Given that non-resident band members have no voting rights under the Indian Act band council system, the Hawthorn Report accurately noted the possibility for conflict as a result of the "dual orientation" of band councils as corporate asset managers for all band members, resident or otherwise, and as local government for resident band members. The possibility of conflict increases as a function of the number of band members resident off-reserve. Prior to 1951, the problem had not arisen to any great extent because band members had only to be "resident" on reserve to vote, whereas after the 1951 revision the voting requirement was increased to "ordinarily resident" - a stricter test.

One of the reasons this problem was a thorny one was because of the potential conflict between egalitarian and collective assumptions concerning the legitimacy of band council government. Non-resident band members had no rights as individuals to say how the collective disposed of collective assets, whereas the collective membership of reserve residents had a right to require a real connection to the community as proof of concern for community welfare before allowing participation in community political life. The 1959-61 Joint Parliamentary Committee Report had recommended allowing all band members actually present on reserve to vote, whether ordinarily resident or not. The Hawthorn Report, however, recommended separating the corporate from the governance functions on an experimental basis so that "[t]he Indian thus would

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<sup>307</sup> Ibid at 271.

<sup>308</sup> Ibid at 272.

have one status as a citizen of a local community and a separate status as a shareholder in the corporate assets of the band.<sup>309</sup>

This recommendation was never adopted in the form of amendments to the Act and the situation described by the Hawthorn Report continues. The contest between egalitarian and collective assumptions to which the authors alluded has come out into the open with the recent case of Corbiere v. The Queen and the Batchewana Band<sup>310</sup> in which the Federal Court, Trial Division struck down the Indian Act voting provisions regarding land surrenders and band moneys on the basis that they infringed the Charter section 15 equality rights of off-reserve band members who were not ordinarily resident on reserve. In striking down these provisions, the judge noted that the impact of the challenged voting restrictions was not limited to the reserve as a political community; rather, it concerned "the use and disposition of communal property in which every band member has a share wherever he or she may live."<sup>311</sup>

It is important to note that a great percentage of the off-reserve band members challenging the residency requirement for voting were Indian women and their children whose status and band membership had been restored in 1985 via Bill C-31 but who had been denied reserve residency by the band council subsequently. Thus, this decision, if upheld on appeal, holds great potential to alter the nature of band politics and governance since there are literally thousands of off-reserve band members awaiting band residence who may now have rights to participate in at least the corporate aspect of band council decisions. The Department of Indian Affairs may yet have to adopt Indian Act amendments along the lines recommended by the Hawthorn Report nearly thirty years ago. The case is currently under appeal.

## (10) New Consultation Mechanisms and Constitutional Reform

### (a) Indian Advisory Boards

The Indian Affairs Branch had been searching for better methods of consulting Indians since the 1946-48 Joint Committee hearings, although their view of what constituted "consultation" was different from Indian views. John Leslie notes in this regard that federal officials have always been faced by an Indian agenda that focuses on larger issues such as treaty rights and land claims. This had become obvious during the 1946-48 presentations to the Joint Committee, with Indian Affairs Branch officials apparently regarded this form of consultation as merely offering a platform for "venal" and "self-serving" Indian politicians.<sup>312</sup>

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<sup>309</sup> Ibid at 20.

<sup>310</sup> [1994] 1 C.N.L.R. 71. For a good summary of the decision and its ramifications see Thomas Isaac "Case Commentary: Corbiere v. Canada", [1994] 1 C.N.L.R. 55.

<sup>311</sup> Ibid at 84.

<sup>312</sup> Leslie, "A Historical Survey", supra note 199 at 18.

As a result, they wished to avoid such experiences in the future and in 1953 and again in 1955, brought hand-picked Indian leaders to Ottawa and presented them with the Branch agenda for discussions that focused on a narrow range of issues around legislative and administrative changes to the Act. Nonetheless, it is reported that they were still suspicious that "Indian spokesmen were grinding their own political axes"<sup>313</sup> and did not truly represent the grass roots Indian view. A series of conferences across Canada were therefore convened in 1955 and 1956 with pre-set agendas focusing on administrative and social welfare issues. Branch officials were thus able to compile information on local reserve conditions.

In further recognition of the need to canvass Indian views, and following the recommendations of the 1959-61 Joint Committee to this effect, in 1965 the Indian Affairs Branch established Indian advisory boards to participate in policy development. A national and several regional advisory boards composed of band-appointed representatives met frequently for a year or two, primarily to discuss the Branch's proposed Indian Act amendments.

George Manual reports that by the time these boards were established in the 1960s, much of the Indian animosity towards the 1951 Indian Act had dissipated. He notes that a consensus on potential amendments emerged among Indian members that supported only a few relatively minor revisions "making it clear that it should be interpreted as supportive legislation."<sup>314</sup> The source of the problems with the Act was found by the Indian delegates to reside less in the Act itself than in the attitudes of federal bureaucrats who were criticized for refusing to emerge from the traditional structures and processes of the Department of Indian Affairs and for maintaining a controlling and paternalistic relationship with Indians. In the face of such attitudes, it was felt that legislative changes alone would accomplish little. Importantly, it is reported that "[t]here was never a point in all those discussions when the Indian delegates recommended that the Indian Act be repealed."<sup>315</sup>

From the Indian perspective, except for the fact that they brought Indian leaders together to discover and explore their common interests, these advisory boards were of limited utility and ended up engendering suspicion on their part. Being co-chaired by Branch officials and with agendas already largely set by the Branch, these groups came to be seen as too closely tied to the government agenda and to bureaucratic needs to satisfy Indians' desire for wider and more meaningful consultations. Moreover, National Board members were uncertain about the extent to which they were in fact truly representative of Indians generally and whether therefore they were to attempt to represent their constituencies or to offer their own views.

The boards were discontinued in 1967 when federal officials decided to embark on a third

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<sup>313</sup> Ibid at 19.

<sup>314</sup> Manual and Posluns, The Fourth World, supra note 268 at 165.

<sup>315</sup> Ibid.

round of direct consultations with Indian leaders on Indian Act amendments. Direct consultations with Indians across Canada began in 1968 and continued into 1969. At the early meetings, Sally Weaver reports that there was a clear lack of Indian consensus on the specific changes the Department was proposing for the Indian Act, "highlighting the obvious fact that the Indian political agenda differed dramatically from the one government had laid down."<sup>316</sup> Indians wanted what they had been calling for since before the first Indian Act: respect for the rights associated with their special status and redress of historic and treaty related grievances. Since there was no Indian consensus of specific changes to the Act, Indians wanted more time to develop one.

A series of regional consultations followed throughout 1968 and into 1969. The final consultation meeting with Indians took place in April 1969 in Ottawa. It was a notable gathering, significant because it brought together Indians from all regions of Canada, including a number of those who would figure prominently in later constitutional events. Impatient with what they perceived as the federal government's stalling on claims and a failure to address Indian priorities, they tabled a brief setting out those priorities as follows:

It has been made abundantly clear, both by the consultations to date and through Indian meetings throughout the land, that the principal concerns of Indian people center around:

- A) recognition of the treaties and the obligations imposed by same
- B) recognition of aboriginal rights
- C) reconciliation of injustices done by the imposition of restrictions on Indian hunting through the ratification of the Migratory Birds Convention and subsequent federal and provincial legislation
- D) Claims Commission

It is our opinion that before meaningful consultation on amendments to the Indian Act can take place, these four items must be dealt with and a position of mutual understanding and commitment reached.<sup>317</sup>

They also requested government funding to establish a national committee on Indian rights and treaties to undertake research on these topics for the purpose of subsequent negotiations with the federal government. Indian Affairs Minister Chrétien agreed to meet again later to discuss the financial requirements for further consultations, which Indian delegates took to mean that henceforth partnership and a cooperative stance on the part of government would replace the

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<sup>316</sup> Weaver, Making Canadian Indian Policy, *supra* note 4 at 64.

<sup>317</sup> Cited in Weaver, *ibid* at 147-48.

paternalistic approach of government to Indians.<sup>318</sup>

(b) The White Paper and the Joint NIB/Cabinet Committee

1969 is also the date usually chosen as marking the birth of "pan-Indianism" or national Indian political consciousness of their special legal and constitutional status. That year, instead of the further consultations referred to above, the federal government brought out a White Paper, Statement of the Government of Canada on Indian Policy 1969<sup>319</sup> proposing "the full, free and non-discriminatory participation of the Indian people in Canadian society" on the basis "that the Indian people's role of dependence be replaced by a role of equal status..."<sup>320</sup>

The new policy shocked Indians because it would have seen the global elimination of all Indian special status, the gradual phasing out of federal responsibility for Indians and protection of reserve lands, the repeal of the Indian Act, and the ending of treaties. In short, the policy amounted to terminating the special relationship between Indians and the federal Crown and treating Indians as full provincial residents for nearly all purposes. Sally Weaver reports that "Indian leaders felt duped by the consultation process and were incredulous at the government's assertions that the White Paper was a response to their demands."<sup>321</sup>

In fact, the 1969 White Paper contained a number of assumptions and perspectives worthy of comment that reflected the very opposite of what Indians had been calling for.<sup>322</sup> The values shaping it were formal equality, sameness and individual rights. The tone was negative in the sense of viewing Indian ethnicity as a cultural remnant not worth preserving and Indians primarily as a particularly disadvantaged minority. Treaties were seen as anomalous in the Canadian federation and as without significance in the modern world. Pluralistic and ethnicity based solutions to Indian problems were shunned in favour of the universal institutions and laws. The focus, moreover, was on the socio-economic needs of Indians as deprived persons moving towards equality of services as opposed to a perspective based on the existing special political and cultural status of Indians as a positive attribute in an evolving and diverse federation.

In yet another of the paradoxes in the area of Indian policy, the White Paper actually effected the opposite of what its authors intended, becoming in Sally Weaver's words a catalyst for

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<sup>318</sup> Ibid.

<sup>319</sup> Presented to the First session of the Twenty-eighth Parliament by the Honourable Jean Chrétien, Minister of Indian affairs and Northern Development, June 25, 1969.

<sup>320</sup> Ibid at 5.

<sup>321</sup> Weaver, Making Canadian Indian Policy, supra note 4 at 171.

<sup>322</sup> This list is drawn from Sally Weaver, "A Commentary on the Penner Report" in "The Report of the House of Commons Special Committee", X:2 Canadian Public Policy (1984), 215 at 217.

Indian nationalism and a resurgence of native values: "Ironically, the White Paper precipitated 'new problems' because it gave Indians cause to organize against the government and reassert their separateness...".<sup>323</sup> In this vein, the most well-known Indian response, Harold Cardinal's The Unjust Society, called for the retention, unchanged, of the Indian Act. However, this was not because it was viewed as non-discriminatory. It was simply because it was protective of Indian rights: "We would rather continue to live in bondage under the Indian Act than surrender our sacred rights."<sup>324</sup>

In 1970, after widespread Indian opposition the White Paper was withdrawn and the federal government began a core funding program to allow Aboriginal organizations to articulate Aboriginal interests to government directly.

Sally Weaver has analyzed the White Paper development process in detail and has concluded that in general, there was a complete failure of non-Indian politicians and many bureaucrats to grasp that their own liberal ideology and preconceived notions prevented them from understanding Indian viewpoints except as variants of their own views. The following passage captures her assessment of the later stages of the policy making process in which traditionalists and activists in the process confronted each other:

The situation led them to seek solutions almost entirely from within their own world views. In this sense they became inward looking and conceptually closed. The policy-making arena had become a cocoon of self-searching and soul-searching among a very small group of people.

Early on in the process academics were dispensed with as being out of tune with many realities, and with the exception of the [DIAND] old guard, no one read the Hawthorn Report. Indians were not fully accepted as knowing their own priorities, and their spokesmen were suspected of not being representative of their own constituency. Even the activists were not above deciding what Indians really sought and wanted. Individuals in each alignment screened Indian demands through the two ideologies - the traditional and the activist - and this screening process became more selective as the opposition between the alignments hardened.<sup>325</sup>

It would be difficult to exaggerate the negative effect the White Paper policy proposals and the manner in which they were developed had on relations between Indians and the federal government. In the first place, it had been prepared in secret and without Indian participation at a time when the government was actively consulting Indians on revising, not eliminating, the Indian Act. Secondly, it ignored the consensus among Indians during those consultations. Thirdly, it was contrary to the primary recommendation of government's own Hawthorn Report opposing assimilation. Fourthly, it disregarded the lessons of the termination policy adopted in the United

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<sup>323</sup> Weaver, Making Canadian Indian Policy, *supra* note 4 at 171.

<sup>324</sup> (Edmonton: M.G. Hurtig Ltd, 1969) at 140.

<sup>325</sup> Sally Weaver, Making Canadian Indian Policy, *supra* note 4 at 109.

states in 1953 and abandoned as a disastrous failure at the same time the White Paper was being prepared in Canada.<sup>326</sup>

The campaign to defeat the White Paper galvanized Aboriginal organizations, particularly the National Indian Brotherhood. In 1970, Prime Minister Trudeau formally suspended the White Paper proposals in favour of a more cooperative and open approach. However, by 1974 the distrust engendered by the White paper had soured relations between Indians and government and many Indian bands and organizations had resorted to direct confrontation and had organized public demonstrations against certain federal policies.

In response a joint NIB/Federal Cabinet Committee was formed for cooperative formation of Indian policy, bringing together the thirteen member NIB executive board and the eight member cabinet Social Policy Committee, all supported by two joint working groups of officials to perform detailed work on the Indian Act and on Indian rights and claims processes. Interestingly, despite the "termination" of Indian status experienced by the growing numbers of Indian women forcibly enfranchised under the Indian Act mixed marriage provisions, this discriminatory aspect of the Act was never tabled for discussion, largely because the NIB was opposed to dealing with it.<sup>327</sup> In any event, the Joint Committee collapsed in failure in 1978 when the NIB abandoned it to concentrate on constitutional amendments.

Sally Weaver has reviewed the history of this initiative and concludes that its failure is linked to the parties' differing perceptions of the nature of the committee and the results that could reasonably be expected to be produced by such a process. The NIB saw the committee as a political forum for the direct negotiation of important issues, whereas government saw it as a mere consultative committee whose input could assist the cabinet but could not determine priorities or directions. Other complicating factors were the jealousy and continuing development of Indian policy by the Department of Indian Affairs outside the Joint Committee process favoured by the NIB; and the NIB insistence on discussing questions of principle such as Indian rights and special status in the Joint Committee meetings, a forum considered inappropriate for such global topics by government officials.<sup>328</sup>

### (c) Constitutional Consultations

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<sup>326</sup> The termination policy was seen to be a disaster from as early as the late 1960s, but has never been formally ended. Nonetheless, (then) President Nixon's "Special Message to Congress on Indian Affairs" of July 8, 1970 is generally considered to mark the passage from termination to tribal self-determination. In this regard see Prucha, Documents of United States Indian policy, *supra* note 65 at 256-58 and Fixico, Termination and Relocation, *supra* note 205.

<sup>327</sup> Kathleen Jamieson, Indian Women, *supra* note 29 at 89.

<sup>328</sup> Sally Weaver, "The Joint Cabinet/National Indian Brotherhood Committee: a unique experiment in pressure group relations", vol. 25, no. 2 Canadian Public Administration (Summer 1982) 211-239.

That same year, near the end of a decade that saw the landmark Calder<sup>329</sup> decision reaffirm aboriginal title as a legal concept in Canadian law, constitutional reform came more and more to be seen by the NIB as a national Indian issue and as the only way to fully secure aboriginal rights, including the right to self-government. Subsequently, the NIB president wrote to the Prime Minister requesting Indian participation in the constitutional renewal process. Two basic demands were formulated by the NIB at that time: the new constitutional arrangements would have to entrench aboriginal and treaty rights; and the aboriginal people would have to be involved directly in the actual reform and renewal process.

The three national aboriginal organizations<sup>330</sup> had already been invited and had attended the first ministers' meetings of October 1978 and February 1979, but as observers. They continued to press for more direct involvement and in the fall of 1979, following highly publicized lobbying in England by the NIB and nearly 300 Indian chiefs, Prime Minister Clark wrote assuring the NIB of the full participation of Indians in the process of constitutional reform, but only on issues directly touching them. In 1980, Prime Minister Trudeau gave a similar undertaking, which was subsequently extended to include all aboriginal peoples, not just status Indians. Although consulted, Indians were not at the bargaining table for the actual discussions and negotiations.

When the Constitution Act, 1982 was proclaimed on April 17, 1982 it contained three provisions relating to aboriginal matters, sections 25, 35 and 37, the latter entrenching the requirement to meet again to deal with the many outstanding Aboriginal issues that had arisen during the protracted constitutional renewal process and to invite representatives of the Aboriginal peoples to participate in the discussions. The NIB had reorganized in 1982 to permit chiefs to participate in developing national policy and been renamed the Assembly of First Nations (AFN). As is well known, a number of first minister's constitutional conferences have taken place since then.

The initial follow-up first ministers' meeting was held in March 1983 and was occupied with issues that had arisen over the years such as sexual discrimination under the Indian Act. Ultimately several amendments to the Constitution Act, 1982 came out of this first meeting, including a new section 35.1 to provide that a constitutional conference involving Aboriginal people be called before any amendment that affects them is made to the Constitution. In addition, a political accord was signed mapping out an agenda for the future constitutional conferences and calling for a further such meeting within a year.

Thus, by the early 1980s, permanent, funded and high level consultations involving the national Aboriginal organizations had become the norm - a vast change from the situation that had prevailed in the Joint Committee hearings of 1946-48 when Indians appeared to present their views

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<sup>329</sup> Calder v. A.G.B.C. [1973] S.C.R. 313.

<sup>330</sup> NIB for status Indians, Native Council of Canada (NCC) for non-status Indians and Métis, and the Inuit Committee on National Issues (ICNI) representing the Inuit.

by the grace of the committee and with little expectation that they would be ever be invited to such an event again. From being the objects of policy, Indians had active become participants in making policy, at least in a formal and visible sense.

## D. INDIAN ACT SELF-GOVERNMENT INITIATIVES

### (1) Early DIAND Proposals

While these larger constitutional matters were unfolding, the Department of Indian Affairs had been searching since the early 1970s for a self-government policy to replace the former goal of assimilation. In 1982, DIAND issued a document for discussion purposes, Strengthening Indian Band Government,<sup>331</sup> outlining five major areas of weakness in the Indian Act that militated against band council effectiveness. These are still problems with the Act:

First, the exercise of all these powers is subject to various kinds of control by the Minister and/or the Governor in Council....

Second, land tenure system under the Indian Act...based on the historical view that reserve lands were meant for the exclusive use of Indians and were to be protected....limits the ability of both the band and the individual to deal with the land.

Third, the Minister has trust responsibilities in relation to band moneys which prevent him from permitting band governments to control their own assets....

Fourth, band governments have few legislative powers in social and economic development areas....[DIAND] has devolved the administration of many such programs to numerous bands, but has retained the power of program definition.

Fifth, the legal status of band governments has been put in question by the courts. It is unclear whether band governments have legal power to contract with other legal entities.

At that time, DIAND indicated that it was considering a number of approaches to self-government including: (1) revising the Indian Act, in part or in whole; (2) developing a series of "subject" acts in different areas, e.g. An Indian Education Act, An Indian Finance Act etc.; (3) developing regional or individual band Indian Acts; or, (4) developing companion legislation to the Indian Act into which bands could opt.

The latter approach was favoured and in 1982 another discussion document, The Alternative of Optional Indian Band Government Legislation<sup>332</sup> was prepared setting out the areas

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<sup>331</sup> Described in the Penner Report, supra note 17 at 21-22.

<sup>332</sup> Described in the Penner Report, ibid at 22-23.

that would be strengthened through such optional legislation. In essence, this approach embraced the following five principles:<sup>333</sup>

- (1) removal of some of the Indian Act ministerial authority over bands or delegation of it to bands (but under continuing DIAND supervision and disallowance power regarding by-laws as under the Indian Act);
- (2) delegation of federal authority over Indian land and money management, health, education and other social services to the bands and the power to tax their own populations, (all the while keeping the current element of federal protection of Indian lands as under the Indian Act);
- (3) band developed charters or "constitutions" to establish band internal political structures and accountability provisions to band membership;
- (4) band authority to determine its own membership (while respecting acquired rights and the need for "some minimal connection" through descent or marriage with the band i.e. blood quantum and kinship by marriage criteria, as under the Indian Act); and
- (5) provision to bands of a clear legal status vis-à-vis band members and other governments, businesses and non-Indian individuals to correct the lack of such status in existing law.

A number of possibly contentious subjects requiring resolution through future discussion were tackled in this document: band council accountability to members and to DIAND, particularly regarding band finances; justice administration and law enforcement; individual appeals to the Minister regarding band wrong-doing or other "irregularities"; and, the effect of band government by-laws on surrounding municipal and provincial jurisdictions. These issues remain thorny ones in the self-government context and have continued to be "deal-breakers" both at the local and at the constitutional level.

The DIAND document also contained vague hints that the trust relationship of the Minister with regard to Indian lands and assets would be "significantly changed" by a band opting into this legislation, but further details were not forthcoming. Subsequent testimony before the Penner parliamentary committee by Indian witnesses showed marked opposition to any change in the Minister's role in this regard.<sup>334</sup>

Superficially, at least, the proposed principles in the government's optional approach resembled many of the provisions of the American Indian Reorganization Act of 1934, especially

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<sup>333</sup> These principles are described J. Long, L. Littlebear, M. Boldt, "Federal Indian Policy and Indian self-Government in Canada: An Analysis of a Current proposal" VIII: 2 Canadian Public Policy (1982) 189-99.

<sup>334</sup> The Penner Report, *supra* note 17 at 23-24.

the notion of band constitutions and a clear legal status to bands for business and other purposes.<sup>335</sup>

However, unlike the American legislation, the governing authority of Canadian Indian bands was to be delegated federal power, not inherent tribal sovereign powers. Moreover, while the proposed band constitutions would presumably allow bands great latitude in designing their own political structures, the absence of inherent sovereignty meant that the federal government would have had a large measure of control over what went into them and how they would be interpreted and implemented.

Indian representatives did not view this proposal favourably since their emerging constitutional demands for self-government went much farther than the concept of delegated federal authority. Moreover, Indian witnesses before the Penner Committee also disapproved the implied goal of making reserve communities provincial municipalities.<sup>336</sup>

After canvassing the views of a large number of Indian witnesses, the Penner Committee determined that this latest self-government proposal was unacceptable as the basis of the new relationship that was required between Indians and the federal government. In the view of the committee members it was merely "a revision of existing arrangements," "a further extension of devolution," and, since Ministerial permission to opt in would be required, it would maintain the notion of "advanced bands" and the overall paternalistic role of DIAND. More importantly, it did not "take account of the origins and rights of Indian First Nations in Canada."<sup>337</sup>

Despite the fact that federal Indian self-government legislation was not introduced in Parliament at that time, the principles described above have returned in different forms over the years.

## **(2)The Penner Committee Report**

### **(i) Shortcomings of The Indian Act**

In between the first and second Aboriginal constitutional conferences, in October 1983, a parliamentary committee chaired by Liberal Keith Penner tabled its report, Indian

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<sup>335</sup> Supra note 27. The Indian Reorganization Act provided in section 16 for self-government, setting out a number of specified powers in addition to tribal powers recognized in the phrase "powers vested in any Indian tribe or tribal council by existing law." As already mentioned (see text at note 28) that phrase was interpreted as referring to pre-existing sovereign powers. A tribe was entitled under that section to prepare a constitution and by-laws to be approved by tribal members.

In section 17 the Act provided for a tribe to obtain a charter of incorporation from the Secretary of the Interior, with the tribal assets to be the corporate assets, but subject to restrictions on alienation and leasing. Tribes, of course, determine their own membership as one of their sovereign powers, although the federal government demands a certain Indian blood quantum for purposes of federal services. In this regard, see note 18, supra.

<sup>336</sup> The Penner Report, supra note 17 at 24.

<sup>337</sup> Ibid at 47.

Self-Government in Canada,<sup>338</sup> in the House of Commons. Committee membership was made up of seven members of Parliament and representatives of three national Aboriginal organizations, the Assembly of First Nations, the Native Women's Association and the Native Council of Canada. The Committee travelled to all regions in Canada to hear witnesses, both on and off-reserve. In total, 39 of 60 public meetings were held on the road. The Committee also travelled to the United States, to Washington D.C. and to several pueblos in the southwest for comparison purposes. In short, extensive efforts were made to canvass Indian views. The recommendations, therefore, reflect to a great extent the perspective and priorities of Indian people, even to the point of adopting the term "First Nations." There is an obvious bent in the direction of on-reserve status Indians, however, something for which the Report has been criticized.

The basic thrust of the Penner Report was to condemn the existing Indian Act band based structure of delegated authority in favour of a new relationship based on the recognition of Indian self-government as an Aboriginal right that should be entrenched constitutionally as a distinct third order of government. In this same vein, the Committee condemned the federal self-government proposals described above. Committee criticisms of the Indian Act were not new:

- it was a "homogenizing" approach, failing to take account of Indian diversity;
- under it bands were mere administrative arms of DIAND and not true governments due to their limited powers and DIAND supervisory and by-law disallowance powers;
- it was band-based and did not allow for larger self-governing groupings such as tribal councils;
- DIAND's control of finances and other areas meant that accountability was only to DIAND and not to band membership;
- bands and band councils had uncertain legal capacity that prevented them from obtaining outside financing, entering into contractual relations, suing and being sued etc.;
- corporations formed by Indians did not enjoy the tax-free status that Indians enjoyed under the Act and historically;
- the devolution process begun in the 1950s was still DIAND controlled as program decisions were made by DIAND and not by the bands to which the delivery functions had been delegated.<sup>339</sup>

#### (ii) Indian First Nation Membership

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<sup>338</sup> Ibid.

<sup>339</sup> Ibid at 17-21.

Somewhat paradoxically, however (and in line with the submission of the Assembly of First Nations), the Committee recommended taking the Indian Act band as the starting point "to begin the process leading to self-government,"<sup>340</sup> and adopted the term "Indian First Nations Governments." It also recommended that while membership decisions are for Indian First Nations to make, a procedure should be adopted by Indian First Nations to allow "all people belonging to that First Nation" (presumably those who had lost status and membership by operation of the Act earlier) to participate in the process of forming a government without regard to the status and membership restrictions in the Indian Act.<sup>341</sup> In the same way, Indian First Nations were not necessarily restricted to Indian Act bands, since it was recommended that they be able to "combine for various purposes - administrative, economic or cultural" and that they be able to merge, separate and regroup over time.<sup>342</sup>

Although it mentioned them, the Committee did not go so far as to actually recommend either federal legislation reinstating people to status and band membership Indians or a particular procedure to permit such people to participate in the membership decision-making process. It called instead for the federal government to consider a general list of status Indians for purposes of federal benefits for Indians who may not be members of First Nations. This proposal, the Committee believed, "has the merit of meeting the concerns of some witnesses without imposing anything on Indian First Nation governments."<sup>343</sup>

In short, from the Committee's perspective, Indian Act bands were generally considered as constituting the initial Indian First Nations, and other Indians would have to rely on the good will of existing bands to devise a participation procedure or on the federal government to reinstate them or to continue to provide services to them outside the proposed First Nation framework. Thus, the Penner Committee basically advocated a "two-tier"<sup>344</sup> system of Indianness, with one tier made up of Indian First Nation members and the other comprised of free-floating Indians without a first nation affiliation. Of course, this was in many ways simply a more elegant version of the system since 1951 whereby DIAND maintained both band lists and a general register of Indians. Although everyone on the band lists was registered on the general list, the reverse was not true, and there were always persons without a particular band affiliation.<sup>345</sup>

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<sup>340</sup> Ibid at 53.

<sup>341</sup> Ibid at 55. This was in response to submission from the Native Womens' Association and the Native Council of Canada criticizing any notion of allowing current band members - the beneficiaries of discriminatory practices in the past - to determine membership in the future.

<sup>342</sup> Ibid at 56.

<sup>343</sup> Ibid at 56.

<sup>344</sup> This concept was proposed by the Association of Iroquois and Allied Indians: ibid at 55-56.

<sup>345</sup> According to information received from DIAND, at that time there were probably less than 100 persons without a band affiliation on the general register.

(iii) Implementation of the Inherent Right of Self-Government

The Committee did not use the term except in reference to briefs presented to it,<sup>346</sup> but it is clear in retrospect that it viewed the "the origins and rights of Indian First Nations in Canada"<sup>347</sup> to which it had referred earlier in its report as meaning inherent sovereignty. The Penner Report cited submissions and testimony from Indian associations reiterating the view that the Royal Proclamation of 1763 and the treaty process both assumed and confirmed the status of Indian tribes and bands as nations<sup>348</sup> and hinted strongly that Constitution Act, 1982 section 35 already impliedly referred to self-government as a protected Aboriginal or treaty right.<sup>349</sup>

Hence the further proposal that, pending the constitutional entrenchment of self-government, the federal government should occupy the field of "Indians and Lands reserved for the Indians" under Constitution Act, 1867 section 91(24) and then vacate it in favour of Indian First Nations who would fill the vacuum with their own laws.<sup>350</sup> This occupying and vacating legislation would have ousted competing provincial laws and would assure that no provincial law could apply to an Indian First Nation without its consent. As mentioned earlier, this view of Parliament's authority under the Constitution is not necessarily a valid one.<sup>351</sup>

In the absence of a constitutional amendment entrenching Indian First Nations as another order of government in Canada, the Committee proposed interim federal legislation - an Indian First Nations Recognition Act - authorizing the Governor in Council to recognize by Order in Council an Indian First Nation that had met criteria such as:

- (a) demonstrated support for the new government structure by a significant majority of all the people involved in a way that left no doubt as to their desires;
- (b) some system of accountability by the government to the people concerned;
- (c) a membership code, and procedures for decision-making and appeals, in accord with international covenants.<sup>352</sup>

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<sup>346</sup> E.g. the brief of the Indian Association of Alberta, Penner Report, supra note 17 at 44.

<sup>347</sup> Ibid at 47.

<sup>348</sup> Ibid. at 43-44.

<sup>349</sup> Ibid.

<sup>350</sup> Ibid at 59.

<sup>351</sup> See the discussion in the text at note 17 supra.

<sup>352</sup> The Penner report, supra note 17 at 57.

The requirement for accountability systems were in response to concerns expressed by Indian witnesses to the Committee and were conceived of as including such items as financial information and annual and audit reports etc., the reservation of certain "rights and areas of interests"<sup>353</sup> requiring the people's approval for action (i.e. presumably a band/Indian First Nation referendum provision not unlike those in the present Indian Act), a system for removing officials from office, an appeals system for government decision, and the protection of individual and collective rights.

A new department, a Ministry of State for Indian First Nations Relations, and linked to the Privy Council Office was recommended to replace DIAND. A recognition panel composed of persons appointed by the new ministry and representatives of Indian First Nations was proposed. Recommendations for recognition would go to the Governor in Council whose Order in Council would empower the Governor General to affirm the recognition thereby accorded.

Indian First Nations would not have to accept or exercise full jurisdiction over all matters to which they were entitled by the recognition process. It was an optional approach whereby they could decide "in consultation with the federal government, on the jurisdiction to be exercised."<sup>354</sup> Thus, additional federal legislation would authorize negotiated agreements between the federal government and Indian First Nations as to jurisdiction and funding. These agreements would be amended from time to time to reflect evolving Indian First Nation jurisdictional competency, with negotiations to be conducted with the assistance of an independent secretariat (whose members were to be jointly appointed) along the lines of the Indian Commission of Ontario or the Intergovernmental Conference Secretariat that coordinates federal/provincial meetings.

Thus, while awaiting constitutional entrenchment of Indian First Nation government, three pieces of federal legislation would be necessary: (1) a "recognition" act, (2) an "occupying and vacating" act, and (3) a "negotiation authority" act to allow the federal government to enter into jurisdictional agreements with Indian First Nations. In order to be recognized, Indian First Nations would presumably have been required to draft a document setting out their government structure - a "charter" or "constitution" - for examination by the recognition panel, but this requirement is not mentioned in the Penner Report. Otherwise, it is difficult to conceive how the panel would be able to assess the extent to which the Indian First Nation had met and would continue to meet the recognition criteria in the recognition act. Of course, it is possible that the Penner Committee intended that these matters to be set out in the jurisdictional agreements between the federal and Indian First nation governments, although that is not clear from the discussion in the Report.

In any event, any Indian First Nation governments thus constituted would have been able

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<sup>353</sup> Ibid.

<sup>354</sup> Ibid at 62.

to operate as governments even without formal constitutional protection due to the Committee's assumption that Indian First Nations already had the sovereign powers necessary for their existence and functioning as governments. Federal legislative recognition would merely have confirmed that. Provincial approval and agreement to be bound by these arrangements would have been obviated by ousting any jurisdiction they enjoyed over the areas that Indian First Nations wish to govern through federal occupation and vacation of the field of "Indians and Lands reserved for the Indians." Constitutional entrenchment could come later, to finalize these arrangements and offer the ultimate protection under Canadian law.

#### (iv) Scope of Powers

In terms of jurisdiction, the Penner Committee did not see any inherent limits: "Self-government would mean that virtually the entire range of law-making, policy, program delivery, law enforcement and adjudication powers would be available to an Indian First Nation within its territory."<sup>355</sup> This would mean full jurisdiction over all persons, Indian or not, on Indian First Nation territory, including the power to tax "individuals, transactions, land and resources within their territorial boundaries."<sup>356</sup> Administration of justice would presumably have been included, although there is no discussion in the Penner Report of any of the potential jurisdictional conflicts of the type that plague tribal justice systems in the United States such as questions of mutual recognition of judgments (full faith and credit and comity issues), "hot pursuit" of criminals fleeing one jurisdiction for another, extradition procedures etc.

In the interim, while Indian First Nations were fleshing out their respective jurisdictions, a cooperative attitude would be required by all parties, Indian, federal and provincial, to ensure workable power sharing arrangements and "ensure recognition in Canadian law of Indian values."<sup>357</sup> Even after full Indian First Nation jurisdiction had been attained, a similar attitude of cooperation would be required to cope with shared areas of concern like zoning of land, environmental matters etc. on adjoining Indian and non-Indian territory. Cooperative joint regulation of shared use areas in the case of treaty harvesting rights, for example, would also be necessary.

Even after agreements had been worked out, implementation issues would likely still arise nonetheless, especially around questions of funding. For all these reasons, the Penner Committee called for a specialized tribunal to resolve these matters, with its structure, powers and procedures to be worked out by the federal government and representatives of Indian First Nations. There is no indication that any sort of appeal to the courts would be permitted from this specialized tribunal, meaning that its rulings would likely be final ones.

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<sup>355</sup> Ibid at 63.

<sup>356</sup> Ibid at 64.

<sup>357</sup> Ibid at 66.

(v) Economic Development and Fiscal Arrangements

The Penner Report criticized the Indian Act in some detail for setting up obstacles to Indian reserve economic development. Bands are unable to obtain financing because Indian lands cannot be mortgaged or otherwise pledged against loans. The serious infrastructure problems on reserves (lack of roads, sewage systems etc.), the relatively low level of DIAND economic development expertise and the under-capitalization of reserve enterprises due to DIAND policies were seen as augmenting the problem.

The solution proposed was to settle land and Aboriginal rights claims and to transfer control of resources to bands so as to afford to Indian First Nations the land and resource base required, and then to set up a special Native Economic Development Bank under the Bank Act. The problem of protected reserve land was to be dealt with by developing "innovative financing methods that would protect the Indian First Nations land base and at the same time permit their businesses to raise capital."<sup>358</sup> There was no description of what these methods might be. Interestingly, the Penner Report also called for domestic implementation of the Jay Treaty of 1794 between Great Britain and the United States to permit Indians in North America to cross the border without hindrance to "freely carry on trade and commerce with each other."<sup>359</sup>

In terms of fiscal arrangements for self-government, the Committee found the system of band funding, especially the procedures involved with devolution of DIAND functions to the band, to be unacceptable:

- DIAND managers were unsure of their roles regarding the priority for distributing funds - whether it was to be on the basis of DIAND or Indian priorities and were not provided with clear information to enable them to evaluate "success" in performing their functions;
- the absence of accurate DIAND long term projections of the costs involved in devolution meant that meetings with Indians to forecast financial needs concerning the devolution process were often a waste of time for all concerned;
- devolution often actually increased costs because DIAND had staff advising on and monitoring how bands delivered services, thereby duplicating functions;
- bands were forced to develop detailed and time-consuming accounting procedures in response to federal government contribution agreement audit requirements that diverted the few qualified staff from actually implementing programs;
- band operating budgets had to be negotiated with DIAND officials, often on a line by line basis,

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<sup>358</sup> Ibid at 76.

<sup>359</sup> Ibid at 77.

and DIAND often made unilateral decisions anyhow;

- promised moneys were often late, requiring the bands to borrow money in the interim and to pay interest on that money which was not reimbursed by DIAND;
- the general bureaucratic "red tape" involved in dealing with DIAND with respect to financial and related matters lowered band morale;
- the difficulty and uncertainty of obtaining economic development assistance undermined band initiative; and
- a large (estimated at 25%) proportion of DIAND's budget was eaten up by bureaucratic costs - which never seemed to shrink even in difficult times.<sup>360</sup>

Thus, it was not difficult for the Committee to agree with the two main conclusions of its' consultant's report: DIAND rules regarding moneys were more appropriate for agents than for governments; therefore, new funding mechanisms must be found to reduce the financial and administrative burdens.<sup>361</sup>

Thus the Committee recommended that Indian First Nation governments must be free to develop their own policies and to set their own priorities - the reverse of the (then) current situation, and that accountability must be to their own citizens and not to DIAND. Accordingly, the Committee further recommended that financing be in the form of direct grants similar to the Established Programs Financing Arrangements used with the provinces. As "block funds", they could be spent by Indian First Nation governments according to their priorities. Services could, for instance, be delivered directly or by way of contract with another government. Amounts would be determined on a modified per capita basis sufficient to provide a level of government and services comparable to those of nearby non-Indian people.

Additional, separate federal funds were to be available to Indian First Nations for economic development and to correct infrastructure deficiencies (which would differ from community to community), with disbursement to be subject to federal-Indian First Nation government negotiations. Global amounts to pay for all this were to be appropriated by Parliament every five years by statute as in the case with payments to the provinces. In addition to these funds for Indian governments as such, Indians as individuals were to be able to apply for funds from federal programs e.g. grants for insulating older houses etc.

#### (vi) Lands, Resources and the Trust Relationship

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<sup>360</sup> Ibid at 83-93.

<sup>361</sup> Coopers and Lybrand, ibid at 94.

In terms of land and resources, the Committee proposed a radical break with the tradition of Crown protection of Indian land by recommending that Indian First Nation "have full rights to control its own lands in the manner it sees fit..."<sup>362</sup> This would include the right to "exchange, sell, or otherwise alienate their interest in lands or non-renewable resources,"<sup>363</sup> including the ability to mortgage those lands to raise money. In keeping with their recommendations of self-government, the Committee called for shared use and joint decision-making on adjoining lands based on treaty or Aboriginal rights to them, and on sharing revenues from the resource exploitation on these lands.

In this vein, the Penner Committee noted that full Indian First Nation government control of land "poses a special problem in regard to non-Indians living on Indian lands, who might feel that, as residents, they have a right to participate in the government of the community."<sup>364</sup> Citing the fact that as non-Indians they do not share in the assets administered by the Indian First Nation government, the Committee reiterated their earlier conclusion that membership is a question for Indian First Nations to decide, notwithstanding Charter protections: "Aboriginal rights should predominate over any claims of non-members to protection under the Charter of Rights."<sup>365</sup> Thus, whereas the Hawthorn Report called for separating asset management from governance functions in order to include those without voting rights who have an interest in the assets, the Penner Committee saw asset management as the criterion for restricting voting rights.

In order to provide for an adequate land base for Indian First Nations, the Committee called for a new legislatively-based claims process, the elimination of the requirement for extinguishment in claims settlements, and the provision of a land base to bands without one. Significantly, and foreshadowing the problems that would arise with Bill C-31 of 1985, the Penner Report also recommended that in the case of legislatively reinstated band members, a review should be conducted and a mechanism established to ensure that bands have the resources necessary to address the anticipated strains of limited reserve housing etc. that reinstatement would entail.

The trust relationship between Indians and the federal government was recast by the Committee from one based on the guardian - ward relationship to one based more on the concept of the equality of nations and roughly analogous to the protectorate model of Article 73 of the United Nations Charter regarding "non-self-governing territories" in which the "peoples have not yet attained a full measure of self-government" and over which members states have assumed responsibility.<sup>366</sup> One of the duties of the proposed Minister of State for Indian First Nation

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<sup>362</sup> Ibid at 108-09.

<sup>363</sup> Ibid at 109.

<sup>364</sup> Ibid at 110.

<sup>365</sup> Ibid.

<sup>366</sup> Ibid at 122.

relations was to be the internal federal government advocate for Indian First Nations interests. In addition, an independent office similar to that of an ombudsman was to be created after federal-Indian First Nation negotiations to serve as a monitoring and reporting body to Parliament regarding the discharge by the federal government of its obligations to Indian First Nations. Also, a federally funded advocacy office was recommended to permit Indian First Nations adequately to represent their interests in disputes concerning their rights.

Indian moneys management by DIAND came in for sharp criticism by the Penner Committee. In 1980, the Auditor General had been unable to audit these accounts because of the difficulty of valuing the opening balances after so many years of DIAND management. The Penner Committee cited extracts from a study it commissioned of these accounts to demonstrate why these opening balances are problematical:

"[the Pacey historical study] documents innumerable frauds and abuses; excessive commissions; disbursements for purposes which do not appear to relate properly to the purpose of the trust; sales with parties who were clearly involved in gross conflicts of interest; and every other form of impropriety available to an irresponsible trustee. The opening balances with which this following study deals are the amounts left over after this sort of mismanagement.<sup>367</sup>

DIAND managers were reported to be confused about the DIAND role: whether in its dual capacity of program manager and trust fund manager it was "to seek economic and social gains for Indian people or... simply distribute these funds equitably to native peoples as they pursue their own objectives."<sup>368</sup> The Penner Committee therefore recommended that DIAND Indian Moneys revenue trust funds<sup>369</sup> be transferred directly to the individual Indian First Nation concerned. Capital moneys trust funds<sup>370</sup> were recommended to be transferred to the trust management system designated by the individual Indian First Nation concerned.

#### (vii) New Institutions Proposed

By way of summary, it is perhaps useful to review the new or altered institutions that would have resulted from implementation of the Penner Report. Aside from the Indian First Nation

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<sup>367</sup> Ibid at 127.

<sup>368</sup> Ibid.

<sup>369</sup> Those derived from the rental or leasing of band lands, from selling renewable resources and (such as crops) and from interest earned on money held in capital and revenue accounts: Lands, Revenues and Trusts Review, supra note 1 at 36.

<sup>370</sup> Those derived from the sale of band lands or capital assets, including (according to federal government interpretation) payments for non-renewable resources such as oil and gas, timber, minerals and sand and gravel extracted from reserve lands: ibid.

governments, a number of bodies would have been created at the federal level:

- Ministry of State for Indian First Nations Relationships to promote the interests of Indian First Nations, funding their governments, economic development and community infrastructure improvements;
- a jointly constituted recognition panel;
- a jointly appointed secretariat as a neutral forum for federal-Indian First Nation negotiations;
- a jointly designed tribunal for settling disputes between Indian First Nation and other governments;
- a negotiated monitoring and reporting body to Parliament regarding the discharge by the federal government of its obligations to Indian First Nations;
- a federally funded advocacy office to permit Indian First Nations adequately to represent their interests in disputes concerning their rights;
- a new land and related claims agency;
- Indian financial institutions to manage capital moneys trust funds (where the Indian First Nation does not use a private trust company).

In addition, the Committee recommended a five year phase-out period for Indian programs delivered by the existing Department of Indian Affairs, with the successor department to have responsibility only for northern development. There was little discussion of what would happen to bands that chose not to seek recognition as a self-governing Indian First Nation beyond calling for "special funding for development and training" on the assumption that the lack of trained staff would be the only reason not to proceed with seeking recognition.<sup>371</sup> In such cases, the Committee called for the contractual delivery of services to such bands by tribal councils, an Indian First Nation government, private enterprise or with DIAND.

### **(3) Bill C-52 of 1984<sup>372</sup>**

#### **(i) Federal Government Response to the Penner Report**

The official response of the federal government to the Penner Report was delivered in

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<sup>371</sup> The Penner Report, *supra* note 17 at 101.

<sup>372</sup> An Act relating to self-government for Indian Nations. It was introduced for first reading in the House of Commons on June 27, 1984 by the Minister of Indian Affairs, the Hon. John Munro.

March 1984 and showed an unwillingness to acknowledge an inherent Aboriginal right to self-government of the type proposed in the Penner Report, noting that "this matter can only be resolved through agreement with Provincial Governments in the context of ongoing constitutional discussions involving First Ministers' conferences."<sup>373</sup> The government response was short (7 pages) and written in a way that avoided outright rejection of the Penner Report. The language used and the emphasis on certain aspects of the proposals indicates, not surprisingly, that the federal government perspective on the many matters covered in the Penner Report was far different from that of the Penner Committee members.

In its "General Commentary", for example, the federal response notes that the Penner Report called for a new relationship that would allow "Indian First Nations and their governments... to set their own course within Canada to the maximum extent possible."<sup>374</sup> Thus the federal response focused indirectly on jurisdictional limits, whereas the Penner Report had focused instead on empowering and assisting Indian First Nation governments to attain their proper stature within Canada. The issue of limits to powers was therefore to be the subject of negotiations, but with a presumption of a wide scope to inherent Indian First Nation government powers.

Moreover, the federal response emphasized Indian needs rather than rights (breaking the "dependency cycle"), stressed the importance of cultural rather than political integrity ("cultural heritage and integrity of Indian First Nations"), and avoided the issue of present and immediately actionable self-government rights by focusing on the past ("Indian communities were historically self-governing").<sup>375</sup> In this context, the government response was able to agree with the Penner Committee recommendation, however, that it should not adopt either an incremental approach to Indian Act amendments or a band-based subject-matter opt-in approach of the type proposed by DIAND in 1982.<sup>376</sup>

The most important point of difference between the Penner Report and the government response involved the nature of provincial participation in Indian self-government initiatives. Unlike the Penner Committee approach, which called for a federal jurisdictional ousting of the provinces from all Indian matters, the federal government stressed the need to consider the provincial perspective:

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<sup>373</sup> Response of the Government to the Report of the Special Committee on Indian Self-Government (Indian and Northern Affairs Canada, March 5, 1984) at 2.

<sup>374</sup> Ibid at 1.

<sup>375</sup> Ibid.

<sup>376</sup> Nonetheless, the federal government has subsequently done both: the Indian Act was amended in 1985 regarding membership and again in 1988 regarding band taxation powers; and the subject matter opt-in approach was revived through the Indian Act Alternatives policy and the drafting of legislation to cover Indian monies, forest management and lands. The latter is still proceeding at the time of writing.

The Government, therefore, is prepared to acknowledge that effective movement toward self-government will require substantial restructuring of the current relationship between Indian people and the Government of Canada. Changes are clearly needed. However, it is important for us to recognize that any change in the relationship will affect not only the Federal Government and Indian peoples but also Provincial Governments and others.<sup>377</sup>

Thus, the federal government proposed to leave the constitutional aspects of the Penner Report to the ongoing series of federal/provincial/Aboriginal first ministers' meetings and to concentrate on the other aspects: general Indian self-government framework legislation; related legislative proposals such as the 1985 re-instatement amendments to the Indian Act;<sup>378</sup> and improvements under existing legislation such as the subsequently announced community based self-government policy,<sup>379</sup> alternative funding arrangements<sup>380</sup> and joint policy-making initiatives.<sup>381</sup>

Moreover, throughout the government response the emphasis is on bilateral and tripartite consultations rather than on unilateral federal action in the many areas highlighted by the Penner Report. Thus, despite the strong message of the Penner Report, the federal government seemed to be saying that it was more or less "business as usual" regarding Indian self-government and that a slower, more cautious tripartite process would be followed "in concert with Indian First Nations and in consultation with the provinces."<sup>382</sup>

#### (ii) Bill C-52

Bill C-52, An Act relating to self-government for Indian Nations, followed that same year and was characterized as the self-government framework legislation called for by the Penner Committee recommendations.<sup>383</sup> It was largely in keeping with the tenor of the initial government response described above. One of the most striking features of the Bill was its length and detail (65 sections) in which Indian Nation powers were defined precisely and narrowly. Also of significance was the fact that it used the term "Indian Nations" rather than "Indian First Nations." Perhaps this was in response to what was then considered to be the politically charged nature of the claim to inherency implied by the term "First Nation." Significantly, in the preamble to the Bill, Indian Nations were ambiguously described as having been self-governing in the past ("were

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<sup>377</sup> Ibid.

<sup>378</sup> Ibid at 6.

<sup>379</sup> Ibid at 7 where the response refers to "the importance of seeking concrete results at the community level."

<sup>380</sup> Ibid where the response refers to future consultations to "ease current administrative constraints."

<sup>381</sup> Ibid.

<sup>382</sup> Ibid at 2.

<sup>383</sup> Ibid.

self-governing"), but with no reference to their current capacity for self-government.

In short, while the Penner Committee had called for a federal recognition act - which in its view would have been relatively straightforward and brief, since Indian First Nations in its view already existed in embryo with a potentially full panoply of inherent powers - what was provided by the federal government was a detailed act that reads more like enabling legislation than it does a recognition act. It appears on a close reading to delegate powers instead of recognizing them and continued to permit a considerable degree of oversight including disallowance powers as under the current Indian Act. In addition, the source of Indian Nation power was never stated. In retrospect, it seems clear that despite its recognition language and format, Bill C-52 attempted to skirt the line between true recognition and delegated authority in a way that left many unconvinced that it was true recognition legislation.

To be recognized under Bill C-52 an Indian Nation had to meet certain criteria in a written Indian Nation constitution setting out its membership code and procedures for appeals, accountability, protection of individual rights, independent review of executive decisions for fairness etc. For example, the membership code would have been required to conform to the Charter and to all international human rights covenants to which Canada is a signatory. This condition would likely have forced Indian Act bands to open up their membership considerably since the International Covenant on Civil and Political Rights under which the Lovelace Case was decided against Canada would have applied.<sup>384</sup> Similarly, section 15 of the Charter in the context of which the Corbiere Case<sup>385</sup> is proceeding would also have forced bands that may have wished to restrict membership to be more inclusive.

As mentioned above, Bill C-52 does not appear to be unalloyed recognition legislation. In the first place, the process proposed was skewed in favour of continuing federal control. Recognition would have been accorded by a "recognition panel," all of whose seven members would be named by the Governor in Council on the recommendation of the Minister of Indian Affairs, subject to the requirement to consult with Indian representatives and to appoint three Indians. The chairman, however, would be appointed by the Governor in Council. Moreover, Bill C-52 gave the Governor in Council power to set additional recognition criteria that would subject applicant bands to minimum population size limits, governing how and by whom the band referendum for recognition would be held, establishing criteria that would reduce the discretion of the recognition panel concerning when it might judge the recognition criteria to have been met, and restricting the taxation and enforcement powers of recognized Indian Nation governments.

In this same vein, the Governor in Council could prescribe "criteria relating to the possession of a land base and evidence of viability in terms of population and economic potential." Thus, the federal government could, it seems, have restricted the exercise of self-government

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<sup>384</sup> See note 84, supra.

<sup>385</sup> Supra note 310.

under Bill C-52 to larger, more economically developed groups on a defined land base. This seems in retrospect to parallel in some respects the former Indian Act section 83 requirement that bands be at an "advanced stage of development" before being delegated additional powers of self-government. Moreover, despite the fact that the recognition panel was to be a court of record, any recognition order could have been disallowed by the Governor in Council within six months of having been made. There were no criteria for setting such an order aside and there was no appeal.

In the second place, it is not clear from a constitutional perspective what type of entity the federal government would have recognized under the proposed process. A recognized Indian Nation government under Bill C-52 would not have enjoyed a wide range of powers. Its recognized legislative powers were limited to education, local taxation, service charges, voting eligibility and procedures, membership applications, punishment for minor infractions, and ancillary matters. In the same way, an Indian Nation's recognized executive powers were limited to land management, establishing government institutions, community facilities and social services, economic development, educational facilities, and ancillary matters. These lists are not very comprehensive. Additional powers could have been acquired through negotiated agreements with the federal and provincial governments. These would clearly have been delegated federal or provincial powers, however.

Indian Nation laws would have been subject to the Charter and international human rights instruments signed by Canada and could have been disallowed by the Governor in Council in any event just as band by-laws under the Indian Act may be disallowed. There were no criteria for disallowance and no appeals. Furthermore, the Indian Act would have ceased to apply absolutely to recognized Indian Nations only regarding sections 32 & 33 [sale and barter of produce in the prairies] and 88 [provincial laws of general application]. Otherwise, the Act would have continued to apply, as would federal and provincial laws except to the extent of inconsistency with Indian Nation constitutions, agreements regarding additional powers, treaties etc under normal federal paramountcy rules. The status provisions of the Indian Act would have continued to apply in any event, thereby allowing the federal government to control indirectly the potential membership of any Indian Nations it chose to recognize. In addition, Indian lands would have continued to be inalienable, and Indian Nation governments would have been subject to annual reporting requirements regarding their funding.

Bill C-52 was not what the Penner Report had called for, although there were many features such as the explicit recognition criteria and the provisions for a recognition panel that may be worth retaining in modified form in any future recognition legislation.<sup>386</sup> The Penner Committee had called for a new relationship based on rough equality between the federal government and the new Indian First Nation governments it proposed- what it got in response was something less than this. Richard Bartlett comments in this regard that:

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<sup>386</sup> Recognition criteria will be discussed in more detail in Part III in the section entitled "Indian Status and Band Membership."

The Bill did not contemplate the conferment of self-government on Indian communities. Rather, it represented an elaboration of section 60 of the Indian Act [land management] - that is, the conferment of powers of management under federal superintendence and control - a transfer of the junior bureaucracy from the Department of Indian Affairs to the bands.

Substantial powers might be obtained, but only by "agreement" with the Minister and with the approval of the Governor in Council and "subject to such limitations as are set out in the agreement." Moreover any laws made pursuant to an agreement were subject to disallowance by the Governor in Council.<sup>387</sup>

Bill C-52 died on the order paper in 1984 when Parliament was dissolved and was not revived when Parliament reconvened.

#### (4) Cree-Naskapi (of Québec) Act<sup>388</sup>

This legislation arose out of the first modern land claims agreements and treaties, the James Bay and Northern Québec Agreement of 1975<sup>389</sup> (JBNQA) and the Northeastern Québec Agreement of 1978<sup>390</sup> (NEQA).<sup>391</sup> By these agreements, vast tracts of land were ceded to the province of Québec, extinguishing Cree and Naskapi Aboriginal title to them. Three categories of land were created over which Cree and Naskapi people were to have differing title and interests and descending degrees of access to and control over resources. The self-government regime is provided for in the land claims agreements, but in the vaguest terms as the provisions refer to

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<sup>387</sup> Bartlett, The Indian Act, *supra* note 93 at 33.

<sup>388</sup> S.C. 1984, c. 46. The summary of these complex agreements and of the Cree-Naskapi (of Québec) Act is drawn from the following sources: Evelyn J. Peters, "Federal and Provincial Responsibilities for the Cree, Naskapi and Inuit Under the James Bay and Northern Québec and the Northeastern Québec Agreements," Aboriginal Peoples and Government Responsibility, D. Hawkes ed. (Ottawa: Carleton University Press, 1989) 173-242; Evelyn J. Peters, Aboriginal Self-Government Arrangements in Canada, (Aboriginal Peoples and Constitutional Reform, Kingston: Institute of Intergovernmental Relations, Queen's University, 1987); Richard Bartlett, Subjugation, Self-Management and Self-Government, *supra* note 90; Wendy Moss, "The Implementation of the James Bay and Northern Québec Agreement," Aboriginal Peoples and the Law, B. Morse ed. (Ottawa: Carleton University Press, 2nd ed. 1989) 684-694; Frank Cassidy and Robert Bish, Indian Government: Its Meaning in Practice (Victoria: Morriss Printing Company, 1989).

<sup>389</sup> James Bay and Northern Québec Native Claims Settlement Act, S.C. 1976-77, c. 32.

<sup>390</sup> Ibid, n. 5.

<sup>391</sup> Given that the land settlement provisions are essentially identical, subsequent references shall be to the JBNQA: James Bay and Northern Québec Agreement and Complementary Agreements, (Québec: Les Publications du Québec, 1991).

"special legislation concerning local government."<sup>392</sup> The self-government legislation is therefore largely a function of the land claims settlement regime and is interwoven with it.

Category 1 lands refer to the lands on which the eight Cree and one Naskapi communities are located (a total population of over 11,000 people). These lands have been set aside for their "exclusive use and benefit."<sup>393</sup> This category is sub-divided into Category 1A (Cree) and 1A-N (Naskapi) and 1B (Cree) and 1B-N (Naskapi) lands, with "bare ownership"<sup>394</sup> (underlying title) of Category 1A and 1A-N lands in Québec. Unlike the situation obtaining on Indian reserves elsewhere (where the lands are held in trust for them but not owned by the bands themselves), Category 1A and 1A-N land is owned in a "proprietary sense" by provincially incorporated band corporations. To this extent, they belong to the corporate entities although, as mentioned, ultimate title is in the province.

However, "administration, management and control" is vested in Canada so as to ensure continuing federal jurisdiction.<sup>395</sup> Category 1A and 1A-N lands can only be ceded to the province of Québec and then only in accordance with procedures similar to those obtaining with respect to Indian Act land surrenders.<sup>396</sup> In this vein, if the lands are disposed of in any way to a non-native person for a period in excess of five years, they will revert to provincial jurisdiction.<sup>397</sup> For practical purposes, category 1 and 1A-N lands are, like reserve lands elsewhere, under federal jurisdiction and (for practical purposes) inalienable to all but Indian persons.

Category 1A and 1A-N lands are governed by the incorporated bands through their councils under the Cree-Naskapi (of Québec) Act. Category 1B and 1B-N lands, on the other hand, are under provincial jurisdiction and are managed by provincial municipal corporations composed exclusively of Cree and Naskapi people.<sup>398</sup> Thus, all Category 1 lands are governed by two sets of corporate entities. Since the Cree and Naskapi peoples all live on Category 1A and 1A-N lands respectively, the membership of the 1B and 1B-N municipal corporations is the same as the 1A and 1A-N band corporations. These two sets of corporations are the successor bodies to the Indian Act band councils that preceded them.

Category 2 lands are those immediately adjacent to category 1 lands and are governed in

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<sup>392</sup> JBNQA s. 9, NEQA s. 7.

<sup>393</sup> JBNQA, s. 5.1.2.

<sup>394</sup> Ibid, Cree-Naskapi (of Québec) Act, s. 109.

<sup>395</sup> JBNQA s. 5.1.2.

<sup>396</sup> Ibid, Cree-Naskapi (of Québec) Act, s. 142-49.

<sup>397</sup> JBNQA s. 5.1.13.

<sup>398</sup> JBNQA s 10.0.1.

the case of the Cree by the Cree Regional Zone Council whose six person board has three Cree members.<sup>399</sup> Although under provincial jurisdiction, the JBNQA and NEQA agreements reserve to the Cree and Naskapi peoples some exclusive harvesting rights as well as the right to participate in the overall management of harvesting, tourism and forestry.<sup>400</sup> Category 3 lands are also under provincial jurisdiction, being public lands, but give some exclusive trapping rights to the Cree and Naskapi as well as the right to participate in decisions regarding the administration and future development of the land.<sup>401</sup>

Cree and Naskapi resource management powers even on Category 1 lands are not extensive. For example, existing mineral interests as well as seashore, beds and shores of rivers and lakes are specifically excluded from Category 1 lands no matter where situated.<sup>402</sup> Moreover, subsurface and forestry jurisdiction is in the province.<sup>403</sup> Thus mineral extraction and timber cutting must conform to provincial regulations and are subject to provincial permits. In the same way, Cree and Naskapi wildlife management by-laws are subject to federal disallowance and to quotas set by these governments.<sup>404</sup> Category 1 lands are also subject to federal and provincial expropriation.<sup>405</sup> Even the use of gravel for personal use or for earthworks etc. is subject to provincial license.<sup>406</sup> Although the province must obtain community consent and provide compensation to communities where it wishes to exploit subsurface resources, it can nonetheless impose easements for these and other purposes including infrastructure for resource development and transmission lines.<sup>407</sup>

It is the category 1A lands that are governed by the Indian self-government institutions referred to in the Cree-Naskapi Act. Unlike Indian Act bands on reserves, however, on the category 1A lands each of the nine Cree and Naskapi bands is provincially incorporated, thereby enjoying the capacity, rights, powers and privileges of a natural person, subject only to the limits in the provisions in the land claims agreements. As a result, the Indian Act predecessor bands have

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<sup>399</sup> JBNQA s. 11B.0.2.

<sup>400</sup> JBNQA s. 24.

<sup>401</sup> Ibid.

<sup>402</sup> JBNQA s. 5.1.2.

<sup>403</sup> JBNQA s 5.1.10.

<sup>404</sup> Cree-Naskapi (of Québec) Act s. 48 (5), JBNQA s. 24.5.1.

<sup>405</sup> JBNQA s. 5.1.8., Cree-Naskapi (of Québec) Act, ss. 118-129.

<sup>406</sup> JBNQA s. 5.1.10.

<sup>407</sup> JBNQA s. 5.1.7.

ceased to exist.<sup>408</sup> Thus bands as corporations have the legal status to enter into contracts, to sue and be sued etc. as do American tribes under the Indian Reorganization Act.<sup>409</sup> Unlike tribes under the American legislation, though, bands do not draw up constitutions setting out their goals and powers. Rather, the bands operate pursuant to their objects as set out in the Act:

- to act as local government;
- to use and administer band lands and resources;
- to control the disposition of land rights and interests;
- to regulate building use;
- to use and administer band moneys and assets;
- to promote the general welfare of band members;
- to set up and administer band services, programs and projects;
- to promote and preserve Cree or Naskapi culture, values and traditions.<sup>410</sup>

The membership of the Cree or Naskapi bands is composed of the beneficiaries of the JBNQA and NEQA. This is a wider group than Indian Act band members and includes Cree or Naskapi persons ordinarily resident in the territory, those of Cree or Naskapi ancestry recognized by the community as a member or the adopted child of such persons, and, after the coming into force of the agreements, their descendants and adopted minor children.<sup>411</sup> Communities may at any time direct the addition to their membership of any person born in the territory or ordinarily resident in the territory, or any person who was not registered earlier "through inadvertence or otherwise."<sup>412</sup> Thus, communities have continuing control of this aspect of their membership in the same way as bands under the Indian Act that have taken control of their membership through band membership codes.

The Local Enrolment Committees and Enrolment Commission responsible for posting the initial membership lists have since 1977 been replaced by the Secretary General of the Registre de la Population du Québec for purposes of maintaining, adding to or deleting from the Cree and Naskapi Registers.<sup>413</sup> Appeals are made to a Québec Native Appeals Board (a provincial court judge).<sup>414</sup> The Indian Act status provisions continue to apply.<sup>415</sup> However, since the JBNQA and

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<sup>408</sup> Cree Naskapi (of Québec) Act, ss 12-15.

<sup>409</sup> See note 27 *supra*.

<sup>410</sup> Cree-Naskapi (of Québec) Act, s. 21.

<sup>411</sup> JBNQA ss. 3.2.1-3.2.9.

<sup>412</sup> JBNQA s. 3.2.3.

<sup>413</sup> JBNQA s. 3.5.3.

<sup>414</sup> JBNQA s. 3.4.

<sup>415</sup> Cree-Naskapi (of Québec) Act s. 5.

NEQA beneficiaries and band members are a broader group than Indian Act Indians, Indians who are non-Indian Act beneficiaries may reside on Category 1A and 1A-N lands<sup>416</sup> and be admitted to band membership. Non-Indian Act band members, however, do not have access to the exemptions from tax and seizure provided in the Cree-Naskapi (of Québec) Act.

A band must operate through an elected council which has power to pass by-laws in certain areas.<sup>417</sup> One of those areas is with regard to its own structure and procedures. This flexibility allows bands to design procedures of local government more in keeping with local traditions or practices. This is not unlike the ability of Indian Act bands to operate their band councils according to custom. Cree and Naskapi band councils are subject to legislated guidelines regarding meetings, procedures etc. as set out in the Cree-Naskapi Act<sup>418</sup> much as bands under the Indian Act.

Cree and Naskapi band law making powers are similar to, but broader than, those found in the Indian Act. They are more like the kinds of powers a rural municipality might have (being specifically expressed as referring to "by-laws of a local nature"<sup>419</sup>) and are heavily oriented towards land use and management. Some of these by-law powers are:

- access and residence on band lands;
- land zoning and land use planning;
- regulation of buildings and structures;
- local band administration and internal management;
- public health and hygiene;
- parks and recreation;
- environmental protection and prevention of pollution;
- public order and safety;
- roads and traffic regulation;
- business operations;
- alcohol prohibition;<sup>420</sup>
- local taxation (but pursuant to Governor-in-Council regulations);
- local expropriation for community purposes (but pursuant to Governor-in-Council regulations);
- regulation of harvesting (but subject to ministerial disallowance);

By-laws apply to all persons on category 1 and 1A-N lands. Some of the Cree and

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<sup>416</sup> e.g. JBNQA s. 9.0.3., Cree-Naskapi (of Québec) Act, s. 103 (1).

<sup>417</sup> Cree-Naskapi (of Québec) Act, s.26.

<sup>418</sup> Ibid, ss 30-44.

<sup>419</sup> Cree-Naskapi (of Québec) Act, s. 45.

<sup>420</sup> Ibid, ss 45-48.

Naskapi by-laws must be approved by the band itself and not just the band council (e.g. harvesting). This is analogous to the situation under the Indian Act for bands elsewhere in Canada regarding certain matters. Copies of all by-laws must be forwarded to the Minister of Indian Affairs.<sup>421</sup> Unlike the situation under the Indian Act, however, there is no general ministerial power of disallowance.

The band corporation is accountable to band members for its financial management, but the Minister has the power to inspect financial records and to appoint an auditor if the band has not done so.<sup>422</sup> In addition, within four months of the end of each fiscal year the band auditor must send an audited copy of the band's financial statement to the Minister.<sup>423</sup> In the same vein, if the Minister forms the opinion that the band financial affairs are in serious disorder, he may appoint an administrator until matters are rectified.<sup>424</sup>

Cree band by-law powers on Category 1A lands are supplemented to some extent by those of the other bodies established under the JBNQA. For example, both the Cree Regional Board of Health Services and Social Services and the Cree School Board operate under delegated provincial authority and basically administer provincial programs in culturally appropriate ways. Naskapi services are delivered directly by Québec. The Cree argue that under the JBNQA the federal government has continuing responsibilities to them in these areas and that it cannot abandon the field entirely to the province. The federal view is to the contrary, namely that it need no longer participate in the direct delivery of services but need only contribute financially to their delivery by the province.<sup>425</sup>

The Grand Council of the Cree is the political regional delegate of the band councils and is the body that harmonizes the overall political views of the eight Cree communities. The Cree Regional Authority, on the other hand, is a corporation that operates as the administrative body for the Crees of the region with powers to appoint persons to other bodies set up under the JBNQA, to consent to various arrangements and procedures under the JBNQA on behalf of the Cree people and to coordinate and administer band programs with band consent.

Funding for self-government purposes is provided by DIAND grants negotiated on a five year basis, by allocations from federal programs, from funds received from the Board of Compensation set up under the JBNQA and NEQA to manage moneys received in compensation for Cree and Naskapi lands and by the power of the band corporations to levy taxes for "local

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<sup>421</sup> Cree-Naskapi (of Québec) Act, s. 53(3).

<sup>422</sup> Ibid., ss 91, 93.

<sup>423</sup> Ibid., s. 94.

<sup>424</sup> Ibid., s. 100.

<sup>425</sup> Cassidy and Bish, Indian Government, *supra* note 388 at 149.

purposes.<sup>426</sup> There have been a number of problems associated with DIAND funding that have been described in the reports of the Cree Naskapi Commission.<sup>427</sup> The band taxation power is limited to interests in 1A and 1A-N lands and upon all occupants, Indian or otherwise, of Category 1 lands. However, these taxation by-laws may not include income taxes nor resource development taxes or royalties and are tantamount to municipal property taxes. The taxation by-laws must also conform to any Governor-in-Council regulations.

Another important body is the Cree-Naskapi Commission established under the Act to monitor the implementation of the Cree-Naskapi (of Québec) Act.<sup>428</sup> Its mandate is to prepare reports every two years for the Minister (who then tables them in Parliament) and to receive and investigate any inquiries or complaints made regarding implementation and to report on them with recommendations.<sup>429</sup> Problems with the implementation of the Cree-Naskapi (of Québec) Act must be distinguished from the well-known and ongoing problems associated with the implementation of the JBNQA and NEQA such as those surrounding the interpretation of many of the open-ended provisions of those agreements in the area of health services, for example,<sup>430</sup> as well as those concerning the James Bay II hydroelectric project and the overall constitutional and legal status of the JBNQA and NEQA.<sup>431</sup>

The Cree-Naskapi Commission has now issued four reports on the implementation of the Cree-Naskapi (of Québec) Act and has noted a number of recurring implementation problems aside from the perennial funding issue. Training and staff development, for example, have been problems since the outset due to the challenge posed to the "extensive rules and procedures of the Act and the expectation that Cree personnel will follow accepted administrative practices and

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<sup>426</sup> Cree-Naskapi (of Québec) Act, s. 45(1)(h).

<sup>427</sup> The disagreements over funding began almost immediately and have been described in all of the reports. The basic problem lies with the fact that the original Statement of Understanding of Principal Points Agreed to by the Cree-Naskapi (of Québec) Act Implementation Working Group arrived at in 1984 was never approved by Treasury Board and is therefore not seen by the federal government as binding. It provides for an updating of the "base year" funding formula for operations and maintenance in 1989 and every five years thereafter. The formula has not been updated. The Cree-Naskapi Commission reported again in 1994 noting that: "the Crees are left with a funding formula that is outdated and does not meet their present needs." Report of the Cree-Naskapi Commission 1994, at 11.

<sup>428</sup> Cree-Naskapi (of Québec) Act, s. 157.

<sup>429</sup> Ibid, s. 165.

<sup>430</sup> Cassidy and Bish, Indian Government, supra note 388 at 148-152.

<sup>431</sup> In its 1991 report, the Cree-Naskapi Commission drew attention to a number of problems with the implementation of the JBNQA, even though such issues are technically beyond its mandate: Report of the Cree-Naskapi Commission 1991 at 45-56. According to the report, the federal government does not always accord to the JBNQA the status of a constitutionally protected treaty, and often treats the agreement as a mere contractual arrangement. The Commission also notes a general failure of the federal government to honour its fiduciary obligation in the context of the JBNQA.

procedures.<sup>432</sup> As a result, Cree band governments therefore sometimes operate outside the ambit of the Act in much the same way as Indian bands in other parts of Canada sometimes follow procedures that are not sanctioned under the Indian Act. In this regard, the Commission has called for additional funding for training and for amendments to the Act to simplify procedures. In the same vein, the Commission has repeatedly called for a new funding formula for Cree government operations and for maintenance of the community infrastructure as well as for funds for the complex land registry system called for by the Act.

The Commission has also called for movement by both the federal and provincial governments on justice administration since the Itinerant Court (the fly-in provincial court) that serves the Cree communities is inadequate for its needs. In addition, there is no Québec superior court within hundreds of miles of Cree territory, thereby making ordinary civil actions extremely difficult. In this respect, Cree communities are similar to other Indian communities in many respects and have been calling for control of their own justice processes. In terms of policing, which is also under provincial jurisdiction, the Cree have been calling for more and better trained Cree police officers with powers equal to those of their non-Cree counterparts. The Naskapi, on the other hand, have no police of their own and thus have no effective way to police themselves or to enforce their community by-laws.

Both the Cree and Naskapi have called attention to their growing populations and the fact that they have serious housing and infrastructure needs for which they receive inadequate funding from DIAND. They have also called for amendments to the Cree-Naskapi (of Québec) Act: to reduce the size of the band membership quorums required on by-law approval in some areas; for removal of the requirement that only status Indians can claim the taxation exemption; for extension of that exemption to Indian owned corporate entities; for relaxing of the requirement that audited financial statements be sent to the Minister within four months of the end of the fiscal year; for relaxation of the exemption against seizure on category 1A and 1A-N lands so as to permit individuals to waive their exemptions in order to more easily obtain bank loans and mortgages; and for band control of "trade and commerce" within their communities so that all of the local economy may be Cree and Naskapi controlled.<sup>433</sup>

In order to facilitate amendments the Cree and Naskapi have both called upon the Cree-Naskapi Commission to undertake a complete review of the Cree-Naskapi (of Québec) Act.<sup>434</sup> It is interesting to note the inability of the Cree and Naskapi peoples to amend their own self-government vehicle, the Cree-Naskapi (of Québec) Act, without the assistance of Parliament - an outside body. It is ironic that in this sense the Cree and Naskapi are in a situation analogous to that of Canada prior to 1982 when it had to go to a foreign legislature, the British Parliament, to

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<sup>432</sup> Report of the Cree-Naskapi Commission 1991, at 21.

<sup>433</sup> Report of the Cree-Naskapi Commission 1991, at 57-60.

<sup>434</sup> Report of the Cree-Naskapi Commission 1994, at 13.

amend the British North America Act to respond to and correct problems in its own self-governing system.

In summary, the Cree-Naskapi (of Québec) Act replaces the Indian Act and reduces thereby federal power over the day to day affairs of the Cree and Naskapi communities. It does not eliminate them, however, as there exist a number of areas that the Minister of Indian Affairs may regulate including: local taxation;<sup>435</sup> harvesting by-laws;<sup>436</sup> elections;<sup>437</sup> long term borrowing;<sup>438</sup> land registry matters;<sup>439</sup> band expropriations;<sup>440</sup> and punishment for infringing local by-laws.<sup>441</sup> Both federal and provincial laws of general application apply on Cree-Naskapi lands, but only to the extent they are not ousted by competing provisions in the land claims agreements, or the competing provisions, regulations and by-laws of the Cree-Naskapi Act.<sup>442</sup> The scheme therefore replaces the delegated federal authority under the Indian Act with a different species of delegated federal authority.

Aside from the retention of the Indian Act status provisions, a number of protections currently available under the Indian Act have been retained for the Cree and Naskapi peoples covered by this legislation. For example, the interest of a Cree or Naskapi person (who is also an "Indian" as defined in the Indian Act) in 1A and 1A-N lands and any personal property situated on it is exempt from taxation<sup>443</sup> or seizure for debt etc.<sup>444</sup> This, coupled with the fact that many of the powers and privileges available to "advanced" bands under the Indian Act have been referred to specifically and accorded to the Cree and Naskapi bands<sup>445</sup> demonstrate in a graphic way that the

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<sup>435</sup> Ibid, s. 45 (4).

<sup>436</sup> Ibid, s. 48 (5).

<sup>437</sup> Ibid, s. 66.

<sup>438</sup> Ibid, s. 98.

<sup>439</sup> Ibid, s. 151.

<sup>440</sup> Ibid, s. 156.

<sup>441</sup> Ibid, s. 198 (2).

<sup>442</sup> Ibid, s. 3.

<sup>443</sup> Ibid, ss 187-188.

<sup>444</sup> Ibid, ss. 189-193.

<sup>445</sup> JBNQA s. 9.0.1. notes that the proposed legislation must contain the following provisions:

- (c) powers of the band council, which shall include those powers under the existing sections 28(2), 81 and 83 of the Indian Act and all or most of the powers exercised by the Governor-in-Council under s. 73 of the Indian Act as well as certain non-governmental powers;

Cree-Naskapi (of Québec) Act is in most respects an updated version of the Indian Act rather than a real departure from it. This view is acknowledged, but not accepted completely, by the Cree-Naskapi Commission itself in its 1991 report.<sup>446</sup>

Thus, in conclusion it can readily be seen that Cree and Naskapi self-government powers under the Act might more accurately be described as powers of advanced self-management as opposed to self-government in the wider sense in which most First nations now use the term. In many ways their Indian Act predecessors shine through, indicating that the regime thereby established is one of Indian municipal government of the type that has always formed the heart of federal policy. In a submission to the Royal Commission on Aboriginal Peoples the Grand Council of the Crees (of Québec) agreed with this assessment, referring to the Cree-Naskapi (of Québec) Act as having transferred "certain Indian Act powers to local councils in the nine Cree nation communities, which constitute a 'municipal' form of local government accountable to the Cree people themselves."<sup>447</sup> Richard Bartlett supports this assessment:

The regime declared by the Agreements and the Cree-Naskapi Act may be a "landmark", as it has been described by Keith Penner. It appears to have strongly influenced the Indian Self-Government Bill [Bill C-52] and the Sechelt Indian Band Self-Government Act. The Act does not, however, confer "self-rule" or "self-government", except in the sense of self-management of a band's property and municipal government of the community.<sup>448</sup>

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<sup>446</sup> Supra note 433 at 61. In discussing the many problems associated with implementing the Act the Cree-Naskapi Commission draws up the following list of criticisms of the Cree-Naskapi (of Québec) Act:

That these problems are still so much a part of Cree and Naskapi life may suggest that the Crees and Naskapi do not benefit from the full promise of self-government. Indeed the presence of these problems may be indications that Cree and Naskapi expectations of self-government are not fully realizable under the present design and content of the Cree-Naskapi (of Québec) Act. Critics may argue that the Cree-Naskapi (of Québec) Act is nothing but a modern version of the Indian Act. The corporate design, the many rules and procedures, the absence of institutions such as policing and courts and the inability of the Cree and Naskapi to change the Act appear to make Cree-Naskapi governments simply versions of the Indian Act administrative bodies that exist in other Indian communities. Critics could argue further that the federal government's treatment of Cree and Naskapi aspirations and entitlements as part of their overall burden of Native responsibilities is a denial of the promise that the land claims agreements and the Cree-Naskapi (of Québec) Act establish new relationships with the federal government and new premises upon which the federal government's conduct towards Cree and Naskapi communities is to be guided.

In the long run, such suggestions are unfounded....

Such suggestions, however, also point to important realities which must be acknowledged.

<sup>447</sup> Presentation to the Royal Commission on Aboriginal Peoples by the Grand Council of the Crees (of Québec), Montréal, November 18, 1993, at 11. The Grand Council submission notes in addition that the imposition of non-Cree models and institutions meant that the Crees have never been able to negotiate "Cree" self-government as such, but "have tried to make the best of these institutions." Ibid at 14, n. 25.

<sup>448</sup> Bartlett, Subjugation, Self-Management, supra note 90 at 49.

### (5) The Sechelt Indian Band Self-Government Act<sup>449</sup>

The Sechelt band in British Columbia has self-government arrangements specifically tailored to its unique circumstances that, like those under the Cree-Naskapi (of Québec) Act, allow the band to exercise a higher degree of self-government than could be done under the Indian Act. These arrangements serve mainly to constitute the band and its lands as a specially empowered municipality and, in this sense, do not represent self-government of the type referred to in the Penner Report or in the various constitutional conferences of the 1980s and 1990s. John Taylor and Gary Paget note in this regard that "while the band has an unprecedented degree of local autonomy it most emphatically is not fully autonomous."<sup>450</sup>

The Sechelt Indian Band is the successor to the Indian Act Sechelt Band and has a population of around 700 with commercially valuable and resource rich property comprised of 2500 acres on 33 separate reserves not far from Vancouver. There are also several hundred non-Indian residents on Sechelt lands who now fall under band jurisdiction. The Sechelt Indian Band was established as a self-governing community by the 1986 Sechelt Indian Band Self-Government Act.<sup>451</sup> The membership of the successor band is to be the same as that of the Indian Act Sechelt band, with all rights to membership that may have existed prior to the successor band's adoption of a membership code to be protected.<sup>452</sup> In short, the Sechelt Indian Band membership code must respect the provisions of Bill C-31 of 1985 which restored Indian status and band membership rights to several classes of persons.

The Sechelt Indian Self-Government Act specifically states that it is not to derogate from any existing Aboriginal or treaty rights under section 35 of the Constitution Act, 1982. Thus, if self-government is ultimately found to be one of the rights protected in section 35, the Sechelt Indian Band will not be precluded from accessing them. There is no corresponding provision in the Cree-Naskapi (of Québec) Act or in the Indian Act.

Under the Sechelt Indian Band Self-Government Act the Sechelt Indian Band was constituted as the replacement to the Indian Act band<sup>453</sup> and vested with fee simple ownership of its

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<sup>449</sup> The summary of this legislation is drawn from the following sources: Evelyn J. Peters, Aboriginal Self-Government, *supra* note 388, 8-11; John Taylor, Gary Paget, "Federal/Provincial responsibility and the Sechelt," Aboriginal Peoples, *supra* note 388, 297-344; Richard Bartlett, Subjugation, *supra* note 90; Frank Cassidy, Robert Bish, Indian Government, *supra* note 388, 135-44.

<sup>450</sup> "Federal/Provincial Responsibility," Aboriginal Peoples, *ibid* at 313.

<sup>451</sup> S.C. 1986, c. 27.

<sup>452</sup> S. 10(2).

<sup>453</sup> S. 5.

reserve lands.<sup>454</sup> Although therefore "owned" by the Sechelt Indian Band, the Sechelt lands are nonetheless expressly stated to fall within Constitution Act, 1867 section 91(24) as "lands reserved for the Indians"<sup>455</sup> so as to preserve continuing federal legislative jurisdiction and to maintain the federal fiduciary obligation. Moreover, natural resources on Sechelt lands are nonetheless regulated by federal and provincial legislation: the federal Indian Oil and Gas Act and the Indian Reserves Mineral Resources Act; and the provincial British Columbia Indian Reserves Mineral Resources Act.<sup>456</sup>

The Sechelt Indian Band Self-Government Act also created the Sechelt Indian Government District<sup>457</sup> to have jurisdiction over Sechelt lands and to receive provincial municipal benefits and delegated provincial municipal powers under the authority of the subsequently enacted British Columbia Sechelt Indian Government District Enabling Act.<sup>458</sup> The Sechelt Indian Government District is the Sechelt Indian Band Council assuming a different name in order to exercise whatever provincial powers it receives. These provincial powers, of course, must fall within the categories of legislative powers that the Band is able to exercise under its Sechelt Indian Band Council law-making authority (which will be described below). This provincial Act also created "tax room" for the District Council by enabling the provincial authorities to suspend taxation of non-Indian residents on Sechelt lands so that they could be taxed by the District Council for the purpose of the services to be provided to them.<sup>459</sup>

In terms of finances and service delivery, the Sechelt Indian Band acquired the moneys held in trust for it by DIAND under the Indian Act<sup>460</sup> as well as the ability to enter into negotiated block finding arrangements with DIAND.<sup>461</sup> In terms of provincial revenues, the Band and the province have entered into what Taylor and Paget refer to as "a unique set of quid pro quo arrangements"<sup>462</sup> whereby the province withdrew from taxing non-Indians on Sechelt lands to allow the Sechelt Indian Government District to levy municipal property taxes on all residents on Sechelt lands, including (for the first time), Indians.

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<sup>454</sup> S. 23.

<sup>455</sup> S. 31.

<sup>456</sup> Ss. 39-41.

<sup>457</sup> S. 17.

<sup>458</sup> S.B.C. 1987, c. 27 as amended, ss. 3,4.

<sup>459</sup> Ibid, s. 5.

<sup>460</sup> S. 32.

<sup>461</sup> S. 33.

<sup>462</sup> "Federal/Provincial Responsibility," supra note 388 at 330.

Taxes are levied on the same basis as such taxes are levied in similar municipalities in the overall British Columbia Sunshine Coast Regional District. The proceeds are remitted by the Sechelt to the appropriate provincial government agency or department. In exchange for coming within the provincial tax structure, the Sechelt Indian Government District receives a variety of provincial municipal financial grants and other benefits. Sechelt social services are delivered in some cases by the Sechelt Indian Band and in others through an array of service delivery methods that often involve adjacent municipalities.<sup>463</sup>

Both the Sechelt Indian Band and the Sechelt Indian Government District are corporations and therefore able to exercise all the powers of a natural person including entering into contracts, suing and being sued and, importantly, holding, pledging or disposing of property - including the Sechelt lands.<sup>464</sup> The new entities, the Sechelt Indian Band and the Sechelt Indian Government District operate under delegated federal and provincial authority through a band constitution that must refer to the following matters:

- composition, tenure and terms of office of the Sechelt Indian Band Council;
- Council election procedures;
- Council procedures and processes;
- financial accountability to the band membership;
- band membership code;
- referenda rules and procedures;
- rules and procedures for disposing of Sechelt lands;
- Council legislative powers according to the classes set out in the Act;
- "any other matters relating to the government of the Band, its members, or Sechelt lands."<sup>465</sup>

The Constitution was declared in force following a band referendum (under the Indian Referendum Regulations) ratifying it and Governor in Council approval.<sup>466</sup> Amendments to the Constitution follow the same procedure.<sup>467</sup> There are no provisions in the Act for dissolving the Sechelt Indian Band and reverting to Indian Act control, although that is theoretically a possibility, since the legislative self-government arrangements are not constitutionally protected. Observing that this meant "perpetual vulnerability" the Union of British Columbia Indian Chiefs criticized the policy behind the Act shortly after its passage: "It is a creature of the senior level of government that

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<sup>463</sup> The structure of the Sechelt financing and service delivery is described in Taylor and Paget, ibid at 329-336.

<sup>464</sup> Ss. 6, 18.

<sup>465</sup> S. 10.

<sup>466</sup> S. 11.

<sup>467</sup> S. 12.

created it and it can be limited or destroyed by its creator with impunity."<sup>468</sup>

Federal laws of general application apply to the band members and the lands except where they conflict with the Sechelt Indian Band Self-Government Act.<sup>469</sup> In addition, the Indian Act applies to determine Indian status and to any other matter where it is not in conflict with the Sechelt Indian Band Self-Government Act, the band constitution, or any laws passed by the band under its law making powers.<sup>470</sup> Thus, the general taxation and seizure exemptions under that Act continue to apply to those Sechelt Indian Band members who are also status Indians.

Provincial laws of general application apply to band members subject to the terms of any treaty, the Sechelt Indian Band Self-Government Act, any other federal act, the band constitution or any band laws.<sup>471</sup> Thus, like the Cree and Naskapi under the Cree-Naskapi (of Quebec) Act and other Indian bands under section 88 of the Indian Act, the Sechelt Indian band is subject to this legislated extension of the effect of provincial laws.

Band law making powers are similar to, but much expanded versions of, band by-law powers under the Indian Act and focus to a great extent on land and resource management. In this respect they are not dissimilar to the by-law making powers enjoyed by Cree and Naskapi bands under the Cree-Naskapi (of Québec) Act. The Sechelt Indian Band Council law making powers include:

- access to and residence on Sechelt lands;
- zoning and land use;
- expropriation of interests in Sechelt lands "for community purposes;"
- taxation "for local purposes;"
- administration and management of band property;
- education of band members;
- social welfare services including "custody and placement of children of Band members;"
- health services;
- preservation and management of natural resources;
- preservation, management and control of fur-bearing animals, fish and game;
- public order and safety;
- road construction and maintenance and traffic regulation;
- operation of businesses, professions and trades;
- prohibition of intoxicants.<sup>472</sup>

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<sup>468</sup> February 20, 1987, cited in Cassidy and Bish, Indian Government, *supra* note 388 at 141.

<sup>469</sup> S. 37.

<sup>470</sup> Ss. 35, 36.

<sup>471</sup> S. 38.

<sup>472</sup> S. 14.

Unlike the Cree-Naskapi (of Québec) Act, however, band taxation laws need not conform to Governor in Council regulations, nor is there Ministerial disallowance of laws dealing with preservation, management and control of fur-bearing animals, fish and game.

Sechelt laws apply to all persons on Sechelt lands. As already mentioned, all persons are subject to taxation by the Sechelt District Council. To accommodate the views of the several hundred non-Indian residents on Sechelt land an advisory council has been established under the provincial Sechelt Indian Government District Enabling Act.<sup>473</sup> This council is not referred to in the federal Act. Its sole purpose is to enable non-Indian residents to have some input into Sechelt District Council decisions. The advisory council was established by provincial Order in Council in 1988 and calls for elections to it under provincial municipal law. The advisory council mandate is to help plan and estimate the costs of the service program for the Sechelt district, to recommend a servicing program and to receive and consider petitions regarding Sechelt District service delivery.

In short, it is plain that the province is concerned that non-Sechelt Indian Band members have an effective voice in certain Sechelt District matters. This assertion is supported by the fact that the Sechelt Indian Government District Enabling Act will only be in force for twenty years: section 6 provides for its repeal on June 30, 2006 unless the Lieutenant Governor in Council prescribes a continuation for a further period of time. This decision is to be made on the basis of a referendum to be held in the year 2004. Taylor and Paget comment as follows on this unusual provision:

Clearly, this clause commits the province and the band to review and evaluate the legislation after the benefit of 20 years of experience. In this sense, the province's approach is experimental. In particular, this gives the Province the opportunity to consider whether the interests of non-Indian occupiers are being looked after.<sup>474</sup>

The Sechelt Indian Band Self-Government Act offers more freedom to the Sechelt band than it could have obtained under the Indian Act. The Band has much broader powers of taxation as well as jurisdiction over child welfare and succession. Although restricted by federal and provincial regulations regarding resources, the Sechelt Indian Band also has greater jurisdiction over natural resources than a corresponding Indian Act band would have. Moreover, the open-textured language allowing for band laws on "matters related to the good government of the Band, its members or Sechelt lands"<sup>475</sup> may permit the future evolution of band law making powers over wider areas. There is no similar provision in the Indian Act. Importantly, there is no

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<sup>473</sup> Sechelt Indian Government District Enabling Act, S.B.C. 1987, c. 16 as amended, s. 2. The following description is from Taylor and Paget, "Federal/Provincial Responsibility," supra note 388 at 325-26.

<sup>474</sup> "Federal/Provincial Responsibility," ibid at 319.

<sup>475</sup> S. 14(1)(u).

general ministerial power of disallowing band laws in this Act. The Minister's powers are limited to advising the Governor in Council regarding the declaration in force of the Sechelt Indian Band Constitution and amendments to it<sup>476</sup> and to negotiating Sechelt Indian Band block funding.<sup>477</sup>

But this is not to say that the Sechelt Indian Band Self-Government Act provides a full range of self-governing powers to the Sechelt Indian Band. Richard Bartlett agrees, observing that in this regard that "the affirmation of provincial power over the lands, and the limited ambit of the power to tax, does not suggest that 'self-government' is a proper description."<sup>478</sup> As in the case of the Cree-Naskapi (of Québec) Act, he believes that "self-management" is the more appropriate term.<sup>479</sup> Nonetheless, Cassidy and Bish explain why it would be wrong to dismiss it or to think that it will not be used as a model for future self-government initiatives:

The positive aspects of the Sechelt initiative should not be obscured. The Sechelt Band has played a very significant role in determining and designing its relationship with the federal and provincial governments. Members of the band have not lost their rights as aboriginal people or as status Indians. The federal government's fiduciary obligations are maintained. The Sechelt government has become a much more comprehensive part of the federal system. It is no longer the anomaly that Indian Act bands are. It is not precariously and irregularly set in a framework that was designed only with other levels of government in mind. To the contrary, it is securely nested in between the federal and provincial governments. The relationship of the Sechelt government to its own members, non-Indians, the provincial government, and the federal government has been clearly worked out. Sechelt now has a fully operative status as a well-empowered federal and provincial municipality. The Sechelt model is an important model.<sup>480</sup>

#### (6) Community-Based Self-Government<sup>481</sup>

The community-based self-government (CBSG) process was announced in 1986 as one of

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<sup>476</sup> Ss 11, 12,

<sup>477</sup> S. 33.

<sup>478</sup> Subjugation, supra note 90 at 60.

<sup>479</sup> Ibid.

<sup>480</sup> Indian Government, supra note 388 at 143.

<sup>481</sup> The summary and analysis of the community-based self-government policy is based for the most part on the author's experience in the area of Aboriginal self-government, conversations with persons in the federal government who are or have been involved in self-government negotiations, on an official document prepared by the Department of Indian Affairs, "Community-Based Self-Government Negotiations," DIAND Background Document no. 2 for the Royal Commission on Aboriginal Peoples, and on a document prepared by Participating First Nations, "Negotiating Self-Government Agreements: The Experience of First Nations Involved in Self-Government Negotiations," (Meeting at Kingsclear, October 1, 1992).

two self-government tracks designed to create the new relationship between the federal government and Indian First Nations that the Penner Report had called for. The first track was the (then) ongoing series of first ministers' conferences (FMCs) on constitutionally entrenching an Aboriginal right to self-government. The second track had as its objective to provide "practical examples" of self-government as a transitional measure on the road to the type of full and constitutionally entrenched self-government that was under discussion at the FMCs.

The goal of CBSG negotiations is to develop flexible new arrangements that could be given effect through legislation developed for the particular community or communities concerned. Although not originally negotiated within this policy framework, the self-government arrangements under the Cree-Naskapi (of Québec) Act and the Sechelt Indian Self-Government Act are now cited by the federal government as examples of "regional-level" and community-level" self-government agreements respectively and as proof that "self-government can be negotiated successfully" as practical forms of government within Canada.<sup>482</sup> It is probably safe to assume that these are precisely the types of arrangements that the federal government intends will result from the CBSG process.

The CBSG process may be initiated by any Indian community on "lands reserved for the Indians" within the meaning of Constitution Act, 1867 section 91(24) (essentially Indian bands on reserves), or by any Indian or Inuit community holding land under a comprehensive claim agreement. Not all communities that may wish to initiate negotiations can be accommodated, however. Since 1988 federal policy is to limit the number of negotiations at any one time to fifteen, exclusive of those accompanying comprehensive claim settlements. Moreover, communities are selected for inclusion in the process on the basis of criteria imposed by the federal government that reflect not only the desire of the community concerned but also the needs of DIAND and its assessment of how that community is doing under current arrangements. In short, as with Bill C-52 of 1984, it appears as if the process for inclusion is weighted in favour of bands that might, in the Indian Act context, be described as having reached "an advanced stage of development"<sup>483</sup> as assessed by DIAND.<sup>484</sup>

There is no officially announced limit to the number of individual communities that may

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<sup>482</sup> DIAND, "Community-Based Self-Government, ibid at 5.

<sup>483</sup> This was the criterion for receiving additional by-law powers under section 83(1) of the Indian Act, R.S.C. 1970, c. I-6 as it read before it was amended to delete the "advanced band" requirement.

<sup>484</sup> DIAND, "Community-Based Self-Government, supra note 481 at 8:

The selection of proposals for negotiation is based on a number of criteria: the commitment of the community to develop new self-government arrangements, e.g., demonstrated community support; the quality of the community's proposal, e.g., level of detail; the overall record of the community in managing its affairs under existing authorities, e.g., the community's record of financial management; and, the practical experience that new self-government arrangements, based on the proposal, could provide for other communities in comparable circumstances.

come together for negotiation purposes since "community" and "community-based" are not defined.<sup>485</sup> Thus, prior to the recent cancellation of the CBSG process, a total of 44 Indian Act bands were involved in 14 CBSG negotiations. Negotiations with another band (Sawridge) had proceeded to the legislative drafting stage but had become stalled and may not proceed farther.<sup>486</sup> A further 29 bands were involved in six CBSG negotiations accompanying the negotiation of their comprehensive land claims, with an additional four bands (from the Council of Yukon Indians) having proceeded at the date of writing this paper to the stage of legislative drafting of their self-government arrangements.

The entire CBSG process is to occur in five stages: (1) development by the negotiating group or community of its framework proposal setting out in general terms what it wants to achieve through this process; (2) framework negotiations to set out respective positions in areas agreed upon for negotiation and a schedule and work plan; (3) substantive negotiations; (4) implementing legislation; and then, (5) actual implementation. All substantive negotiations must be conducted according to guidelines approved by cabinet in 1988, two years after the policy was originally announced. They are as follows:

- negotiations are without prejudice to Aboriginal and treaty rights (this also includes any self-government legislation resulting from the negotiations);
- the "special relationship" between the federal government and Indian people will continue (presumably this means the fiduciary relationship);
- negotiations and new arrangements will not alter the constitutional division of powers, but will be within the current Canadian constitutional framework;
- the involvement of the province will be required in areas that extend beyond the present reserve base or which involve areas where provincial legislation, regulations or standards are currently applicable;
- new arrangements must be compatible with the established principles, jurisdictions and institutions of government in Canada i.e. they must
- conform with the Charter,
- ensure political and financial accountability by the Indian government to its membership,
- recognize rights of redress for individuals;

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<sup>485</sup> Ibid at 11: "It is left up to the First Nations involved to decide how they want to organize themselves, whether individually or in groups, such as a tribal council, for the purposes of self-government arrangements."

<sup>486</sup> This latter negotiation has been complicated by the fact that the band (along with three others) is challenging the membership amendments in Bill C-31 of 1985 on the grounds they infringe their Aboriginal and treaty rights to control their own membership and that they infringe section 2(d) of the Charter: Twinn v. The Queen (F.C. Trial Div.).

- new financial arrangements to support self-government must be within current DIAND resource levels and be consistent with historic levels of funding provided to the Indian community concerned;
- any negotiated agreements require ratification by community membership and by cabinet;
- federal laws of general application continue to apply to the extent they do not conflict with the legislation giving effect to the new arrangements;
- provincial laws of general application continue to apply to the extent they do not conflict with the terms of any:
  - treaty,
  - the legislation giving effect to the new arrangements,
  - any other federal legislation, or
  - a law of the Indian community passed under the authority of its new arrangements;
- the population and territory over which the Indian government will exercise jurisdiction is subject to negotiations.<sup>487</sup>

While the federal government is careful to note that it has "no overall blueprint or model for each self-government negotiation" and will therefore develop its policy options "in response to concrete proposals" from negotiating communities, it is nonetheless clear from the guidelines that there can only be one result: a community or regional municipal model based on powers delegated from the two existing levels of government in Canada. As has been noted earlier, the municipal model of Indian self-government has been federal policy since the advent of the band council system. Perhaps the strongest modern affirmation of this policy is to be found in the Hawthorn Report of 1967.<sup>488</sup>

The areas that the federal government considers as essential to any new Indian government that will result from CBSG negotiations are:

- band legal status and capacity;
- structures and procedures of governance;
- membership;
- land and resource management;
- financial arrangements;
- application of the Indian Act;
- environmental assessment processes; and

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<sup>487</sup> DIAND, "Community-Based Self-Government, supra note 481 at 20-21.

<sup>488</sup> See text at notes 289-99 supra.

- development of an implementation plan.<sup>489</sup>

The other areas available for negotiation are referred to in the federal policy as "optional:"

- community infrastructure and public works;
- education;
- social and welfare matters;
- justice;
- licensing, regulation and operation of business;
- taxation for local purposes;
- public order and safety;
- health and hygiene;
- wildlife management;
- management of Indian monies;
- agriculture;
- protection and management of the environment;
- succession;
- culture;
- traffic and transportation;
- access to and residence on reserve.<sup>490</sup>

Although the federal policy is clear that the provinces will be invited to the bargaining table only upon the request of all parties, it is readily apparent that many areas cannot meaningfully be engaged without provincial participation. The apparent choice in the matter is therefore somewhat illusory. Justice administration has been a particularly prominent example. Despite the 1991 federal policy announcement of financial and technical support for local community justice pilot and demonstration projects, it has proven difficult, if not impossible, to get many of the negotiating communities to accept such limited measures as comprising the content of "justice" for purposes of these negotiations. Where there is no invitation to the province to join such discussions, many draft agreements have large gaps waiting to be filled on a future occasion. In other cases, the negotiating communities have opened up separate negotiations with the provinces and have kept the federal negotiators uninformed about them in an attempt to get as much jurisdictional room as they can.

The CBSG policy is clear that all areas of self-government jurisdiction are subject to negotiation regarding the extent of the authority that the Indian government will have. In practice this means that negotiated arrangements may vary from negotiating group to negotiating group, depending on the ability of the negotiators and other factors that may have little to do with principled consistency. In fact, one of the complaints that negotiating communities have is that

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<sup>489</sup> DIAND, "Community-Based Self-Government Negotiations" *supra* note 481 at 19.

<sup>490</sup> *Ibid.*

there is too much duplication of effort in the various negotiations since "it has become apparent that many community proposals are similar in various areas, such as legal status and capacity and land title management."<sup>491</sup>

From the beginning there has been a problem with the vagueness of the federal policy and its relatively unprecedented nature. Moreover, it took longer than anticipated to get the CBSG negotiating process fully under way. This was partly due to the learning process that bands and negotiators had to go through since, apart from the marginally similar self-government negotiations in northern Québec that led to the 1984 Cree-Naskapi (of Québec) Act, nothing like this had ever been attempted before in Canada. The delay was also partly due to the unforeseen issues that arose during the negotiation process. Jurisdiction over waters adjacent to a reserve offers a good example. Resolution required extensive research into original reserve boundaries, often in the context of the historic treaty negotiations by which the reserve was created. Moreover, community members had to be kept abreast of the progress of negotiations at all times and this took patient explaining.

Early in the process, federal negotiators, most of whom are not legally trained, included language and provisions recognizing an inherent right of self-government in anticipation that it would become a reality through constitutional amendment. When that didn't happen, further rounds of talks were required to delete the concept from the draft agreements. The failure of the federal policy to speak to the inherent right of self-government continues to be a stumbling block to progress. Negotiating communities have expressed in the strongest terms their objection to this shortcoming in the CBSG policy: "The First Nations in the current negotiations process view any suggestion that they are negotiating the delegation of Federal powers as offensive."<sup>492</sup>

Bands involved in CBSG negotiations are eligible to receive up to 1.5 million dollars for each substantive set of negotiations. Such negotiations are supposed to be completed within a two year time frame. Over 200 bands have participated in some stage of the CBSG process at one time or another since its inception.<sup>493</sup> To this point, around 50 million dollars has been spent to support negotiations, but, as already mentioned, there are as yet no finalized CBSG agreements.

As the cabinet guidelines indicate, the CBSG policy does not provide for enhanced levels of federal government funding to self-governing communities to allow them to take on their new jurisdictions. Nor does the policy speak to the broader issue of economic development more generally. It is this aspect of the policy that most clearly demonstrates that "self-government" is not the most accurate term to apply to any negotiated new arrangements arrived at under the CBSG process. In this respect the federal government is candid, noting that in fact the goals of the

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<sup>491</sup> Ibid at 16.

<sup>492</sup> Participating First Nations, "Negotiating Self-Government," supra note 481 at 18.

<sup>493</sup> DIAND, "Community-Based Self-Government Negotiations," supra note 481 at 15.

CBSG process are somewhat modest:

While First Nations identify a viable economy as an important component of self-government, the CBSG policy is not intended to address economic development directly. Rather, the CBSG policy assists communities to develop practical measures to increase self-management and self-reliance as part of the overall strategy of disengaging First Nations from their dependent relationship with the federal government.<sup>494</sup>

Participating CBSG bands have complained about several features of the federal policy, especially the failure to recognize their inherent right of self-government and the fact that they must deal with a government bureaucracy that they do not perceive as responsive to commitments or statements of principle made by more senior federal bureaucrats or politicians.<sup>495</sup> They have also noted that given the need to fully inform, and obtain the consent of, the community, the short time frames imposed by the CBSG policy are unrealistic.<sup>496</sup> Moreover, they also note that the federal government negotiators often come to the table without a clear or consistent mandate, especially in the areas of fiscal relations, tax regimes, the involvement of provincial and territorial governments, justice matters, and third party interests on lands under negotiation.<sup>497</sup> More fundamentally, they also complain about what they see as the underlying federal agenda of reducing the federal exposure to its general trust and specific treaty obligations.<sup>498</sup>

With regard to these problems, participating CBSG bands have made a number of recommendations, including having the services of a neutral third party to resolve impasses over specific negotiation areas and to assure that the federal government is negotiating in good faith. In this latter regard they note a problem that has surfaced in other areas of federal-Aboriginal relations, especially specific claims:

As in most federal policies, the Federal Government is the last court of appeal over its own decisions. This is not fair or equitable. There needs to be an independent and neutral body that provides advice to the parties in situations involving conflict and disagreement.<sup>499</sup>

Despite these problems and delays, matters have now proceeded to the point where at least two CBSG agreements are ready to be signed off and a number of other are close to being

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<sup>494</sup> *Ibid* at 14.

<sup>495</sup> Participating First Nations, "Negotiating Self-Government," *supra* note 481 at 19.

<sup>496</sup> *Ibid* at 20.

<sup>497</sup> *Ibid* at 20-21.

<sup>498</sup> *Ibid* at 21.

<sup>499</sup> *Ibid* at 22.

finalized. However, another wrinkle has been added by the Liberal government's election promise to implement the inherent right of self-government and to begin by consulting bands on how this should be done. The status of the CBSG process is somewhat unclear at the moment in light of the federal government's negotiation policy with respect to the inherent right of self-government.<sup>500</sup>

It is not clear in any event that the CBSG policy has been able to deal with a major issue: ratification of concluded self-government agreements. In many ways this is a paradigm of the whole membership issue that reveals itself in the question, Who is the negotiating First Nation? Although under current CBSG policy it is accepted that this is the band and all its members, on and off-reserve, in fact the band councils in most cases represent only the on-reserve members since these are the "electors" under the Indian Act who put them in office and whom they see every day.<sup>501</sup> Moreover, the practical reality that current and future federal funding levels are based on the number of status Indians in a band, however, militates against a band being too inclusive in this regard. However, the issue of the relationship of status to band membership and its relationship to citizenship in a self-governing Indian First Nation will be touched on in the next section of this paper. The immediate issue confronting CBSG bands and the federal government is that of ratification of concluded agreements.

Because of the fiduciary obligation, the federal government must be careful to ensure that all those with actionable interests in band matters are given an opportunity to participate in self-government decisions. This is because self-government involves the transfer of legal interests such as lands and moneys to a new entity that will itself be under the control of a successor governing body to the band council. Off-reserve band members are obviously entitled at law to have a say in how assets in which they have an interest are handled. The Corbiere Case now seems to have put this matter beyond doubt.<sup>502</sup> But does this mean that non-status Indians who are not non-band members but who may be connected to that band by treaty or family ancestry or otherwise should have a say in developing any new self-government arrangements that will affect band assets? If one accepts that they may be covered by the fiduciary obligation, one would likely have to agree that they should, but current policy omits them. Thus the issue of their "connectedness" to band assets and other band matters remains unresolved for the moment.

The federal government has no set policy in regard to who ought to ratify self-government agreements, preferring to rely on a flexible yardstick that identifies "interest-holders" and which, depending on the circumstances, allows the federal government a measure of security regarding the

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<sup>500</sup> See Indian Affairs and Northern Development Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (Ottawa: Minister of Public Works and Government Services Canada, 1995).

<sup>501</sup> This may be different if a band operates under a custom election process pursuant to section 2 of the Indian Act that allows it to include off-reserve band members.

<sup>502</sup> Supra note 310.

potential liability of the Minister of Indian Affairs for breach of fiduciary obligation. In some cases this means that the interests of off-reserve band members who are only a small percentage of the total number of band members can be discounted. In other situations, it means that there may be pressure on a band to include off-reserve members even where the band may be opposed to this. In all cases, the federal government is committed to ratification by voting in accordance with Indian Act or like procedures even where bands have requested that more informal or traditional methods (such as potlatches) be utilized instead. Given that the CBSG policy is apparently not going forward at present, these and other related issues remain unresolved. They will have to be overcome at some point, however. This issue will be touched on later in this paper.

Although there is no doubt the community based self-government process has experienced growing pains and does not offer a full range of powers to bands, it would be wrong to dismiss it as a complete failure. Much has been learned by federal and by community negotiators that may be of assistance in future negotiations based on a broader concept of "self-government." The most important lesson to date from the community perspective appears to be the need to devote more time, energy and resources to the first phase of negotiations - development of a framework proposal. As the justice inquiry reports in particular have pointed out, many Indian communities are socially and economically dysfunctional and suffer from high crime rates. Many are politically "factionalized," often along family and kinship lines. Thus the participating CBSG communities have called for a much extended time frame for the first stage so they can engage in community-building to address some of their internal problems at the outset:

From the First Nations perspective, the self-government negotiations process is a process in community; in empowering the grass roots people; in building capacity within the community. It is a process of fundamental social change; in building understanding and acceptance; in encouraging individuals to take responsibility so that we can ensure responsible government.

The self-government process is about formative social change within the communities. The exercise is a grass roots movement toward critical community development and the quest to return self-sufficiency and wellness to the people.... This takes time.<sup>503</sup>

Another important lesson highlighted by the participating communities is the need to address the final stage, implementation, in more realistic terms that speak to the crucial issue of resources for self-government. Participating communities believe that this issue must be tackled at the outset by gearing the whole process to implementation rather than to simply arriving at an agreement. Implementation must be part of the negotiations protocol by asking the question: Is the agreement being negotiated able to become operational?<sup>504</sup> It is important to recall in this

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<sup>503</sup> Supra note 481 at 21-22.

<sup>504</sup> Ibid at 22.

context that most CBSG bands are not as resource-rich as the Cree and Naskapi (who have received compensation for surrendering their lands) or the Sechelt. Without additional resources, participating communities simply receive more control over funds they are now receiving from the federal government. Under current circumstances, that means that this form of self-government will give them little more than what Murray Angus refers to as "the responsibility for administering their own poverty."<sup>505</sup>

In conclusion, it is clear that the CBSG policy, like the policy behind the Cree-Naskapi (of Québec) Act and the Sechelt Indian Self-Government Act, is one of limited authority, limited governance structures and limited resources. It does not appear to enjoy widespread support among Indian communities and cannot be said to have succeeded except as a learning device for all parties. It has now apparently been abandoned by the federal government, although a number of bands are still involved in negotiations as this paper was being written. Its apparent failure coupled with the failure of the constitutional process means stalemate on the formal self-government front. How that stalemate can be broken remains the most important challenge facing the federal government and Indian communities.

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<sup>505</sup> Murray Angus, And The Last Shall Be First: Native Policy in an Era of Cutbacks (Toronto: NC Press Ltd., 1991) at 33.

### (7) Bill C-31 Of 1985<sup>506</sup>

Bill C-31 dealt with a number of issues, most particularly those surrounding Indian status and band membership. One of the primary thrusts of these amendments to the Indian Act was to devolve to bands the power to control their own membership and to pass the necessary by-laws to supplement this new power. From this vantage point Bill C-31 was self-government legislation, albeit of a rather limited type that will be described in more detail below, and for that reason is included in this portion of the paper.

On April 17 1982 the Canadian Charter of Rights and Freedoms became part of the supreme law of Canada with the advent of the Constitution Act, 1982. In order to allow the federal and provincial governments time to bring their legislation into conformity with its requirements, section 15, the equality provision, did not become operative until April 17, 1985.

The Indian Act would have been greatly affected by section 15. In June that year Bill C-31 was given Royal Assent (and given retroactive force as from April 17, 1985). It amended the Indian Act to accomplish three primary purposes:

- to eliminate the discriminatory effects of the status and band membership provisions in the Act;
- to reinstate several classes of persons (primarily women and their children) who had lost Indian status or been enfranchised over the years; and
- to permit bands to take control of band membership by drawing up membership codes.

Indian status was to remain in the hands of the federal government, however. It remains there, primarily for fiscal reasons: the federal government needs to know how many people it will have constitutional responsibility for; and it needs to be able to control those numbers by limiting access to Indian status.

#### (i) "legal" Indians

The distinction between what the editors of the Felix Cohen's Handbook of Federal Indian Law refer to as Indians in an "ethnological" sense (Indians by virtue of racial ancestry) and Indians in a "legal" sense (Indians by virtue of recognition in law as such)<sup>507</sup> has become a well-established one in Canadian law that is reflected in the terms "non-status" and "status" Indian respectively. As discussed in the historical examination presented earlier, the distinction between status and non-status Indians evolved through the gradual imposition by the colonial and later federal government of legal standards whereby racial ancestry, membership in an Indian community, and a subjective sense of being "Indian" were no longer dispositive of the issue of whether or not a

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<sup>506</sup> This portion of the paper is based to a considerable extent on the comprehensive legal and historical analysis of the effect of the Indian Act and its legislative precursors on Indian women provided by the RCAP Womens' Policy Team in chapter 4 of their policy paper of June 30, 1994. The conclusions of the writer do not differ in any significant way from those of the RCAP Womens' Team.

<sup>507</sup> Supra note 51 at 19.

person was an "Indian" for official purposes. Recognition in law and subsequent registration of a person as an Indian reflected the Victorian moral standards of the nineteenth century, favouring maleness and patrilineal descent.

Thus, and to briefly review the historical record in this regard, in amendments to Indian land protection legislation in Lower Canada in 1851, for the first time, a non-Indian man who married an Indian woman was denied membership in the woman's band and with it the right to reside on reserve. The right of the Indian wife and her children of that marriage to band membership was not affected, though.<sup>508</sup> A non-Indian woman who married an Indian man faced no barrier to membership in the band.

Six years later the first enfranchisement legislation, the Gradual Civilization Act, became law in both Canadas. Any male Indian who met the qualifications for enfranchisement could do so. His wife and children were automatically enfranchised with him, but, unlike him, they received no allotment of reserve land upon being enfranchised. If he died, the widowed wife would not receive a life estate in his allotted lands unless there were no children of the marriage.<sup>509</sup>

In 1869, the Gradual Enfranchisement Act continued the enfranchisement provisions described above and added to them by providing that an enfranchised man could draw up a will leaving his land to his children - but not to his wife. This legislation also went farther than previous mixed marriage legislation in terms of the consequences for Indian status. Henceforth when an Indian woman married a non-Indian man, not only would he be denied Indian status and band membership, she and any children of the marriage would also lose theirs. In the same vein, if an Indian woman married an Indian man from another band, she and any children of the marriage lost membership in her band and became members of his. Moreover, no matter what band an Indian woman might be a member of, after 1869 she could not vote in band elections.<sup>510</sup> These provisions were carried forward into the first Indian Act in 1876.

Amendments to the Indian Act in 1884 permitted any male Indian holding reserve land by location ticket to draw up a will. He could bequeath his property to anyone in his family, including his wife. However, in order for her to receive anything she had to have been living with him at his death and to be "of good moral character" as determined by federal authorities.<sup>511</sup> Further amendments in 1920 transferred to the Superintendent General the band council power to decide whether Indian women who "married out" would continue to receive their entitlements to treaty annuity and band moneys distributions or whether they would receive a lump sum

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<sup>508</sup> See note 64, supra.

<sup>509</sup> See text at note 73, supra.

<sup>510</sup> See text at note 94, supra.

<sup>511</sup> See text at note 147, supra.

settlement.<sup>512</sup>

The 1951 revision of the Indian Act went farther in attempting to sever completely the connection between Indian women who married out and their reserve communities.<sup>513</sup> Rather than allow Indian women who had married out (and lost status thereby), but had then been deserted or widowed by their non-Indian husband to regain Indian status and band membership in their original communities, it was decided to provide for their involuntary enfranchisement upon marriage. Although no provision was made for the children of such mixed marriages until later, they were enfranchised too.

#### (ii) Pressure for Reform

As a result of these and related provisions, by 1985 the Indian Act status provisions had become what Imai, Logan and Stein describe as a "mishmash of nonsensical, ethnocentric and sexist rules."<sup>514</sup> The manifest unfairness of these rules had led to many legal challenges, some successful, that had drawn adverse publicity to their discriminatory nature both domestically and internationally.<sup>515</sup> The Lavell and Bedard Case has already been described.<sup>516</sup> Two Indian women who had lost status automatically upon marrying non-Indians argued that they had been discriminated against contrary to the guarantee of equality before the law in section 1(b) of the Canadian Bill of Rights. A bare majority of the Supreme Court held against them on the basis that there was no impermissible discrimination. The reasoning is not convincing and smacks of a policy decision to save the Indian Act in its entirety from being overturned on equality grounds.

Mr. Justice Pigeon for the dissenting minority in the earlier Drybones Case had perceived the threat posed to the Indian Act by the Bill of Rights, noting that full application of the equality provision would mean a "virtual suppression of federal legislation over Indians."<sup>517</sup> Political scientist Ian Greene has concluded with respect to the subsequent Lavell and Bedard Case that "[i]t seems likely that the Court had buckled under the strain of continued worry over the possible abandonment of legislative supremacy."<sup>518</sup>

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<sup>512</sup> See text at note 184, supra.

<sup>513</sup> See text at notes 234-36.

<sup>514</sup> Shin Imai, Katherine Logan, Gary Stein, Aboriginal Law Handbook (Toronto: Carswell, 1993) at 123.

<sup>515</sup> The challenges to the notion of special Indian status posed by these court cases are described by Douglas Sanders in "The Renewal of Indian Status" in Equality Rights, supra note 42.

<sup>516</sup> See note 20, supra.

<sup>517</sup> R.v. Drybones, supra note 20 at 304. In fact, in the separate case of Isaac v. Davey [1973] 3 O.R. 677, Mr. Justice Osler of the Supreme Court of Ontario had ruled (at 690-91) that the Indian Act as a whole was contrary to the Bill of Rights.

<sup>518</sup> Ian Greene, The Charter of Rights (Toronto: James Lorimer and Company, 1989) at 29.

Upon the request of Indian Affairs Minister Chrétien and as a result of the strenuous urging of the national status Indian organizations, the Lavell Case (which Mrs. Lavell had won on appeal to the Federal Court) was appealed by the federal government to the Supreme Court of Canada. The National Indian Brotherhood intervened on the side of the federal government while a number of smaller Aboriginal womens' organizations and the Native Council of Canada intervened on the side of Mrs. Lavell and Mrs. Bedard. Despite the Supreme Court ruling upholding marrying out provision in former section 12(1)(b) of the Indian Act, the controversies generated by this case animated public discussion of sex discrimination in the Indian Act and generated strong pressure for reform.

Additional reform pressures were added by the Lovelace Case in 1981.<sup>519</sup> Canada was criticized by the Human Rights Committee (established pursuant to the International Covenant on Civil and Political Rights to which Canada is a signatory). Under the Optional Protocol to the Covenant, individual complaints may be brought to the Committee.<sup>520</sup> The Covenant is one of the documents that influenced the development of the Charter and it contains many human rights provisions similar to Charter protections. The Human Rights Committee took dead aim at section 12(1)(b) and found it to unjustifiably deny Sandra Lovelace her right under section 27 of the Covenant as a member of an ethnic minority to enjoy her culture and language in community with other members of her band.<sup>521</sup> The Committee did not find the loss of status attendant upon her marrying out to be reasonable or necessary to preserve the identity of the Tobique Band.

The reform pressures building on the federal government resulted in the announcement in

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<sup>519</sup> See note 84, supra. The case is discussed in A. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace," (1982) 20 Can. Year Book Int'l Law 244.

<sup>520</sup> The Covenant and the Optional Protocol entered into force in Canada on August 19, 1976. The Human Rights Committee established under the Covenant is not a court; rather it has been described by Martin Dixon, Textbook on International Law (London, Blackstone Press, 1990) as follows (at 228-29):

This Committee is made up of 18 individuals elected from among the contracting parties, but they do not formally represent their states. Reports submitted to the Committee should indicate the measures undertaken to implement the terms of the Covenant and there may be limited cross-examination of a state representative. However, the Committee is reluctant, and some would argue, not empowered, to identify particular malefactors or to criticise the conduct of states too severely. It sees its function as supervisory rather than investigatory... the Committee does not act in a judicial capacity and state parties to the Protocol cannot be compelled to provide information or make representations. Moreover, even if the Committee makes a determination that a breach of the Covenant has occurred, this is not binding on the state, although publication of the award ...may go a long way to ensuring that a state does carry it out.

<sup>521</sup> Section 27 reads as follows:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

June 1980 by the Minister of Indian Affairs, John Munro, that the federal government would suspend the operation of the sections of the Act dealing with loss of status on marrying out<sup>522</sup> and the "double mother" rule.<sup>523</sup> That there were mixed feelings about these provisions among Indian bands is shown by the fact that, three years later, only 41 bands had requested suspension of the former provision and only 105 had requested suspension of the latter.<sup>524</sup>

In 1982, the parliamentary Standing Committee on Indian Affairs and Northern Development (the Penner Committee) was handed the issue by the same Minister. The Penner Committee was anxious to proceed to the issue of Indian self-government and so it delegated the sex discrimination issue to its Sub-committee on Indian Women and the Indian Act which held hearings that lasted only five days. The Penner Committee then adopted the sub-committee report without change, issuing its report on September 20, 1982. While generally calling for fairer treatment for Indian women and their children through specific amendments to the Indian Act, it also called for greater band control of membership, albeit in accord with international covenants.<sup>525</sup> In this way, it seemed to concede continuing federal control over Indian status questions while introducing a separation between Indian status and band membership.

The Penner Committee returned to this theme in its report on Indian self-government the next year, recommending a "two tier" approach where there would be a general list of status Indians eligible for federal benefits, and individual Indian First Nation membership lists.<sup>526</sup> The two would not necessarily have coincided. Thus status would have remained under federal government control, with Indian First Nation citizenship under Indian control. However, this proposal, had it been adopted, might have perpetuated the membership problems under the current Act where substantial numbers of persons are simply unable to reside on their home reserves because of housing shortages, related socio-economic problems and the related unwillingness of band councils to introduce new members to their communities.

Bill C-47 of 1984 followed. It would have added an estimated 70,000 persons to existing band lists.<sup>527</sup> This have greatly added to federal expenditures for Indians and would likely also have disrupted internal band politics and social relations in many reserve communities across Canada. When introduced for first reading there were just under nine days left in the parliamentary sitting.

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<sup>522</sup> S. 12(1)(b).

<sup>523</sup> 12(1)(a)(iv).

<sup>524</sup> Reported in Sanders, "The Renewal of Indian Status" in Equality Rights, supra note 42 at 549.

<sup>525</sup> Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 1st sess., 32nd Parl., 1980-81-82, Issue no. 58. The recommendations of the Committee are set out in chapter 4 of the policy paper by the RCAP Womens' Team.

<sup>526</sup> See text at note 344, supra.

<sup>527</sup> Sanders, "The Renewal of Indian Special Status," Equality Rights, supra note 42 at 550.

After modifying the bill in response to criticisms, it was reintroduced by the government on the last sitting day prior to recessing for the summer break. Although passed by the House of Commons, it was not passed by the Senate and died when the Liberal government called the election later that summer.

Bill C-47 was relatively prescriptive in that it retained the connection in the Indian Act between Indian status and band membership that the two Penner Committee reports had recommended against. There was thus no provision for band control of its own membership. In this vein, residency rights for non-Indian spouses would also have remained under federal, and not band, control. In order to avoid "dilution" of the blood line, Bill C-47 would have imposed a minimum one-quarter Indian blood quantum for Indian status and band membership in the future, and would have required the grandchildren of reinstated persons to have had a 50% Indian blood quantum to retain status and band membership. Obviously, this would have imposed higher blood quantum requirements on the descendants of reinstated or "new status" persons than on the descendants of "old status" persons. Since most of the reinstated persons would have been Indian women (and their children) who had lost status through marrying out in the first place, it is evident that Bill C-47 was simply attempting to postpone for two generations the discriminatory double standard that it was designed to remedy.

Moreover, it seems intellectually dishonest to impose blood quantum requirements in the twentieth century, after so many years of contact between Indian and non-Indian populations. Canada has never used a pure blood quantum approach; rather, it has used a "kinship" approach based on descent through the male line to determine which persons were to be recognized as Indian for federal purposes. Sanders notes that this creates a paradox (to add to the long line of paradoxes already referred to throughout this paper): "The paradox results from using a racial term - Indian - to signify a group which is not limited by blood criteria".<sup>528</sup> The kinship approach requires some Indian blood quantum, since kinship and descent imply Indian ancestry, but has never been predicated on blood quantum as such. If it had been, the mixed-blood children of Indian women who married out would have been recognized as Indian along with the mixed-blood children of Indian men who married non-Indian women.

By the time the Indian Register was drawn up beginning in 1951, the confusion between "ethnological" and "legal" Indians had become complete. Many ethnological Indians with relatively "pure" blood lines were never included on this list, and many were subsequently excluded for reasons having little to do with the "purity" of their Indian bloodline. In fact, there are many communities of status Indians with large numbers of members who could not now meet an strict ethnological one-quarter Indian blood standard. Despite being 100% legal status Indian, they are

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<sup>528</sup> Douglas Sanders, "The Bill of Rights and Indian Status," Vol. 7 No.1 University of British Columbia Law Review 81 at 94. Seven possible approaches to determining who has been and who ought to be recognized as "Indian" are set out and discussed in Morse and Giokas, "Do the Métis," supra note 16 at 19-24. They are: (i) blood quantum; (ii) kinship; (iii) culture, lifestyle or belief; (iv) acceptance by an Aboriginal group; (v) acknowledgement as Aboriginal by the dominant society;(vi) charter designation; (vii) self-identification.

ethnologically of mixed Indian and non-Indian ancestry. In this regard, Sanders comments that "mixed blood peoples were not excluded from Indian status when membership lists were first prepared and could not now be excluded from Indian status without purging the Indian-reserve communities of at least half their population."<sup>529</sup> However, as will be seen, Bill C-31 of 1985 has reintroduced a disguised blood quantum approach in its distinction between those who reacquire Indian status under subsection 6(1) of the Indian Act and those who reacquire it under subsection 6(2).

Bill C-31 is extremely complex and has produced a number of anomalies based on the division of status Indians into the two categories mentioned above. While it did correct some of the prescriptiveness and shortcomings of Bill C-47, it is not clear that it has resolved the issues for which it was devised. Nor is it clear that it has clarified the issue of who the real "Indians" are. "The overall situation is more confused than ever" according to Imai, Logan and Stein.<sup>530</sup>

### (iii) Bill C-31: Indian Status

Subsection 6(1)(a) of the Indian Act recognizes that all those persons who were already registered or entitled to registration as "Indians" when Bill C-31 came into force on April 17, 1985 will continue to have Indian status. These are the "old status" Indians, those who were status Indians under the old rules. In addition, subsection 6(1)(b) recognizes that anyone who is a member of a group that is declared to be a band under the Indian Act after April 17, 1985 will also have status. There have been no new bands created since 1984,<sup>531</sup> however, and the effect of this latter provision is minimal. Subsections 6(1)(c)(d)(e) and (f) and (2) register a number of sub-categories of persons people who had earlier lost or been denied status through operation of the Indian Act. These are the "new status" Indians. Subsection 6(1)(f) and (2) also serve to define who will be a status Indian in future.

Without going into the details, subsection 6(1) registers those who lost or were denied status as a result of:

- the "double mother" rule;
- having married a non-Indian man;

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<sup>529</sup> Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S.M. Beck and I. Bernier eds., Canada and the New Constitution: The Unfinished Agenda, Vol.1 (Montréal: Institute for Research on Public Policy, 1983) 227 at 255.

<sup>530</sup> Aboriginal Law Handbook, *supra* note 514 at 124.

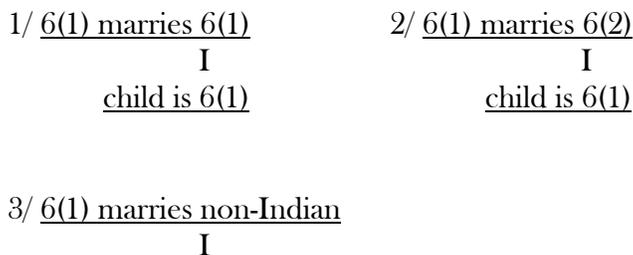
<sup>531</sup> The Conne River Micmac community of Newfoundland was declared to be a band under the name Miawpukek Band on June 28, 1984 by order in council. Other bands "created" after that date have been constituted from already existing bands using the Minister's power in this regard under s. 17 of the Indian Act. Thus, for example, the Woodland Cree (157 persons) separated from the Lubicon Lake Band and were recognized as a separate band by order in council in 1989 under this provision. They settled their portion of the Lubicon Lake land claim in 1991.

- having been the legitimate or illegitimate child of a non-Indian man whose wife or partner was Indian at the time of birth;
- enfranchisement, voluntary and involuntary; and
- the first generation children of the above.

The overall effect of these amendments, aside from the reinstatements, was that no one would henceforth gain or lose status through marriage. Non-Indian women who gained status through marriage prior to 1985 will nonetheless retain their acquired status. Enfranchisement as a concept was entirely abolished - there is now no way for a status Indian to renounce status. Status may yet be lost as a result of marriage, however, since it is clear under the new rules that for status to be passed on, marriages must produce children who fit into the definition section for status in section 6. Since there is no difference in this respect between status Indian men and women, the visible sex discrimination that was a feature of the pre-1985 rules has been removed.

The major complications arise in the rules for conferring status in the future as a result of the distinction between those persons falling into subsections 6(1) and those who fall into subsection 6(2). Subsection 6(1)(f) registers all those persons both of whose parents (living or dead) were registered or entitled to be registered under either subsection 6(1) or (2). Subsection 6(2) registers the child of one parent (living or dead) who was registered or entitled to registration under only subsection 6(1). As will be illustrated below, this will usually be the child of an Indian woman who married out prior to the 1985 amendments. The differences between 6(1) and 6(2) status Indians lies in their relative abilities to pass that status on to future generation and it is here where the effects of the prior discrimination are felt.

Thus, for the grandchildren of the present generation of "old status" or "new status" Indians, the manner in which one's parents and grandparents acquired status will be important determinants of whether they will have status themselves. The net result of the new rules is that by the third generation, the effects of the 6(1)/6(2) distinction will be most clearly felt. The following diagram shows how transmission of status works under these categories:<sup>532</sup>




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<sup>532</sup> This example is drawn from the explanatory materials prepared by the Native Womens' Association of Canada, "Guide to Bill C-31: An Explanation of the 1985 Amendments to the Indian Act," at 13.

child is 6(2)

4/ 6(2) marries 6(2)  
I  
child is 6(1)

5/ 6(2) marries non-Indian  
I  
child is non-Indian

Thus, it is clear that the children of a 6(2) parent are penalized immediately if the 6(2) parent marries out, while the children of 6(1) parents are not.<sup>533</sup> Thus, whom the children marry will be crucial in determining whether status will be passed on to future generations, since there is a definite disadvantage to falling into the 6(2) category. If one assumes for the sake of example, that a status Indian brother and his status Indian sister both marry non-Indians, the example becomes clearer. The children of the sister who married out prior to the 1985 amendments will be "new status" since they all fall into the 6(2) category at the outset because they will only have one parent (their mother) who was registered or entitled to registration under Bill C-31. The children of the brother who married out prior to the 1985 amendments will be "old status" because both their parents already had status on April 17, 1985. They will therefore be 6(1)s and will start off with an advantage over their similarly situated 6(2) cousins in terms of status transmission.

But, it must be recalled, this has nothing to do with actual blood quantum, since the 6(1) and 6(2) children discussed above will have exactly the same ethnological Indian blood quantum. They will each have one ethnological Indian parent and one non-ethnological Indian parent. The legal fiction whereby the children of the status Indian man who married out had status, while the children of the status Indian woman who married out did not, is at the root of it. Thus, the effect of the pre-1985 discriminatory status rules continue to discriminate against Indian women, but the effects are simply postponed to the subsequent generations unless the 6(2) child marries someone within the 6(1)/6(2) categories.

There is another and related anomaly in the new rules with respect to how illegitimate children are treated. In 1983 the supreme court held in Martin v. Chapman<sup>534</sup> that the illegitimate child of a status Indian man and a non-Indian woman would also have status. The illegitimate children of a status Indian woman and a non-Indian would not, however. Although the child of the latter union will now have status, it will be "new status" as a 6(2), while the child of the former union will be "old status" as a 6(1). Some Indian communities surveyed during the DIAND Lands, Revenues and Trusts review have maintained that as a result non-ethnological Indian children adopted by "old status" Indians (and therefore 6(1)s) have greater rights than children of

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<sup>533</sup> That is why Ovide Mercredi, for example, a "6(2) new status" Indian and national chief of the status Indian organization, the Assembly of First Nations, having married a non-Indian woman cannot pass that status on to his child of that marriage.

<sup>534</sup> [1983] 1 S.C.R. 365.

Indian ancestry reinstated or registered under Bill C-31.<sup>535</sup> In short, children with no Indian blood whatsoever will have greater rights to pass on Indian status than children who may have a high Indian blood quantum.

Another problem lies in the unequal treatment of members of the same family. For example, in an "old status" family where a non-Indian wife gained status through marriage to a status Indian man, if the husband enfranchised under the pre-1985 rules she and any children of the marriage would also have been enfranchised. Under the post-1985 rules, the husband and those children would have regained their Indian status under s. 6(1)(d). Those children would therefore be 6(1)s. The non-Indian wife, however, would not regain Indian status under the 1985 rules because section 7(1)(a) specifically bars women who had gained status only through marriage under former section 11(i)(f) from regaining their status if they had lost it prior to the 1985 amendments. Nonetheless, any children born to her and her husband during the period when the family was without Indian status would gain Indian status. However, unlike the children born prior to enfranchisement, the later-born children would be first-time registrants. Moreover, since only one of their parents (the father) is registrable under the post-1985 rules, they would be 6(2)s. Thus, siblings could have different abilities in law to pass on status, despite being from the same family and with exactly the same ethnological Indian ancestry.

It is plain that the new rules are ingenious and exceedingly complex. The many problems associated with their implementation have been documented by the RCAP Womens' Team and will not be repeated here except to note that the financial and other aid necessary for existing bands to be able to accommodate the new registrations under Bill C-31 has not been forthcoming. DIAND notes that at the end of 1992, 160,592 persons had applied for reinstatement and that 83,797 had been returned to status or had been registered for the first time.<sup>536</sup>

Bands are left, therefore, with little incentive to admit these potential new members to their reserve communities and so most are listed on the Indian Register, but without a reserve community to go back to. Thus, the Penner Report recommendation regarding separating the "general list" of status Indians from "Indian First Nation" citizenship<sup>537</sup> appears to have been brought at least partially into operation. In summary of the new status rules in Bill C-31, it seems safe to conclude that the "mishmash of nonsensical, ethnocentric and sexist rules" to which Imai, Logan and Stein have referred continue only partially abated.

This conclusion is reinforced when one recalls that Bill C-31 did not reinstate everyone who arguably ought to have Indian status, since it dealt only with the discriminatory rules that have been described. There are many other persons in Canada of "Indian blood" who are still unable

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<sup>535</sup> Lands, Revenues and Trusts Review, *supra* note 1 at 134-35.

<sup>536</sup> DIAND, "Identification and Registration of Indian And Inuit People," Background Document No. 6 to the Royal Commission on Aboriginal Peoples, June 1993, at 9.

<sup>537</sup> See text at note 344, *supra*.

to register as "Indians" under the Indian Act. They await their turn to acquire official recognition as status Indians and can only hope that if their turn for registration arrives, the lessons from the mess created by Bill C-31 will have been learned by the federal government.

#### (iv) Bill C-31: Band Membership

Under the pre-1985 rules, status and band membership went hand in hand. Bill C-31 also changed the band membership rules in the Indian Act by separating status from band membership so that one may now have status without band membership or band membership without status. Bill C-31 grants automatic band membership to some classes of status Indians, but not to others. Subject to what the bands do with regard to band membership codes, eight classes of persons have automatic band membership while another five classes of persons have conditional band membership.<sup>538</sup>

A band may now take control of its own membership from DIAND by following the procedures set out in Bill C-31. These procedures call for a band membership code that respects the rights of those reinstated persons with acquired rights to membership prior to the band taking control of its membership. A band membership code must be adopted by a vote of the band electors (which need not, but may, include off-reserve members if the band council so desires).

The band membership code takes effect from the date that notice is sent to the minister, who must approve it if it is in proper form. That date could be anytime after Bill C-31 entered into force on April 17, 1985. Those with an automatic right to band membership to a particular band will be members if they have been reinstated to status prior to the date the band takes control of its membership. If they are reinstated to status after that date, they must then apply to the band for membership, since the Indian Act rules will no longer apply and their automatic right will no longer be operative.

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<sup>538</sup> The eight classes are:

- "old status" band members i.e. those already on a band list prior to April 17, 1985;
- "new band" members i.e. members of groups declared to be bands after April 17, 1985;
- persons regaining status under Bill C-31 who lost or were denied it due to:
  - the double mother rule,
  - marriage to a non-Indian,
  - illegitimate children of an Indian mother and non-Indian father,
  - involuntary enfranchisement due to marriage to a non-Indian, and
  - any children involuntarily enfranchised due to the involuntary enfranchisement of the mother
- children born after April 17, 1985 both of whose parents are members of the same band.

The five classes are:

- anyone enfranchised voluntarily;
- anyone enfranchised involuntarily for living outside Canada without permission for more than five years;
- anyone enfranchised involuntarily for acquiring a university degree, or becoming a doctor, lawyer or clergyman;
- a child whose parents belong to different bands;
- a child, only one of whose parents is, or was, entitled to be a member of a band.

Persons with conditional band membership, however, had to wait two years before knowing whether they would become members of a particular band. Bill C-31 gave bands until June 28, 1987 to adopt band membership codes that might exclude conditional members. If a band had not done so by that date, then conditional members became band members automatically on that date if they had been reinstated to status prior to then.

There is no requirement that band membership codes be published or otherwise made available for inspection, although they can be obtained by application under the federal Access to Information Act.<sup>539</sup> A bill to require publication was put forward in 1988 but died on the order paper when Parliament was dissolved in 1988.<sup>540</sup> It is therefore not easy to get information about band membership codes.

Band membership codes are as problematic as the status rules. They do not deal with every person who has Indian status. For example, those on the pre-1985 General List of Indians without a band affiliation are not provided for. There were about 100 persons on that list prior to Bill C-31. Such persons have no right to band membership, automatic or conditional, and must therefore apply to the council of a particular band for membership.

In addition, the only appeals from band decisions regarding membership are to whatever review mechanism the band has set up under the membership code. The only judicial review of band decisions is for failure to follow the dictates of Bill C-31 or on general constitutional law principles. What this means is that unfairness may be built into the system so long as the formalities of Bill C-31 are followed. For this reason, the possibility that a band may wish to replicate the discriminatory features of the pre-1985 status and band membership rules cannot be discounted.

From this perspective, what the amendments in Bill C-31 have done is to transform the question of band membership from one of federal control and sexual discrimination to one of Indian control and sexual discrimination. This assessment is borne out to some extent by a recent study commissioned by the Assembly of First Nations of the population impacts of Bill C-31. Of the 236 bands that had taken control of their membership, 49 had adopted membership codes that adopted the Indian Act status provisions. A further 97 had codes based on eligibility based on a specified blood quantum as such (normally 50%) or on the requirement that both parents have Indian blood. Only 90 had codes based on single parent eligibility criteria.<sup>541</sup>

This puts the issue of membership firmly in the hands of the band council governments and removes it to some extent from public view since most bands are small, rural and removed

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<sup>539</sup> R.S.C. 1985, c. A-1, as confirmed in Twinn v. Canada [1987] 3 F.C. 368 (F.C.T.D.).

<sup>540</sup> Related in Woodward, Native Law, *supra* note 20 at 40.

<sup>541</sup> Stewart Clatworthy and Anthony Smith, "Population Implications of the 1985 Amendments to the Indian Act: Final Report," prepared for the Assembly of First Nations, December 1992.

from the daily scrutiny of the press. In a contest between Indian self-government powers and sex discrimination, it is not clear that the rights of individual women will be protected by the federal government or by the courts, since to do so might conceivably be considered to be interfering with the general trend in favour of Indian self-government. In this regard, the American case of Santa Clara Pueblo v. Martinez<sup>542</sup> may be instructive and may offer an indicative of how Canadian courts might deal with Indian womens' rights in such a contest.

In the Martinez decision, the adult children of Julia Martinez, whose husband was Navajo, were disqualified from membership in the Santa Clara Pueblo under a tribal membership ordinance that denied membership to the children of women (but not to the children of men) who married outside the tribe. Julia Martinez and one of her children sued the pueblo, alleging sexual discrimination. The United States federal courts took jurisdiction under the equal protection of law provision of the Indian Civil Rights Act.

At trial, the judge applied a balancing test, finding that the tribal ordinance was a custom of long date to which he felt bound to defer. Judgement was granted for the pueblo on the basis that it was best suited to arrive at the proper balance of interests between pueblo cultural values and the protection of individual rights under the Indian Civil Rights Act.<sup>543</sup> On appeal, the court also applied a balancing test and found the opposite: the ordinance was of more modern origin and therefore not entitled to the same judicial deference. The balance was struck by the Court in favour of Julia Martinez and her daughter and the trial decision was reversed.<sup>544</sup> The Supreme Court avoided the merits and decided on narrower procedural grounds. It refused to interfere because tribal sovereign immunity as extra-constitutional self-governing entities meant that such issue were for the tribal, not the federal, courts to decide.

Evidently, the Martinez Case is not in any way determinative of how such an issue would be handled in Canada. In American constitutional theory tribes are not bound by U.S. constitutional strictures, having never ratified the Constitution and being neither states nor federal territories or agencies. They are only bound by Congressional legislation that applies to them, explicitly or implicitly, and by state legislation that Congress allows to apply in the absence of federal regulation of a particular area.<sup>545</sup> The issue of whether and to what extent Indians in this country are within or outside the Canadian constitutional framework remains to be determined. Nonetheless, the Martinez Case offers a hint about how the superior courts might choose to deal with band or Indian first nation sex discrimination issues in this country should they arise in an approximately similar context.

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<sup>542</sup> Supra note 18.

<sup>543</sup> 402 F. supp. 5.

<sup>544</sup> 540 F. 2nd 1039.

<sup>545</sup> Congress in theory could preempt the application of any or all state legislation under its plenary power over Indian tribes. See note 7 supra.

As the U.S. Supreme Court did in Martinez, Canadian courts might choose to return an issue arising out of a band membership code that on its face is discriminatory to whatever Indian controlled forum will exist in the future under whatever self-government regime eventually emerges in Canada. This is not a prospect towards which large numbers of Indian women in Canada look forward with anticipation. Nor is bringing such issues into the wider Canadian court system a prospect that the federal government necessarily regards with enthusiasm. To do so would bring into sharp relief two competing paradigms that have never been reconciled in the United States after more than 150 years of tribal self-government. A contest between Indian sovereignty and the liberal democratic values inherent in the notion of sexual equality are ill-matched partners in current legal thinking in both countries. This problem is only exacerbated in Canada by the attachment of an actionable fiduciary obligation to the assets that loss of membership will deny to persons excluded from membership. The intertwining of these issues will pose an enormous challenge in the self-government context in the future.

## Part II: Selected Provisions of the Indian Act

### E. THE INDIAN ACT: INTRODUCTION

In the General Introduction in Part A of this paper it was noted that, in the view of former Indian Affairs Minister Tom Siddon, "real change" is impossible under the Indian Act.<sup>546</sup> This is a widely held and long standing view that has been substantiated in the public hearings held by RCAP over the years.<sup>547</sup> The reasons for this are many, but may be summarized as resulting from the fact that for over a century, the Indian Act itself has been the dominating influence on issues vital to Indians such as personal identity, culture, political powers and economic status.

The Indian Act was the point of departure for all attempts by the dominant Canadian society to variously protect, civilize, assimilate, reform and otherwise make Indians over into an image consistent with colonial and Canadian social ideals at any particular period of time. No analysis of possibilities for reform and transition from the Indian Act can ignore the fact that, to an extent that few wish to admit, Indians and modern First Nation life have been at least partially made over in this way. Ironically, no analysis can ignore the fact that the Indian Act continues to be a vital defining element in Indian identity, culture, political power and economic status. Dosman sums it up well in the context of the prairie provinces:

The life of an Indian was never isolated from all contacts with white society, only from most. He was numbered and rationed, and closely watched. He could do almost nothing without the permission of the Indian agent: buy or sell; slaughter cattle; be educated; drink or travel. While every person of whatever background relates to his primary group of family and peers, his community and the outside world, Indians have an exceptional balance, or rather imbalance, among these levels. The outside world, the Indian Affairs framework, not only determined the Indian's income, living conditions, education and mobility; it also made every attempt to shape his culture and personality. It is for this reason that a study of Canadian Indians must start, not with "culture," or the "culture of poverty," but with the institutions that dominated him and the society that destroyed him.<sup>548</sup>

Evidently, the primary institutions referred to above are those that have emerged under the aegis of the Indian Act. For purposes of the following discussion and analysis, a framework that focuses on three aspects of the Indian Act and the policies underlying it - its antiquated,

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<sup>546</sup> Supra note 1.

<sup>547</sup> See e.g., Framing the Issues: Overview of the First Round (Ottawa: Royal Commission on Aboriginal Peoples, 1992) at 48-50; Exploring the Options: Overview of the Third Round (Ottawa: Supply and Services Canada, 1993) at 41-43; and Toward Reconciliation: Overview of the Fourth Round (Ottawa: Supply and Services Canada, 1994) at 60-62.

<sup>548</sup> Edgar Dosman, Indians: The Urban Dilemma (Toronto: McClelland and Stewart Ltd., 1972) at 13.

inconsistent and confusing nature - will be employed in an effort to lay bare some of the reasons why the Indian Act is an unappealing and ultimately limiting vehicle of reform. However, by the same token, it should also become apparent that leaving the Indian Act and its legacy behind may prove to be a politically and legally daunting proposition without the most elaborate, secure and legally binding assurances to First Nations that its protections will be retained.

(a) Antiquated and Paternalistic

The Indian Act is in general an antiquated and paternalistic vehicle. It finds its conceptual basis almost entirely in nineteenth century philosophies, policies and presumptions. The net result is a legislated image of Indians as wards of the state or as minors unable to manage their own affairs without extensive supervision and assistance. The 1876 "Annual Report of the Department of the Interior" cited earlier in this paper reflects this view in the starkest terms where it noted that "...our Indian legislation generally rests on the principle that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the state."<sup>549</sup>

In keeping with this view, many amendments were passed over the years bestowing an ever increasing number of powers over almost all aspects of Indian life on reserves on the Superintendent General (the Minister of Indian Affairs). Thus, the modern version of the Indian Act contains no less than 87 provisions granting the Minister of Indian Affairs a full range of administrative, quasi-judicial and legislative powers in all important areas.<sup>550</sup> The Minister thus has a role to play in registration of "Indians" and band membership; elections; by-laws; estates; Indian moneys and land management and resource development. There are, in addition, 25 provisions providing the Governor in Council with various powers including wide regulation-making authority.<sup>551</sup>

In short, there is no area of life under the Indian Act that is untouched by the hand of non-Indian officials. Many RCAP intervenors have commented that these wide governmental powers over First Nation communities have robbed them of their original self-reliance, noting, for example, that the Indian Act "has hindered the development of our people"<sup>552</sup> and "has bred a feeling of helplessness."<sup>553</sup>

In retrospect it seems clear that the Indian Act regime has created a self-fulfilling prophecy or vicious cycle: as the degree of ministerial control increased incrementally over the years, reserve communities gradually became more and more dependent on the Act and its structures for their

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<sup>549</sup> Supra note 102.

<sup>550</sup> Woodward, Native Law, supra note 20 at 158.

<sup>551</sup> Ibid, listed at 153-158.

<sup>552</sup> Framing the Issues, supra note 547 at 22.

<sup>553</sup> Exploring the Options, ibid at 32 per Greer Atkinson.

functioning and their finances, thereby justifying the demeaning vision of Indians of the non-Indian bureaucrats and politicians who had imposed it on them in the first place. This has not only permitted non-Indian society to maintain an image of Indians as dependent wards, it has also facilitated what one modern chief refers to as getting Indians "to accept the negative views that whites have of them."<sup>554</sup>

However, dispensing with the acknowledged paternalism in the Act may not be easy in light of the attachment since 1984 of an open-ended and legally enforceable fiduciary obligation on the Minister in many situations.<sup>555</sup> This makes it difficult for the Minister to withdraw easily from the affairs of Indian bands. This is especially so, it is feared, with regard to the large numbers of off-reserve band members whose interests might not be adequately protected if bands assumed full control of many areas now governed by the Act. In this respect there have been calls for an even greater degree of federal control over bands that have pursued membership and residency policies, for example, that in the view of the National Action Committee on the Status of Women have left many persons reinstated to status and membership under Bill C-31 "shut out from their Native communities and ... almost as disadvantaged as they were before."<sup>556</sup>

#### (b) Inconsistency

To its antiquated and paternalistic nature must be added a second reason why the current Indian Act cannot support real change: it is not consistent in its approach to the many areas that it attempts to regulate. The band council system is a good example. In this regard Richard Bartlett underlines "[t]he inconsistency of a policy conferring all control on the Superintendent General and yet seeking to encourage self-government...".<sup>557</sup> Thus, in the modern Indian Act band councils are provided with a long list of by-law powers under section 81. All are subject to ministerial disallowance, however, and to being overridden Governor in Council regulations under section 73 in many of the same areas covered by the band by-law powers. If a measure of autonomy was the intention of the section 81 by-law powers, it may easily be thwarted by the overlapping section 73 regulation-making powers.

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<sup>554</sup> Chief Oscar Lathlin of The Pas, supra note 85.

<sup>555</sup> In Guerin v. R., supra note 24 former Supreme Court of Canada Chief Justice Dickson articulated a broad standard of enforceable conduct that he describes (at 385) as being "in the nature of a private law duty" despite the fact that the Crown normally exercises only public law duties. Moreover, even where the discretion that is the hallmark of the existence of a fiduciary relationship is narrowed, he is clear (at 387) that "[a] fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion." The Dickson judgment was subsequently affirmed by the Court in R. v. Sparrow, supra note 25 as being the correct statement of the fiduciary principles applicable in Canadian Aboriginal law.

<sup>556</sup> Exploring the Options supra note 547 at 42. See also the concerns and criticisms of Aboriginal womens' groups (at page 33) noting, among other things, a distrust of the current Indian leadership.

<sup>557</sup> The Indian Act of Canada, supra note 93 at 4.

In this vein, the elective band council system - still imposable by the Minister under section 74 - seems to be at odds with fostering the social and political cohesion necessary to make effective use of even the limited section by-law powers. The resultant factionalism in First Nation communities that sees political and kinship groups struggle to attain control of band government in many bands is a recipe for impasse in the reform area. Stò:lo Chief Clarence Pennier cogently supported this assessment during one round of RCAP public hearings as follows:

Once elected, a similar situation typically arises within Council. Instead of working to build consensus, Chiefs and Councillors frequently divide along family lines and seek to block each other's initiatives while promoting their own. In a standard three-persons Band Council, the Chief and at least one Councillor normally owe their support to a single family block. These two can then work independently of the other Councillor whose support is not really required to pass Band Council Resolutions.<sup>558</sup>

The Assembly of First Nations has been particularly vocal in its criticism of this aspect of the Indian Act, noting in its submission to RCAP that the band council system "has severely undermined our traditional governing systems and attacked our consensus form of democracy...".<sup>559</sup> A good example of this is the imposition of the band council system on the Six Nations of Brantford in 1924.<sup>560</sup> Ovide Mercredi refers to the elective band council system as "the ten second model of democracy, since it gives us input at the ballot box for a total of about ten seconds every few years."<sup>561</sup>

This original Indian Act inconsistency has carried over into the entire Indian self-government policy arena, leading Professor Douglas Sanders to criticize current federal initiatives in the area as being largely "incoherent."<sup>562</sup> The evolution of Indian self-government policy will be discussed below.

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<sup>558</sup> RCAP Public Hearings, Kelowna, B.C., 93-06-16 32 at p. 62.

<sup>559</sup> Reported in Toward Reconciliation, *supra* note 547 at 61.

<sup>560</sup> See note 170, *supra*.

<sup>561</sup> Ovide Mercredi and Mary Ellen Turpel, In The Rapids: Navigating the Future of First Nations (Toronto: Penguin Books Canada 1993) at 90.

<sup>562</sup> Notes taken by the writer from a presentation made by Professor Sanders at a 1992 Canadian Bar Association continuing legal education symposium, "Constitutional Entrenchment of Aboriginal Self-Government." Professor Sanders saw the self-government process as incoherent due to the diversity of approaches and lack of overall coordination among them: Indian Act; Sechelt Indian Band Self-Government Act; Cree-Naskapi Act; Community Based Self-Government; Alternative Funding Arrangements; Kamloops Tax Amendments plus the ongoing land claims and constitutional negotiations. The fact of 633 potentially sovereign First Nations only adds to the understandable sense of loss of control experienced by the bureaucracy and the resultant slow progress and abundance of caution. For a short description of the incoherency of past and current federal Indian self-government policy, see John Giokas, "Aboriginal Self-Government: Its Déjà Vu All Over Again", Vol. 3, No. 7 The National (October, 1994) 22-30.

Another example of Indian Act inconsistency lies in the separation of Indian status from band membership and band residency rights. The federal government amended the status provisions through Bill C-31 of 1985 and by 1992 had added nearly 84,000 people to the Indian Register.<sup>563</sup> For a variety of reasons often connected to band funding and infrastructure issues, bands that control their band membership have either not added these people to their lists,<sup>564</sup> or, where they were added by operation of law, have not accorded residency rights to these new band members. Thus, these people remain in a sort of legal limbo, recognized as "Indian" and often even as band members, but with no Indian band community to which to return.

In this vein, the Native Council of Canada in its presentation to RCAP has referred to "the new category of bandless Indians" who are, in effect, "internal refugees."<sup>565</sup> If the intention behind Bill C-31 was to restore the integrity of bands as communities encompassing the majority of recognized Indians it has succeeded only in emphasizing the extent to which Indian Act bands cannot yet claim that distinction. The variety of categories of "Indians" has been increased, but without bringing a resolution to the area of who ought to be recognized as an Indian and included within recognized Indian communities since, as Wendy Moss observes "[t]here are now "C-31" Indians and "regular" Indians, section 6(1) Indians and section 6(2) Indians, status Indians with band membership and status Indians without band membership, and band members with and without Indian status."<sup>566</sup> Another unintended consequence may also to have introduced new sources of friction within existing First Nation communities as a result.<sup>567</sup>

### (c) Confusing and Incomplete

A third problem with the Indian Act is that it is both confusing and replete with gaps. Its ambiguity and incompleteness regarding the many matters with which it attempts to deal cause frustration and lead to practices outside the framework of the Indian Act as bands try to cope with the demands of modern economic and political life within its structure.

The reserve timber regime offers a good example of its confusing nature in the economic sphere. Under one section the Governor in Council may make regulations authorizing the Minister to grant licences to cut timber on surrendered or on reserve lands.<sup>568</sup> Another subsection

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<sup>563</sup> DIAND, Identification and Registration of Indian and Inuit People, supra note 536.

<sup>564</sup> Where they took control of their membership lists prior to June 2, 1987.

<sup>565</sup> Reported in Exploring the Options, supra note 547 at 43.

<sup>566</sup> Wendy Moss, "Indigenous Self-Government in Canada and Sexual Inequality Under the Indian Act: Resolving Conflicts Between Collective and Individual Rights," Vol. 15, No. 2 Queen's Law Journal 279 (Fall, 1990) 279 at 287.

<sup>567</sup> Ibid.

<sup>568</sup> S. 57(a). Timber may be cut on reserve lands (as opposed to surrendered lands) under this subsection only with

of that same provision authorizes further regulations to penalize on summary conviction (3 months imprisonment or a fine of \$100) the failure to observe the timber cutting regulation.<sup>569</sup> However, another provision in a different part of the Act penalizes anyone on summary conviction (3 months imprisonment or a fine of \$500) who removes timber from a reserve without the written authorization of the Minister.<sup>570</sup> It is not clear how these two provisions relate to each other.

A good example of a major gap in the Act is its failure to deal with treaties except for the minor reference to payment of treaty moneys to Indians or Indian bands in section 72. As will be recalled, the first Indian Act as such was passed in 1876 during a particularly active period in Canadian history when the "numbered treaties" were being entered into with Indian nations that were subsequently brought within the Act.<sup>571</sup> This legislative gap in the Indian Act has not stopped some courts from restricting treaty benefits to status Indians, however - a precedent that the federal government follows in order to limit its Indian expenditures and responsibilities.<sup>572</sup>

A good example of a minor gap is the provision in section 69 authorizing a band to "control, manage and expend" its revenue moneys. However, the provision does not permit a band to actually collect its own revenue moneys. Moreover, the authority is granted to the band and not to its governing organ, the band council. DIAND will thus collect the moneys for the bands and release it to them upon the issuance of a band council resolution despite the wording of the Act.<sup>573</sup> In practice, DIAND supervision is often minimal and, despite the absence of any legal authority under the Act, many bands do collect revenue moneys directly from leases, permits etc.<sup>574</sup>

#### (d) Repeal or Reform

The sheer number of problems with the Indian Act make the idea of repealing it an

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the consent of the band, however.

<sup>569</sup> S. 57(d).

<sup>570</sup> S. 93.

<sup>571</sup> Following Imperial policy and the earlier precedent of the Robinson treaties, the federal government entered into treaties 1 and 2 in the summer of 1871, with treaties 3 to 7 following between 1873 and 1877. The final treaties, 8 to 11, were made between 1899 and 1921. The Canadian government has never formally ended the treaty-making process (as was done in the United States, for example, in 1871) and the most recent example of the negotiation of a document in the classic "treaty" manner occurred in 1956 with an adhesion to treaty 6 by the Sauteaux Indian Band of Saskatchewan: note 42, supra.

<sup>572</sup> R. v. Laprise, [1978] 6 W.W.R. (Sask. C.A.). This is a much criticized decision. See Woodward, supra note 20 at 14.

<sup>573</sup> Lands, Revenues and Trusts Review: Phase II Report, supra note 1 at 40.

<sup>574</sup> Ibid at 49.

attractive one. There has certainly been no shortage of criticisms of the Act during the various rounds of RCAP hearings. There has been no consensus, though, about how to move out of it and what it ought to be replaced with. In fact, there have been very few concrete recommendations at all. Part of the explanation for this lies in the many paradoxes posed by the Indian Act and its origins that have been noted throughout this paper.

The central paradox for purposes of reform is described by Sally Weaver as "the century old ambiguity that Indians have felt about the Indian Act - their resentment of its constraints and yet their dependence on it for the special rights provided."<sup>575</sup> As the review of post war Indian policy reform initiatives has shown, Indian representatives have never spoken with one voice regarding the merits of repealing the Indian Act, nor have they advanced a widely held position regarding potential amendments or processes for opting out of it. This problem was noted early on in the RCAP hearings process where "strong support for abolishing the Indian Act" was observed, but with "no consensus on what might be done to replace it, if anything."<sup>576</sup>

One of RCAP's contributions to the national constitutional debate, Partners in Confederation, has outlined in a general way the historic failure of the federal government to protect Indian rights where it notes, for example, that "treaties were honoured by Canadian governments as much in the breach as in the observance..."<sup>577</sup> In practice, this meant that the Indian Act with its limited protections for an ever decreasing spectrum of the overall Aboriginal population in Canada was, until the advent of the Constitution Act, 1982, the only tangible symbol of Aboriginal special status and rights. George Manuel has described the Indian Act in this regard as something of a mixed blessing.

The main value of the Act from our view was that it was the one legal protection of our lands, and spelled out the basic rights and privileges of living on a reserve. But it also included a price tag.<sup>578</sup>

That Indians did not wish to see the Indian Act repealed without some guarantees of their historic rights was borne out by the joint parliamentary committee hearings of

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<sup>575</sup> Making Canadian Indian policy, *supra* note 4 at 19.

<sup>576</sup> Framing the Issues, *supra* note 547 at 23. In Exploring the Options, *ibid*, similar sentiments were expressed (at 41):

Aboriginal intervenors were almost uniformly critical of the Indian Act and of the federal administration of its responsibilities for Aboriginal peoples.

No support was expressed for the Indian Act in its present form. Some intervenors simply wanted to get rid of it.

<sup>577</sup> Royal Commission on Aboriginal Peoples, Partners in Confederation (Ottawa: Supply and Services Canada, 1993) at 26.

<sup>578</sup> The Fourth World, *supra* note 280, at 123.

1946-48 and 1959-61 and by the response to the 1969 ill-fated White Paper termination exercise. Harold Cardinal expressed it well in a passage cited earlier in this paper: "We would rather live in bondage under the Indian Act than surrender our sacred rights."<sup>579</sup> Indian Affairs Minister Ron Irwin has sometimes heard similar messages in his more recent round of consultations with reserve communities across Canada.<sup>580</sup>

Related to the ambiguity expressed by Indian people toward the Indian Act is the evident fact that the forms through which reserve communities have attempted to maintain their internal political cohesion are not necessarily traditional ones. As the earlier analysis in this paper has shown, often they are structures and processes forced upon Indians through the civilizing and assimilating measures making up historic Indian policy. Band council government is a good example, as vividly illustrated by the following observation from the Hawthorn Report:

If we say that the traders invented a new kind of Indian intermediary, the trading chief - we can also say that the government invented still another - the government chief - as well as an institution called the band council through which its affairs with the Indians were handled.<sup>581</sup>

The process of substituting commercially acceptable leaders for traditional ones also occurred in the United States.<sup>582</sup>

Thus, in Canada and in the United States, a new power structure was created in reserve communities that often led to conflict between traditional leadership and the new leaders. In both countries this in turn has led to a factionalism that continues to plague many communities. Some

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<sup>579</sup> The Unjust Society, *supra* note 324.

<sup>580</sup> See, for example, Doug Small, "Straight Talk, High Hopes, No Hoopla", Vol. 3, No. 7, October 1994 The National 16 at 18 where the author notes that recently at the Algonquin community at Lac Simon Québec the Minister "had endured a lecture on the ... virtues of the Indian Act" and "had been told that the ... Indian Affairs department he's working to abolish is 'a guardian angel' to Indians."

<sup>581</sup> Hawthorn Report, *supra* note 5 at 177 (vol 2).

<sup>582</sup> The effect of the imposition of the "trading chief" on traditional Indian government is underlined by the following statement by William Warren, an early observer of such matters and himself a mixed-blood Ojibway descendant of the traders [William W. Warren, History of the Ojibway People (St. Paul: Minnesota Historical Society Press, 1984) at 393-94]:

At the treaty of Fond du Lac [in 1826], the United States commissioners recognized the chiefs of the Ojibways, by distributing medals amongst them, the size of which were in accordance with their degree of rank. Sufficient care was not taken in this rather delicate operation, to carry out the pure civil polity of the tribe. Too much attention was paid to the recommendation of interested traders who wished their best hunters to be rewarded by being made chiefs....

From this time may be dated the commencement of innovations which have entirely broken up the civil polity of the Ojibways.

groups in Indian communities have clearly prospered under the new political structures. In the Canadian context Boldt refers to the "political and economic favouritism" by which "compliant Indian families" were rewarded with greater opportunities for social and political advancement.<sup>583</sup> In the United States, where the process has a longer history, there is now a comparative wealth of literature showing a similar "divide and conquer" approach to more traditional tribal governing structures and the emergence of competing power structures dependent on support from the federal and state governments.<sup>584</sup>

Dosman contends in the Canadian context that the modern consequence of these historic Canadian Indian policies is as follows:

... Indian administration since the establishment of the reserves has permitted a small elite of nuclear families to thrive, while allowing the vast majority to sink into a miserable dependent existence based on extended kinship relationships. A deep wedge therefore was drawn between the leading families and the majority of Indians within reserve boundaries. There were other divisions as well, but the most profound was the cleavage between "leaders" who allied themselves with the Indian administration, and their less fortunate followers.<sup>585</sup>

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<sup>583</sup> Boldt, Surviving As Indians, *supra* note 39 at 120. He summarizes the process as follows:

The process of transforming the traditional Indian leadership system into a ruling class system began upon first contact with Canadian government officials...[who] exploited the absence of formal political organization in Indian communities by following a practice of political and economic favouritism towards leading Indian families who were willing to ally themselves with the government. Government officials would subvert the traditional system of leadership by channelling essential goods and services to bands/tribes through such compliant Indian families, thus empowering them to disproportionately benefit themselves and their kinfolk and followers.

<sup>584</sup> See e.g. John Ehle, Trail of Tears: The Rise and Fall of the Cherokee Nation (New York: Anchor Books/Doubleday, 1988); William Hagan, Indian Police and Judges, *supra* note 129; Vine Deloria Jr. (ed.) American Indian Policy in the Twentieth Century, *supra* note 18.

In a study prepared for the Royal Commission on Aboriginal Peoples Russell Barsh confirms this in the specific context of the Indian Reorganization Act in "Aboriginal Self-Government in the United States: A Qualitative Political Analysis (June, 1992) as follows at 6:

The IRA did more than standardize tribal political structures and regularize the administrative relationships between tribal governments and the federal government. It further concentrated power within the Indian community, in the hands of Indians who could read and write and remain on good terms with Federal bureaucrats. Some IRA councils were taken over by successful Indian businesspeople who had money to invest in gifts and campaigning, while others were dominated by former Indian Office employees and landless or unemployed Indians, who secured their power by restricting or nationalizing private Indian farming, ranching or fishing. In either case, control of the tribal council became a new way of consolidating or redistributing Indian power and resources, swiftly undermining what remained of traditional political mechanisms.

<sup>585</sup> Indians: The Urban Dilemma, *supra* note 548 at 56-57.

This has led to modern charges that the governing structure on some reserves is dominated by an "élite group" that is unresponsive to the wishes of the broader community, a theme that will be explored later in this paper. Clearly, however, there have been many positive changes in attitude and rhetoric in official circles in recent years, often coupled with the increasing move to devolution of Indian service delivery to bands and other measures to enhance the self-governing capacity of First Nation communities. Nonetheless it seems fair to say that Canada is still in many ways in the situation of "internal colonialism" described by the authors of the Hawthorn Report nearly thirty years ago.<sup>586</sup> A precipitous rush to a new relationship of greater equality without adequate transition measures seems from this perspective to be as short-sighted as the historic policies of civilization and assimilation that have produced the current situation of impasse and bitterness.

Support for a gradual transition is provided by not only by history and logic, but also by testimony and submissions to RCAP during its rounds of hearings. In this regard, the following RCAP summary from the third round of hearings is typical:

No support was expressed for the Indian Act in its present form. Some intervenors simply wanted to be rid of it.

The more common view was that the Indian Act should be phased out, but not overnight.

Intervenors suggested that the Act be replaced by a treaty relationship; that it be dismantled according to a timetable agreed with Aboriginal peoples; that a separate federal department be set up to deal with the interests of off-reserve Aboriginal people because they are largely excluded from the Indian Act; that the Act be replaced by a national treaty; and that the Indian Act be changed to accommodate regional differences sought by Aboriginal peoples in different parts of Canada.<sup>587</sup>

Unfortunately, beyond general statements such as those above, there are few practical suggestions in the testimony or submissions regarding reform or transition. The challenge will be to design a transition procedure that takes account not only of the expressed preferences of Indian people themselves, but also conforms to whatever theory of Aboriginal self-government becomes widely accepted in Canada. Needless to say, such a procedure will also have to conform to fiscal and political realities. That being said, it is appropriate to examine the current version of the Indian Act.

## F. PROVISIONS OF THE CURRENT INDIAN ACT

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<sup>586</sup> Supra note 290.

<sup>587</sup> Exploring the Options, supra note 547 at 41.

### (1) Indian Status and Band Membership

The status and membership provisions of the Indian Act have already been discussed earlier and will not be described again here except to note that this is an area where DIAND exercises a number of powers. For example, under the Minister's authority, DIAND performs the following functions:

- defines "Indian" in sections 6 and 7, thereby determining who will be eligible for federal benefits under the Act and in other federal policy contexts;
- maintains an Indian register of registered/status Indians under section 5 as well as a register of band members under section 8;
- allows bands to assume control of their membership register under section 10, subject to a majority vote of the "electors"<sup>588</sup>; and
- under section 14.2 deals with protests regarding the Indian register and band lists - but only those lists maintained by DIAND under section 8. Lists controlled and maintained by bands under section 10 are supposed to have their own protest and appeal mechanisms built in.

#### (a) Individualistic Philosophy

There are a number of general features of this part of the Indian Act that merit comment. In the first place, and as Wendy Moss notes, "the right to be registered as an 'Indian' is a right pertaining to individuals."<sup>589</sup> Thus, the Indian Act adopts an essentially individualistic approach to those who fall within its ambit, despite its focus on group privileges and benefits in various sections.

The Indian Act is based on the definitions in section 2 of "Indian," "band," and "reserve." An "Indian" is someone who is registered or entitled to be registered as an "Indian." It is significant that an "Indian," the essential subject matter and rationale for this legislation, is defined in the first instance as an individual and not as a member of a group. As will be seen below, the group (band) is defined as an assemblage of individual Indians and not as a self-defining community as such. This individualistic philosophy is to be contrasted with the approach in the United States in the Indian Reorganization Act of 1934:

19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For purposes of this Act, Eskimos and other Aboriginal peoples of Alaska shall be considered "Indians".<sup>590</sup>

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<sup>588</sup> Those band members normally resident on reserve pursuant to s. 77.

<sup>589</sup> Supra note 566 at 298.

<sup>590</sup> Supra note 27, s. 479.

The focus on individuals is only the third criterion in the American definition, with the first two focusing on tribal membership and descent from tribal members. In the United States, tribal membership decisions are for the tribe, and not the federal government, to make. (In Canada, until 1985, band membership decisions were for the federal government, not the band, to make). Thus, while the Indian Reorganization Act, like the Indian Act, is a recognition act, its focus is firstly on the recognition of the group and only secondarily on the recognition of the individual members.

The Indian Act is equally a recognition act. However, its focus is on those individuals entitled to be recognized as Indians and to accede to the rights and privileges accorded to "Indian" individuals. Two of those rights and privileges are to live in a recognized community (band) of other individuals who are recognized as Indian on lands recognized as being reserved (reserves) for individuals recognized as Indian.

In keeping with this perspective, "band" is defined in section 2 as a "body of Indians" and not as, for example, a successor entity to the "several Nations or Tribes of Indians" referred to in the Royal Proclamation of 1763. In 1763, those nations or tribes decided who they were and who their members were and these decisions were respected by the British Imperial authorities under a policy of recognition that respected the capacity of an Aboriginal nation to define itself and to enter into relations with other self-defining entities.<sup>591</sup> With the shift in relative military powers, however, came the imposition on Indian entities of individualistic and liberal values via the civilizing and assimilation policies described earlier. In short, the ascendant Imperial and colonial authorities applied a policy of recognition based on objective factors such as blood quantum or kinship as determined through the male line, thereby denying to Aboriginal nations their former capacity to self-define.

Nor has Bill C-31 of 1985 fundamentally altered things. Indian status and band membership have been separated for purposes of bands taking control of membership decisions.<sup>592</sup> The separation of status from band membership does not alter the basic focus of the Act on individuals as opposed to collectivities. In short, from the Indian Act perspective, the individual precedes the group - a notion more in keeping with the liberal and contractarian values of non-Aboriginal cultures.<sup>593</sup>

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<sup>591</sup> For a review of the distinction between the declaratory and constitutive theories of recognition, see John Giokas, "Domestic Recognition in the United States and Canada: Possible Implications in Light of "Partners in Confederation" and Suggestions for Further Inquiry and Discussion," September 30, 1994.

<sup>592</sup> Recognizing that this may lead to awkward situations in practice, section 4.1 of the Act allows band members who are not status Indians under the status rules in subsections 6(1) and 6(2) to nonetheless be deemed status Indians for the purposes of other provisions under the Indian Act that might otherwise be frustrated. When one recalls that "status" is itself a legal fiction, it becomes clear that the section 4.1 deeming provision is a legal fiction grafted on to another legal fiction. And who says government lawyers have no imagination?

<sup>593</sup> In the same way, the municipal model of Indian government reflected by the elective band council voting system

One of the ironic aspects of this individualistic focus of the Indian Act has been its adoption by those who have benefitted from it over the years - status Indians resident on reserve and their national organization, the Assembly of First Nations. While this may be understandable, given the tremendous centrifugal pressures exerted by the federal government on First Nation communities, the net effect in modern times has been to impede unity among Aboriginal peoples. Ovide Mercredi comments in this regard as follows:

What is especially hurtful about the Indian Act is that, while we did not make it, nor have we ever consented to it, it has served to divide our peoples. We sometimes buy into the Indian Act definitions and categories in our own assessments of people and politics. This is one of the legacies of colonialism.<sup>594</sup>

One final point to note in connection with the individualistic focus of the Act is that while recognition of new bands is possible, it too is based on the identity of the individuals who will comprise the band. Under section 17 the Minister may amalgamate existing bands or "constitute new bands." However, in the latter case the new band will only be constituted from existing band lists or from the Indian Register. In short, only if the individual members of a potential new band are already recognized either as band members or as status Indians will the Minister exercise this power. This is thus not a true group recognition policy, but is, to the contrary, reflective of the individual orientation of the Indian Act

One band that has been constituted in this way in recent years is the Woodland Cree Band of Alberta. It is a breakaway group from the Lubicon Band and it was constituted as a separate band under section 17 in 1989. Two years later it accepted a federal settlement offer for its portion of the Lubicon claim area. While the federal government was moved in this instance to exercise its "recognition" power in this regard, its motivation appears in retrospect to be somewhat suspect. As Dickason puts it, in accepting its settlement package in July 1991, "[w]hat the Woodland Cree gave up in return was not announced; what was clear was that the department's policy of dividing and conquering was working..."<sup>595</sup>

#### (b) Federal Control of Indian Recognition Policy

A second feature of this part of the Indian Act worthy of note is its statement in section 4 that it applies only to "an Indian" and specifically does not apply to "the race of aborigines commonly referred to as Inuit." This disclaimer is necessary to counter the 1939 Supreme Court

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of "fifty per cent plus one" majority government rather than traditional Aboriginal consensus decision-making models is yet another manifestation of that philosophy.

<sup>594</sup> In The Rapids, *supra* note 561 at 88.

<sup>595</sup> Dickason, Canada's First Nations, *supra* note 29 at 392.

decision in Re Eskimo<sup>596</sup> confirming that Inuit were indeed "Indians" within the meaning of section 91(24) of the Constitution Act, 1867 and therefore amenable to federal Indian legislation and policies. Thus, despite the judicial recognition of Inuit as "Indians" for constitutional purposes, successive federal governments have restricted the Indian Act to the other "group of aborigines," namely, ethnological Indians.

However, as described earlier, not all ethnological Indians have been accorded official recognition as "legal Indians." Logic would seem to demand that Indian status somehow be accorded with Indian racial descent and culture. But that is not the case. In this vein and as has been noted earlier, there is no necessary connection between Indian status and Indian blood or culture, despite the adoption of the status/non-status distinction even by Indian people themselves. Many commentators have noted as much, including Dosman, who states unequivocally that "the pure blood Indian exists only in fiction."<sup>597</sup>

The difficulty of eliminating the fiction to which Dosman refers accounts for the other categories of "non-status Indian" and "Metis" that exist separate from that of "Indian" under the Indian Act. There is no necessary scientific or constitutional justification for restricting recognition in the way that has been done. It is and always has been a pure policy decision related more to administrative convenience and an official desire to restrict the Indian service population and to foster assimilation than to any principled position defensible on neutral grounds.<sup>598</sup> It is, in essence a political decision related to the political needs of the dominant Canadian society.

Thus, there is no reason in principle why non-status Indians could not equally be brought within the ambit of the Act. In the same way, there are arguments militating in favour of including the Metis as well, on the basis of their ethnological Indian (and Inuit<sup>599</sup>) roots and their distinctive cultures and forms of political association.<sup>600</sup> In short, if it were necessary formally to bring the categories of persons referred to in section 35 of the Constitution Act, 1982 as "Indian, Inuit and Metis peoples" within federal legislative competence - for the purposes of attempting to occupy and then vacate the field of "Indians and Lands reserved for the Indians" in section 91(24) as contemplated by the Penner Report proposals, for example - there are strong arguments why it might be possible to bring all the Aboriginal peoples within the formal federal embrace.

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<sup>596</sup> Supra note 22.

<sup>597</sup> Indians: The Urban Dilemma, supra note 548 at 36.

<sup>598</sup> See, e.g., Kathleen Jamieson, supra note 29 at 118.

<sup>599</sup> On the assumption that all persons of mixed Aboriginal and non-Aboriginal racial ancestry are Métis, and not just the descendants of the historic Manitoba Métis communities.

<sup>600</sup> The arguments for and against this assertion have been canvassed and assessed in Morse and Giokas, supra note 16.

In this vein subsection 4(2) empowers the Governor in Council to declare that any or all of the Indian Act is inapplicable to Indians, bands, reserves or surrendered lands under the Act, but with the notable exception of the provisions regarding Indian status and band membership (ss. 5-14.3) and land surrenders and land designations<sup>601</sup> (ss. 37-41).<sup>602</sup> Thus, while the federal government is apparently prepared under some circumstances to abandon the protections and restrictions in the Indian Act, it is apparently not prepared to concede the power to control the recognition of Indians and groups of Indians. The rationale for retention of control of Indian recognition policy has been to reduce or at least control the federal Indian service population. Thus, as DIAND officials have admitted, this aspect of the Indian Act "passed the responsibility on to the provinces for thousands of people who, but for the statute of 1876, would have been federal responsibility for all time."<sup>603</sup>

### (c) Continuing Federal Policy of Assimilation?

A third aspect of this part of the Act that merits comment is the federal government contention that it has addressed any charges of injustice by restoring Indian status and band membership via Bill C-31. It is important to be aware of the following shortcomings in this initiative, however.

First, not all ethnological Indians were included. There are still hundreds of thousands of non-status Indians (and Metis) in Canada - unrecognized constitutional (section 91(24)) "Indians" who do not belong to recognized constitutional Indian communities. These are the descendants of what Partners in Confederation refers to as the "political units that became associated with the Crown at definite historical periods"<sup>604</sup> and with which the non-Aboriginal settler society entered into relations. They have been excluded from membership in those original political units and are

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<sup>601</sup> A term in the revised Act to clarify that reserve lands conditionally surrendered for purposes of leasing remain reserve lands for purposes of the tax exemption for income earned on reserve.

<sup>602</sup> Based on a manual count in the index to Woodward, Native Law, supra note 20, nearly 340 bands have been exempted from many of the provisions of the Indian Act. In many cases they are pre-1985 status and membership provisions, particularly s. 12. In addition, 14 bands have been exempted from pre-1985 land provisions, primarily ss. 12(1) and 93.

<sup>603</sup> Supra note 219. That reduction, or at least control of the Indian service population is the rationale is underlined in the following statement from a DIAND publication:

Alternatively, the Government could allow bands to define their own membership, but continue to define status in the Indian Act. This would continue to allow the Government to have some kind of control over its expenses, for historically it has provided funding and programs only for status Indians. The band could divide its funds in any way it chooses.

DIAND, The Elimination of Sex Discrimination from the Indian Act (Ottawa: Ministry of Supply and Services, 1982) at 6.

<sup>604</sup> Supra note 577 at 29.

the "internal refugees" referred to by former Native Council of Canada (now Congress of Aboriginal Peoples) president Ron George.<sup>605</sup>

Moreover, Bill C-31 was a one-time expansion. Its effects in adding to the total population of registered Indians may well be offset by the effects of the subsection 6(1)/6(2) distinction that it introduced and which has been described in some detail earlier. Indian status may be lost after two successive generations of marriage between Indians and non-Indians. In short, the "two generation cut-off" effect of the post-1985 Indian Act Indian registration provisions may well lead to a drastic decline in the registered Indian population. In this respect, the effects of the 6(1)/6(2) distinction may prove to be a demographic "time bomb" for the registered Indian population. This assessment is borne out by a recent study on band codes prepared for the Assembly of First Nations in which the authors conclude that their projections "suggest a declining Indian Register population beginning in roughly fifty years or two generations".<sup>606</sup>

If this is accurate, in the foreseeable future bands that control their membership under the post-1985 rules may well have populations that are only deemed under section 4.1 to be Indians for certain purposes under the Indian Act. They may well be ethnological Indians, descendants of the original nation or community of which the band is the successor, self-defining as Indian and members of a self-defining Indian community, but not registered and recognized as Indian by the federal government. Evidently, in the absence of new band funding criteria, they will not be eligible for federal funding directed to bands on the basis of the band status Indian population.

Aside from the purely logical and political elements of such a scenario, this raises the narrower legal issue of whether a band made up of non-status Indians will still be a "band" under the Indian Act. A band, after all, is a "body of Indians" under section 2 i.e. a body of persons registered or entitled to be registered as Indians. Can there be a body of "Indians" when there are no "Indians" left in that body? Will the de-recognition of individual Indians who marry out once too often therefore permit by stealth what the federal government tried so openly to do in 1969, namely, to terminate the special group status of Indians via the White Paper exercise? In the face of the relentlessly shortsighted nature of most of federal Indian policy one hesitates to attribute this much sophistication to the federal policy makers who devised the scheme in Bill C-31. Nonetheless, there is much to justify the frequent accusations of "genocide" levelled at the federal government in this context.<sup>607</sup>

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<sup>605</sup> Supra note 547.

<sup>606</sup> Clatworthy and Smith, "Population Implications of the 1985 Amendments" supra note 541 at ii. They go on to note that "some First Nations, whose out-marriage rates are significantly higher than the national norms, would cease to exist at the end of the 100 projection period."

<sup>607</sup> See, e.g., the testimony of Damon Johnston reproduced in Framing the Issues, supra note 547 at 22: "The Indian Act was a genocidal instrument clearly designed to destroy the culture and the integrity of the Aboriginal people of this land...".

It is also important to note that sex discrimination has not been eliminated from the Indian Act by Bill C-31. There are still lingering effects of the earlier sex discrimination that fall harder on Indian women and their descendants than on Indian men. Also, since "C-31 Indians" are drawn mostly from the ranks of formerly enfranchised Indian women and their descendants, they are the ones bearing the brunt of the refusal of many bands either to accord them band membership or residency on the reserve. It should also be noted, that Indian women and their descendants who have been educated outside the band community and exposed to wider egalitarian social and political philosophies are in many respects threatening to the entrenched political élites on many reserves.

Bill C-31 has satisfied very few in the Indian population as a whole. Non-status Indian groups see it as an incomplete response since their membership does not yet have Indian status. Indian womens' groups see it as a feeble initiative half-heartedly administered that will require federal enforcement to ensure adequate band compliance with its intent. Both groups see the emphasis placed on "band" government as misplaced - the former because the band is not the entire "first nation" in their view, womens' groups because they assert that bands are insufficiently respectful of individual rights and of women in general.

Status Indian communities and groups resent the fact that Bill C-31 is further delegation of federal power rather than recognition of the inherent right of a First Nation to control its own membership. Several bands are pursuing litigation against the federal Crown in this regard.<sup>608</sup> In this vein, they also complain that the powers delegated are too limited, since they must respect the acquired rights of "C-31 Indians" who got automatic band membership upon re-acquiring Indian status. Moreover, many bands resent the fact that they have not been given power over Indian status as well as band membership. However, as Wendy Moss notes, both womens' groups and status Indians are united by two things: opposition to the second generation cut-off rule; and a claimed right to self-identification:

...the parties on each side are essentially claiming a right of self-identification. Indigenous nations are claiming the right to define the group by determining its citizenship, while indigenous women are claiming a right to define themselves first as Indigenous persons and second as Indigenous persons connected by descent to a particular clan, tribe, nation, or band. It is easy to sympathize with the right claimed in each case.<sup>609</sup>

Finally, it is important to recall the legacy of discrimination in the Indian Act that Bill C-31 was supposed to address. That legislated discrimination was almost entirely the result of federal government efforts to restrict and reduce the "Indian" population and to assimilate Indian people

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<sup>608</sup> Twinn v. The Queen (F.C.T.D.). Four bands are challenging Bill C-31 on the grounds that it contravenes their Aboriginal and treaty rights under Constitution Act, 1982 section 35 to control band membership and also that it fails to conform to section 2(d) of the Charter - freedom of association. As of the date of this paper, no decision had been rendered by Muldoon J.

<sup>609</sup> Supra note 566 at 288.

into larger Canadian society, usually against their will and in violation of treaty promises and prevailing notions of international law (and domestic law in the case of what are now known as "specific claims").

For both status and non-status groups there is thus some irony to federal government statements regarding the requirements of the Charter and international human rights legislation that led to restoring status to the limited categories of persons captured by the Bill C-31 criteria. To a great many Indian people, the fact of the continuing existence of a status system under the control of non-Indian authorities is itself an indication that the federal government still practices discrimination and flouts international human rights trends favouring a right of self-identification for indigenous peoples.<sup>610</sup>

#### (d) Need for New Indian Recognition Criteria

Whether and to what extent a status/non-status distinction is relevant or acceptable in the modern era is a question that RCAP will have to address. If recognition criteria are necessary - and it is likely that they are - the following definition from the International Labour Organization may be useful as a point of reference. The International Labour Organization (ILO) is a U.N. agency based in Geneva that focuses on indigenous issues as part of its larger mandate regarding international labour matters. It pioneered an early study of indigenous issues in 1953, and four years later passed Convention 107 on the "Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries". This is still the only ratified international instrument protecting indigenous human rights.

Convention 107 also attempted for the first time a definition of "indigenous populations" that in retrospect is now seen as being assimilationist. Thus, it was replaced by a new version in 1989: Convention 169, "Convention Concerning Indigenous and Tribal Peoples in Independent Countries."<sup>611</sup> It changes its focus from "populations" to "peoples" as shown by the definition in Article 1:

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions

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<sup>610</sup> A good overview of the evolution of international human rights standards with regard to indigenous peoples is provided by S. James Anaya, "The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective", 1989 Harvard Indian Law Symposium 191. A somewhat more polemical overview is contained in Kronowitz et al, "Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations", [1987] 22 Harvard Civil Rights-Civil Liberties Law Review 507 at 586-622. Another short review of the evolution of this area of international law is provided by John Giokas, "Ratification of Agreements Affecting First Nations", research document prepared for RCAP, undated, at 9-17.

<sup>611</sup> It was adopted by the ILO at its 76th session in Geneva on June 27, 1989 and may be cited as 7 U.N. ESCOR CN.4 (Agenda Items 4 and 5, addendum part 2) at 3, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.2 (1989).

distinguish them from other sections of the national community, and whose status is regulated wholly or partially, by their own customs or traditions or by special laws or regulations;

- (b) peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

The definition may prove useful in furthering the debate because it addresses the elements required to show Aboriginality in more comprehensive way than has been the case to date. There are alternative definitions, each containing objective criteria.

For instance, (a) seems clearly to refer to existing tribes organized as such that are distinguished from the dominant society by their socio-cultural conditions and who enjoy some legal independence from the governance norms of the dominant society. In American terms these peoples would be recognized or unrecognized tribes. In Canadian terms, they would be Indian Act bands, self-governing Indian bands and Metis settlements and Inuit self-governing territories. The criteria in (b) would appear to encompass people who although not presently organized into "tribes," are the racial descendants of the original tribal occupants and who retain some of the elements of that original status. In American terms, these people would be urban Indians and unrecognized tribes, while in Canada they would be non-status Indians and Metis.

It is interesting that in neither case is it necessary for a group to actually be in possession of their own lands in order to qualify. The element that is common seems to be some sense of continuing sense of political organization, whether actual as in (a) or residual but identifiable on objective criteria as in (b). However, the element that really sets this formulation apart is the notion of self-identification in 2. Given the openness of the language it is probably both the group and the individuals making up the group that must self-identify.

Another useful part of the Convention is the requirement in Article 1 that the provisions "shall be applied without discrimination to male and female members of these peoples." Presumably, this would prevent the type of discrimination levelled against Indian women and their children that has been described in this paper. Thus, in recognizing Aboriginal political units, the federal and provincial authorities would arguably be prevented from endorsing the current unsatisfactory situation where the lingering effects of the original discriminatory policies continue to place Indian women and their children at a disadvantage.

## (2) Reserves and Land Management

### (a) The General Nature of the Reserve legal Regime

Reserve land management is the heart of the Indian Act and the area where the powers of the Minister and DIAND officials are most pronounced. The reserve land management provisions of the Indian Act are too detailed and complex for anything other than cursory treatment here. Thus, only the major themes will be isolated and a number of the problem areas described.

Before entering into the specifics of the reserve system, two things must be noted. First, and in keeping with the failure of the Indian Act to refer in any important way to treaties, the relationship between the creation of reserves and treaty promises to this effect is not reflected anywhere. Although often dealing with the same land, it is as if the legislative provisions and the treaty undertakings inhabit different conceptual universes.

Secondly, it is noteworthy that Indian reserves in Canada are generally much smaller than are Indian reservations in the United States. Prior to the General Allotment Act<sup>612</sup> of 1887, Indians in the United States had 152 million acres of reservation land. Today reservation lands include over 56 million acres and nearly one million Indians live on or near those reservations.<sup>613</sup> In Canada, approximately 350,000 status Indian band members live on less than 7 million acres of reserve lands.<sup>614</sup> American reservation Indians, while only three times the population, thus hold eight times as much land as Indians on reserve in Canada.<sup>615</sup>

There are many reasons for this, but one of the most prominent would seem to be the failure of Canadian authorities either to make treaties setting out reasonable treaty land entitlement amounts or, where treaties were made, to survey and set aside the agreed amount of land. In addition, there have been significant losses of Indian reserve lands through surrenders and other transactions that are now often the subject of Indian complaints and legal claims. These are all matters being dealt with under a variety of different processes: comprehensive claims, modern treaty negotiations, specific claims including treaty land entitlement matters and land claims litigation.<sup>616</sup>

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<sup>612</sup> U.S. Statutes At Large, 24:389-91 (The Dawes Act).

<sup>613</sup> United States Department of the Interior, American Indians Today (Washington: Bureau of Indian Affairs, 1991) at 9.

<sup>614</sup> DIAND, Lands, Revenues and Trusts Review, supra note 1, at 5.

<sup>615</sup> For a discussion and comparison of the land policies of Canada and the United States vis-à-vis Aboriginal peoples see Robert Harvey-White "Reservation Geography and the Restoration of Native Self-Government", Vol. 17, No. 2 Dalhousie Law Journal 587 (Fall, 1994).

<sup>616</sup> A good review of these various processes and the complications and problems associated with them, with particular focus on specific claims, is William B. Henderson, Derek T. Ground, "Survey of Aboriginal Land Claims" Vol. 26, No. 1 Ottawa Law Review 187 (1994). The B.C. Treaty Commission is briefly discussed in Barbara Fisher "The Mandate of the British Columbia Treaty Commission", Vol. 53, Part 1 The Advocate 75 (January 1995).

### (i) Reserves and Special Reserves

A reserve is defined in section 2 of the Indian Act as "a tract of land, the legal title to which is vested in Her Majesty, that has been set aside ... for the use and benefit of a band." In Guerin v. The Queen the Supreme Court stated that, in this case at least, the Indian interest in reserve lands is the same as that in unceded Indian lands still subject to Aboriginal title.<sup>617</sup> Although the Court apparently left open the possibility of revising this finding in a future case,<sup>618</sup> Professor Slattery's conclusion seems accurately to reflect the current state of the law where he notes that as a general rule an Indian Act reserve is "land that has become permanently attached to a particular group of native people under a legal regime similar to that of Aboriginal title".<sup>619</sup> Aboriginal title will be discussed below.

In much the same way that section 4.1 deems certain persons to be "Indians" for purposes of the Indian Act despite their lack of Indian status, section 36 authorizes treating lands that are not held by the Crown to be treated as reserves and subjected to the Indian Act reserve land regime so long as they are "set apart for the use and benefit of a band." These are known as special reserves. The Six Nations reserve at Brantford is one such example. Courts have divided over whether it is held by the Crown in trust for the band, or whether the band itself owns the land in fee simple.<sup>620</sup> It has nonetheless been found to be a reserve under section 36.

As Woodward notes, it is simply unknown at this time whether a band could purchase land in fee simple in the ordinary way and by that means transform it into reserve land, or whether it is necessary for the Crown to do so in order that it be a special reserve.<sup>621</sup> The ramifications of the former possibility are important, not least of all because of the tax exemption for income earned by Indians on reserve lands. In this context it should be noted that federally recognized tribes in the United States may purchase lands in their own names, which lands will then fall under federal trust protection.<sup>622</sup> This is in addition to the authority of the Secretary of the Interior to purchase,

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<sup>617</sup> Supra note 24 at 379 per Dickson, C.J.:

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional lands. The Indian interest in the land is the same in both cases...

<sup>618</sup> Ibid: "It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation."

<sup>619</sup> "Understanding Aboriginal Rights," supra note 45 at 770.

<sup>620</sup> In Isaac v. Davey, supra note 517, Osler J. at trial judge thought the band did hold their land in fee simple, but the Court of appeal (51 D.L.R. (3d) 170 disagreed. The Supreme Court of Canada [1977] 2 S.C.R. 897 did not rule on the issue.

<sup>621</sup> Native Law, supra note 20 at 232-33.

<sup>622</sup> Felix Cohen's Handbook, supra note 51 at 484.

exchange or otherwise acquire lands and to proclaim them as tribal trust lands under various statutes, including the 1934 Indian Reorganization Act.<sup>623</sup>

### (ii) Sovereignty Over reserve Lands

It is almost axiomatic that land is the cornerstone of the existence of First Nation communities, since any surrender of land takes it out of First Nation jurisdiction into that of the province or territory in which the reserve is located. This is due to the unusual nature of Indian land tenure under Canadian law that will be discussed below.<sup>624</sup> In short, unlike the case of non-Aboriginal lands in Canada, a sale of Indian land through surrender is tantamount to a release of whatever sovereignty the Indian group may exercise over it. Indian land transactions are, therefore, attended by greater consequences than transactions involving provincial lands in fee simple where, by way of contrast, the province does not lose sovereignty over the land. Instead, the buyer comes within the sovereignty of the province or territory where the land is located.<sup>625</sup>

Because of the serious consequences of a surrender, the Indian Act was amended in 1988 to make it clear that reserve lands surrendered conditionally for the purposes of leases etc. nonetheless remain reserve lands. They are not, therefore surrendered absolutely so as to fall within provincial jurisdiction. These are now referred to as "designated lands" and are subject to band land regulation and taxation powers.<sup>626</sup> This has important revenue-generating consequences for bands, but has caused friction between bands and provincial and municipal authorities, especially in British Columbia where many municipalities encompass parts of reserves and resent the loss of their ability to tax non-Indian residents on lands now arguably outside their jurisdiction.<sup>627</sup>

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<sup>623</sup> Supra note 27, sections 4-7.

<sup>624</sup> The feudal notion whereby sovereignty and with property rights underlies this whole issue. This, coupled with the enunciation of the discovery doctrine, a reinterpretation of the discovery principle, by the United States Supreme Court in 1823 is at the root of the strange notion that Aboriginal nations do and cannot "own" their own lands. The "discovering" European nation has been deemed under this doctrine to have acquired legal title to the lands of the "discovered" Aboriginal nation by a process that no one has ever convincingly been able to explain. As the "owner" of Aboriginal lands, European nations and later Canada and the United States, merely perfected their underlying title upon buying out the lesser, possessory rights of the Aboriginal nation. Thus, whatever sovereignty Aboriginal nations may have had was viewed as merely temporary (or even illusory), hence the loss of that sovereignty upon sale of the Aboriginal right or title to the European nation. Although self-serving, Canada and the United States rely on this notion for whatever sovereignty they claim over Aboriginal peoples. See Johnson v. McIntosh 21 U.S. 543 (1823) at 591-92. For a fulsome discussion of the relationship between European feudal and religious ideas and the discovery doctrine see Robert Williams Jr., The American Indian in Western Legal Thought, supra note 37.

<sup>625</sup> Although in Johnson v. McIntosh, Marshall C.J. was apparently ready to concede the legitimacy of a similar rule whereby non-Indian purchasers of Indian lands would come within Indian tribal jurisdiction, ibid at 593-94.

<sup>626</sup> See Native Law, supra note 20 at 265, n. 65 for a list of all the sections affected by the amendment. This raises the issue of whether simply renaming the conditional surrender process and conditionally surrendered land alters the constitutional consequences of a conditional surrender/designation. Woodward discusses this issue at 267-70.

<sup>627</sup> See Robert L. Bish "Aboriginal Self-Government Taxation and Service Responsibility" in Canadian Bar

Present and former Indian lands are the cornerstone of the Canadian federation, since settlement occurred on lands originally under the sole sovereign power of the Aboriginal peoples. How Canada acquired sovereignty over Indian lands generally is an issue that is subject to competing interpretations regarding its legitimacy. Professor Slattery is nothing if not frank in this regard: "Canadian law treats the question of when and how the Crown gained sovereignty over Canadian territories in a somewhat artificial and self-serving manner."<sup>628</sup> Thus, and to return to the obvious example, treaties and the nation to nation relationship of competing Indian and Crown sovereignty is largely ignored in the cases and in official pronouncements. The irony in this regard is that treaties - the affirmation of First Nation sovereignty vis-à-vis that of the Crown - are conceived in Canadian law as the vehicles whereby that original Indian sovereignty was extinguished.

Nor is this question one of merely academic interest. During the DIAND Lands, Revenues and Trusts Review consultations in the 1980s, for example, federal officials were frequently challenged on precisely this issue:

A related concern is the lack of consensus between Indian people and DIAND regarding the legal obligations of the Crown with respect to the management of Indian lands. In fact, the federal government's legislative jurisdiction over Indian lands is not generally accepted by Indians. For example, several participants in Phase II did not acknowledge the statutory authority of the Minister of Indian Affairs and Northern Development to make decisions regarding the management of their reserve lands for their use and benefit. This was despite the fact that the Minister usually exercise such authority only at the request or with the consent of Indian bands.<sup>629</sup>

Despite its importance for any consideration of reserve land management, the legitimacy of Canada's assertion of sovereign power over Indian reserve lands will not be addressed here, and the assumption will be made for the purposes of this paper that Crown jurisdiction is legally valid, even in those portions of Canada not formally ceded by treaty.

### (iii) Title to Reserve Lands

As described in some detail earlier in this paper, the protection of reserve land is the historical reason for Indian-specific land legislation in the first place, beginning with the Royal Proclamation of 1763. Indian reserves are the modern equivalent and remnants of Indian lands, referred to in the Proclamation as "such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting

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Association, Constitutional Entrenchment of Aboriginal Self-Government (Ottawa: Continuing Legal Education Seminar, March 27 & 28, 1992).

<sup>628</sup> "Understanding Aboriginal Rights" supra note 45 at 735.

<sup>629</sup> Supra note 1 at 7.

Grounds.<sup>630</sup>

Because of what Professor Slattery has referred to as the "self-serving manner" of the Crown's assertion of jurisdiction over unceded Indian lands, with the exception of the Sechelt Indian Band and the Cree and Naskapi bands of northern Québec, Indian bands are not generally viewed in Canadian law as owning their own lands - as having "full" legal title to them (fee simple) - even those lands which they have occupied and defended for hundreds (if not thousands) of years. Instead, Indian lands are held under what is referred to as Aboriginal title: a legally recognized right to use and possession only.

An early case notes in this regard that "the tenure of the Indians was a personal and usufructuary right, dependent on the good will of the Sovereign."<sup>631</sup> The right is personal - it goes with the Indians and not necessarily with the land. If there are no Indians in possession of the lands there is no right that has to be dealt with. It is usufructuary - it is a right to the enjoyment of the land that does not necessarily translate into what the common law describes as fee simple ownership.

In short, Indian or Aboriginal title as originally conceived by the courts was viewed as being akin both to a personal right and to what might be referred to as a beneficial interest. That being said, however, it is equally if not more true that one must exercise extreme caution in applying common law notion of land tenure to the Indian interest in their lands. Perhaps the best that can be said is that Indians have an "interest" in their own lands of a special or sui generis character that defies classification under the normal common law categories of thought. Former Chief Justice Dickson has made this abundantly clear in the Guerin Case where he noted as follows in this connection:

Indians have a legal right to occupy and possess certain lands, the ultimate title of which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is

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<sup>630</sup> See note 38, supra.

<sup>631</sup> Saint Catherine's Milling v. The Queen, supra note 15 at 54.

both unnecessary and potentially misleading.<sup>632</sup>

Aboriginal or Indian title is therefore a burden or charge upon the underlying title that must be cleared ("extinguished") so that the party with the underlying title (the Crown) can then have the benefit of the land. Upon being cleared through cession or purchase, Aboriginal title is considered to be extinguished and the lands revert to the Crown as the holder of the ultimate or underlying legal title.<sup>633</sup> That underlying title may be in either the federal or provincial Crown, depending on a number of factors that will be discussed below such as which level held the land when the reserve was created, how it was created etc. Sometimes the province was created after the reserves, in others the province cooperated with the federal government in the creation of reserves, while in others the federal government purchased the lands from the province. There are reserves in all provinces and territories in Canada - albeit only one in the Northwest Territories.<sup>634</sup>

In those provinces where the underlying title is in the provincial Crown, under section 109 of the Constitution Act, 1867, once a tract of Indian reserve land has been surrendered and thereby "cleared" of the Aboriginal title, the underlying title of the province takes hold and the province has the sole power in law to deal with the land. This is an awkward situation, in that the surrender must be negotiated with the federal Crown, but once it occurs the federal Crown drops out of the picture to be replaced by the provincial Crown. Any transaction such as sales or leases therefore require extensive federal-provincial cooperation. To facilitate matters a series of federal-provincial agreements were concluded to deal reserve land management, the result of which is to vest title in the federal Crown in most cases.<sup>635</sup>

There are no agreements in Prince Edward Island, where the four reserves are on lands purchased by the federal government. Nor, aside from the Cree-Naskapi (of Québec) Act, are there any in Québec where federal-provincial relations around reserve land transactions have been strained for decades.<sup>636</sup>

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<sup>632</sup> Supra note 24 at 382.

<sup>633</sup> In a special report prepared for the Minister of Indian Affairs, former Manitoba judge A.C. Hamilton has recommended that extinguishment be abandoned as an operating concept in future land claims settlements between Aboriginal peoples and the Crown: Canada and Aboriginal Peoples: A New Partnership (Ottawa: DIAND, 1995) at 100.

<sup>634</sup> Hay River.

<sup>635</sup> See in this regard, Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian," [1967] 14 Can. B. Rev. 513 at 517, n. 12; Richard Bartlett, "Reserve Lands" in Bradford Morse (ed.) Aboriginal Peoples and the Law (Ottawa: Carleton Univ. Press, 1989) 467 at 487-504.

<sup>636</sup> Federal policy is to accept no land surrenders for mineral development in that province, for example, because of the provincial attitude that it owns all subsurface rights upon surrender and has no intention of revenue sharing with the federal government or with the bands concerned. See Richard Bartlett, Subjugation, supra note 90 at 38-39.

Regardless of which Crown, federal or provincial, has underlying title, only the federal Crown can accept the surrender. This is due to the historic role of the Crown, inherited by the federal level and confirmed in section 91(24) of the Constitution Act, 1867 and reflected in the Indian Act surrender provisions. In any event, from the broad category of Indian lands the Crown - through purchase, cession or otherwise - obtained large portions that were then made available for non-Indian settlement on the legal basis that the Aboriginal title had been extinguished.

(iv) Variable Rights and Interests in reserve Lands

The Guerin ruling that the Indian interest in unceded traditional lands is the same as in reserve lands means that for many (but not all) practical purposes, the manner by which the reserve may have been created is less important than the fact that the Indian interest in the land is a compensable, legal property right that the Crown is bound to deal with according to fiduciary standards of conduct. However, this does not mean that all reserves are legally identical. There are many variations between provinces and even between parcels of land within a particular reserve. This is because reserves have not been created under any uniform statute. The Indian Act itself has no mechanism for the creation of reserves. Rather, reserves are created, or if already in existence, are legally affirmed, under the Crown prerogative power. There are no apparent statutory limitations to this power.<sup>637</sup>

Professor Slattery has described Indian reserves as falling into two broad categories: Aboriginal; and granted.<sup>638</sup> Aboriginal reserves, like the Musqueam reserve in the Guerin Case, are remnants of the traditional lands of the Indian band concerned and are subject to a derivative form of their original Aboriginal title. There are three types of Aboriginal reserves according to Slattery. First, the reserve may be a parcel of land excepted from the cession by which the rest of the traditional lands were lost. The reserves in the Robinson-Huron treaty cessions of 1850 fall in this category. Second, the reserve may have been carved out of the traditional lands of the band by unilateral government action as in those parts of British Columbia where there are as yet no treaties. Still a third type of Aboriginal reserve may have emerged gradually in a less formal way as in the case of Akwesasne. It is connected historically to the Mohawk people and has the anomalous distinction of straddling an international border.

The Indian interest in granted reserves, on the other hand, arises from a statutory or other Crown grant or other formal instrument. The title to the Six Nations reserve at Brantford falls into this category, as the land was purchased for the Six Nations by the Crown from the Mississaugas. The Huron reserve at Lorette and the Maritime Micmac and Malecite reserves fall into a similar category. Other reserves such as those referred to in the numbered treaties were created out of lands ceded in their entirety to the Crown, out of which the Crown granted reserves back to the treaty groups. The theory in this case is that the cession extinguished the original

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<sup>637</sup> Hay River v. R. (1979) 101 D.L.R. (3d) 184 (F.C.T.D.).

<sup>638</sup> "Understanding Aboriginal Rights," supra note 45 at 770.

Aboriginal title.

After Confederation, the federal Crown was unable to use its jurisdiction over Indian lands in section 91(24) to create reserves unilaterally, since the land was after 1867 vested in the provincial Crown.<sup>639</sup> Joint federal-provincial action was required. The nature and conditions of that joint action is reflected in a various federal-provincial agreements, and vary somewhat from province to province. What this means in practice is that the history of a reserve and, indeed, the history of particular parcels of land within a reserve, will determine the extent of many of the interests in reserve lands such as which Crown has underlying legal title, subsurface rights etc.

The most well-known example is that of British Columbia with its long history of federal-provincial bickering over reserves and Aboriginal title matters more generally.<sup>640</sup> When the underlying title to reserve lands was ultimately conveyed to Canada in 1938 by order in council, the conveyances preserved the provincial right to "resume" (take back) up to 1/20th of the conveyed land for certain public purposes, to authorize water privileges for regional agricultural and mining purposes, to take construction materials and to reserve all existing highways. If there are no more Indians remaining and lands are still held by the Federal Crown for them, they will revert to the province.<sup>641</sup>

Thus, where private or provincial Crown lands have been transferred to Canada for Indian reserves, one must be alert to the various rights and interests created through the conditions that may appear in the deed, order in council or general provincial land legislation.<sup>642</sup> Accordingly, even national Indian reserve resource legislation or regulations may be subject to exceptions. To cite British Columbia again, the B.C. Indian Reserves Mineral Resources Act<sup>643</sup> provides for revenue sharing with the province regarding reserve minerals and imposes provincial mineral exploitation regulations notwithstanding the federal title. A similar provincial mineral exploitation regime applies in most of Ontario and the prairies.

The upshot of all this is that the Indian reserve land regime has many complications due to history, politics and geography. As a result, general rules cannot be easily formulated in many areas without sacrificing accuracy.

#### (v) Federal Fiduciary Obligation To Deal With Indian Lands

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<sup>639</sup> Ontario Mining Co. v. Seybold [1903] A.C. 73 (PC).

<sup>640</sup> See in this regard Native Rights in Canada, supra note 50 at 171-93 for a brief but excellent review of British Columbia history regarding Aboriginal title and reserve issues.

<sup>641</sup> For a more detailed examination see Richard Bartlett, Subjugation, supra note 90 at 29-35.

<sup>642</sup> See Woodward, supra note 20 at 233-241 for a discussion of the complicated nature of this particular subject.

<sup>643</sup> S.C. 1943-44, c. 19.

Returning to the Indian Act itself, the surrender and designation provisions in sections 37 to 40 are derived from the requirements of the Royal Proclamation of 1763, but are nonetheless subject to a number of exceptions that will be discussed below. However, as a general rule, Crown protection of Indian lands and inalienability of those lands except to the Crown through public land surrender procedures underlie the entire notion of the Indian reserve system. Thus, as noted in Guerin, the surrender requirements of the Indian Act merely confirmed the "historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties...".<sup>644</sup> As will be discussed below, bands have few powers in the land management area. Thus, it is really only in the right to withhold surrender or attach conditions to it that they can somewhat independent exercise powers over reserve land development at present.

Although the interest that Indians have in their lands has been described in the cases as "possessory and usufructuary" or as a "beneficial interest" (being based on Aboriginal title), the Court in Guerin was clear that it was a legal right best characterized as sui generis.<sup>645</sup> Surrender of that interest to the Crown transformed the Crown's historic responsibility into a fiduciary obligation to deal with the land in the best interests of the Indians surrendering it.<sup>646</sup> This is reflected in section 18 of the Act where the statutory language specifies that the Crown has the discretion to "determine whether any purpose for which lands in a reserve are used is for the use and benefit of the band." The fiduciary obligation is a function of the Crown discretion in this regard, and the concomitant power to affect the Indian interest.

It is important to note that it is the band as a collective entity that holds the Indian interest in reserve lands.<sup>647</sup> Nonetheless, as the earlier part of this paper has described, under the Indian Act possession of reserve land may be on an individual basis under certificates of possession (CPs) or occupation (COs, a conditional and time-limited version of the former). Individual allotments are made by the band council and the CPs and COs are issued by the Minister. CPs are the reserve equivalents to ownership in fee simple and, as will be seen, are compensable individual interests in collectively held reserve lands that have brought many complications to band commercial and political life. CPs are the modern versions of the location tickets first introduced in the 1869 Gradual Enfranchisement Act as a way of teaching Indians the value of private property by encouraging sales and leases of individual plots of land between Indians.

There is a speculative argument to the effect that the federal fiduciary obligation is owed not only to the collective band membership, it is also owed to individuals whose rights and liabilities may be affected by the discretion given in the Indian Act to the Minister. Moreover,

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<sup>644</sup> Supra note 24 at 383 per Dickson C.J.

<sup>645</sup> Ibid at 382.

<sup>646</sup> Ibid at 384.

<sup>647</sup> Joe v. Findlay, [1981] 3 W.W.R. 60 (B.C.C.A.).

these individuals may also be persons who have some connection to the reserve but who are not band members. The federal government attempts to restrict this category of persons by falling back on the Indian status provisions and denying liability to persons without status. It is nonetheless arguable that the Minister's fiduciary obligation extends to anyone who may have a connection with the reserve through descent from a band member who lost status and band membership in the past and was unable or unwilling to attempt to regain it. This argument gains in force if that person is also the descendant of a band member beneficiary of any treaty signed by the band with the Crown.

In any event and in summary, the overall effect of the Indian Act regime is to prevent bands or individual Indians from entering into direct commercial relationships around land with non-Indians. As a result, a great deal of pressure has been exerted on DIAND to interpret various land provisions widely and a number of doubtful practices have arisen as devices to circumvent the protections and impediments in the Act. The effects of modern reserve land practices will become evident in the following part of this paper.

#### (b) Reserve Land Management

The reserve land management provisions in the Act are numerous, technical and complicated. They have been the source of much recent dissatisfaction among Indian people, primarily because they prevent bands from exercising direct control over reserve lands.<sup>648</sup> This in turn hinders band economic development because of the bureaucratic delays that flow from DIAND involvement. For example, DIAND itself agrees that it takes too long to generate the orders in council required to accept a designation of reserve lands under section 39 - sometimes up to four months for completion.<sup>649</sup>

In this context, Commissioner Hall of the 1986 Westbank Inquiry observed that many of the difficulties experienced at the Westbank reserve arose from the structure and administration of the Indian Act itself, rather than from any particular wrongdoings on the part of various individuals involved in the many land and commercial transactions that had led to the inquiry. However, there was no consensus among witnesses before the inquiry as to the precise nature of the problems with the Act or how to remedy them.<sup>650</sup>

Given the complexity of this topic, it may be useful to review the land management provisions under the headings utilized earlier regarding the general nature of the Indian Act - its antiquated and paternalistic nature, its inconsistency, and its confusions and gaps.

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<sup>648</sup> See, e.g., DIAND, Lands, Revenues and Trusts Review, supra note 1 at 7-8.

<sup>649</sup> DIAND, materials provided to RCAP regarding problematic Indian Act provisions, in the possession of the writer.

<sup>650</sup> The Report of the Commission of Inquiry Concerning Certain Matters Associated With the Westbank Indian Band (The Westbank Inquiry) John Hall, Q.C. Commissioner (Ottawa: Ministry of Supply and Services, 1988) at 367.

(i) antiquated and paternalistic

The various powers exercised directly by the Minister or the Governor in Council (GIC) demonstrate the antiquated and paternalistic nature of the land management provisions. For instance, it is the GIC that:

- accepts reserve land surrenders in sections 39 and 40;
- determines whether a purpose for which reserve lands are used or to be used is "for the use and benefit" of a band (s. 18);
- consents to and directs an expropriation of reserve land and then grants the expropriated land (s. 35);
- approves the acquisition of surrendered lands by DIAND employees or persons appointed by the Minister to manage reserve lands (s. 53); and
- permits a band to manage and control its own lands within limits set by the GIC (s. 60).

Importantly, only the surrender pursuant to sections 39 and 40 involves band consent. The expropriation power is particularly controversial.

The Minister also exercises a number of paternalistic powers. They may conveniently be viewed under three sub-headings: band interests; individual interests; and the grant of interests to outsiders.<sup>651</sup>

determining band interests

First, the Minister determines the interests of the band itself without band input (unless specified below) through specific statutory language authorizing ministerial discretion to:

- authorize the use of reserve land for a variety of purposes (schools, administration, burial grounds, and health projects) and the taking of reserve lands for these purposes. Only if the purpose is outside this list is band consent required (s. 18(2));
- authorize surveys of reserves and divisions of the reserve into lots and subdivisions and determine the locations of and direct the construction of reserve roads (s. 19);
- instruct the band to maintain roads, bridges, ditches and fences and do so him/herself and pay for such maintenance out of band funds or the funds of a member of the band (s. 34);
- appoint a person to manage, sell or lease surrendered lands (a band is not a person under the Act) (s. 53);
- issue temporary permits for the removal of sand, gravel, clay and other non-metallic substances where the consent of the band council "cannot be obtained without undue difficulty or delay" (s. 58(4)(b));
- operate farms on reserve and apply any profits in any way considered "desirable to promote the progress and development of the Indians" (s. 71).

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<sup>651</sup> These subheadings are drawn from the analysis in DIAND, Lands, Revenues and Trusts Review, *supra* note 1 at 9-11.

managing individual interests

Second, the Minister is empowered to manage the individual interests of Indians in reserve lands, without the consent of the band or band council, in the following ways:

- approve the band council allotment of individual possession or occupation of reserve land (CPs and COs) to make it lawful and issue the actual certificates (s. 20);
- determine the compensation payable to an Indian "lawfully removed" from reserve lands that he/she has improved, compensation to be paid by the band or the person going into possession of the land (s. 23);
- approve all transfers of land between Indians (s. 24);
- direct the transfer of possession or occupation to the band or another Indian where someone ceases to be entitled to possess or occupy reserve lands e.g. loses Indian status and does not have band membership (s. 25);
- approve the possession or occupation of reserve lands under the estates provisions (ss. 49, 50 (4)).

granting interests to outsiders

Third, the Minister also grants interests in reserve lands to outsiders, once again without the consent of the band or band council:

- authorize by permit any person to occupy or use reserve land for a one year period. Any longer period requires band council consent (s. 28(2));
- lease for the benefit of any individual Indian upon his/her request any reserve land held by that individual by CP (s. 58(3));

Under the Indian Act the GIC and Minister may delegate certain land management powers. Because this is not recognition of inherent band powers, the delegation does not necessarily relieve the Crown of legal responsibility for decisions taken by the delegatee. As mentioned above, under section 53, the Minister may appoint someone to manage surrendered or designated lands on behalf of the Crown. Under section 60, the GIC may delegate authority to the band to manage its reserve lands to the extent the GIC "considers desirable." Since this authority is only delegated, in practice DIAND requires consistency with DIAND land management policies and procedures and attempts to monitor performance of the "person" and the "band" respectively. Very few bands have been given "53-60" authority - less than ten under each section.<sup>652</sup>

As the Westbank Inquiry shows, however, DIAND monitoring often offers the worst of both worlds: either financially ruinous bureaucratic delay, or an often overeager desire to ultimately comply with the desires of strong chiefs and councils even where the course of action proposed may be a doubtful one:

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<sup>652</sup> A manual count in the index to Native Law, supra note 20 indicated 8 section 53 bands, and 7 section 60 bands.

The failures of the Department, if they could be summarized, were not those of malevolence, but rather failures to fully perceive responsibilities. On occasion, the Department or its members suffered impaired vision in the good cause of devolution.<sup>653</sup>

(ii) inconsistency

Despite its original assimilative purposes the Indian Act has been retained ostensibly to protect the integrity of Indian communities and their land base. However, there are a number of aspects of the land management regime that seem utterly inconsistent with these goals. As mentioned, the Indian interest in reserve lands is a collective one, hence the requirement, derived from the Royal Proclamation of 1763, that surrenders and designations be supported by a majority of the band.

However, surrenders and designations need only be supported in section 39 by a majority of the "electors" of the band (band members normally resident on reserve). In cases where there are substantial numbers of band members normally resident off the reserve, this provision deprives them of a say in how band assets will be dealt with. As described earlier, this aspect of the Indian Act has been challenged successfully at trial in the Corbiere Case.<sup>654</sup>

Moreover, the actual surrender or designation vote need not even involve a majority of the electors of the band, since section 39 also permits surrender or designation on a (second) vote where the majority of those electors actually voting (as opposed to a majority of all the electors) supports it. Evidently, this could lead to land surrenders or designations where only a fraction of band members actually vote on the proposal. In the Six Nations situation considered in Logan v. Styres, for instance, most of the 3600 eligible band members refused to participate in the surrender proceedings and the surrender at issue ended up being supported 30-23.<sup>655</sup> These provisions amount therefore to a reverse onus on band members in which silence (inaction) will be deemed to be consent to potentially drastic land reductions. Given the importance of land surrenders and the constitutionalization of the surrender requirement, one may well question the constitutional legitimacy of the section 39 "majority of a majority" rule.

Another example of inconsistency involves the many ways by which the Crown may bypass the surrender requirement entirely in any event. As mentioned earlier, this may violate constitutional requirements since public surrender is a prominent element in the procedure outlined in the Royal Proclamation of 1763. This tendency to bypass the surrender requirement began with the Gradual Civilization Act<sup>656</sup> of 1857 and picked up speed with the amendments to

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<sup>653</sup> Westbank Inquiry, supra note 650 at 227.

<sup>654</sup> Supra note 310.

<sup>655</sup> Supra note 183.

<sup>656</sup> See text following note 89, supra.

the Indian Act over the years. This legislative tendency also makes something of a mockery of the fact that in many cases reserve lands are established by treaty, something commented upon in Parliament in the past.<sup>657</sup>

There are at least four ways in which the surrender requirement and band consent may be avoided under the current Act:

1. expropriation of any reserve land - under federal or provincial expropriation legislation in favour of a province, municipality, local authority or corporation, the GIC may permit the taking of reserve lands or may grant them directly to the expropriating bodies outside the procedures in the expropriation legislation (s. 35). In effect, this provision allows cabinet to decide whether the interests of the dominant society are to override those of the band;
2. lease of allotment - lease for the benefit of any individual Indian upon his/her request any individual plot of reserve land held by that individual by CP (s. 58(3));
3. general permit - authorize by permit any person to occupy or use reserve land for a one year period (s. 28(2));
4. removal permit - authorize the removal of sand, gravel, clay and other non-metallic substances where the consent of the band council "cannot be obtained without undue difficulty or delay" (s. 58(4)(b)).

In this context it is to be noted that specific legislation designed specifically to get around the Indian Act surrender procedures has been passed in the past. The St. Regis Islands Act<sup>658</sup> was passed by the federal government in 1927 giving the Minister full power over the islands in the St. Lawrence River belonging to the Akwesasne Mohawk band, including that of leasing. Band members now require ministerial permission to use or occupy these islands.

In yet one other significant way the land management powers are inconsistent with the avowed protective purpose of the Indian Act. In some ways, they actually promote circumventing the protective features of the Act. For example, with respect to the leases and permits mentioned above, under the moneys provision in section 63 of the Indian Act the Minister may pay the proceeds directly to the individuals concerned (notwithstanding the provisions of the federal Financial Administration Act<sup>659</sup>). In a similar way, where a band does surrender land according to the procedures in section 39, the Minister may distribute up to one half of the proceeds from the surrender transaction to band members on a per capita basis under section 64(1)(a).

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<sup>657</sup> Robert Borden, commenting on the precursor legislation to the section 35 expropriation powers, pointed out that treaties "have been sacredly observed for a hundred and fifty years" and that to permit expropriation in the way proposed would deny Indians and Parliament itself the chance to respond every time a treaty was violated in this way: CP House of Commons Debates, 1910-11, Vol. IV, col. 7827: Indian Act Amendment Bill, April 26, 1911, cited in The historical Development of the Indian Act, *supra* note 29 at 110-11.

<sup>658</sup> S.C. 1926-27, c. 37.

<sup>659</sup> R.S.C. 1985, c. F-11.

These financial provisions offer powerful inducements to individuals to wish to deal with reserve land for their own short term financial benefit rather than with a view to the collective and long term benefit of the band as a whole. Once again, however, to the extent that the band council or other elements in the community may oppose possibly short-sighted transactions, they have no say in the matter. It is for the Minister to decide. The per capita capital moneys distribution originated in a deliberate policy decision reflected in the 1918-19 DIAND Annual Report where it is noted that its object was, in fact, to encourage surrenders.<sup>660</sup> The Westbank Inquiry strongly condemns this approach: "The underlying philosophy of the per capita payment - to encourage Indian bands to sell their reserve lands - is repugnant to the interests and the aspirations of Indian people today."<sup>661</sup>

Another inconsistency results from the effect of the policies favouring individual possession of reserve lands. Although statistics are difficult to obtain, it is widely known that some families and individuals on some reserves control large blocks of land to the exclusion of large numbers of other band members. Boldt expresses the situation as follows:

Taking advantage of these provisions, some Indian families have been able to divert large parcels of prime communal lands to their own personal possession. This constitutes a significant deviation from traditional Indian values and customs. This practice has generated great inequities on many reserves. Some families have large valuable landholdings; others may only have a residential lot and many have no land to put their feet on. In "advanced" bands/tribes, it is mainly through privatized landholdings that most families of the ruling class have achieved and maintain their status. They have translated their landholdings into political-administrative power, and they are using their political-administrative powers to protect and enhance their landholdings. In this endeavour, they are being aided and abetted by the DIAND.<sup>662</sup>

Aside from the fact that some individuals on reserve become wealthier than others because of their possession of blocks of reserve land and control of band councils, this inevitably leads to conflict of interest. Many of the problems at Westbank, for example, were due to the fact that the chief was not only the primary political officer, he was also the land manager, negotiator on land claim and related matters and one of the major holders of reserve land by CP.<sup>663</sup> Moreover, the band council allotted individual plots of land to him by way of CP without any form of ratification of the allotment by a vote of the band membership that official DIAND policy called for.<sup>664</sup>

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<sup>660</sup> Cited in Bartlett Subjugation, *supra* note 90 at 17.

<sup>661</sup> Westbank Inquiry, *supra* note 650 at 409.

<sup>662</sup> Surviving As Indians, *supra* note 39 at 123-24.

<sup>663</sup> Westbank Inquiry, *supra* note 650 at 36.

<sup>664</sup> Ibid at 121-22.

Another inconsistency is the effect on possession of reserve lands upon marriage breakdown. Family law, including the division of joint family assets upon marriage breakdown is governed by provincial law. However, the matrimonial home on reserve land is immune from provincial law on general constitutional principles, since it is on "lands reserved for the Indians" under section 91(24) of the Constitution Act, 1867.<sup>665</sup> A provincial court cannot grant exclusive possession to the wife - an otherwise common order. If the band uses the CP system and the matrimonial home is on land held by CP in the husband's name only (a relatively common phenomenon), the wife will have to leave the family home. Nor can the court even order temporary possession of the matrimonial home while these matters are being sorted out.<sup>666</sup> The court can only order the husband to compensate the wife for her share of the home in monetary terms.

The result of a compensation order on reserves in which housing is in short supply is often to force the wife to leave the reserve if the band council refuses to allot her land under a CP. Moreover, even the order of financial compensation is often hollow. This was the case in the leading judicial decision on this point, as the following comments by Commissioner Hall of the Westbank Inquiry indicate:

Although some spouses may benefit in future from that aspect of the [Derrickson] decision, it was not of great practical assistance to Rose Derrickson. In order to obtain a compensation order in lieu of division of lands, she would have had to return to the Supreme Court of British Columbia. This would entail further expenditure. Furthermore, it would have to be established that her husband had sufficient liquid resources to comply with any order... If the only substantial asset is real property on a reserve, any enforcement of a compensation order may be practically impossible.<sup>667</sup>

### (iii) confusion and gaps

There are many provision in the Act that are simply vague or ambiguous and which result in confusion. For example, in section 18 the Minister may authorize the use of reserve lands for particular purposes, and, with band consent, "for any other purpose for the general welfare of the band." Where someone possesses the lands under the Act by CP, compensation must be paid. The Act does not define "general welfare of the band," not does it specify who must pay the compensation, in what amount or by what formula, or what happens to the land when no longer needed for the purpose for which it was taken.

In a similar way, when lands are expropriated for public purposes under section 35, there

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<sup>665</sup> Derrickson v. Derrickson [1986] 1 S.C.R. 285.

<sup>666</sup> Paul v. Paul [1986] 1 S.C.R. 306.

<sup>667</sup> Westbank Inquiry, supra note 650 at 524-25.

are no criteria regarding compensation to the band or to the individual band members in possession of the expropriated land, nor is there a formula for dividing compensation between the band and individuals in possession of the land or even a requirement that it be paid as of a particular date.

There are many important but undefined terms in the Act. Only a few will be mentioned here. For example, where someone may be authorized by ministerial permit "to occupy or use" reserve land under section 28, the scope of that use or occupation is problematic because important terms such as "occupy or use" are undefined. Where reserve lands are "uncultivated or unused," the Minister may lease such lands to outsiders under section 58 with band consent. What does "uncultivated or unused" mean in the context of a reserve that is not a farming community? Where another provision, section 53, calls for naming a person to manage surrendered or designated lands on behalf of the Minister, is it possible to specify "chief" or "council member" as opposed to naming a particular individual?

There are, in addition, significant gaps in the Act. The largest is the failure to deal with treaties and treaty rights in any way in the important area of lands. It is almost as if they exist as an afterthought in the reference to treaty annuities in section 72 and to treaty terms in section 88 rather than as the basis of the relationship between large numbers of First Nations and the federal government.

There are also many lesser gaps. For example, there are no provisions governing conflict of interest to regulate situations such as that of Westbank where the political officers are also landholders. If it is true that many band councils are controlled by relatively wealthy families who hold large portions of their respective reserves as private family holdings for commercial development, then this is a problem that can only exacerbate the factionalism on many reserves and cause problems for any future self-government scenario.

As Commissioner Hall noted in the Westbank Inquiry, while a CP obviously cannot give a fee simple interest,"it has in practical terms much similarity to such an interest in land."<sup>668</sup> Thus, another related gap is the inability of bands to grant more varied interests in reserve lands such as joint tenancies or tenancies in common. They are unable to do so because the Indian Act system is limited to CPs and COs. Moreover, many bands, while interested in granting individual rights, do not necessarily wish to allot the full interest represented by these certificates. They would prefer to be able to limit the control an individual has over particular portions of the reserve for the reasons outlined above.

Many bands do not use the Indian Act system at all, preferring to give lesser or varied interests in reserve land, often on the basis of custom. Customary allotments are not recognized by the DIAND Indian land registry system authorized under section 21, since they are outside the Indian Act. That registry is authorized only to register CPs and COs. Thus, in the case of some commercially oriented bands, it cannot accommodate strata-titling (registration of individual

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<sup>668</sup> Ibid at 10.

condominium units).

The net result of all these problems with land management under the Indian Act has been time-consuming procedures and bureaucratic delay that can mean a turnaround time of two or three years for some transactions.<sup>669</sup> Many bands see commercial opportunities slipping away, the result being an ever increasing degree of non-compliance by bands and individual band members with the strictures of the Act. Many band councils, for example, enter into direct ("buckshee") leases with non-Indians. Sometimes individual band members with CPs or custom allotments conduct transactions regarding their allotments such as crop sharing agreements with non-Indian farmers. In neither case is the interest registrable under the Indian Act registry system and legally protected.

Another related problem has to do with short and long term land use permits under section 28. Although they are only to occupy and use reserve land, in some cases they are being used to establish more permanent enterprises such as motels etc. as a way of getting around the delays involved in surrendering or designating the lands. Evidently, this is likely a breach of the surrender provisions. In addition, it does not create an interest in land that will attract secure outside financing.

There are no easy solutions to these problems. Moreover, the tensions generated by land dealings among the band members often lead to heightened factionalism and even to violence. This occurred on the Westbank reserve in British Columbia and led to a judicial inquiry in the 1980s. These tensions are not restricted to Westbank. Thus, Commissioner Hall's observations probably reflect the reality in many bands across Canada:

The process of growth and change is one that always generates a certain amount of controversy and tension. At Westbank, there has been economic tension between Indian lessors and non-Indian lessees. There were jealousies and controversies between different factions in the Band. The Department was in a state of transition from the older "Indian agent" style of management to a new approach of granting greater autonomy to local Indian governments. Westbank had the fortune or misfortune to be rapidly escalating its economic activity at a time when the Department was moving away from active involvement in the management of Indian bands. With regard to leases and leasing authority there was a very real vacuum of authority. One witness said Westbank was on the "cutting edge of change." At times, largely because of the personalities involved, it resembled a battle zone.<sup>670</sup>

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<sup>669</sup> DIAND, Lands, Revenues and Trusts Review, *supra* note 1 at 17.

<sup>670</sup> Westbank Inquiry, *supra* note 650 at xiv.

### (3) Resource Development

The most important areas for reserve resource development at the moment are the timber and minerals regimes. The mineral regime also includes oil and gas, which will be discussed separately. Sand and gravel, water rights, and wildlife harvesting also offer some scope for economic development, but are presently less important in the economic evolution of reserve communities.

Resource development in the reserve context is intimately tied up with the land management regime that has been described. Since it is based on the notions of Aboriginal title and absolute Crown jurisdiction over Indian reserve lands, bands are not recognized as owning subsurface resources like minerals and oil and gas which are highly regulated by both the federal and provincial governments. Bands receive a share of the revenues from exploitation of subsurface resources as a function of federal-provincial revenue sharing agreements rather than on the basis of any right of their own.

Even areas such as timber harvesting - which seem more compatible with the concept of Aboriginal title that sees Indians as mere users and occupiers rather than owners of land - are heavily regulated. In the same way, water rights and wildlife harvesting also fall under heavy and largely provincial regulation. Given that these activities also falls within Aboriginal and treaty rights under section 35 of the Constitution Act, 1982, these may be predicted to be areas that will increasingly engage the courts in sorting out relative regulatory priorities. There is a long history of hunting and fishing litigation, and water rights cases are now coming to the fore as well.

In any event, a brief review of reserve resource development will demonstrate the extent to which resource development is a highly regulated field and contentious field.

#### (a) Timber<sup>671</sup>

##### (i) DIAND Management

Timber is an important resource, all the more so as, unlike minerals, it is a renewable resource. Reserve timber is dealt with in section 57(a) of the Indian Act where the GIC is authorized to make regulations authorizing the Minister to grant licenses for timber cutting in two situations: on already surrendered lands and, with band council consent, on reserve lands that have not been surrendered. Basically, therefore, ministerial authorization is required for all removals of timber from Indian lands.

Under this authority, the Indian Timber Regulations<sup>672</sup> have been passed. They place virtually all regulatory power over timber harvesting under DIAND authority, to such a point that

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<sup>671</sup> Much of the general information about the federal government role in this section is from DIAND, "Lands and Trusts Services", Background Document for the Royal Commission on Aboriginal Peoples at 46-51.

<sup>672</sup> C.R.C. 1978, c. 961.

under section 4 of the regulations bands and individual Indians must get permits to cut wood for fuel or for personal use. DIAND also takes responsibility for managing forest lands on reserves (s. 22) and imposes provincial timber laws on licensees (s. 25).

Thus, although federally regulated, band forest resources are in many ways governed by provincial rules. This is in itself not necessarily a bad thing, since the provinces have well-developed forestry rules and practices. There are also a number of federal-provincial agreements in the area of forestry management whereby forestry inventories and management plans have been formulated.

There is also active collaboration between the DIAND Forest management Program and Natural Resources Canada by way of a 1989 memorandum of agreement between them, and advice on good forestry practices and other technical information is available to bands, tribal councils etc. Assistance is also provided for negotiations leading to timber sales and for the development of new forestry policies in the future. Since 1984, DIAND policy has been that bands should be more involved in managing and controlling Indian forestry practices, and a number of policy discussions and initiatives have followed in this vein, including the current effort to develop alternative Indian forestry legislation.

#### (ii) Shortcomings of the Timber Regime

However, no powers of any kind are granted to the band or to the band council under the Act except in the first instance to consent to the surrender or to cutting timber on unsurrendered lands respectively. Thus, the power is essentially a negative one. In each situation bands may impose conditions, but this means drawn out discussions on a case by case basis. This hampers efficient and effective reserve forestry practices and is not conducive to the development of a band inspired and controlled forestry management plan.

Once consent is given under either procedure, all management authority is in DIAND. However, even the DIAND authority is incomplete as it does not address such related matters as sale, regeneration, access and road construction to timber harvesting areas etc. Nor does DIAND have specific authority to manage the harvesting, sale and removal of wood (but non-timber) products such as plants, cuttings, bark, seeds and cones etc.

In addition, under the Indian Act moneys regime timber revenue is treated as capital and not as revenue moneys. Capital moneys, which are derived from the sale of assets, are the financial equivalent of lands and are accordingly harder for the band to access than are revenue moneys. The Minister will require detailed information and analysis of why capital moneys are required in order to meet his/her fiduciary obligations, and this means delay in getting the moneys out to the band. Since modern forestry practices require a consistent and easily accessible source on moneys for the reforestation and other management practices that are necessary to keep the industry vital, this is yet another hindrance to band resource development planning.

One other paternalistic provision is that in subparagraph 58(4)(a) allowing the Minister to

dispose of dead or fallen timber without a surrender. The subsequent subparagraph (b) allows the Minister to dispose of "sand, gravel, clay and other non-metallic substances" and to credit the proceeds to band funds or to divide them between individuals with CPs and the band. It is not clear that this subparagraph applies to the removal of dead or fallen timber. If it does, then evidently any proceeds would go to the band or the individual concerned.

The overlapping and redundant penalty provisions for timber matters has already been discussed earlier.<sup>673</sup> In addition to their confusing nature, however, must be added the fact that the penalties (\$100 fine or 3 months imprisonment under s. 57(d) or \$500 fine 3 months imprisonment (s. 93)) are too low to be much of a disincentive to discourage large scale timber harvesting outside the Act or to prevent timber poaching on even a smaller scale.

In short, the whole statutory attitude seems to minimize the importance of this area for future band economic development and to discourage bands from taking part on resource management decisions involving their own timber stands. Nor is there much variation from this theme in the self-government context. For instance, under the Cree-Naskapi (of Québec) Act forestry jurisdiction is with the province, even on Category 1 lands.<sup>674</sup> The Sechelt Band, on the other hand, does have forestry jurisdiction under its law-making power over "preservation and management of natural resources" on Sechelt lands.<sup>675</sup> Evidently, however, their lands are considerably less extensive than those of the Cree and Naskapi peoples of northern Québec.

Since the 1939 decision in United States v. Shoshone Tribe<sup>676</sup> the rule in the United States is that "Indian tribes enjoy full equitable ownership of timber located upon tribal reservations lands" unless the United States has reserved those rights to itself by treaty.<sup>677</sup> Timber regulations are an important part of the 1934 Indian Reorganization Act where, in section 6, the Secretary of the Interior is directed to make "rules and regulations for the operation and management of Indian forestry units on the principle of sustained yield management,"<sup>678</sup> which has been done. Thus, tribes are restricted in how they manage their timber resources by the requirement that all timber sales and leases for timber cutting be approved by the Secretary of the Interior. Tribal members may cut timber for their personal use without the Secretary's approval, however.

The timber regime in the United States has been, like the land management regime

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<sup>673</sup> See text at notes 568-69, supra.

<sup>674</sup> Supra note 403.

<sup>675</sup> Supra note 472.

<sup>676</sup> 304 U.S. 111 (1938).

<sup>677</sup> Felix S. Cohen's Handbook, supra note 51 at 538.

<sup>678</sup> Supra note 27.

referred to in the Guerin Case, the source of much judicial elaboration of the nature of the fiduciary relationship.<sup>679</sup> Although timber matters do not involve as much tribal-state litigation over regulatory jurisdiction as do some other areas, there have nonetheless been some significant courtroom battles in the area. For example, in White Mountain Apache tribe v. Bracker the United States Supreme Court held a logging company working under contract on the tribal timber harvest to be free from Arizona "motor carrier license tax" and "use fuel tax" because federal regulations had preempted state regulation.<sup>680</sup> Absent the federal protection, of course, the clear implication is that the state might have a role to play in tribal resource development. Thus, despite the tribal beneficial ownership of the resource and federal protection, there is still considerable scope for bickering with local authorities over the relative independence of tribal economic activities.

### (b) Minerals

#### (i) Federal-Provincial Management

Minerals on reserve are governed by section 57(c) of the Indian Act under which the GIC may make regulations "providing for the disposition of surrendered mines and minerals." Under this authority, the GIC has passed the Indian Mining Regulations.<sup>681</sup> They apply in every province except British Columbia, where the mining regime is governed by two separate federal enactments and confirmed by provincial legislation.<sup>682</sup> Thus, as with the forestry regime, the Minister authorizes virtually all removal of minerals from reserves.

The Indian Mining Regulations have not changed in essential respects in over thirty years. They govern exploration and development in mines and minerals in surrendered and reserve lands everywhere but British Columbia under the direction of the mineral division of DIAND. DIAND issues permits and leases by way of public tender and takes full responsibility for all aspects of the mining regime on reserve. Once again, the regulatory scheme is derived from provincial laws: under section 4 of the regulations, permit holders "shall comply with the laws of the province... [that] relate to exploration for, or development, production, treatment and marketing of minerals" so long as there is no conflict with the federal regulations.

In short, and as seen in the timber example, provincial laws are incorporated into the regulatory regime. and there is no role for the band or band council in regulating mineral

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<sup>679</sup> Beginning in 1940 with Chippewa Indians v. United States, 91 Ct. Cl. 97. See also the most important recent judicial pronouncement in United States v. Mitchell (II) 463 U.S. 206 (1983). In both cases, money damages were recoverable against the United States for breach of the fiduciary duty in forest management.

<sup>680</sup> 448 U.S. 136 (1980).

<sup>681</sup> C.R.C. 1978, c. 956.

<sup>682</sup> British Columbia Indian Reserves Mineral Resources Act, S.C. 1943-44, c. 19, and the Fort Nelson Indian Reserve Minerals Sharing Act, S.C. 1980-81-82-83, c. 38.

development. As with the timber regime, the only band power is a negative one: to refuse to surrender the lands or to attempt to impose conditions on it.

The DIAND Mineral Management Program<sup>683</sup> manages the development, sale and removal of on-reserve minerals through the issuance and administration of mineral permits and leases on Indian lands and provides technical assistance to bands, tribal councils etc. It also assists in negotiating solutions to federal-provincial mineral resource issues and is supposed to help develop new mineral policies and regulatory initiatives.

The entire issue of subsurface ownership rights on reserves is a highly political one since legal theory considers the underlying title to reserve lands to be in the province except where the reserve may have been established on federal land prior to the creation of the province. No province is therefore willing to concede ownership of subsurface resources to the federal government, let alone to bands themselves. Since they insist on a major provincial role in subsurface resource extraction, the area is largely governed by federal-provincial agreements<sup>684</sup> like that of 1943 granting the province of British Columbia "administration, disposal and control" of all mineral resources under reserves conveyed to the federal government.

Under the Canada-B.C. agreement the federal government gets fifty percent of revenues from royalties and fees at rates set by the province. A second agreement was made in 1977 regarding the Fort Nelson band.<sup>685</sup> It too has a fifty-fifty revenue sharing formula. Nor is the Sechelt Indian Band considered to own its subsurface resources despite holding its land in fee simple. The federal legislation is clear in section 24 that the lands were transferred to the band subject to "any interests recognized or established" by the reservations and agreements referred to above regarding British Columbia Indian land policy.<sup>686</sup>

In Ontario, despite apparent treaty promises and oral undertakings to the Indians to the contrary, a 1924 federal-provincial agreement confirming earlier reserve conveyances granted the province rights to one half the proceeds of all mineral dispositions on reserve lands.<sup>687</sup> The agreement also provides for the application of provincial mining standards and requirements. Treaty Three was excepted because of a prior agreement giving full control of reserve minerals to

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<sup>683</sup> This information is derived from DIAND, "Lands and Trusts Services", supra note 671 at 41-45.

<sup>684</sup> See Richard Bartlett, Subjugation, supra note 90 at 29-39 for a summary of these federal-provincial agreements. The following account is taken largely from this source.

<sup>685</sup> The Fort Nelson Indian Reserve Mineral Revenue Sharing Act S.C. 1980-81-82-83, c. 38.

<sup>686</sup> Sechelt Indian Band Self-Government Act, S.C. 1986, c. 27. See the comments made earlier in the text at notes 695-98, supra.

<sup>687</sup> Canada-Ontario Indian Reserve Lands Agreements, S.C.1924, c. 48. With respect to the treaty promises and undertakings to the contrary, see Richard Bartlett, Indian Reserves and Aboriginal Lands: A Homeland (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at pp. 106-11.

the federal government.

A similar arrangement was made in the prairies via the 1930 Natural Resources Transfer Agreements, but only for lands set aside as reserves after 1930 (since earlier reserves would have been created on federal land).<sup>688</sup> These agreements also included oil and gas in the fifty percent revenue sharing split. In Manitoba, section 12 of the Manitoba Natural Resources Transfer Agreement incorporates by reference the terms of the 1924 Ontario agreement mentioned above. Thus, the federal and provincial governments share the resource revenues on a fifty-fifty basis, with the federal government holding its share in trust for Manitoba bands. Treaty Three Manitoba bands are not included within the terms of section 12. This provision has been criticized in the Manitoba Report and is stated to have inhibited potential mineral development on those reserves covered by it.<sup>689</sup>

Agreements in New Brunswick and Nova Scotia in 1958 transferring title to reserve lands to Canada specifically excepted minerals and declare that provincial mining regulations will apply.<sup>690</sup> However, in a departure from the other models, all revenues are to go to the federal government for the benefit of the bands. There is no agreement with Prince Edward Island.

The situation in Québec is difficult due to the complexity of its history regarding the creation of reserves,<sup>691</sup> the lack of a federal-provincial agreement, the insistence of Québec that it has full ownership and complete jurisdiction over mineral development once a band surrenders its interest, and the reluctance of the federal government to force the issue. As a result, federal policy is to discourage land surrenders for mineral development in that province, since the band will receive no benefit from them. In the same vein, existing mineral interests under the Cree-Naskapi (of Québec) Act are specifically excluded from Category 1 lands and subsurface jurisdiction is with the province.<sup>692</sup>

#### (ii) Shortcomings of the Minerals Regime

Because of the restrictive notion of Aboriginal title there are unresolved ownership and revenue sharing issues in the area of mineral resources. Where Indians are seen as mere users and occupiers of the surface of the land and the province is the holder of underlying legal title, there is large area for disagreement about resources lying under the surface but, until surrendered, not yet within the provincial grasp. This issue cannot be resolved here. However, as Woodward

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<sup>688</sup> Constitution Act, 1930 (U.K.), R.S.C. 1985, App. II, (No. 26).

<sup>689</sup> Manitoba Report, *supra* note 137 at 194.

<sup>690</sup> New Brunswick: S.C. 1959, c. 47; S.N.B. 1959, c. 4. Nova Scotia: S.C. 1959, c. 50; S.N.S. 1959, c. 4.

<sup>691</sup> There are eight different reserve legal regimes in that province, depending on the historical facts surrounding the creation of the reserves. See Native Rights in Canada, *supra* note 50 at 231-32.

<sup>692</sup> Notes 402-03, *supra*.

notes, "[a] review of the system of sharing mineral wealth in light of a better understanding of aboriginal title may result in fundamental changes."<sup>693</sup>

There are some lesser issues in this area that also merit comment and which demonstrate yet again the inconsistencies and ambiguities in the Indian Act. For instance, under section 28(2) it will be recalled, the Minister may authorize anyone to "occupy or use" reserve land for up to one year without band council consent. Does that permit mineral exploration permits outside the federal-provincial agreements (which are triggered by a surrender)? The answer to this question is not known at this time.

In the same way under section 53 the Minister may appoint a person to "manage, lease or to carry out any other transaction" regarding surrendered or designated lands. Can this be used for mineral development purposes? How does the recently clarified designation procedure relate to the federal-provincial agreements? Is it a surrender sufficient to trigger their provisions, or is it outside the scope of the agreements? Similarly, section 58(4) allows the Minister without a surrender but with band council consent to dispose of "non-metallic substances upon or under lands in a reserve...". Does this include minerals that might otherwise be subject to the federal-provincial agreements and to the surrender precondition? The answer to these questions would have obvious ramifications on federal-provincial relations.

In addition, the shortcomings of section 57 itself require some comment. It refers to "surrendered mines and minerals." Throughout this discussion it has been assumed that the word "surrendered, despite its placement before "mines" refers to minerals as well as mines. If it does not and only existing mines need to be surrendered, then the GIC could deal with minerals outside the federal-provincial agreements.

Another issue regarding section 57 has to do with the scope of the terms. Does "surrendered mines and minerals" include rights of exploration and surface and access rights to mines too? If mining companies cannot obtain control over exploration and access to the reserve, evidently they will be hampered in efficiently exploiting the mineral deposits on the reserve.

In the United States, full beneficial ownership of minerals by the tribes was established in the case referred to above, United States v. Shoshone Tribe.<sup>694</sup> As in Canada, however, mineral development and leasing on Indian lands has a long, turbulent and politically charged history. In 1938, a measure of order was finally brought out of the relative chaos by legislation delegating authority to the Secretary of the Interior to make regulations regarding mineral leasing on Indian lands.<sup>695</sup> Overall mineral leasing and management authority over Indian lands is divided between

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<sup>693</sup> Native Law, *supra* note 20 at 242.

<sup>694</sup> Supra note 676.

<sup>695</sup> Act of May 11, 1938, ch. 198, 52 Stat. 347, codified as amended at 25 U.S.C. SS 396 a-g.

the Department of the Interior (BIA) and the United States Geological Survey (USGS). Nonetheless, the mineral development and leasing regime in the United States under both BIA and USGS authority has come under criticism in recent years for poor planning, mismanagement, failure to supervise lease operations and general lack of technical support to tribes.<sup>696</sup>

The general rule followed by BIA is apparently not to treat Indian lands as federal lands for mineral development purposes and thereby to further United States economic policies, but rather "to assist Indian landowners in deriving maximum economic benefit from their resources with sound conservation practices."<sup>697</sup> Whether or not this is entirely true, the area of mineral development and leasing has continued to be coloured by considerable litigation and political manoeuvring. A recent example of the latter is the Hopi-Navajo land dispute that has seen the creation of "joint use area" and evictions of Navajo shepherders from what are considered to be Hopi lands. There are some who suspect that the vast deposits of coal under and adjacent to these lands and the involvement of a multinational coal company is at the root of it all.<sup>698</sup>

In any event, it can be predicted that attempting to resolve the issue of ownership and control over resources under Indian lands, especially in provinces such as British Columbia and Québec, whose economies rely on mineral resources to a great extent, will be a politically difficult issue.

#### (c) Oil and Gas

Oil and gas revenues are governed by the Indian Oil and Gas Regulations<sup>699</sup> originally passed under the authority of the Indian Act. For regulatory purposes oil and gas fall under section 57(c), mineral development. Thus, they must be surrendered before being disposed of for revenue purposes.

The authority for the regulations is no longer to be found in the Indian Act. The passage in the 1970s of the Indian Oil and Gas Act<sup>700</sup> has provided a specific statutory authority for them. However, the Act is minimal, setting out regulation-making authority and band rights to receive whatever royalties are collected by the Crown for them. The regulations provide for permits, leases and exploration contracts and for conformity with provincial standards and provincial environmental, and oil and gas development, treatment and production laws. In short, they call

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<sup>696</sup> See, for example, Felix Cohen's Handbook, *supra* note 51 at 736.

<sup>697</sup> Ibid at 735-36.

<sup>698</sup> See e.g. Ward Churchill, "Genocide in Arizona: The Hopi-Navajo Land Dispute in Perspective" in Struggle for the Land (Toronto: Between The Lines, 1990) at 143-195.

<sup>699</sup> C.R.C. 178, c. 963.

<sup>700</sup> R.S.C. 1985, c. I-7, passed originally by S.C. 1974-75-76, C. 15, S.1.

for provincial regulation of most important processes, including levels of production as set by provincial energy agencies and departments.

Many of the comments and criticisms expressed above regarding mineral extraction apply to the oil and gas area, although pre-1930 reserves do not suffer the 50-50 federal/provincial revenue-sharing split. There is no formal role for the band or band in all this, beyond refusing the surrender or imposing conditions on it, although section 7 of the Act does call for consultations with representatives of the bands "most directly affected."

The oil and gas regime has been separate from the general mineral regime since the passage of the Indian Oil and Gas Act and the establishment in 1987 of Indian Oil and Gas Canada as a branch of DIAND to specifically manage oil and gas resource development on Indian lands. It is mandated to identify, promote and assess development opportunities, to recommend terms and conditions, conduct environmental assessments and to assure that the necessary band council approvals are provided. It also manages the disposition, leasing and general administration of all agreements negotiated with resource development companies and performs a subsequent monitoring and oversight function. It also gives technical advice to bands and performs a number of other technical functions.<sup>701</sup>

#### (d) Sand and Gravel

The Indian Mining Regulations state in section 2 that they do not apply to sand and gravel extraction. This is to be contrasted with the situation in the United States where sand and gravel on reservations are classed as minerals and regulated accordingly.<sup>702</sup> Sand and gravel on Canadian reserves fall, therefore, to be regulated by section 58(4) of the Indian Act which, it will be recalled, allows the Minister to dispose of sand and gravel with band council consent or without it if it cannot be obtained without undue difficulty or delay. However, it is not clear that sand and gravel may not be "minerals" under section 57(c), in which case a surrender would be required to dispose of them. If so, then there would be a conflict between the two sections.

In any event, it is clear that once again there is no role for the band or band council except to withhold consent under either section or to impose conditions. Once again, the limited band role and the paternalism of the statutory regime dominate the area. With respect to Québec, the Cree-Naskapi (of Québec) Act specifically refers to the use of gravel for personal use or earthworks and subjects it to provincial licence.<sup>703</sup>

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<sup>701</sup> DIAND, "Lands and Trusts Services", supra note 671 at 55-59.

<sup>702</sup> Felix Cohen's Handbook, supra note 51 at 532.

<sup>703</sup> Supra note 406.

(e) Water

Water rights are not dealt with in the Indian Act. This is a gap that must be filled in by looking to the common law and to the law of Aboriginal title and rights. Woodward notes that, as basic rule, "provincial laws may not encroach upon the water rights attached to reserve lands."<sup>704</sup> In short, the reserve water regime is immune from, and different than, normal provincial water law. However, it is always necessary to look to the process by which the reserve was created, as in the examples discussed earlier regarding other reserve interests, to determine whether and to what extent the water forms part of the reserve.

Bands do have certain by-law making powers in the area under the Indian Act, but they appear to refer to local matters of relatively minor importance in the larger scheme of water resource law. For example, under section 81((f) bands may regulate the "construction and maintenance of water courses" and under (l) may control the "the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies." The scope of these provisions is not known. In short, just as the wider law of Aboriginal water rights is uncertain, so is the scope of these by-law powers. Since the legal status and capacity of bands is not clear, DIAND acts on their behalf in applying for, signing and complying with water licences issued by provincial governments.

Indian water law is not well developed in Canada but can be expected to involve increasing conflict with the provinces as bands begin to assert ownership of rivers running through their reserves or control over off reserve actions (like building a dam) that interfere with their use of water within reserve boundaries. For example, in recent British Columbia cases the question has arisen as to whether reserve boundaries extend to the middle of the body of water. Related issues may include matters such as whether band authority to enact by-laws applicable "on the reserve" extends to fishing by-laws regulating waters adjacent to, but not within, the reserve. This would have evident consequences for issues like fishing on the reserve side of the centre line of the river, for example.

In any event, this is also an issue that engages section 88 of the Indian Act which incorporates by reference provincial laws of general application so as to allow them to regulate vital band processes. The net effect of the lack of knowledge about the limits of band water rights and the potential intrusion of provincial regulatory schemes is to prevent rational economic planning in a number of areas.

The law of tribal water rights is much more developed in the United States where, according to the ruling in Winters v. United States<sup>705</sup> tribes are considered to have reserved to themselves sufficient water to fulfil the present and future needs of the reservation. Obviously, in relatively dry states like Arizona and California the uncertainty created by this rule has been the

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<sup>704</sup> Native Law, *supra* note 20 at 245.

<sup>705</sup> 207 U.S. 564 (1908).

source of considerable concern and has led to much recent litigation over issues such as whether the rule applies to all reservations,<sup>706</sup> whether final boundaries had ever been determined for some reservations<sup>707</sup> etc. In light of recent Canadian and American history, it is likely that water rights litigation involving reserves and the provinces will continue to expand in Canada.

There may also be internal reserve water rights issues. It is interesting to note in this connection that access to an adequate water supply was one of the minor, but nonetheless important, issues confronting the Westbank band in its quest for enhanced economic development opportunities. Ultimately Commissioner Hall recommended a central reserve agency something like a public utilities commission to ensure that water allocation was conducted in a "proper and even-handed and businesslike fashion."<sup>708</sup>

#### (f) Wildlife Harvesting

This is an area that some bands currently attempt to regulate under their section 81(1)(o) by-law power over "the preservation, protection and management of furbearing animals, fish and other game on the reserve." Leaving aside for the moment the section 88 issue and the fact that these are matters that engage section 35 Aboriginal and treaty rights, wildlife harvesting on reserve is inconsistently dealt with even within the Indian Act. For example, under subparagraph 73(1)(a) the GIC may make regulations in precisely the same area. The fact that it has not done so to date does not detract from the general inconsistency of granting a power to a band with one hand and then removing it with the other.

Wildlife laws comprise an area generally under provincial or territorial regulatory power. Hunting and trapping, for example, fall under Constitution Act, 1867 authority over property and civil rights in the province, whereas fishing, a federal matter, has been a shared jurisdiction area with the provinces for some time. The federal government simply adopts and enforces provincial regulations in the area as in the Sparrow scenario that was the subject of considerable judicial comment. Although provincial wildlife laws will apply in principle on and off-reserve, since reserves are not federal enclaves, there are formidable obstacles to their direct application on reserve that will be discussed below.

The whole area of wildlife harvesting rights is in a period of extreme turmoil and there is an overabundance of litigation flowing from the Sparrow ruling about the limits of Crown regulatory power over wildlife harvesting matters. There the Court described fishing by the Musqueam people as being "an integral part of their lives"<sup>709</sup> and as "an integral part of their distinctive

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<sup>706</sup> Arizona v. California (I), 373 U.S. 546 (1963).

<sup>707</sup> Arizona v. California II, 460 U.S. 605 (1983).

<sup>708</sup> Westbank Inquiry, supra note 650 at 515.

<sup>709</sup> Sparrow, supra note 25 at 1094.

culture.<sup>710</sup> The law of Aboriginal and treaty harvesting rights is vasy and will not be explored here. Suffice it to say that the Indian Act regime is part of the general regulatory framework. This regulatory framework raises a number of obstacles to the direct application on reserve of provincial laws. Woodward summarizes these obstacles, noting that provincial laws will be ineffective in the following cases:

1. the exercise of an Aboriginal right protected by section 35 of the Constitution Act, 1982;
2. the exercise of a treaty right or a related constitutional right such as those referred to in the prairies in the Natural Resources Transfer Act and confirmed by the Constitution Act, 1930;
3. where the provincial law was seen as a law relating to the use of land, since section 88 will not save it (it only makes them applicable to Indians, not Indian lands);
4. where the matter was already covered by a band council by-law under section 81(o) above.<sup>711</sup>

It should be noted in this context that there is no provision in the Indian Act for resolving these issues between bands and the provincial governments. It is not entirely clear that bands are legal entities fully recognized as such by the common law, and they do not have apparent authority under the Act to enter into binding agreements with provincial and territorial governments for the co-management of wildlife. While this may obviously be done by way of a political accord, such an arrangement would not provide a legally binding way of resolving the issues that are sure to arise as bands become more and more involved in managing and controlling harvesting regimes under their own auspices in future.

#### (g) Summary of Resource Issues

As Richard Bartlett has noted,<sup>712</sup> there at least three major points to be made about the present resource development regime. First, it does not shelter bands from paternalistic federal regulatory intrusions that enable provincial law to govern most of these vital resource development matters. Second, bands are denied any real role in managing their own resources. Third, there is no provision for regulating off-reserve resource development or resource co-management matters so as to provide bands with income and security regarding the nature and extent of their own resource development plans and initiatives.

From a broader perspective, what the resource development provisions of the Indian Act and the related Cree-Naskapi and Sechelt self-government legislation indicate is that these are political issues that go to the root of the "self-serving manner" of the assertion of Crown jurisdiction

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<sup>710</sup> Ibid at 1099.

<sup>711</sup> Supra note 20 at 337-38.

<sup>712</sup> Subjugation, supra note 90 at 26.

that Professor Slattery has referred to.<sup>713</sup> Aboriginal title, upon which the Crown control of resources is based, has traditionally conceived Aboriginal rights as possessory rather than proprietary, and as comprising merely a "personal and usufructuary" right to the surface resources of their lands. There is a line of cases, however, that tends in the direction of characterizing it as fuller "beneficial interest" that would seem to allow for an expanded role in resource management issues since presumptively the resources in the lands would be, like the lands themselves, for what section 2 of the Indian Act calls the "use and benefit" of those for whom they have been reserved.<sup>714</sup>

The position in the United States, while not entirely free from doubt in this respect due to the particulars of some reservation histories, seems to accord federally recognized tribes a full beneficial interest in surface and subsurface resources on the theory that these resources presumptively fall under tribal sovereign jurisdiction.<sup>715</sup> The United States may nonetheless reserve these rights to itself on the basis of its plenary powers over tribes. In such cases, however, this would be characterizable as a compensable "taking" under the fifth amendment to the United States Constitution.<sup>716</sup>

There are evident dangers for bands themselves as they take greater control of their own resources without developing consensus about how best to utilize them. It is here that factionalism may play a destabilizing role in band politics as it did in the case of Westbank. If the American example is anything to go on, resource based political disputes may lead to what Deloria has referred to as "terrible divisiveness" in tribal communities, the effects of which continue on many reservations where the "homeland versus resource development" debate has never been resolved. Perhaps there is food for thought here about what may be in store for Canada as well:

Today a terrible divisiveness exists in many Indian tribes. After almost a century of regarding their reservations as a place to live, Indians are discovering that they are being prodded into leasing large portions of their lands so that others can exploit the mineral wealth that lies underneath the ground. Sometimes it is coal deposits, often oil or natural gas, and occasionally uranium and molybdenum. All of these resources bring immense wealth, and their removal always leaves some desolation that cannot easily be corrected. Sacredness and utility confront each other within the tribal psyche, and it is not at all certain how Indians will decide the issue. Most Indians are so desperately poor that any kind of income seems a godsend. On the other hand, ancient teachings inform Indians that the true mark of a civilization is its ability to live in a location with a minimum disruption of its features.<sup>717</sup>

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<sup>713</sup> Supra note 628.

<sup>714</sup> See the Guerin Case, supra note 24 at 381-82 for a brief discussion of these cases.

<sup>715</sup> United States v. Shoshone Tribe, supra note 676.

<sup>716</sup> United States v Creek Nation 295 U.S. 103 (1935).

<sup>717</sup> The Nations Within, supra note 27 at 11.

#### (4) Wills and Estates

##### (a) General Outline of the Estates Provisions

Estates law is normally a provincial matter under the Constitution, falling under the heading of property and civil rights in the province in section 92(13) of the Constitution Act, 1867. An estate comprises all of the property and debts of a deceased person at the time of death, and estates law deals with the distribution of the estate to the beneficiaries.

Distribution by will is called a devise and is carried out by an executor. This is known as testate distribution. However, where there is no will or if the will cannot be probated, distribution is called descent and is carried out by an administrator in accordance with the intestate distribution scheme in provincial legislation where the range of possible beneficiaries is set out. Executors and administrators have strict duties to perform under exacting standards and will be liable for breach of their duties.

In the non-Indian estate setting, supervision and adjudication are handled by surrogate or probate courts in each province. These courts generally exercise the following functions: (1) determine the validity of the will (probate); (2) approve the appointment of administrators on an intestacy; (3) approve the distribution of the estate; and (4) approve the deduction from the estate of moneys required to pay the administration fees.

The Indian Act removes Indian estate matters from the realm of provincial law so that the functions mentioned above are carried out by the Minister and not by the provincial courts. In section 2 of the Act, an "estate" is defined as "real and personal property and any interest in land." There is no definition of will. Under section 4(3), the estates provisions of the Act do not apply to Indians not normally resident on reserve or on federal or provincial Crown lands unless the Minister specifically orders otherwise. Thus, the Minister could presumably take jurisdiction over the estates matters of all status Indians wherever resident in Canada if so desired.

The basic outline of the Indian Act estate provisions is as follows. Under sections 42 and 43, all jurisdiction over Indian estates matters is vested in the Minister to be performed according to regulations made by the GIC. The Indian Estates Regulations<sup>718</sup> have been enacted under this authority, and provide guidance on the procedures to be followed in executing the will and administering the estate such as taking an inventory, advertising for creditors, outlining powers and duties of administrators etc.

All power is vested in the Minister to appoint executors and administrators and to empower them to carry out their duties in accordance with the regulations. This aspect of the Minister's role is clearly administrative. Under section 44 the Minister may direct that a particular estate be handled by the provincial court "that would have jurisdiction if the deceased were not an Indian," and the court may then "exercise the jurisdiction and authority conferred on the Minister

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<sup>718</sup> C.R.C. 1978, c. 954.

by this Act...".

Wills are dealt with in section 45, where the Minister is given great latitude regarding what may be accepted as a will. A document may not be treated as a will, however, until accepted by the Minister as such or, in the case of matters sent to the provincial courts, until probated. Thus, in this respect the Minister is expected to carry out quasi-judicial functions similar to the probate functions exercised by courts. It should be noted that provincial law requirements for wills are relatively strict. Thus, the Indian Act gives a discretion to the Minister that courts do not usually have in these matters. In section 46 the Minister's powers to vary the terms of any will reflect the normal criteria available to courts in similar circumstances and do not appear to be any broader.

Appeals to the federal court are provided in section 47, and distribution of the estate on an intestacy is provided for in section 48, with priorities for distribution established that exclude family members that are too remote. Under section 49, no one acquiring reserve lands through these provisions can be confirmed in their possession or occupation except through a CP or CO from the Minister. Under section 50, where someone "is not entitled to reside on a reserve" any interest in reserve lands that has been received via these provisions must be put up for sale to the highest bidder among persons entitled to reserve residency. If there are no bids, after six months the band will get the property.

#### (b) Problems with the Wills and Estates Provisions

##### (i) antiquated and paternalistic

The estates provisions have a long history, some of which has been reviewed in earlier parts of this paper. That history demonstrates the assimilative nature and goals of the wills and estates provisions in the Indian Act that were originally intended to supplement the other policies (e.g. individual land allotments by location ticket) designed to "teach" Indians about private property rights.<sup>719</sup> Thus, the modern provisions inherit a legacy that is out of place with modern First Nation aspirations. Indeed, one may well ask why the Minister continues to be inserted into what are essentially private family matters that might more properly be handled under band custom or in accordance with available provincial law if the band or family desired.

For example, writing wills is not a traditional Indian practice. In fact DIAND estimates that no more than ten percent of Indian people have wills,<sup>720</sup> and many continue to rely on more informal or customary practices. Because the Indian Act scheme makes no provision for custom distribution of the estate, that means that more often than not the intestacy provisions are employed and the actual wishes of the deceased ignored. Also, since the Indian Act mentions

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<sup>719</sup> See also Wendy Moss, Elaine Gardner-O'Toole, "Aboriginal People: History of Discriminatory Laws" (Ottawa: Research Branch, Library of Parliament Background Paper BP-175 E, November 1987) at 17-20. These materials were provided to RCAP for research purposes.

<sup>720</sup> Lands, Revenues and trusts Review, *supra* note 1 at 70.

custom adoptions in section 2 but fails to define them, some persons who may have been adopted in this way but who are not recognized as children of the deceased may be deprived from receiving a portion of the estate on an intestacy distribution.

Moreover, the Minister has exclusive jurisdiction reflected in very broad powers going beyond those available to any single person in estate matters outside the Indian Act. The Minister both administers the estate and exercises quasi-judicial decision-making and supervisory powers. In practice the powers are delegated to regional DIAND officials. Aside from the potential for conflict of interest, this is a great deal of power to place in the hands of officials.

In addition, with the growing complexity of Indian estates matters as individuals become more involved in the cash economy by investments etc. the ability of DIAND to continue to exercise these all-encompassing functions has been thrown into doubt. The questioning of DIAND continued authority in this area has been accentuated by the trend to close regional offices and to promote greater band autonomy generally.<sup>721</sup> In the same vein, DIAND acknowledges increasing frustration among band members, noting that "many Indian people are becoming more knowledgeable about estate matters and want to administer estates themselves."<sup>722</sup> This is a tendency that can only be expected to grow as the effects of Bill C-31 are felt in larger and larger numbers of Indian people whose estates will fall to be dealt with under these provisions.

#### (ii) inconsistency

A fundamental inconsistency that is related to the antiquated and paternalistic nature of the wills regime has to do with its origins. As the historical review has shown, originally wills were restricted to "advanced" Indian men who had enfranchised and who had therefore ceased to be "Indians". Later, it was extended to Indian men who held land by location ticket. The need for band council consent was also removed in time, so that only the Minister had a say in approving the passing of reserve property. In short, the whole scheme was developed and administered for an élite group of Indian men who were expected to prosper and to influence the cultural development of Indian band communities along the lines of the dominant society.

The modern reality is that it is largely the economic élite of many reserve communities that utilize the wills provisions to maintain their relative wealth within their family and kinship groups. As there is no succession tax or other tax-based or other wealth redistribution scheme in most communities, the effect according to commentators like Boldt is to reinforce a class structure in many communities that is self-perpetuating because "[t]he élite class has the legal right to transmit its landholdings and wealth, undiminished by taxes, to its descendants..."<sup>723</sup> Moreover, what

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<sup>721</sup> Ibid at 71.

<sup>722</sup> Ibid.

<sup>723</sup> Boldt, Surviving As Indians, supra note 39 at 127. His full observation is as follows:

Within the reserve community, the emerging two-class structure has the potential to endure for many generations. The élite class has the legal right to transmit its landholdings and wealth, undiminished by taxes, to its

Dosman refers to as the "leading families" are apparently able to carry their relatively privileged status over into the non-Indian urban environment in ways that continue their dominance over reserve life in many ways.<sup>724</sup>

Moreover, the estates provisions reflect an inconsistency similar to that which has been seen in other areas of the Indian Act. For example and as mentioned above, at a time when DIAND is promoting self-government and devolving service delivery functions to bands and tribal councils, it seems quite anomalous to retain jurisdiction over this area. Many of the functions such as notification of death, listing assets, searching for a will etc. could more easily be carried out at the local level anyway.

In this same vein, another inconsistency lies in the diminished role for family members or friends of the deceased in estates matters. In non-Indian Act estates distributions it is not uncommon for family members or close friends to be named as executors or as administrators. Evidently, family and friend involvement not only protects family privacy from unwarranted official intrusions, it also facilitates locating heirs, finding the will, clarifying the deceased's wishes etc. Conflict of interest rules and strict standards enforced under court supervision ensure competency and fairness in the distribution.

In the Indian Act context, however, family members are prevented from performing these functions because of the bonding requirements imposed by DIAND. Normally executors and administrators obtain insurance or an administrative bond pledged against their own assets prior to undertaking their functions. This is obviously to protect them in the event of liability regarding their performance of their duties. Indians living on reserve are unable to pledge their property against such requirements, since under sections 29 and 89 it is exempt from seizure. This means that they cannot generally meet the DIAND bonding requirements, and so they are rarely appointed as executors or administrators. DIAND notes, however, that they may be appointed as co-administrators with DIAND officials in some circumstances.<sup>725</sup>

It should also be noted that because the Indian Act wills and estates regime is derived from non-traditional Euro-Canadian laws, Indian people are often unfamiliar with the concepts and so are unprepared to undertake these responsibilities in any event. In short, as with much that is in

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descendants.... Moreover, in the absence of a taxation system on reserves to redistribute income from land ownership and entrepreneurial activities, and with traditional customs of sharing and redistribution no longer being practised, there are virtually no legal or normative operative mechanisms for redistributing wealth from the élite class to the lower class. Given a politically entrenched élite class, that is a ruling élite class, it seems unlikely that any mechanisms (e.g. progressive taxation) will be introduced soon that could serve as vehicles for sharing or redistribution of wealth on Indian reserves. Thus, the prospect is for growing inequities of wealth between the two classes in future.

<sup>724</sup> Indians: The Urban Dilemma, *supra* note 548 at 64.

<sup>725</sup> Lands, Revenues and Trusts Review, *supra* note 1 at 73.

the Act, there is little reflection of traditional Indian cultures and so the area remains unconnected to daily Indian reserve life.

(iii) confusion and gaps

There are several areas of confusion in this part of the Indian Act. In the first place, it is not clear whether the Indian Act estates regime actually displaces all provincial laws in this area. This issue is tied into the larger one regarding the scope of Parliament's jurisdiction over Indians and lands reserved for the Indians under section 91(24) that has been discussed in an earlier part of this paper.<sup>726</sup> Thus it is not clear whether the estates provisions in the Act provide an entire and exclusive code of federal regulations, or whether provincial laws that are not in actual conflict with the Indian Act rules continue to apply. There are competing interpretations. "Which position is correct is not firmly settled" according to Woodard.<sup>727</sup>

Similarly, the issue of which law, federal or provincial, a provincial court seized of jurisdiction is to apply is equally unsettled. Under section 44, it will be recalled, the Minister may direct that a particular estate be handled by the provincial court "that would have jurisdiction if the deceased were not an Indian." This seems to imply that the court will exercise its own jurisdiction and therefore apply the law within its own jurisdiction, namely provincial estates law. This would evidently be to the exclusion of the federal law under the Indian Act.

However, section 44 also states that the provincial court may "exercise the jurisdiction and authority conferred on the Minister by this Act...". This seems to imply that the court will exercise only the powers that the Minister has under the Act. Even if the court were restricted to federal estates law, the previous point becomes relevant. If the Indian Act is not a complete federal code, then the court will apply a mixture of federal and provincial law. What that mixture might be is unknown. This is obviously an unsatisfactory situation for dealing with private family matter of this gravity.

Finally, it will be recalled that section 50 deals with the case where someone inherits a "right to possession or occupation" of reserve land but is not "entitled to reside on a reserve." Any right of possession or occupation received via the estate provisions must be put up for sale to the highest bidder among persons entitled to reserve residency. If there are no bids, after six months the band will get the property.

As Woodward points out, however, the use of the term "entitled to reside on a reserve" is unfortunate because that class of people may well include status Indian band members who are unable to obtain residency on the reserve because the band council has not authorized it for one reason or another. Many Indian women and their children restored to status and band membership through Bill C-31 fall into this category. This is different than the case of

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<sup>726</sup> See text at notes 6-23, supra.

<sup>727</sup> Native Law, supra note 20 at 359.

non-Indians or non-status Indians who inherit land.<sup>728</sup> It also creates the anomalous possibility that a non-Indian band member (deemed to be an Indian under section 4.1) could inherit reserve property because he or she has residency rights, while a status Indian band member could not.

Moreover, another problem arise in the commercial context where an individual allotment of reserve land is leased to someone outside the reserve. A lease is an interest in reserve lands. When the lessor dies and the land passes to someone not entitled to reside on the reserve, will that person continue to receive the lease payments for the duration of the lease even if the land must be put up to auction to the highest bidder? It all turns on whether by using the term "right to possession or occupation" in section 50 it was intended to include leases as well. If not, then the anomalous situation may be created where the beneficiary of the land will continue to receive the lease payments, while the person buying the land on the auction will not. This is an issue yet to be decided by the courts.<sup>729</sup>

In the same way there are no clear rules regarding how to conduct the auction required under section 50. It is simply not known, for example, whether there must be a sale for cash or whether customary methods of payment in kind may be accepted.<sup>730</sup>

## 5. Indian Moneys

### (a) Overview of Indian Moneys Regime

Indian moneys are defined in section 2 as "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands." The concept of Indian moneys has a long history that will not be reviewed here. Generally, Indian moneys have received relatively little attention from academic commentators or from the courts.<sup>731</sup> In fact, the leading handbook on the Indian Act does not have a section on moneys.<sup>732</sup>

In any event, under section 61, it is the GIC that determines whether a particular expenditure purpose is for the use and benefit of Indians or bands. The amount of Indian moneys has increased dramatically since the 1960s, primarily because of the revenues from oil and gas.

There are three types of Indian moneys: capital, revenue and individual. Treaty moneys

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<sup>728</sup> Ibid at 362.

<sup>729</sup> Ibid.

<sup>730</sup> Ibid at 362-33.

<sup>731</sup> For a brief but excellent review see the Westbank Inquiry, supra note 650 at 490-97.

<sup>732</sup> Native Law, supra note 20.

may also for present purposes be defined as Indian moneys. The Crown continues to pay annuities and clothing allowances as well as hunting and fishing supplies under the 11 numbered treaties and the Robinson-Huron and Robinson-Superior treaties. These payments are referred to in section 72 where the Crown is authorized to pay them out of the Consolidated Revenue Fund (CRF). About 1.5 million dollars is paid out annually as treaty moneys.<sup>733</sup> Treaty moneys will not be dealt with here.

Capital and revenue monies are band moneys and are distinguished from each other in section 62. Capital moneys are derived from the sale of capital assets, mainly lands and non-renewable resources such as minerals, oil and gas, sand and gravel, and timber. Royalties and exploration fees associated with oil and gas are also considered capital moneys. DIAND currently holds around 830 million dollars as capital moneys, with a number of Alberta bands accounting for around 95% of that sum.<sup>734</sup>

Revenue moneys come from the rental or leasing of lands, cottage fees, the sale of renewable resources such as farm products and the interest earned on moneys held in both capital and revenue moneys accounts. As mentioned earlier, the inclusion of timber revenues within the capital moneys regime has been the subject of criticism by some bands. DIAND holds around 80 million dollars in revenue moneys.<sup>735</sup>

Individual moneys are moneys that are not held in common for the "use and benefit" of Indians in the same way as are capital and revenue moneys. Rather, they are held for individuals under several circumstances: minor children, including those under ministerial guardianship or adopted by non-Indians (s. 52); mental incompetents (s. 51); and missing heirs (Indian Estates Regulations, reg. 13). In fact, most individual Indian moneys are held for minors who may have received per capita distributions of capital moneys under section 64(1)(a). DIAND holds around 170 million dollars in 16,000 individual accounts.<sup>736</sup>

Individual moneys will not be dealt with here except to note that the Minister is impressed with a fiduciary obligation regarding these moneys and will likely be hard pressed to delegate control over them to bands since the beneficiaries are generally not in a position to give their informed consent to such a move. This is not to say that improvements could not be made in this area, however. It is just that it is one that is less important to bands as a whole than capital and revenue moneys and the ministerial controls over them.

Moneys received by bands or individuals, Indian held corporations, trustees or other

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<sup>733</sup> DIAND, "Lands and Trusts Services", supra note 671 at 17.

<sup>734</sup> Ibid at 15 and 17.

<sup>735</sup> Ibid at 17.

<sup>736</sup> Ibid.

entities by way of settlement agreements are not Indian moneys under the Act unless the settlement agreement says otherwise.

All Indian moneys are collected by **DIAND** for bands and individuals and under section 61 are kept in the Consolidated Revenue Fund (CRF) until released for distribution. Interest is credited twice yearly and based on rates determined quarterly on the average yield of long term government bonds.

It is clear that capital and revenue moneys are in many respects simply the financial equivalent of lands, and are dealt with in a parallel manner. For example:

- both are held for the "use and benefit" of those entitled to them (s. 2 definitions of reserves and moneys respectively);
- the decision whether a purpose is for their use and benefit or is for the **GIC** to make (ss. 18(1) lands and s. 61(1) moneys);
- leases of individual allotments of lands directly by the **Minister** and bypassing the band or band council allow payment of those lease revenues directly by the **Minister** to the individual concerned (ss. 58(3) lands and s. 63 moneys); and
- management responsibilities may be delegated by the **GIC** to a "band" (s. 60 lands and s. 69 revenue moneys).
- both are impressed with a fiduciary obligation because of the **GIC** and ministerial discretion involved.

The most important Indian moneys provisions are the provisions allowing for the expenditure of capital and revenue moneys in sections 64 and 66 respectively, and the provision granting management powers to bands over revenue moneys in section 69. The overall framework is as follows.

Under section 64, band councils may request that the **Minister** release a part of the band capital moneys. The normal procedure is to pass a band council resolution setting out the purpose for which the distribution is desired. The officially sanctioned purposes are described in subparagraphs (a) to (k). Under (a), up to half the accumulated band capital money may be released on a per capita distribution. If minors, mental incompetents or missing persons are involved, their portions will be held as individual Indian moneys as described above.

The other subparagraphs in section 64 refer generally to reserve infrastructure construction and maintenance, land purchase for additions to the reserve, farm implements and machinery, loans to band members up to a certain value, **DIAND** expenses regarding reserve or surrendered lands management, house construction, and in (k), "for any other purpose that in the opinion of the **Minister** is for the benefit of the band." In addition, subsection 64(2) allows the **Minister** to pay a one per capita share from capital to persons deleted from band lists by bands that control their membership and which have passed the necessary by-law.

In all section 64 distributions and expenditures, the Minister is required under section 61 to ensure that all releases of moneys are for the "use and benefit of the band." In general, the Minister has delegated the approval authority to regional officials - the exceptions being land purchase and the general purpose referred to in (k) which are still dealt with from headquarters.<sup>737</sup>

Section 64.1 is a "payback" mechanism for persons reinstated under Bill C-31. If someone had earlier lost status or was enfranchised and had received a per capita payment in commutation of band membership over \$1,000.00, the money plus accrued interest but minus the original \$1,000.00 will be deducted from any subsequent per capita payouts under section 64(1)(a). In short, the money (minus \$1,000) plus interest must be paid back. In addition, the band council may pass a by-law under section 81(1)(p4) whereby these persons are denied band benefits unless and until the net amount is repaid.

Section 66 is the revenue moneys equivalent to section 64. Under it the band council may request the expenditure of revenue moneys in the same way as under section 64 "for any purpose that in the opinion of the Minister will promote the general progress or welfare of the band or any member of the band."

In addition, the Minister may, without band council consent, expend revenue moneys for a number of purposes such as assisting sick and destitute band members and burying deceased indigent members etc., for the destruction of noxious weeds, the prevention of pests or disease etc., inspection and renovation or destruction of buildings, to prevent overcrowding or unsanitary housing conditions and to build and maintain fences. If the band controls its membership and has passed the appropriate by-law, the Minister may also pay out a one per capita share of revenue moneys to persons deleted from the membership lists.

As with section 64 distributions, the Minister must conform to the section 61 requirement that all expenditures be for the use and benefit of the band, although it seems redundant in light of the requirement that the "progress or welfare" of the band be promoted by the expenditure.

Section 67 allows the Minister to recover federal government costs in recovering band revenue moneys for it from the revenue moneys themselves. Under section 68, the Minister may also order that any annuity or interest moneys payable to an individual Indian be used to support his spouse or family in the case of desertion.

Section 69 authorizes the GIC to delegate to bands the authority to manage their own revenue moneys under regulations to that effect. The Indian Bands Revenue Moneys Regulations<sup>738</sup> have been passed to control the exercise of this delegated authority. These regulations also note which provisions of the Financial Administration Act do not apply to the

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<sup>737</sup> DIAND, Lands, Revenues and Trusts Review, *supra* note 1 at 39-40.

<sup>738</sup> C.R.C. 1978, c. 953 as amended.

bands. Section 69 is the moneys equivalent to the lands management provision in section 60. DIAND notes that around 75% of bands have received section 69 authority.<sup>739</sup>

In general, the attitude of DIAND in the Indian moneys context has been that the Minister is under a relatively strict fiduciary duty similar to that concerning Indian lands. There is in theory a high degree of oversight by the department of how Indian moneys are spent, even in situations where the band is managing its own revenue moneys under section 69. In practice, however, there are significant gaps in official supervision.

#### (b) Problems With the Indian Moneys Regime

Indian moneys management by DIAND has come under some criticism in recent years. For instance, in 1983, the Penner Report singled out several aspects of Indian moneys management for comment, including the confusion in the minds of DIAND managers regarding their roles.<sup>740</sup> The Penner Report conclusions were bolstered by the 1988 findings of the Westbank Inquiry. It devoted considerable space to untangling band finances and clarifying muddled DIAND policies in the area, citing Ron Derrickson's observation that DIAND administration was "all policy and no law."<sup>741</sup> DIAND attempts to satisfy band desire for more control seems to have resulted in the development of a number of questionable practices that will be described below under the headings employed in earlier parts of this paper.

##### (i) antiquated and paternalistic

As evident from the discussion above, under sections 64, 66 and 69, the ultimate decision on virtually all important Indian money matters rests with the Minister. Moreover, even where revenue moneys management authority is delegated under section 69, it is still the Minister that leases all Indian lands and collects all Indian revenues.

It is perhaps in the context of section 64 that the paternalism is most clearly felt. Because of the onerous reporting requirements before the Minister can satisfy the fiduciary obligation and release capital moneys, a high level of frustration has developed. Even DIAND admits that the current process is "bureaucratic, time consuming, and can place the Minister in the role of overriding a band initiative."<sup>742</sup>

##### (ii) inconsistent

Much of the inconsistency of the moneys regime has to do with how it has actually been administered by DIAND. This is linked to the primary inconsistency of trying to devolve

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<sup>739</sup> 440 bands according to "Lands and Trusts Services", supra note 671 at 16, n. 9.

<sup>740</sup> See text at note 368, supra.

<sup>741</sup> Westbank Inquiry, supra note 650 at 380.

<sup>742</sup> Lands, Revenues and Trusts Review, supra note 1 at 44.

management functions to bands within a legislative framework patterned on the notion of wardship and relative incompetence.

The first thing to be said in this context is that the capital/revenue moneys distinction is not necessarily in keeping with normal accounting practices. This point was made by Commissioner Hall in the context of the Westbank Inquiry, where he added that "it was often desirable to denote funds as revenue" because it made them easier to access.<sup>743</sup> As mentioned above, pressures have been applied on DIAND by some bands to reclassify timber and even oil and gas moneys as revenue moneys so as to avoid the cumbersome section 64 procedures.

It should also be noted that there have been Indian complaints about the low interest rate on Indian moneys in the CRF and calls for release of these moneys into higher interest bearing accounts elsewhere.<sup>744</sup> In the same way, bands have complained about the potential effects on them of the influx of new members as a result of Bill C-31. The infrastructure needs of the expanding reserve and the additional members for purposes of per capita distributions under section 64(1)(a) means additional pressure on their capital moneys.<sup>745</sup>

The delays occasioned by the lengthy and bureaucratic section 64 procedures also mean missed business opportunities for many bands. For example, if a band requires matching funds for a reserve business proposal involving outside investment or development companies, the delays may be sufficient to discourage the outsiders. These delays have their counterparts in the lengthy delays in the lands context. Designation, for instance, may take up to four months, other procedures may take years.

The pressures for faster action and a more flexible DIAND approach have led to questionable practices. "Buckshee leases" where Indians enter into direct lease arrangements with non-Indian outside the Indian Act structure and procedures, for example, have already been mentioned in the lands context.

In keeping with the trend to devolution and to enhancing band control of band processes, there has been a corresponding lessening in practice of DIAND supervision over important money matters. DIAND acknowledges,<sup>746</sup> for instance, in the case of capital moneys that they are often used for day to day expenditure purposes and that there is an overall lack of attention to the balance to the impact of declining capital moneys balances. Moreover, DIAND is also frank in admitting an accompanying lack of monitoring of whether bands actually use their capital moneys for the purpose approved.

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<sup>743</sup> Westbank Inquiry, supra note 650 at 379.

<sup>744</sup> Lands Revenues and Trusts Review, supra note 1 at 38.

<sup>745</sup> Ibid.

<sup>746</sup> Lands Revenues and Trusts Review, supra note 1 at 43.

Similarly, in the case of revenue moneys DIAND acknowledges an unofficial tolerance of band collection of its own revenue moneys under section 69 authority as well as a failure in the section 69 context to verify the purpose for which the revenue moneys are being expended by bands.<sup>747</sup>

The pressures from some bands on the DIAND officials to comply with these unauthorized procedures has led, at least in the case of the Westbank Band, to accusations of criminal wrongdoing involving the chief. As mentioned earlier, no criminal activity was found. What was found was "Departmental reluctance to deal more firmly with a strong chief who was inclined to interpret and exercise his authority to the fullest,"<sup>748</sup> and, in terms of overall policy, "a lack of direction at all levels of the Department."<sup>749</sup>

On a more technical note, it also seems that the very notion of permitting per capita distributions of up to 50% of capital moneys via section 64(1)(a) is completely inconsistent with a notion of maintaining a capital moneys account. This provision has been referred to earlier in several contexts and appears to have been developed originally solely to promote surrenders.

Another example of inconsistency lies in the competing nature of the Minister's obligations in the case of a section 64(1)(k) release of capital moneys what the Minister sees as the being "for the benefit of the band." The breadth of this provision coupled with the relative lack of departmental oversight prompted Commissioner Hall of the Westbank Inquiry to warn DIAND about the potential for suit by disgruntled individual band members where the purposes to which the band council put the moneys might be doubtful.

In short, the responsibilities of the Minister to individuals regarding how their assets are dealt with may not be met by simply acquiescing to open-ended band council requests under this provision. As discussed earlier, there is a long and growing body of comment on band asset management that has recently culminated in the trial decision in the Corbiere Case.<sup>750</sup> Although that case was not argued on fiduciary grounds, it is clear that fiduciary obligations attach to reserve assets and that current band council procedures and actices may not sufficiently respect this fact.

### (iii) confusion and gaps

There are a number of areas where the moneys management regime requires clarification. For example and as mentioned earlier, under section 69 revenue moneys management authority, a band cannot actually collect its revenue moneys. Moreover, the authority is delegated to the

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<sup>747</sup> Ibid.

<sup>748</sup> Westbank Inquiry, supra note 650 at 240.

<sup>749</sup> Ibid at 243.

<sup>750</sup> Supra note 310.

band. It seems ridiculous, though, to have a full membership vote on every revenue moneys issue, and so in practice the band council exercises the authority. This was the case, for example, at Westbank.<sup>751</sup> However, there is strictly speaking no legislative sanction for this practice, even though it may make sense from a financial management viewpoint.

A significant and worrisome gap in the legislation has to do with the absence of a framework for long term band financial management planning or for the creation of a "heritage fund" to ensure that there will be band moneys available for future generations. This question is tied to the earlier point about lack of DIAND monitoring of declining capital moneys account balances as bands expend their financial resources for current needs.

A technical but important gap has to do with the lack of criteria for a section 64(1)(k) distribution of capital moneys "for the benefit of the band." The potential problems have been mentioned above. In the same vein, there are no criteria under section 61 for determining whether the purpose for which the Indian moneys have been spent is really for the "use and benefit" of the band. The present bureaucratic framework for making such assessments is, when applied, too stifling. Where bureaucratic oversight is too slack, it may lead to the type of problems experienced by the Westbank band in the 1970s and 1980s.

In summary, in the area of Indian moneys management for the benefit of the band, the Minister appears to be in a no-win situation under the current Indian Act regime. If the legal regime is followed, band initiative is stymied, commercial opportunities are lost and the move to devolution and enhanced band self-government is undermined. However, if the legal regime is ignored or interpreted too flexibly, the Minister is in danger of not meeting particular fiduciary obligations to bands and to individual band members, both on and off-reserve.

Moreover if the Westbank situation is any indication, such loose practices may also foment discontent and factionalism among reserve populations and lead to tensions with the surrounding non-Indian communities. In this regard, the Minister may be in a "no-win situation" under current operating procedures, as many First Nations commentators blame the Indian Act elective system and, indirectly, the Minister of Indian Affairs, for the problems associated with land and with moneys management:

We feel the DIA elective system, which was imposed upon us, encourages corruption, favouritism and nepotism. There is an inherent lack of accountability and arbitrary decision-making in relation to spending, political direction and setting goals for the community.<sup>752</sup>

As will be discussed below, other briefs and testimony to RCAP reflect similar sentiments.

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<sup>751</sup> Westbank Inquiry, supra note 650 at 406.

<sup>752</sup> Tom Lindlay, Westbank Band, RCAP Public Hearings, Kelowna, B.C., 93-06-17 132 at p. 298.

## 6. Leadership Selection/Elections

Bands under the Indian Act are governed by a body known as the band council, normally made up of a chief and a number of councillors. Band councils are defined in section 2 in terms of how they are chosen by the band. The Indian Act recognizes two procedures for choosing a chief and council: custom pursuant to section 2, or Indian Act elections pursuant to the scheme in sections 74-79. The elective system may be imposed by the Minister without band consent. Unless the Minister has done so, bands operate according to custom leadership selection procedures. At present, 277 bands operate according to custom under section 2, while 317 are under the section 74 elective system.<sup>753</sup>

### (a) Custom Band Council

As the historical review in the earlier part of this paper has shown and as the cases confirm, "[b]and councils are created under and derive their authority to act from the Indian Act."<sup>754</sup> Thus, whether they operate under the custom or elective system, all band councils are recognized by the Indian Act and are generally viewed in law (with some recent exceptions where courts have found necessarily incidental powers<sup>755</sup>) as restricted to the governance powers set out in the Indian Act that will be discussed below.

Custom ostensibly refers to more traditional ways of selecting leaders. As Woodward notes, the size of a custom band council is not regulated. Thus, it may include only one person - a chief - and need not have councillors as such,<sup>756</sup> or it may have many councillors, depending on the band custom. Nor, as Woodward further points out, does "custom" necessarily mean "hereditary." There are many custom bands that follow procedures that involve elections as such. He cites the British Columbia Squamish Band as an example. It holds elections every four year for sixteen councillors and, despite the similarity in procedures, has apparently never been brought under the Indian Act elective system.<sup>757</sup> In short, custom cannot now be taken to be the equivalent of the "life chiefs" referred to in early versions of the Indian Act who were the object of so much attention by official policy makers who viewed them as a hindrance to their civilizing and assimilating goals."

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<sup>753</sup> DIAND, Lands and Trusts Services, supra note 671 at 7.

<sup>754</sup> Paul Band v. R., [1982] 2 W.W.R. 540 (Alta. C.A.).

<sup>755</sup> Joe v. Findlay (1987) 12 B.C.L.R. (2d) 166 (B.C.S.C.). This will be discussed in more detail in the section on "Governance".

<sup>756</sup> Native Law, supra note 20 at 167.

<sup>757</sup> Ibid at 166, n. 70. The index to Native Law does not indicate that the band has ever been brought into the elective system.

It is not clear that "traditional" is necessarily the most accurate or appropriate term to apply to custom leadership selection procedures. "Custom" is, after all, merely the verbal device by which the Indian Act recognizes band councils outside its formal structures. There is no way short of historical or anthropological analysis to determine whether "custom" leadership selection procedures are "customary" in the sense that historians or anthropologists would accept. In this vein, Boldt has argued that most custom bands actually follow procedures that conform in a general way with the Indian Act elective system described below. As a consequence, he states, the majority of custom procedures "conforms to the standard electoral regime in Canada in all fundamental respects."<sup>758</sup>

In the absence of the data necessary to assess this assessment of custom procedures, it is impossible to know whether or to what extent it is true. However, it should nonetheless serve once again to alert commentators and policy makers of the dangers of confusing the labels used in the Indian Act for the reality over which the Act has been laid. In short, in the same way that the term "Indian" under the Act does not exhaust the category or persons who may be Indian by racial descent and culture, neither does the term "custom" necessarily exhaust the category of traditional forms of leadership selection.

In any event, bands operating according to custom fall into two broad categories: those that have never formally been brought under the elective system and those that have, but have subsequently "reverted" to custom. Around one-third of the 277 custom bands fall into the latter category,<sup>759</sup> and most of them reverted to custom between 1972 and 1985.<sup>760</sup> There are many bands, it will be recalled, that were never formally brought into the Indian Act elective band council system, but which nonetheless followed similar procedures under the advice and direction of the Indian agents. Although heavily influenced by the elective procedures, they would likely be categorized among the two-thirds of bands that DIAND notes as having never being within the elective band council system. It is perhaps these bands to which Boldt refers.

Bands are brought into the elective system under the Indian Act by ministerial order or order in council. There is no provision in the Act for reverting to custom, but in practice it is done by another order "repealing" the original order.<sup>761</sup> Up until 1985, DIAND tended to accept without question a band's definition of custom and would repeal the original order upon proof of band consent to opt out of the elective system. Since then, however, stricter criteria have been imposed by DIAND on the advice of the Department of Justice. A "custom" must be supported by the band membership as before, but must now include the following elements:

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<sup>758</sup> Surviving As Indians, *supra* note 39 at 122.

<sup>759</sup> Based on a manual count using the index to Native Law, *supra* note 20.

<sup>760</sup> DIAND, Lands, Revenues and Trusts Review, *supra* note 1 at 112.

<sup>761</sup> Native Law, *supra* note 20 at 422.

- protection of the rights of individual members;
- no involvement of DIAND at any stage;
- provisions for appeals and for amending the custom;
- follow the principles of natural justice and be consistent with the Charter; and
- be in a clear, written format.<sup>762</sup>

It is apparent from these criteria, that "custom" since 1985 is even less likely to conform to traditional leadership selection methods and will in future resemble to an even greater extent the norms of the dominant Canadian society.

Although, as DIAND admits, many bands have reverted to custom from an apparent desire to restore traditional leadership selection practices, many have done so simply to escape the strictures of the elective band council system.<sup>763</sup> Nevertheless, even though custom bands select their leaders outside the Indian Act elective system, they may still be subject to federal court supervision for how they conduct their elections or other selection procedures.<sup>764</sup> Federal supervision does not cease, in short, simply because a different method has been chosen to create it.

#### (b) Elective Band Council

The elective band council system is defined in sections 74 through 79 of the Indian Act and supported by the Indian Band Election Regulations (IBER).<sup>765</sup> Among other things, the regulations set out the procedures for conducting band elections and the appeal process. DIAND officials are more often than not involved at every stage of elections conducted under these provisions. They assist at the nomination meeting, help establish the voters list, run the polling station, count the votes and even cast the tie-breaking vote where necessary. DIAND records the election results, keeps a register setting out the names of all the chiefs and band councils, and will also conduct the investigation in the event of an appeal.

The legislative scheme is as follows. In section 74, bands may be brought into the elective system by a ministerial declaration "[w]henever he deems it advisable for the good government of a band." As the earlier part of this paper has shown, the antecedents for this provision are to be found in the Gradual Enfranchisement Act of 1869 which first imposed the elective band council system as a way of substituting "a responsible, for an irresponsible system" and also "to pave the way for the establishment of simple municipal institutions".<sup>766</sup> There are no objective criteria for

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<sup>762</sup> DIAND, Lands, Revenues and Trusts Review, *supra* note 1 at 112-13.

<sup>763</sup> Ibid.

<sup>764</sup> See Joe v. John [1991] 3 C.N.L.R. 63 (Fed. T.D.) and Baptiste v. Goodstoney Indian Band [1991] 1 C.N.L.R. 34 (Fed. T.D.).

<sup>765</sup> C.R.C. 1978, c. 952 as amended.

<sup>766</sup> Annual Report (1871) *supra* note 93.

imposing the elective system. In this vein, Woodward reports that DIAND officials will sometimes "require a band to describe in detail its custom, in return for not invoking s. 74."<sup>767</sup>

The imposition of an elective system without band consent will sometimes result in a single band having two councils - what the early Indian Acts somewhat inaccurately referred to as the band council as such and "life chiefs." This was the situation discussed earlier regarding the Six Nations of Brantford, the last "band" to be brought under the similar provisions of the Indian Advancement Act in 1924.<sup>768</sup>

Many First Nations today, most notably some of the Mohawk communities, have competing power structures on reserve. Thus, Deloria's comment in the context of imposed tribal councils in the United States is probably accurate for Canada as well: "The administrative creation of institutions does not really supplant the old institutions but simply creates a very powerful competitor for them."<sup>769</sup> It is not known in Canada to what extent elective band councils have in fact supplanted the older power structures on reserves. This is a topic for further research and is certainly an issue of internal political reorganization and accommodation for many bands. Hence Ovide Mercredi's criticism of the band council system and his stated desire "to revive the traditions of consensus decision-making that involve everyone."<sup>770</sup> Boldt refers to a need for a "fundamental restructuring" and describes it as a "daunting challenge" that must be faced if band self-government is to have any reality.<sup>771</sup>

Section 74 also sets out the maximum number of councillors a band may have (one for every 100 people with a minimum of two and a maximum of 12) with no more than one chief. Only the Minister may vary the size of the council. Section 74 also provides, with band consent, for dividing a reserve into electoral sections up to a maximum of six; otherwise a reserve is considered a single section. The notion of electoral sections is a hangover from the Indian Advancement Act of 1884.<sup>772</sup>

Importantly, section 74 also provides for GIC orders and regulations giving effect to the imposition of the band council system. Interestingly, while the chief is normally elected in the same way as councillors, namely by a majority vote of the electors, section 74 nonetheless allows

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<sup>767</sup> Native Law, supra note 20 at 166. Imai, Logan and Stein agree, and cite the example of an unnamed band in British Columbia: Aboriginal Law Handbook, supra note 514 at 114.

<sup>768</sup> Supra note 170.

<sup>769</sup> The Nations Within, supra note 27 at 31.

<sup>770</sup> In the Rapids, supra note 561 at 90.

<sup>771</sup> Surviving As Indians, supra note 28 at 118.

<sup>772</sup> S.C. 1884, c. 28.

for a GIC order that the chief be elected by a majority of the elected councillors. This is also a throwback to the Indian Advancement Act which dispensed with the whole notion of "chief" in favour of the term "chief councillor."<sup>773</sup> Thus, there are two sorts of councillors that may be part of a band council under section 74: at large reserve councillors; and councillors representing particular reserve electoral sections.

Under section 75, electors are the only ones permitted to run for office as councillors or to nominate persons to be chief or councillors. It is interesting that there are no qualifications set out for who may run for chief. This raises the possibility that a non-member or even a non-Indian may run for the highest office. Imai, Logan and Stein comment in this regard that "there are recent cases in Ontario where the elected chief has been the member of another band."<sup>774</sup>

IBER is authorized under section 76, where a sample list of the matters for GIC election regulations is set out along with the provision that all election regulations "shall make provision for secrecy of voting." It will be recalled that the secret ballot was not part of the original elective band council system, and, in fact, was not introduced until 1951, the same year that Indian women were given the vote in band council elections.

Electors are defined in section 77 as band members 18 years of age or older who are "ordinarily resident on the reserve." Under regulation 3 of IBER, "ordinarily resident" is a question of fact. Those living on surrendered lands are not ordinarily resident on reserve,<sup>775</sup> whereas those on designated lands are, since they are considered part of the reserve. As mentioned in other contexts in this paper, the ordinarily resident criterion in section 77 has been challenged successfully at trial by off-reserve members in the Corbiere Case where a distinction was drawn between governance and band asset management functions. In the latter case the ordinarily resident requirement for voting on land surrenders and Indian moneys matters was struck down on Charter section 15 equality grounds.<sup>776</sup>

The actual election procedure is roughly as follows under IBER. At least 6 days before the nomination meeting and at least 12 days prior to the election, the "electoral officer" - someone appointed by the band upon the approval of the Minister - will post a notice calling for the nomination meeting to be held. Following nominations, the electoral officer will draw up and post voters lists. Electors may protest inclusions or exclusions regarding the list. Polls are open from 9 a.m. to 6 p.m. on voting day and all ballots are secret. The electoral officer may vote only to break a tie.

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<sup>773</sup> Ibid.

<sup>774</sup> Supra note 514 at 115. The authors do not cite the examples to which they refer, however.

<sup>775</sup> Naknakim v. Canada [1987] 1 C.N.L.R. 65 (Fed. C.A.).

<sup>776</sup> Supra note 310.

Chiefs and councillors hold office for two years under section 78, but are removed automatically from office upon a conviction for an indictable offence, death, resignation or for any other reason under the Act. They may also be removed where "the Minister declares that in his opinion" they are unfit for office because of conviction of any offence, they have been absent without authorization from three consecutive band council meetings or where they are guilty of "corrupt practice, accepting a bribe, dishonesty or malfeasance." None of the terms are defined. Furthermore, the Minister may declare a person removed for corruption to be ineligible to run again for six years.

An entire election may be set aside by the GIC under section 79 where the Minister reports that there was corruption, a violation of the Indian Act that affected the election or if an ineligible candidate was in the race. Under regulation 12 of IBER elections may be appealed within thirty days by any candidate or elector who actually voted on the grounds set out in section 79. DIAND reports that election appeals have increased dramatically in recent years and that as recently as the late 1980s up to 20% of elections involved some sort of appeal.<sup>777</sup>

Finally, and following up a similar comment made above regarding custom band councils, it should be noted that since band councils are creatures of federal statute, they may be taken to Federal Court for election challenges. In short, neither custom nor elective band councils enjoy anything like the sovereign immunity available to the tribal councils of federally recognized tribes in the United States that may only be sued in tribal courts.<sup>778</sup>

#### c) Problems with Leadership Selection\Elections

As a preliminary observation and in keeping with the comments made above regarding section 74, there is a growing body of criticism in Canada and the United States about the negative effect on Indian social values that imposed election processes bring. The Hawthorn Report and other studies have noted how Indian band communities would support certain individuals who appeared able to work with Canadian officials by electing them in spite of the foreign nature of the imposed elective system and despite the continuing existence of traditional ruling groups in many cases.<sup>779</sup>

Similar observations have been made about the elective tribal councils in the United States.<sup>780</sup> In this regard Barsh has noted that tribal councils on many American reservations are in

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<sup>777</sup> Lands, Revenues and Trusts Review, supra note 1 at 111.

<sup>778</sup> Supra note 18.

<sup>779</sup> See for example, the passage cited at note 5, supra.

<sup>780</sup> See, for example, Hagan, Indian Police and Judges, supra note 129, and the analysis provided by Russell Barsh, "Aboriginal Self-Government in the United States: A Qualitative Political Analysis," supra note 584.

themselves "a force for cultural assimilation."<sup>781</sup> Recent years have actually seen more and more protests by American Indians against their own elective tribal councils, often because they are seen to be a corrupt and not truly representative of the people. In this regard, Holm has written that "[t]o many Indian people, especially those who have knowledge of their traditions tribal value systems, democratic elections more often than not create artificial élites who then rule more or less in an arbitrary manner."<sup>782</sup>

Something like this appears to be true in Canada too. A number of witnesses and intervenors before RCAP have mentioned this problem, including the Stó:lo Tribal Council of British Columbia. Its brief to RCAP refers to this problem, noting that the Indian Act election system has broken down the social fabric of communities, divided them and fostered distrust between the chief and council and the community:

... almost all informants concurred that the system fostered distrust between those who were in the positions of power, and the community at large - in particular between the community and Chiefs. Elders related stories of corrupt Chiefs who allegedly embezzled money from their band, using the funds to benefit only themselves and their families. Greed was described as having reached epidemic proportions among the Councillors and Chiefs of recent generations. Ever since the Department of Indian Affairs permitted local bands to manage their own budgets, certain Chiefs have been accused of stealing and misappropriating band money. In general, it appears that many Chiefs and Councillors were neither respected nor trusted by substantial segments of their communities. In particular, those people who had not supported the Chief in the past election felt especially resentful and suspicious of their leader. These people believed that their Chiefs and Councillors met behind closed doors, unfettered by public scrutiny and therefore unconcerned with public criticism. There they supposedly divide public funds among themselves and their families, and make deals designed to perpetuate their hold on power.

Chiefs, on the other hand, emphasize how difficult it is to retain respect while operating under the Indian Act election system. Many claim that the Indian Act ties their hands and therefore create the negative image of the "greedy Chief." Chiefs complain that as soon as the elections are over those people who supported a non-elected candidate begin to unjustly complain that they are neglected by the winners. It is the election system, and not their own political agendas, they state, which is responsible for fostering the resentment. Both current and retired Stó:lo leaders express frustration at the way the Indian Act has thwarted past efforts to include a broader cross-section of the community in council. Yet, despite their best efforts, Chiefs claim the "system" wrongly paints them as "betrayers of their

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<sup>781</sup> Ibid at 10.

<sup>782</sup> Tom Holm, "The Crisis in Tribal Government" in American Indian Policy in the Twentieth Century, supra note 18 at 135. Barsh confirms this (supra note 584 at 11) where he notes in the context of tribal government that "[t]echnocratic elites have been formed and their political powers is well entrenched."

heritage" in the eyes of some of their people.<sup>783</sup>

The result, according to the Stó:lo brief, is that many community members have become disillusioned with band council government and have withdrawn in anger and frustration from the band political process - something that ultimately harms the community itself.<sup>784</sup> Other briefs and testimony presented to RCAP are in a similar vein.<sup>785</sup>

In its Lands, Revenues and Trusts consultations in the 1980s, DIAND reports hearing three basic complaints from bands about the current leadership selection/election system.<sup>786</sup> First, the current section 74 system of elections does not allow bands to make and adopt their own election rules. Reverting to custom is apparently of little assistance because many bands may wish to use adopt more modern and non-traditional approaches. A second concern was that the Indian Act and IBER regime is simply too rigid and unworkable in the context of evolving band council government and that too many important procedures were not defined. A third concern was that DIAND is too involved in the elections and appeal process.

The precise nature of these concerns may be better illustrated perhaps by using the framework for analysis employed elsewhere in this paper.

(i) antiquated and paternalistic

It is evident that the entire notion behind section 74 is highly paternalistic. The history of the elective system shows that its original purpose was to by-pass traditional leadership selection approaches in favour of inculcating new values based on liberal democratic notions. Thus, it is perhaps not surprising that there is no provision even in the current Act for a band to consent to the imposition of the elective system beforehand or to reject it afterward if it is not suitable for band needs as defined by the band itself.

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<sup>783</sup> Leadership Review: The Indian Act Election System, Traditional Stó:lo Socio-political Structures, and Recommendations for Change," (Prepared for the Stó:lo Tribal Council by Keith T. Carlson, April 1993 and submitted to the Royal Commission on Aboriginal Peoples) at 14.

<sup>784</sup> Ibid at 2:

In other words, the Indian Act election system is destructive to the traditional social fabric of Stó:lo communities. It breaks down the extended family social units and pits people and families against one another rather than encouraging people to work together towards common goals. Over time, more and more people have become disillusioned with Indian Act Band Governments, and increasingly members of Stó:lo communities are excluding themselves from the political process to the detriment of themselves and their communities.

<sup>785</sup> In this regard, an excellent overview of the problems replete with cited criticisms culled from the RCAP record of hearings is Mary Ellen Turpel, Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance (document prepared for RCAP, July 11, 1995).

<sup>786</sup> Supra note 1 at 111.

The unilateral power of the Minister to remove a chief and councillors under section 78 where he forms an "opinion" that they are unfit for office because of a conviction, unauthorized absence or corrupt practice etc. is arbitrary and intrusive. The absence of clear and objective criteria for removal simply add to the apparent paternalism of the provision.

Finally, the arbitrary limits to council size - no more than 12 and no less than 2 - and the fact that only the Minister may vary it, adds yet another element of official control that detracts from the ability of a band to adjust its government to its own needs.

(ii) inconsistent

The "ordinarily resident" criterion has already been the subject of comment in other contexts, so it hardly bears repeating that it seems inconsistent with the dual nature of band council functions (reinforced by the Minister's fiduciary obligation) described above. Nor, apparently, is it consistent with the desires of many bands. According to DIAND, in the context of consultations on voter eligibility issues, the ordinarily resident criterion was "the main source of concern to most Indian leaders..." since it reflects neither the reality that many band members involved in band life live off-reserve, nor the more inclusive history or traditions of many bands.<sup>787</sup>

If the goal of the elective system is to promote good band government, the two year limit on band council terms of office seems inconsistent with such a goal. It is too short for band councillors "to come to grips with problems, develop programs, take control of financial matters, implement action plans and see the results."<sup>788</sup> Moreover, the fact that all officers lose office at the same time is also inconsistent with the continuity that is the hall mark of good government and which staggered terms might assist. Both these criticisms are also reflected in the more recent Stó:lo Tribal Council brief referred to above.<sup>789</sup>

Election appeals are another area criticized in DIAND consultations. If the goal of an appeal is to resolve election disputes expeditiously and with a certain degree of finality, the current process is inconsistent with such a goal. It is poorly defined in the Act and IBER and is administered in a cumbersome and time consuming way. DIAND reports that an election appeal can take up to eight months,<sup>790</sup> and that there is no further recourse except to go to the courts - another time consuming and cumbersome process.

Moreover, the role in which DIAND finds itself is by definition inconsistent. It virtually runs the entire election from the point of view of mechanics, and on an appeal is in the invidious position of investigating itself to a considerable extent. The inherent conflict of interest in which it

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<sup>787</sup> Lands, Revenues and Trusts Review, supra note 1 at 118.

<sup>788</sup> Ibid at 119.

<sup>789</sup> Supra note 783 at 34, 35.

<sup>790</sup> Lands, Revenues and Trusts Review, supra note 1 at 124.

finds itself is not helped by the fact that DIAND staff are not well trained for such a role, nor are they apparently afforded the powers necessary to carry out a thorough investigation.

### (iii) confusion and gaps

Some of the gaps in the elections regime have already been noted above. For instance, there are no qualifications set out running for the office of chief. In the same way, there is no prohibition on dual candidacy i.e. running at the same time for the office of chief and for the office of councillor. Although DIAND notes that in small bands this may be an attractive feature, since qualified individuals not elected to one post may get the other. However, it is reported that generally bands were not in favour of dual candidacies.<sup>791</sup>

The election process, despite IBER, is still replete with gaps. For example, there is no formal meeting for a declaration of candidacy or nomination where important issues could be addressed and possibly added to the ballot for band decision at the same time. Nor are there clear procedures for preparing and revising the voters list, prohibitions on campaigning at or near polling stations, law and order at polls, recounts, proxy voting and other issues that arise in any election.

The role of the electoral officer is also unclear and limited. The person appointed to this position cannot take oaths, delegate authority or responsibility to deputy officers and does not have open-ended emergency powers for dealing with unforeseen events that may interfere with the election.

In the same way, the election time frames are undefined except for the limited requirement that the election be called at least 12 days before being held. Nor do the rules provide for a reasonable transition period after the election for the incoming officers to become familiar with their duties before assuming office. As a result, many must learn on the job. Given that the term is only two years, this seems to be an inefficient way to proceed.

## **7. Governance**

### (a) Preliminary Questions

Governance in the Indian reserve context is a complex topic, but for purposes of this analysis, it will be defined simply as the legitimate exercise of power and will be examined within the traditional functional divisions: legislative, administrative and judicial. The legislative branch, the band council, will receive the most concentration, as it is the aspect of the Indian Act governance regime that is the most developed.

The first and most obvious thing to state is that the imposition of the band council governance system - in effect the direct interference by Parliament with the government of the "several Nations and Tribes of Indians" referred to in the Royal Proclamation of 1763 - seems

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<sup>791</sup> Ibid at 119.

increasingly unjustifiable in light of current understandings of the significance of that document and the modern drive of First Nations to recover an effective measure of their pre-contact self-governing powers. Moreover, it is also at odds with the very nature of the treaty process which presupposes two self-governing entities capable of entering into formal government to government relations with each other.

In the narrower context of the Indian Act, there are a number of preliminary questions about band council government will be raised to draw attention to important shortcomings of the current Indian Act regime and as a way of focusing attention on the goals of governance more generally.<sup>792</sup> Since band government is based for the most part on a non-traditional and non-Indian model, these questions are evidently posed in terms of the values and assumptions that underlie these models. In short, they are not nor are they intended to be the type of questions that Indian persons themselves might pose from the particular perspective of their own tribal or cultural values and traditions.

First, does the band council system establish a legitimate government, with legitimacy assessed by reference to the electoral process or some other customary process that measures consent to be governed? The earlier review of the leadership selection/ election process has dealt with this question to some extent, revealing that legitimacy in these terms is difficult to assess. Partly this is due to the fact that the section 74 election process is flawed and has been criticized extensively by Indian people themselves. Partly it has to do as well with the fact that many custom bands appear to follow elective processes modelled on the deficient Indian Act elective system. Mainly, however, legitimacy is difficult to assess because very little is known about how leadership selection/elections are influenced and actually conducted in most reserve communities.

As discussed earlier, the assertion is made by some critics that the result of the DIAND legacy on many reserves is to favour a self-perpetuating economic and political élite insulated from the controls normally placed on governments in Canada. From this viewpoint, elections are somewhat hollow exercises since this group manufactures consent by monopolizing the political process, with the tacit support of DIAND. In the absence of hard data to support such an allegation, it is difficult to assess such statements. Nonetheless, anecdotal evidence exists to support such a view. RCAP has recorded many complaints of this nature like the following:

Indian leadership is a one party system. If we are going to have a democracy and if the Indian leaders understand the political and democratic process, they will appreciate that all political parties have faced opposition throughout the world. Our opposition is based on very, very serious claims, and the Indian leadership has been unchallenged.<sup>793</sup>

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<sup>792</sup> These questions are derived from Franks' analysis of the Canadian parliamentary and political system more generally: C.E.S. Franks, The Parliament of Canada (Toronto: University of Toronto Press, 1987) at 4-5 discussing the four essential functions of Parliament and two further functions important to democratic government.

<sup>793</sup> Grace Meconse (April 22, 1993, Winnipeg, Man.) in Framing the Issues, *supra* note 547 at 25.

A second important question has to do with the other important components of governance. Does the government have the power and the resources - financial and otherwise - to work properly? The issue of power will be the subject of much of the discussion to come. Resources are evidently the weak link in Indian band government, since in most cases virtually all funding is provided by the federal government and is subject to various forms of DIAND administrative control and to being cut back by Parliament as it wishes. Indian band financing will be discussed separately below.

Third, are there institutions or processes to enforce government accountability? In short, how do you make government behave? This is an issue that will also be discussed separately below. At this stage, however, it can be said that there are few accountability mechanisms available aside from the election process itself and whatever financial reporting arrangements band councils may have with DIAND and other federal funding sources.

Fourth, does band council government allow for the development of an effective opposition? Organized opposition serves not only to seek election itself as the next government, it also promotes accountability by questioning government policies and by offering alternative perspectives to the votes. A more focused variation of this question related question might be whether band council government and the related political activity serves as a training ground for the development and advancement of new leaders with fresh ideas. Given the charge referred to above that band political life revolves around a closed and self-perpetuating élite, then the answer to these questions become important determinants of whether self-government will be anything other than a devolution of current powers to the existing élite under a new name.

It is clear that reform of the Indian Act band council system, no matter how evident the need may be or how desirable, is no easy matter. With the evolution of the debate around the inherent right of self-government and opening up the existing membership of bands via Bill C-31 of 1985, the stakes are high. Many groups, on and off-reserve, status and non-status Indian, treaty and non-treaty etc., are contending at the moment for control of, or at least influence over, the shape of the coming debate about Indian governance. Thus, even though incremental reforms would alleviate a large number of irritants in the current regime, long term reform will evidently involve far more than this.

Although the tone of much of his analysis of Indian leadership is sometimes harshly critical, Boldt offers a relatively neutral and accurate analysis of the longer term challenges facing the current generation of Indian leaders in the self-government context. It is worth repeating here as an introduction to the discussion that follows to illustrate yet again how difficult these issues are:

Indian leaders are faced with a daunting challenge: they must begin to correct the consequences of generations of Canadian political and bureaucratic oppression, misdeeds, mismanagement, and neglect, and they must start the process from a base of inadequate resources and powers. This challenge to Indian leadership is magnified by complex social and cultural

changes that have occurred and are presently occurring in Indian communities. As the nature of their community changes, Indian leaders are confronted with difficult philosophical and political choices and decisions - choices and decisions about a fundamental restructuring of the political, economic and social systems that at present give them their status, powers and privileges.<sup>794</sup>

#### (b) Parliament, Bands and Band Councils

Under the Indian Act, power is delegated to three entities to make the laws that will govern Indians on reserve: the GIC, the Minister and band councils. However, Parliament has also granted a number of powers to bands as such, and has described the procedure for bands to follow, namely majority rule on a general vote. In this regard, subsection 2(3) indicates in subparagraph (a) that powers conferred on a band shall be exercised by "the consent of a majority of the electors."

Aside from the obvious function of choosing either a custom band council (s. 2(b)), or elective one (s. 74) to exercise the powers granted under the Indian Act, bands as such have the following powers and obligations in their own right:

- assume control of band membership (s. 10), leave it with DIAND (s. 13.1) and return control to DIAND if control has been taken under section 10 (s. 13.2);
- consent to amalgamate with another band (s. 17(1)(a));
- allege trespass in order that the Attorney General of Canada bring proceedings in the Federal Court (s. 31);
- consent to land surrenders and designations (ss. 38, 39);
- maintain all roads, bridges, ditches and fences within the reserve, and comply with ministerial orders to repair and pay for such repairs (s. 34);
- request the delegated authority to control and manage reserve lands (s. 60);
- control and manage band revenue moneys (s. 69); and
- assent to a band council alcohol control by-law (s. 85.1(2)).

Band powers exercisable by the band as a whole are in theory significant. However, as has been seen in the surrender and revenue moneys context, in fact the band as a whole does not always exercise them. In the case of surrenders, for example, it is only electors (band members ordinarily resident on reserve) who participate. This is sometimes less than half the total band population, as in the Corbiere situation.<sup>795</sup> Moreover, only a "majority of a majority" on a second surrender vote need approve a surrender to make it effective, as in the Logan v. Styres situation.<sup>796</sup>

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<sup>794</sup> Surviving As Indians, *supra* note 39 at 118.

<sup>795</sup> *Supra* note 310 at 74 where Strayer J. observes that since 1850 a majority of the Batchewana band members have not lived on the reserve.

<sup>796</sup> See text at note 655, *supra*.

It is essentially the same situation in the case of alcohol control by-laws, as only a majority of the electors who actually attend the meeting to assent to the by-law need approve. This may be a small minority of the actual band membership. Moreover, in the case of revenue moneys management, under section 69 it is the band council that usually exercises the management function, despite the lack of clear legal authority to do so.

One of the problems in sorting out the band role in the governance context has been outlined in a general way in the Lands, Revenues and Trusts Review as follows:

The division of powers between a band and its council is not well defined in the current Indian Act. For example, the Act gives some functions to the band... and others to the band council.... Apart from provisions governing the election of councillors, the Act does not spell out the nature of the relationship between band members and the council.<sup>797</sup>

The conclusion drawn from this situation by the authors of this statement was to recommend a specific way by which the band could delegate some of its functions to the band council, coupled with stricter accountability mechanisms to ensure compliance with band membership views. As mentioned earlier, with regard to section 69 (revenue money management) in particular, band councils are presently exercising some functions assigned to bands, but not always through a specific delegation of authority from the band. It is important to bear in mind that the relationship between band membership and band councils is not clear, and as the Westbank situation graphically illustrates, it may in extreme cases become strained in ways that exacerbate factionalism.

### (c) The Band Council: the Legislative Branch

#### (i) Federal Municipalities

As mentioned above, Parliament has delegated legislative power to the GIC, the Minister and to the band council. They make Order in Council regulations, Ministerial regulations and by-laws respectively, all of which constitute delegated legislation and have the force of law. The Statutory Instruments Act<sup>798</sup> makes this clear and provides a mechanism for the examination, registration and publication of all these instruments. Band council by-laws do not need to be published in the Canada Gazette, however. Thus, it is very difficult in practice to discover what band laws are.

In any event, band councils are authorized under the Indian Act to make by-laws under sections 81, 83 and 85.1. While the lines between regulations and by-laws are not always clear in practice, in other legal contexts the term "by-law" is generally restricted to the species of local laws made by private and municipal corporations. The important element in the formal definition of a by-law is its purely local nature.

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<sup>797</sup> Supra note 1 at 104.

<sup>798</sup> R.S.C. 1985, c. S-22.

The band by-law powers in section 81, for example, considered as a group certainly seem to be in relation to minor subject areas that are analogous to the kind of authority a small municipality might have, as they cover areas of local concern like traffic control, animal control, building, road and bridge repair, bee and poultry keeping, weed control, trespassing on the reserve, peddlers and, more recently, residency of band members and their dependents.

The leading cases reinforce the local and delegated nature of band council powers by analogy with municipal powers. For example, in Re Stacey and Montour, the band argued, among other things, that "the observance of law and order" provision in subparagraph 81(1)(c) empowered it to create a court on reserve that could oust the jurisdiction of the Québec courts to hear criminal matters under the Criminal Code. Thus, the band asserted a province-like legislative power capable of displacing competing provincial powers. This contention was rejected by Québec Court of Appeal:

The powers conferred by s. 81 are first of all, powers to regulate and to regulate only "administrative statutes". In other words, a band council has, in this area, the same sort of legislative powers as those possessed by the council of a municipal corporation. The power to give effect to regulations cannot extend beyond these administrative statutes; they are accessory and nothing more.<sup>799</sup>

The Alberta Court of Appeal took a similarly narrow view of band by-law powers in Paul Band v. R., reinforcing the relatively minor stature of band councils as follows:

Band councils are created under the Indian Act and derive their authority to operate qua band councils exclusively from that Act. In the exercise of their powers they are concerned with the administration of band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the Minister. They have no other source of power.<sup>800</sup>

Somewhat wider powers and an enhanced status have been ascribed to band councils in the context of the Cree-Naskapi (of Québec) Act<sup>801</sup> and reserve land management.<sup>802</sup> The increasing

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<sup>799</sup> 63 C.C.C. (2d) 61 (1981) at 68.

<sup>800</sup> Supra note 836 at 549. The band had been found guilty at trial of not paying wages to its special constables in contravention of Alberta labour laws, which the trial court found to apply to Indians on reserve. On appeal it was held that provincial labour legislation did not apply to a band as employer because of its federal delegated status.

<sup>801</sup> Eastmain Band v. Gilpin [1987] 3 C.N.L.R. 54 (C.S.P. Qué.): the right of local self-government being constitutionalized under the Cree-Naskapi (of Québec) Act cannot be removed except by constitutional means.

<sup>802</sup> Joe v. Findlay, supra note 655: bands may bring an action for ejection from reserve lands as an ancillary power to that of allotting the lands in the first place so that they can effectively carry out their land management functions even though there was no specific ejection power granted to them in the Indian Act.

openness of the courts to find additional, implied, powers and capacities in band councils to enable them to perform their roles in the modern world leads Woodward to conclude that "there are growing indications that the powers of band councils, in carrying out their Indian Act functions, will be founded broadly in their status as governments, and not merely as agents of the federal government."<sup>803</sup>

While that may be, at the time of preparing this paper those indications were still mere indications that had not yet risen to the level of law; thus it still seems fair to say that the prevailing view is that bands are seen by the courts as something akin to "federal municipalities" operating under delegated federal authority in the same way that municipalities operate under delegated provincial legislative authority.

The preamble to section 81 reinforces the delegated and subordinate nature of band power by authorizing only by-laws that are "not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister," thus making it clear that Order in council and Ministerial regulations take precedence over band council by-laws where they may conflict. As mentioned earlier, there are nearly 25 provisions allowing the making of Order in council regulations, and 87 that permit Ministerial regulations.<sup>804</sup> Many of these regulations overlap with the by-law powers provided under section 81.

Band by-laws have no extra-territorial effect: they operate only on reserve lands. Moreover, they are not entitled to judicial notice in court proceedings, meaning that they must be proved before a court will take cognizance of them.<sup>805</sup> Although by-laws validly enacted and within the limits of federal jurisdiction under the Indian Act are effective to override competing provincial laws,<sup>806</sup> so far Indian Act by-laws have been held to override competing federal laws only in the area of fisheries.<sup>807</sup>

#### (ii) Band Council Procedure

Band councils whether they are custom or elective are required to operate on the basis of majority rule in meetings organized for this purpose. In this regard subparagraph 2(3)(b) is

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<sup>803</sup> Native Law, *supra* note 20 at 168.

<sup>804</sup> Supra note 577.

<sup>805</sup> R. v. Bear [1982] 3 C.N.L.R. 75 (N.B.Q.B.).

<sup>806</sup> On the notion of general federal paramountcy in areas of federal or concurrent federal/provincial jurisdiction and as a result of the wording of section 88 preventing provincial laws of general application from regulating a matter covered under the Indian Act by "any order, rule, regulation or by-law made thereunder..".

<sup>807</sup> See e.g. R. v. Ward [1988] 2 C.N.L.R. 164 (N.B.C.A.) where under section 81(1)(o) "preservation, protection and management of fur-bearing animals, fish and other game on reserve" the band had passed a by-law conflicting with the New Brunswick Fishery Regulations (made under the federal Fisheries Act) that was upheld as against those regulations.

explicit, stating that powers conferred on a band council shall be exercised by "the consent of a majority of the councillors... present at a meeting of the council duly convened." Although there is no legal requirement that they use them, band councils generally use a form known as a Band Council Resolution (BCR) supplied to them by DIAND. BCRs are used to formally record band council decisions, especially those requiring DIAND action or approval. BCRs will bind the band and can affect the rights of band members and so are powerful tools in the hands of band councils.

BCRs are used by custom and by elective band councils, although only the latter are bound by the quorum and other requirements of the Indian Band Council procedure Regulations<sup>808</sup> passed by the GIC under section 80 to govern elective band council proceedings. Custom bands will nonetheless be required to show on their BCRs that a proper majority of the council has agreed to the decision recorded on it.<sup>809</sup> In this regard, BCRs have been criticized because they tend to mislead band councils into believing they can ignore the second horn of subparagraph 2(3)(b), namely the requirement to hold "a meeting of the council duly convened." Where, for example, a band council merely signed the BCR allocating reserve lands to someone but without actually holding a meeting, the allotment was subsequently ruled invalid by the courts.<sup>810</sup>

Elective band councils are bound by GIC regulations setting out a code of procedure for meetings. For example, no councillor may be absent for more than three consecutive meetings without the authorization of the chief or the Minister (s. 3), a quorum is a majority of band councillors or five if the band council is nine or more (s. 6), the chief shall be the presiding officer (s. 8) who shall maintain order and decide all questions of procedure (s. 10), the order of business is prescribed (s. 11), the presiding officer votes only to break a tie (s. 18), band council meetings are open to all band members (s. 23), the council may make additional rules of procedure not inconsistent with the regulations (s. 31) etc.

Importantly, under the regulations, the chief or the Minister may call a special band council meeting (s. 4). This provision has been interpreted to mean that a district manager of DIAND may call such a meeting and hold it in camera, and off-reserve so long as a quorum is present.<sup>811</sup> Moreover, the regulations also institutionalize a "silence equals consent" rule where they note that a refusal to vote on an issue shall be taken to be a vote in the affirmative (s. 20).

It must also be noted that chiefs under the Indian Act and the regulations are not generally provided with any special powers. Woodward states in this regard, on an analogy with municipalities, that "[t]he powers and influence of the chief, like those of a mayor, are not derived

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<sup>808</sup> C.R.C. 1878, c. 950.

<sup>809</sup> Imai, Logan and Stein, Aboriginal Law Handbook, *supra* note 514 at 103.

<sup>810</sup> Leonard v. Gottfriedson [1982] 1 C.N.L.R. 75 (B.C.S.C.).

<sup>811</sup> Perley v. Higgins [1986] 1 C.N.L.R. 45 (N.B.Q.B.).

from any grant of power, but from the prestige of the office.<sup>812</sup>

A band council, whether custom or elective, has been described as a "federal board, commission or other tribunal" under the Federal Court Act.<sup>813</sup> Thus, and as the earlier discussion on leadership selection/elections has shown, band councils, whether custom or elective, are amenable to Federal Court jurisdiction for how they discharge their delegated governance functions.

In this respect and to summarize what has been said so far, band councils have been viewed as having four basic functions, all of which are reviewable by the Court on administrative law principles: local government; agent of the Minister; intermediary between the band and other forms of government; and consenting body to various provisions under the Indian Act.<sup>814</sup> In short, on the narrow view of band councils favoured by the courts, band councils are generally seen as local federal municipalities and as mere administrative agencies of a particular kind, albeit somewhat unique, rather than as governments of "nations" in the sense in which the term has been used in recent decades in the Aboriginal self-government context.

### (iii) Band By-Laws

The evolution of the band by-law making capacity has been outlined in earlier parts of this paper. The first band by-law making powers were granted in the 1869 Gradual Enfranchisement Act and were limited to relatively minor matters. No enforcement powers were accorded. Later Indian Acts enlarged the list of powers, but as mentioned above, they are still relatively minor and local in scope. Enforcement was reserved to the Indian agent for the most part. Originally, all band council by-laws required prior Governor in Council approval to be effective. The 1951 Indian Act amendments changed this, and now the rules regarding approval vary with the section under which the by-laws are passed.

Bands are currently empowered to pass by-laws under three different provisions of the Indian Act: sections 81, 83 and 85.1. The scope, subject matter and procedure for enactment are different for each.

#### section 81

Under section 81, band councils may pass by-laws related to a large number of local matters:

- (a) health of reserve residents;
- (b) traffic regulation;

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<sup>812</sup> Native Law, *supra* note 20 at 173.

<sup>813</sup> Rice v. Mohawk Council of Kahnawake [1981] 1 C.N.L.R. 71 (Qué. C.A.); Whitefish v. Canada [1985] 5 W.W.R. 664 (Sask. Q.B.).

<sup>814</sup> Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan [1982] 3 W.W.R. 554 (Sask. C.A.).

- (c) observance of "law and order;"
- (d) preventing disorderly conduct and nuisances;
- (e) trespass by cattle and other domestic animals;
- (f) construction of roads and other local works etc.;
- (g) reserve land use zoning;
- (h) regulating building construction and repair;
- (i) surveying and individual allotments of reserve lands;
- (j) destruction and control of noxious weeds;
- (k) regulating bee-keeping and poultry raising;
- (l) regulation and construction of wells and other water supplies;
- (m) control of "public games and amusements;"
- (n) regulations regarding salesmen on reserve;
- (o) "preservation, protection and management" of game and fish on reserve;
- (p) removal and punishment of trespassers on reserve;
- (p.1) residence of band members and others on reserve;
  
- (p.2) application of band by-laws to the spouses and children of resident band members;
- (p.3) authorizing the Minister to make capital and revenue moneys payments to band members deleted by the band from band lists under band membership codes;
- (p.4) bringing the band membership (s. 10(3)) and payback (s. 64.1(2)) provisions into effect;
- (q) ancillary matters to the exercise of by-law powers;
- (r) imposing by summary conviction for violations of by-laws fines up to \$1,000 and jail terms of 30 days or both.

Membership by-laws under subparagraph 81(1)(p.4) referring to sections 10(3) (taking control of band membership) and 64.1(2) (requiring repayment minus \$1,000.00 of former commutation moneys) will not be effective unless and until the band consent required under subsection 10(1) has been obtained. Otherwise, the by-law is a nullity.

Section 81 clearly refers for the most part to minor subject areas that are often irrelevant to modern band needs and circumstances. For example, while band councils have law-making powers over noxious weeds and beekeeping, no mention is made of matters essential to the attainment of community objectives like environmental control, family law and child welfare. Moreover, under section 82 the Minister may disallow even these minor by-laws within 40 days.

The procedure for making section 81 by-laws is as follows. First, following subparagraph 2(3)(b) the band council must pass the by-law at a duly convened band council meeting. Next, a copy must be mailed to the Minister within four days of being made pursuant to subsection 82(1). Third, if at the end of forty days after forwarding the copy to the Minister it has not been disallowed, it will come into force pursuant to subsection 82(2). At that point the regional or district office of DIAND must be informed so that the by-law can be registered under the Statutory Instruments Act.

No statutory guidelines have been provided, however, regarding how the Minister will exercise the disallowance power. The disallowance rate has varied, from a high of 17% prior to 1981, to up to 50% in 1982 and 61% in 1983, finally levelling off at around 40 % after 1987.<sup>815</sup> Since then a By-Law Advisory Service has been introduced by DIAND and it is reported that the disallowance rate has dropped to around 12%.<sup>816</sup> By-laws are disallowed for four main reasons: violation of the Charter; ultra vires i.e. beyond the delegated legal power of the band; infringement on what is viewed as paramount federal or provincial jurisdiction; and, more generally, for poor drafting, arbitrariness etc.<sup>817</sup>

Bands have historically tended not to fully utilize their section 81 by-law powers. A number of reasons may be surmised to account for this: the increasing use of the disallowance power as bands become politically more aggressive in the age of the fiduciary obligation; a general lack of training and assistance to bands until recently in the use of this form of lawmaking authority; the lack of clarity in Canadian law regarding the nature and scope of the by-law power; the expense of employing legal counsel to assist in drafting by-laws that the federal Department of Justice will not recommend for disallowance on technical grounds; the general unwillingness of the RCMP or other provincial police force to enforce band by-laws and the lack of local band police forces to do so; the lack of band access to the revenues generated by the imposition of fines for the breach of by-laws where they are enforced; and, most importantly, the growing political desire of bands to go beyond the limiting strictures of section 81 powers in the modern era of inherent sovereignty.

#### section 83

The section 83 by-law powers are somewhat different. Subsection 83(1) authorizes band councils to pass bylaws on a number of money matters such as:

- (a) "taxation for local purposes;"
- (a.1) the licensing of businesses and trades;
- (b) paying band expenses;
- (c) appointing band bureaucrats;
- (d) salaries for the band council;
- (e) and (e.1) enforcing payment of moneys owed under this section including arrears and interest;
- (f) taxing band members for band projects; and
- (g) "any matter arising out of or ancillary" to the other section 83 by-law powers.

Unlike the section 81 by-laws, however, there is no presumptive validity subject to subsequent ministerial disallowance. Section 83 by-laws must receive the prior approval of the

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<sup>815</sup> DIAND Lands, Revenues and Trusts Review, supra note 1 at 92-93.

<sup>816</sup> DIAND "Lands and Trusts Services," supra note 671 at 14.

<sup>817</sup> Lands, Revenues and Trusts Review, supra note 1 at 93.

Minister before they become effective. No criteria for obtaining such approval are set out and there is no time limit within which such approval must be given.

The procedure for section 83 by-laws is similar to that for section 81. As in the former case, the band must pass it in the required way before it is sent to the Minister for approval. Once approval is received, it enters into force and is then sent to the district or regional DIAND office for registration under the Statutory Instruments Act.

#### section 85.1

Under section 85.1, the third by-law making provision, a band council has the authority to make by-laws prohibiting the sale or supply and the possession of intoxicants on reserve, as well as actually being intoxicated on reserve. Under subsection (2) such by-laws must be approved by a majority of the band electors before they can become effective. Although the Minister's approval is not required, for these by-laws to be effective in court proceedings to enforce them they must be certified by the superintendent under section 86. There are no means for the band to ensure that certification occurs.

#### (iv) Limitations on Band By-law Effectiveness

In addition to the inherent limitations mentioned above having to do with the Minister's overriding and paternalistic role, band council lawmaking authority is further restricted by being made subservient to the following levels of authority:

- other federal legislation (with the exception of the fishing by-laws that have been held to override the Fisheries Act) such as the Criminal Code etc.;
- the other provisions of the Indian Act that may conflict with the area covered in the by-law such as section 30 (trespass penalty);
- any regulations under the Indian Act such as those passed by the GIC in section 73 or in the other areas such as elections or estates etc. discussed in earlier parts of this paper;

Thus, the laws passed by band councils are subordinated to those passed by other arms of the federal government. Bands are frustrated and have complained that these restrictions coupled with the already limited by-law powers are completely "out of step with any concept of providing them with control over local affairs or the capacity to work toward community objectives."<sup>818</sup>

The principle problem with band by-law powers under the Indian Act lies in the fact they were never developed from the perspective of the needs or desires of Indians. They result from the earlier processes of civilization and assimilation, the goal of which was actually to undermine Indian values. A relative lack of case law on which to clarify the by-laws powers has simply compounded the problem of turning these limited by-law powers into more modern law-making vehicles. Where the courts have been involved in interpreting the scope or jurisdictional force of band council lawmaking powers, the results, as exemplified by the Stacey and Montour and the

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<sup>818</sup> Ibid at 83.

Paul cases described above, have been mixed. As a general rule, the band council's lawmaking authority has been held to be narrow.

Bands have pointed out that their limited by-law powers, the continuing Ministerial supervisory and regulation making authority, ongoing provincial regulatory authority in certain areas and the legal uncertainty generated by the absence of judicial guidance all combine to deny them the means to make laws that fit their circumstances. Under the current legal regime bands simply cannot control their daily lives and their future, nor can they incorporate, as appropriate, traditional values and customary law.

#### (d) Executive Branch

It is a truism to observe that all governments require a variety of administrative structures and mechanisms in order to carry out their duties. For example, mechanisms are required to enforce laws made by the government under its lawmaking authority; deliver services to the community directly through a public service or through cooperative ventures with regional, provincial or national organizations; and ensure an appropriate balance between collective community rights and the rights of the individual by creating boards, commissions and tribunals to make such decisions fairly. This power to carry out its lawful duties is also known as the administrative function of government.

Bands have noted that under the existing Indian Act regime, many of the lawmaking powers that exist, however limited, cannot be effectively used because of the absence of such an administrative infrastructure and the resources necessary to support it. The prime example is the inadequacy of existing mechanisms for the enforcement of band laws in the community.<sup>819</sup>

#### (i) Creating a Police Force

Under the Constitution Act, 1867, provincial governments have authority under section 92(14) for the administration of justice in the province and have created provincial police forces or contracted for policing services from the RCMP. In a similar way, the federal government has created federal enforcement agencies and a national police force, the RCMP, under an interpretation of the Constitution whereby a power to legislate is viewed as necessarily implying a power to enforce.

In any event, in all provinces except Ontario and Québec, where the provincial police perform this function, the RCMP have provided policing services to Indian bands since the 1970's. The RCMP, the Ontario Provincial Police and the Sureté de Québec are all now attempting to provide policing services to bands communities by Indian constables. Under the James Bay Agreement a phased approach in northern Québec will eventually see Indian and Inuit constables

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<sup>819</sup> The following abbreviated account is inspired by the DIAND Lands, Revenues and Trusts Review chapter on First Nation law, ibid at 79-108 and by the writer's experience in the area as a federal government lawyer.

operating completely under Indian and Inuit administration.<sup>820</sup>

In 1971, the Department of Indian Affairs issued an administrative bulletin, Circular 55, outlining options to bands for the development and delivery of policing services on reserve. Circular 55 authorizes the appointment of band by-law enforcement officers to enforce civil by-laws on reserve. Since that time, a number of tribal police forces have been established as an offshoot of the Circular 55 program. Under special arrangements, these tribal police forces are authorized under delegated federal or provincial legal authority to offer a narrow range of policing services within the band communities they serve.

Bands have noted an overwhelming reluctance on the part of provincial police forces and the RCMP to enforce band by-laws, primarily because they do not perceive by-laws as falling within their mandates to enforce provincial and federal laws respectively or the Criminal Code. The current federal Aboriginal policing initiative announced after several years study of these problems would see all bands (or larger regional, tribal level organizations) establish police forces via tripartite agreements between the federal, provincial governments and bands or other First Nation organizations. It is beyond the scope of this paper to describe that initiative except to note that it is proceeding and agreements are being signed across Canada. Under those agreements, Indian police forces will receive their authority under provincial legislation. In effect, they will be provincial police forces with a special mandate to police Indian reserves and to be responsive to band needs.<sup>821</sup>

At present, the Indian Act does not provide a band with express authority to unilaterally create its own police force to enforce either criminal or civil matters. Although subsection 81(1) contains a number of public safety and order headings under subparagraphs (b) regulation of traffic; (c) the observance of law and order; (d) the prevention of disorderly conduct and nuisances; (m) the control and prohibition of public games etc.; and (p) removal and punishment of trespassers, they have not, either singly or together, been found by the courts to be sufficient to establish a fully empowered police service.

In this (as in other areas), the courts have yet to clarify the nature and extent of the Indian Act provisions. In the absence of a general administration of justice provision such as the provinces enjoy under section 92(14) of the Constitution Act, 1867, it seems unlikely that the Indian Act alone could provide the legal authority to permit First Nations to create a policing service to do anything more than enforce civil by-laws of a minor nature.

#### (ii) Creating a Civil Service

In the same way, there is no general provision enabling bands to establish a civil service to

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<sup>820</sup> JBNOA ss. 19, 21.

<sup>821</sup> See in this context Ministry of the Solicitor General, First Nations Policing Policy (Ottawa: Ministry of Supply and Services, 1992).

administer and fund a full range of bands public duties in the same way the federal and provincial governments have done. Section 83 does offer some scope for this, however, as subparagraph 83(1)(c) authorizes the band council to appoint officials to "conduct the business of the council, prescribe their duties and providing for their remuneration." The limited lawmaking authority of band councils, the requirement of Ministerial approval under this provision and the lack of financial resources to fund an array of officials means that the scope of the provision remains largely unexplored.

Government in the modern era has become increasingly complex, with large and specialized civil services at all levels. Federal and provincial enforcement and administrative officials now meet regularly to coordinate policies and practices apart from the political meetings conducted by First Ministers. Band governments should have a similar ability to create the kind of service delivery and enforcement mechanisms they will need if they are to develop and manage their own affairs as well as to interact with other levels of government in Canada. Of course, bands will also require the legal status and capacity to do this, something they do not have at present.

#### (e) Judicial Branch

The interpretation of laws, or the judicial function is vital to the integrity of the lawmaking and administrative functions of any government. Government can only operate in accordance with laws it has passed under its lawmaking authority, carried out under its executive authority and adjudicated and interpreted under its judicial authority.

#### (i) Judicial Powers under the Constitution

The Constitution Act, 1867 provides the federal and provincial governments with the joint responsibility for a system of superior courts in Canada, dividing authority between them. The provinces maintain superior courts in every province to interpret and make decisions under both federal and provincial law using their authority under section 92(14). It is the federal government, however, that appoints and pays superior court judges under section 96. It is also responsible for criminal law and procedure under s. 91(27), but it is the provinces that enforce and prosecute criminal law. Both levels must work together to assure that there are both judges and superior courts well as a system of laws, police and prosecutors to enforce those laws.

In addition, each level of government has created courts under their separate constitutional authority. Under section 101, the federal government has created the Supreme Court of Canada, as well as the Tax Court and the Federal Court. The latter two are restricted to interpreting federal laws. The provinces have used section 92(14) to create a system of provincial laws and provincial courts to enforce and interpret them. These courts are also able to enforce and adjudicate criminal law (even though it is a federal subject matter under the Constitution) as a result of historical practice and the wording of the Criminal Code in this regard.<sup>822</sup>

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<sup>822</sup> For a comprehensive outline of the reasons why the provinces are able to enforce federal criminal law and why the federal government could likely remove the provinces from this role see R. Whiskyjack and Whiskyjack [1985] 2

Bands are not provided with anything comparable to the federal and provincial judicial apparatus. Under the Indian Act sections 101 to 105 special offences with respect to bands and their lands are created. Section 106 extends the jurisdiction of provincially appointed magistrates to reserves, thus bringing provincially administered justice to what, prior to the Hawthorn Report<sup>823</sup> and the Cardinal Case<sup>824</sup> was at one time considered to be territory subject to exclusive federal jurisdiction. It is not known what real purpose this provision serves now.

(ii) Section 107 Justice of the Peace Powers

Section 107 permits the appointment of justices of the peace and has been viewed by some as the possible basis upon which the Indian reserve judicial branch may be erected. It reads as follows:

107. The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have and may exercise the powers and authority of two justices of the peace with regard to

(a) offences under this Act, and

(b) any offence against the provisions of the Criminal Code relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.

As a preliminary comment, it must be noted that the precise Criminal Code sections are not set out. This imprecision is an invitation to jurisdictional challenges. For example, it is not known whether the apparent vesting of jurisdiction over the indictable offence of breaking and entering would sustain a challenge, since JPs do not have indictable jurisdiction under the Code.<sup>825</sup> In any event, the criminal jurisdiction is minimal and restricted to matters involving Indians or Indian property. Since it is an Indian Act provision, "Indians" refers to status Indians and those deemed under section 4.1 to be Indians.

An examination of the offences created under the Indian Act shows that the purposes of the provision appear to fall squarely within the purpose of section 91(24) of the Constitution Act, 1867 and the special relationship of protection that the Indian Act and the reserve system generally are supposed to represent. Thus, aside from whatever offences may be created by GIC regulations, the following sections of the Indian Act create offences:

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W.W.R. 481.

<sup>823</sup> Supra note 5.

<sup>824</sup> Supre note 11.

<sup>825</sup> Section 348(1).

- s. 30 - trespass on reserve;
- s. 33 - sale or barter of produce in the prairie provinces;
- s. 57(d) - GIC regulation may prohibit violation of timber regulations
- s. 73(2) - GIC regulations may prohibit violation of section 73 regulations;
- s. 90 - restriction on transfer of property deemed to be on reserve;
- s. 91 - trading with Indians regarding certain traditional objects;
- s. 92 - trading by certain persons without a licence with Indians;
- s. 93 - removing sand, shrubs etc. from reserve without permission.
- ss. 81, 83 and 85 - band by-laws

However, in respect of the last item listed - band by-laws - it is not entirely clear on a strict reading of section 107 that band by-laws fall within the scope of section JPs. Section 107 is limited in subparagraph (a) to "offences under this Act." It is not clear that band council by-laws create "offences."<sup>826</sup> Band councils, it will be recalled, are mere "administrative arms" of the Minister according to a long line of cases exemplified by the cited portions of the Stacey and Montour and Paul Band cases set out above. In other words, as "federal municipalities," band councils may not be capable as a matter of strict law to create "offences" in the sense of a matter of which a criminal court is normally seized. The argument could be made that they do not constitute offences of the same nature as those created directly by the Code, other federal legislation or by the GIC in its capacity of regulation-making to flesh out the federal provisions. Nonetheless, for practical purposes section 107 JP courts do treat band council by-laws as offences and are the forum in which they are prosecuted on reserves where JPs have been appointed.

Yet another possible limitation of JP powers lies in the fact that it is not clear whether they have a general civil jurisdiction as well, or whether they are limited to the narrow range of matters set out in section 107. JPs under the Indian Act are anomalous, and are not appointed in the same way as JPs in the provincial system under detailed statutory schemes setting out the important elements of their jurisdiction and tenure etc.

It should also be noted that it is the federal government, not bands, that appoint these JPs. Thus, even if their jurisdiction was wide and recognized by other courts as such, their utility might be limited by the fact that only a few such appointments have been made. One reason for the lack of appointments is the difficulty of finding persons qualified in the Canadian legal system to serve as justices of the peace in reserve communities. It is important that such officials be Indian and preferably band members, and that they have appropriate backgrounds and experience. There are no formal and government training courses for section 107 JPs offered.

Another reason for the few appointments made lies in the relatively limited range of matters they may try under section 107 that have been discussed above. Under the Criminal Code justices of the peace cannot try the more serious indictable offences. Moreover, the cases

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<sup>826</sup> For a contrary view see the Manitoba Report, *supra* note 139 at 307.

establish that even where section 107 justices of the peace are appointed, the normal presumption that Indian Act matters are to be tried in the provincial courts continues.<sup>827</sup> The federal government has an interest in not duplicating existing functions, especially where the jurisdictional and financial implications are unknown.

Moreover, it should be stated that there are no provisions regarding by whom section 107 JPs are to be paid and how their courts are to be financed and staffed. There is some scope for remedying this through application of existing section 104 of the Act. It provides that fines or forfeitures under the Indian Act offences provisions are to be paid to the federal Crown "for the benefit of the band," but that the GIC may divert the moneys to the enforcing "provincial, municipal or local authority" that bears the cost of the prosecutions. Neither the amounts involved nor the mechanics of such payments is known, but there appears to be some scope for section 107 courts to be self-financing to this extent.

There is apparently an ongoing and unresolved dispute between DIAND and the federal department of Justice regarding which department has responsibility for section 107 JPs and their appointment. At the time of writing this paper present, there are section 107 JPs only on three reserves (Pointe Bleu, Kanesatake and Akwesasne), and it is not known whether the federal government intends to appoint others. Even where the province may have appointed Aboriginal persons to JP positions under provincial law, the federal government apparently refuses to make the "cross-appointment" as a section 107 Indian Act JP that would enhance allow the provincially appointed and paid JP to operate in the reserve milieu as a federal JP under the Act.<sup>828</sup>

### (iii) Provincial Justice Administration

As a result of the weaknesses in section 107 and the lack of appointments, bands must rely for the most part on the provincial court system and provincial Crown attorneys to prosecute by-law offenders. Unfortunately, Crown attorneys have a heavy workload and will usually intervene only in the case of criminal and statutory offences. As a result, bands themselves must often initiate proceedings where their by-laws have been violated, sometimes by engaging counsel to pursue such matters. This is expensive and time-consuming unless the band is a large one with the financial resources and political will to pursue such actions.

With regard to criminal matters, the remoteness and isolation of many communities means that access to the judicial system is often limited to sporadic and hurried visits by provincial circuit courts enforcing Canadian criminal law. Thus, the police and courts are usually unable to accommodate Indian values and concepts of justice. The result is inappropriate charging practices and convictions and sentences that do not reflect Indian views or needs. These matters have been

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<sup>827</sup> R. v. Crosby [1982] 1 C.N.L.R. 102 (Ont. C.A.).

<sup>828</sup> It has recently been reported, for instance, that the federal government has refused to cross-appoint two Indian JPs appointed by the province of Nova Scotia so that they may perform the Indian Act JP functions: "Nova Scotia natives edge nearer to justice," *Ottawa Citizen*, Sunday, November 6, 1994, A6.

extensively reviewed in the series of federal and provincial Aboriginal justice inquiries and reports over the years. Many bands see the existing justice system as a foreign one, and view it therefore less as a protector than as an enforcer of an alien and inappropriate system of law.<sup>829</sup>

The current federal Aboriginal Justice Initiative<sup>830</sup> seeks to remedy these problems by appointing more Indians to positions within the justice system, by developing cross cultural training programs and by adapting the system through research and pilot alternative justice projects to better reflect the values and traditions of bands. Any adaptations or new institutions would be empowered by delegated federal or provincial legislation.

Effective enforcement of Indian Act by-laws and the most common criminal offences involves not only the laying of charges against offenders, but also a means of prosecution, adjudication and sentencing. The current situation of outside police forces refusing to enforce by-laws, the limited criminal jurisdiction of section 107 justices of the peace, the forced reliance on provincially administered courts and the absence of any band power to correct the situation means jurisdictional gaps, confusion over procedures and policies, and a continuing band inability to effectively provide for the safety and security of their own members.

This unsatisfactory situation stands in stark contrast to the situation in the United States. Federally recognized tribes have in the exercise of their inherent sovereignty established tribal courts for a range of criminal offences that the federal government has not removed from their jurisdiction under Congressional plenary power. In addition, tribal courts exercise very wide civil jurisdiction, including powers over non-Indians resident within reservation boundaries. The nature of tribal court powers and prerogatives is a complex and contentious area in American Indian law

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<sup>829</sup> For a review of the findings of the major Aboriginal justice inquiries, reports and studies in this regard, see Giokas, "The Aboriginal Justice Reports", supra note 278.

<sup>830</sup> Created by the federal government in 1991, its focus is described in a discussion paper issued in September that same year, Aboriginal People and Justice Administration. The subsequently created Aboriginal Justice Directorate at the federal Justice department was supposed to engage in the following activities, all in consultation and close cooperation with the national Aboriginal organizations and with particular Aboriginal communities:- general Aboriginal justice policy consultations

- improvements to existing Department Of Justice programs: courtworkers; and legal studies for Aboriginal people
- Aboriginal recruitment to the justice system generally
- cross-cultural training for justice professionals
- innovative Aboriginal community justice pilot and demonstration projects
- community based legal education
- basic Aboriginal justice research
- development of a national resource centre/network for sharing and disseminating justice information.

The policy underlining the nature and approach of the federal Aboriginal Justice Initiative is described in the broad context of the evolution of Canadian Aboriginal law and politics in John Giokas, "Accommodating the Concerns of Aboriginal Peoples Within the Current Justice System" in Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System (Ottawa: Minister of Supply and Services, 1993) 184.

and is evidently not without significant problems and resource issues.<sup>831</sup> However, that being said and despite the criticisms that emerge upon a careful reading of cases such as Santa Clara Pueblo v. Martinez,<sup>832</sup> the fact that American Indian tribes control at least portions of the judicial process speaks volumes about the different degrees of confidence in tribal government in Canada and in the United States.

#### (f) Summary of Governance Issues

The Lands, Revenues and Trusts Review explored by-law governance issues during the course of its consultations in the late 1980s and found that bands had similar concerns and complaints that could be grouped under a few main headings. First, bands are reported to have complained about the limited scope of the by-law powers, "which they consider to be ill-defined, inadequate and obsolete."<sup>833</sup>

A second and related concern was that the by-law powers had been derived from early Indian legislation designed to undermine Indian values and perspectives, thus "the by-law approach was never developed or made applicable from an Indian community perspective."<sup>834</sup> More scope both for traditional values and adaptations to address modern needs are required.

Third, bands are in "profound disagreement" with any notion of being confined to delegated federal authority to make laws for themselves. They reject a municipal analogy for their status as governments and seek powers more akin to those available to provincial governments.<sup>835</sup> Although the DIAND report does not use the terminology, it is evident that the bands consulted are referring to their inherent powers of self-government and are frustrated by the limited nature of delegated and subordinate federal powers.

Questions of legal status and capacity were reported as being a fourth concern. Without some recognition of their status as governments and the legal powers that accompany such status, bands have difficulty making the kind of contractual and inter-governmental arrangements that true governments need to make to deliver services to their citizens.<sup>836</sup>

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<sup>831</sup> For an overview of these issues and the nature of American tribal jurisdiction see Deloria and Lytle, American Indians, American Justice, supra note 118. A shorter and less critical assessment is provided by the Manitoba Report, supra note 139 at 268-302.

<sup>832</sup> Supra note 18.

<sup>833</sup> Supra note 1 at 80.

<sup>834</sup> Ibid.

<sup>835</sup> Ibid.

<sup>836</sup> Ibid at 80-81.

Fifth, Indian leaders are reported to have complained about the inability of bands to create an administrative infrastructure or to enforce their community laws without the assistance of governments outside their reserve territory.<sup>837</sup>

In a related way, there was strong objection to the application of provincial laws to bands, whether under general constitutional principles (that Indians are provincial residents regardless of Indian status) or because of the effect of the incorporation of provincial laws into the federal framework under section 88. Bands are reported as having expressed "strong desires to significantly reduce or eliminate any chance of provincial laws applying to Indians or Indian lands."<sup>838</sup>

The Minister's disallowance role was also singled out for criticism on a number of grounds including paternalism, complicating law-making and causing delay, and being arbitrary and unfair. Moreover, the DIAND role was also criticized as being a conflicting one - on the one hand, officials are involved in helping bands draw up by-laws, while on the other hand they also advise the Minister on disallowance.<sup>839</sup>

However, bands apparently did not wish to see the Minister totally shunted aside, for there were many technical and related areas in which the advice and assistance of DIAND might continue to be helpful and necessary. A new role for the Minister was proposed that would see DIAND assisting to resolve jurisdictional disputes with the provinces if band law-making powers were to be significant expanded in keeping with their aspirations.<sup>840</sup>

Two, more technical problems exist with regard to sections 83 and 85.1. In the case of section 83 financial and taxation by-law powers, they are entirely skeletal and do not provide bands on the one hand with any discretionary power, or, on the other hand, with the detailed framework of powers governments need to enforce their taxation by-laws in sophisticated way (liens, seizure of property for tax reason setc.). The band assent called for to put section 85.1 alcohol prohibition and control by-laws into effect may be accomplished without necessarily involving a majority of the band membership. The meeting called for in the section need involve only the "electors," and assent is based only on a majority of the electors present at the meeting. Thus, a band may be bound by highly restrictive by-laws based upon the one time assent of a small minority of band members.

It is clear that there are many fundamental problems with the governance regime. It is equally clear that most have to do with the historic civilization and assimilation policies that have

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<sup>837</sup> Ibid.

<sup>838</sup> Ibid at 91.

<sup>839</sup> Ibid at 94.

<sup>840</sup> Ibid at 95.

been carried through successive versions of the Indian Act right up to modern times. Commissioner Hall of the Westbank Inquiry perhaps sums it up best in the following observation about the Indian Act: "It is rather as if colonial laws were all that a newly independent republic possessed."<sup>841</sup>

## 8. Accountability<sup>842</sup>

### (a) Lack of Accountability Mechanisms in the Indian Act

The essence of accountability is the responsibility of elected officials and government employees for their conduct in public office. The basic notion is that an official is formally responsible, through clearly defined rules and mechanisms, to those who represented by that official. Proper accountability assumes that those dealing with or receiving services from government will be treated impartially, fairly and on the basis of equality; that government decisions will not be influenced by private considerations and will be carried out efficiently and economically; and that the officials will not use public office for private gain.

Accountability classically falls into three broad categories: (1) for political decisions; (2) for the administration of public affairs; and (3) for the use of public funds. Thus, accountability mechanisms in advanced political systems normally include periodic elections and recall and impeachment provisions (political accountability), a code of ethics for public officials and conflict of interest guidelines (administrative accountability) and reporting requirements regarding how government spends public funds (financial accountability). The goal of such mechanisms is to maintain public confidence in the integrity of government, to uphold high standards in the public service, and to encourage the best persons in the community to present themselves for public office.

There are few political accountability mechanisms under the Indian Act. Elections every two years under the section 74 elective band council system comprise the only real political accountability mechanism. Where a custom band council does not hold elections as such, it is not clear what the equivalent procedures might be. The fact that elective band council meetings are open to the band membership might comprise another accountability mechanism if there were some way aside from elections by which the members could make their wishes known between elections.

Nor are there administrative accountability mechanisms in the form of codes of ethics etc. Accountability is generally external to the band membership through DIAND policy guidelines such as the requirement that land allotments to members of the band council be approved by the band membership. However, as the Westbank Inquiry revealed, DIAND guidelines are often interpreted in an extremely flexible way. In the case of strong band leadership, as at Westbank, they are often ignored.

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<sup>841</sup> Westbank Inquiry, supra note 650 at 378.

<sup>842</sup> Much of the general material in this part of the paper is drawn from C.E.S. Franks, The Parliament of Canada, supra note 792, and more particularly from his chapter on accountability at 227-256.

In the same way, financial accountability reporting is also external to band membership, and is usually pursuant to federal program, contribution agreement and alternative funding agreement auditing requirements. Band funding is through cash transfers authorized under the Indian Act and through the recently acquired power to tax certain interests on reserve. The cash transfers are conditional, do not incorporate equalization factors and are not uniform from band to band. Funding is discretionary and chief and council are usually required to negotiate annually with DIAND and are accountable to the Minister who is in turn accountable to Parliament.

Alternative Funding Arrangements are available to some bands. They cover a wide range of services, are for a 5 year term subject to appropriation. Unused funds can be reallocated to other sectors. There are service standards, audit requirements and administrative procedures to be followed. Thus, most financial accountability reporting is external to the band membership pursuant to federal program, contribution agreement and alternative funding agreement auditing requirements. This is becoming a problem for some bands where the membership have raised questions concerning the allocation of funds but are unable to force their own councils to account outside the external auditing requirements.

In fact, under the Indian Act neither the Minister nor the chief and council is accountable on a day to day basis to the membership of the band. As mentioned, the chief and band council are generally accountable to the Minister of Indian Affairs and not to the band membership. By-laws, for example, are subject to Ministerial disallowance or approval under sections 82(2) and 83(1) respectively, and some functions such as the allotment of reserve land under section 20 cannot be effective without Ministerial approval.

One major facet of this problem is that the allocation of power between the chief and council and the band itself is not clearly defined. Under the Indian Act both are created in law to carry out certain functions that have been described and listed in the preceding part of this paper. While some may say that it is implicit that the band council is the local authority that received governing authority from, and operates on behalf of, the band membership, the history and actual functioning of the band council system militate in the opposite direction. Band councils were created to undermine traditional Indian governance practices and values, and in practice are responsible to the Minister. This is to be contrasted with the case of the Sechelt Indian Band, for example, where it is made explicit that the source of power is in the band, and that the band council is merely its delegate. Thus, in section 6 of the Sechelt Indian Band Self-Government Act the statement is made that "[t]he Band shall act through the Council in exercising its powers and carrying out its duties and functions."<sup>843</sup>

Apart from provisions governing the election of councillors, the Indian Act does not spell out the nature of the relationship between band members and the council and nothing at all is said about how band members can have effective input into the actions of the band council. For

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<sup>843</sup> S.C. 1986, c. 27.

example, and as mentioned, some important functions are given to a band as such. Other powers are given to the band council, most significantly, the power to make by-laws. But little is said about how band members can have effective input into the actions of the band council, nor are there any provisions whereby the council may be held to account for its actions outside the election process.

In the absence of such provisions or practices, it is not difficult to understand how perceptions of conflict of interest can arise in a reserve community and why friction between the council and band members and factionalism could thrive. At Westbank, for example, Commissioner Hall was clear that "[t]he most pervasive problem was that of conflict of interest," largely because of what he referred to as "the old problem of a government of men and not a government of laws."<sup>844</sup> In this context, the band council found itself in the position, for example, of allotting individual land to the chief who was also the leading businessman on reserve and using individual allotments for his business enterprises. As described earlier, the brief to RCAP of the Stó:lo Tribal Council goes even farther, referring to stories related by Stó:lo elders "of corrupt Chiefs who allegedly embezzled money from their band, using the funds to benefit only themselves and their families."<sup>845</sup>

In the case of the Westbank band, because of the lack of formal accountability mechanisms, a group of band members formed what they referred to as the "Westbank Indian Action and Advisory Council," issuing petitions and press releases against the chief alleging wrongdoing. This activity eventually led to a judicial inquiry. Apparently, there had also been previous groups of this nature at Westbank.<sup>846</sup> Ultimately, the Commissioner found that the major culprit was the lack of modern structures and procedures in the Indian Act itself rather than criminal business dealings on the part of the chief or anyone else, adding that "[t]he familial nature of many Indian bands makes the conflict situation more delicate and difficult in Indian government."<sup>847</sup>

Something similar was found by Judge Giesbrecht in the context of an inquiry that led him to examine the functioning of the Dakota Ojibway Tribal Council Child and Family Services Agency following the suicide of a child in the agency's care. His investigation was wide-ranging, and he devotes an entire section to a review of a relatively large number of incidents of political interference by chiefs and councillors and members of powerful families into the operations of the child welfare agency and the tribal council police force. In this context he notes that some powerful families were simply "off limits" to the child welfare agency and that local band level public officials had little concept of the notion of conflict of interest or political interference or of

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<sup>844</sup> Westbank Inquiry, supra note 650 at xv, xvi.

<sup>845</sup> "Leadership Review," supra note 783 at 14.

<sup>846</sup> Westbank Inquiry, supra note 650 at 333.

<sup>847</sup> Ibid at xv.

the need for ethical guidelines to how they carried out their duties.<sup>848</sup>

Many witnesses at the RCAP hearings have made similar observations, some of which have been cited earlier in this paper in different contexts. In a study of ethics and accountability in the context of Aboriginal government, Mary Ellen Turpel notes that "[i]n the public hearings of the Royal Commission on Aboriginal Peoples, over two hundred submissions addressed concerns relating to ethics and conflict of interest in Aboriginal governments."<sup>849</sup> The following comment from one of those hearings is typical:

The Indian Affairs Department and the Indian agent worked to destroy our system of government and replace it with their own. They succeeded. We now have chiefs and council who do not listen to their people but rule them instead through the Indian Act. Under the Indian Act, Chiefs and council are accountable to the Minister of Indian Affairs and his department and not to their own people.<sup>850</sup>

#### (b) Efforts at Reform To Date

Aside from the general supervision exercised by DIAND officials, which was found to be lax in the case of Westbank, there is no effective monitoring function. Many bands are experiencing problems in this area now and have expressed a desire to see greater accountability requirements imposed on their band councils and regional and provincial organizations. This was also the conclusion of the DIAND Lands, Revenues and Trusts Review which revealed, among other things, a growing desire by the membership of many bands collectively to exercise a greater role in the conduct of local affairs. The view was often expressed that the executive powers of band councils ought to be qualified. Some of the areas where band members wanted more say were:

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<sup>848</sup> The Fatal Inquiries Act: Report By Provincial Judge Respecting the Death of Lester Norman Desjarlais, Associate Chief Judge Brian Dale Giesbracht (Brandon, Manitoba, August 31, 1992) at 210-32. In a submission to RCAP that same year, Marilyn Fontaine of the Aboriginal Women's Unity Coalition made a number of suggestions for improving the accountability relationship between the Assembly of Manitoba Chiefs and band members that seem to bear to some extent on the problems outlined by Judge Giesbrecht in the specific context of Dakota Ojibway Tribal Council Child and Family Services Agency (RCAP Public Hearings, Winnipeg, Man., 92-04-23 110 at p. 613):

The Assembly of Manitoba Chiefs must address the lack of checks and balances inherent to all democracies within the current political structure. These mechanisms must be developed in a manner that will ensure the full equal participation of constituent groups. These mechanisms must include facilities for appealing decisions flowing from the Assembly, conflict of interest guidelines for aboriginal child and family agencies, dispute resolution models for conflicts that arise between agencies that deliver services to different members of the same family, and mechanisms that ensure the accountability of the political leadership to their constituents.

<sup>849</sup> Enhancing Integrity, *supra* note 785 at 1.

<sup>850</sup> Bernard Gordon of the Gordon's Band, RCAP Public Hearings, Regina, Saskatchewan, 93-05-11, at 240.

1. changes to a band's constitution (where there was one);
2. expenditure of capital monies, including budgets and spending plans;
3. borrowing money, particularly large or long term commitments;
4. disposition of assets, particularly land;
5. licensing of certain assets.<sup>851</sup>

Band membership also expressed a desire for some formal mechanism to permit band membership to periodically review the performance of the band council. Some interest was also expressed in some mechanism to protect individual band members whose welfare may be affected by council decisions.<sup>852</sup> As Mary Ellen Turpel's comments indicate, the observations at Westbank and the recommendations from the DIAND consultations are also borne out in the RCAP hearings. An RCAP report on the first of its four rounds of hearings summarizes the views expressed to commissioners in this regard as follows:

Concerns about the accountability and performance of band councils and other Aboriginal organizations were raised in many parts of the country. Many women, urban residents, and community members, while supportive of self-government, are worried that its implementation might perpetuate existing inequities, such as lack of community control and accountability, abuses of power, elitism, and infringement of individual rights.<sup>853</sup>

The self-government arrangements under the Cree-Naskapi (of Québec) Act require financial accountability by the band council both to the band membership and to the Minister of Indian Affairs.<sup>854</sup> Similarly, the Sechelt Indian Band Self-Government Act also calls for financial accountability to band membership to be set out the constitution.<sup>855</sup> In addition, the Community Based Self-Government negotiation process ongoing since 1986 calls for greater accountability by Indian governments to their own electors rather than to the federal government as one of its primary goals.<sup>856</sup>

In summary, it is clear that every organization requires decisions to be made through a clearly defined line of delegated authority. It would be extremely cumbersome otherwise to require every contract, expenditure or legislative decision to be made by the overall membership of any community, or to be subsequently authorized by a vote taken by the whole community. But

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<sup>851</sup> DIAND, Lands, Revenues and Trusts Review, *supra* note 1 at 104-05.

<sup>852</sup> *Ibid* at 105.

<sup>853</sup> Framing the Issues, *supra* note 547 at 24.

<sup>854</sup> See text at note 442, *supra*.

<sup>855</sup> See text at note 465, *supra*.

<sup>856</sup> See text at note 487, *supra*.

by the same token, it is equally important that the governing body operate according to clearly defined principles of fairness and rules of conduct in making decisions that will inevitably have an impact on the daily lives of community members. In this respect, Commissioner Hall of the Westbank Inquiry was clear that Indian bands, by their very nature, had a particular need for clear mechanisms to ensure fairness in how band government operates:

I trust that the Westbank experience will serve as a caution to bands and the Department that scrupulous care should be taken to obviate conflict of interest problems. This is one of the more common problems that can occur in bands because of their size and family structures. It is essential for the political health of the band to avoid controversy and rancour arising from perceived favouritism.<sup>857</sup>

In a similar vein Mary Ellen Turpel notes that, while these issues are not confined to the Aboriginal setting and arise throughout Canada in all government contexts, there is a particular urgency for Aboriginal peoples to deal with this problem at this time:

... without appropriate responses or initiatives, public confidence in self-government initiatives, which is already tentative in many regions, may be eroded. What is of particular concern, in my view, is that a failure to squarely address these issues, and the underlying problems they are rooted in, will lead to cynicism on the part of Aboriginal peoples who may begin to give up on the possibility of positive change in the direction of effective and accountable Aboriginal government.<sup>858</sup>

## 9. Incorporation of Provincial Laws by Reference: Section 88

### (a) Section 88: History and Overview

The Indian Act has been passed under Parliament's authority under section 91(24) of the Constitution Act, 1867 over "Indians, and Lands reserved for Indians". Using this power, Parliament has passed laws for Indians in areas like wills and estates and property rights, for example, that would otherwise have fallen within exclusive provincial jurisdiction under provisions such as section 92(13), "Property and Civil Rights in the Province". The corollary, of course, is that provincial legislatures are constitutionally incapable of regulating Indians and Indian lands as such, for to do so would be to invade federal constitutional jurisdiction. Douglas Sanders expresses these propositions as follows:

Federal jurisdiction over "Indians and Lands reserved for the Indians" both permits federal legislative action and excludes the application of certain provincial laws. In Canadian constitutional law, provincial laws can be held inapplicable to a federal subject matter in two

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<sup>857</sup> Westbank Inquiry, supra note 650 at 122.

<sup>858</sup> Enhancing Integrity, supra note 785 at 2-3.

different situations: (1) if the provincial law is in conflict with valid federal legislation, and (2) if the provincial law affects the character of the federal subject. This second proposition is put in differing ways in the cases: does the provincial law affect Indians "as" Indians? Does the provincial law affect the status and capacity of the federal entity or subject matter? A value judgment is made by the courts on whether the provincial law has a tolerable impact on the federal subject matter. If a provincial law picked out the federal subject matter for special and discriminatory treatment, clearly, the result would be intolerable. But, as well, a general provincial law may affect a federal railway or an Indian reserve in a manner which interferes with its normal and proper function. That too is intolerable.<sup>859</sup>

A long line of judicial decision has followed this logic, and has denied the authority of provincial laws over important Indian processes on reserve, while allowing provincial laws of general application to apply to Indians under circumstances that will be discussed below.

At one time federal jurisdiction was believed to be exclusive. Although some early judicial decisions permitted Indians to be regulated by provincial laws under some circumstances, they tended to distinguish between Indians on and off-reserve, thereby carefully skirting the line between federal and provincial jurisdiction.<sup>860</sup> Apparently exclusive federal jurisdiction was thus the sword by which Parliament passed the various laws governing Indians that have been reviewed in earlier parts of this paper. It was also a shield to prevent the provincial legislatures from doing the same.

However, the modern trend has been to question the apparent exclusivity of federal jurisdiction, and to allow all manner on provincial inroads into Indian reserve life. This judicial trend began following the publication of the legal opinion in the Hawthorn Report that has been described earlier.<sup>861</sup> The Supreme Court of Canada expressed this proposition in the Cardinal Case in 1974, noting that "if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to [Indians and Indian reserves] ... it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian reserves might be affected by it."<sup>862</sup>

Even before that, however, the federal government had already begun to allow provincial laws to penetrate the shield provided by its apparently exclusive jurisdiction. This process began in 1936 with an amendment to the Indian Act allowing the Minister to make regulations

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<sup>859</sup> "The Application of Provincial Laws" in Bradford Morse (ed.) Aboriginal Peoples and the Law, supra note 388 at 452.

<sup>860</sup> See the discussion of these cases by Sanders, ibid at 452-56.

<sup>861</sup> See text at note 282, supra.

<sup>862</sup> Supra note 11 at 703 per Martland J.

incorporating provincial laws into the Indian Act framework.<sup>863</sup> This was followed in 1951 by the addition to the Indian Act of what is now section 88,<sup>864</sup> the evident purpose of which was to continue the trend towards greater regulation of Indians by provincial legislatures. In retrospect, it would appear that this approach was based on the assumption that this would assist Indians in becoming familiar with the rights and obligations of provincial residents more generally. At that time, it will be recalled, federal Indian policy was still in the grip of a pronounced and explicit assimilative thrust.

Section 88 currently reads as follows:

88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any rule, order, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

There are a number of aspects of s.88 that merit comment in the light of recent case law and academic comment:

- the basic effect of s. 88 is to "federalize" certain provincial laws by incorporating them by reference into the federal legislative framework for Indians;
- only provincial "of general application" may be referentially incorporated: thus "[t]he phrase certainly excludes provincial laws that single out Indians for special treatment";<sup>865</sup>
- for purposes of interpreting s. 88, there are two types of provincial laws of general application:
  - (i) those to which s. 88 does not apply i.e. those that do not affect the "Indianness" of Indians and therefore apply to Indians of their own force as they do to all other persons living within provincial borders - these do not require the assistance of s. 88 in order to apply to Indians;
  - (ii) those to which s. 88 does apply i.e. those that, while they do not single out Indians for special treatment, nonetheless have a severe effect on them by impairing their "Indianness". These provincial laws would otherwise be "read down" on normal constitutional principles so as to avoid this intrusion into federal jurisdiction over Indians - these

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<sup>863</sup> Supra note 192.

<sup>864</sup> Then section 87.

<sup>865</sup> Hogg, Constitutional Law, supra note 9 at 27-13-14.

are the ones envisaged by s. 88<sup>866</sup>;

- referentially incorporated provincial laws of general application cannot directly regulate Indian lands, since the reference in section 88 is to "Indians" only;<sup>867</sup>
- referentially incorporated provincial laws of general application will give way to the contrary terms of any treaty.<sup>868</sup> Since the advent of the Constitution Act, 1982 with its guarantee of treaty rights this aspect of s. 88 is less important than it once was;
- referentially incorporated provincial laws will also give way before the contrary terms of any other federal laws. Thus federal laws passed by Parliament will be paramount over laws passed by provincial legislatures and merely incorporated into the federal legislative framework. Thus the paramountcy rule favouring federal over provincial law applies within the confines of s. 88. The conflict between the true federal and the referentially incorporated provincial laws, therefore, must be an actual or "operational" one, in the sense that the same person must be told by the two competing laws to do inconsistent things. Failing that sort of conflict, the true federal and the referentially incorporated provincial laws will both stand and Indians will be subject to both of them<sup>869</sup>;
- referentially incorporated provincial laws will give way if they are inconsistent (in the sense of operational conflict as described above<sup>870</sup>) with the following:
  - a provision of the Indian Act,
  - a regulation passed under Indian Act authority, or
  - a band by-law that is within the scope of the Indian Act delegated authority to band councils;
- referentially incorporated provincial laws will give way if they cover an area "for which provision is

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<sup>866</sup> This is the finding of the Dick Case, *supra* note 12.

<sup>867</sup> Provincial laws may nonetheless indirectly affect Indian land rights, however, as where a provincial family law order dividing family assets between husband and wife forces the person (usually the husband) with title to the family home on reserve land to sell it to meet the requirements of any financial compensation order.

<sup>868</sup> This reaffirms the paramountcy of treaty provisions over those in the referentially incorporated provincial law. If it were not for this provision, referentially incorporated provincial laws would have been capable of affecting treaty rights (at least prior to 1982).

<sup>869</sup> See in this respect Multiple Access v. McCutcheon, [1982] 2 S.C.R. 161.

<sup>870</sup> For example, in R. v. Francis [1988] 1 S.C.R. 1025 both the Indian Reserve Traffic Regulations and provincial traffic laws were held to be constitutionally capable of regulating Indian traffic on reserve because they duplicated each other without conflict between them.

made" by or under the Indian Act. This apparently means that operational conflict as described above is not necessary and that the Indian Act should be considered to have occupied the field in any area that it regulates, thereby ousting the referentially incorporated provincial law. This is a widening of the normal paramountcy rule referred to above.

#### (b) Two Sources of Provincial Power Over Indians

The history of the debate around section 88 sheds considerable light on its controversial nature and why there have been calls for its repeal. After the Hawthorn Report legal opinion came out, the question of whether or not a provincial law was of "general application" came to be the focus of contention. The debate revolved around whether section 88 was a declaratory provision i.e. whether it simply restated the Canadian constitutional law principle of federal paramountcy over provincial laws in the same area, or whether it had some other function. If the section were merely declaratory of general constitutional law, then any and all provincial laws affecting Indians as a federal constitutional "subject matter" would be declared ultra vires or read down since they would have to give way to the paramount federal authority under the Constitution. In other words, a provincial law would not be permitted to single out or to regulate Indians as such. If it did, it would not, by definition, be a "law of general application."<sup>871</sup> The issue has now been resolved in favour of referential incorporation as described above.

In Dick v. The Queen,<sup>872</sup> the Supreme Court of Canada interpreted section 88 as doing more than declaring the evident principle that only constitutionally valid provincial laws may apply to Indians. Many provincial laws apply to Indians on ordinary constitutional principles without the aid of section 88, because the Constitution is composed of areas of concurrent and overlapping legislative jurisdiction. In other words, by holding that Indians may be regulated by otherwise constitutionally valid provincial laws, Dick reaffirmed the Cardinal holding that the constitutional category "Indians" does not represent a federal legislative enclave. "Indians" are therefore a double aspect<sup>873</sup> subject matter: for purposes of the special relationship reflected by section 91(24), Indians

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<sup>871</sup> In Kruger and Manuel v. The Queen, [1978] 1 S.C.R. 104 Dickson J. set out two tests (at 110) for determining whether a provincial law was one of general application: first, it had to apply equally throughout the geographic limits of the province; second, it must not by its effect impair the "status and capacity" of Indians. In that case, provincial hunting regulations were upheld as applicable to Indians on reserve despite the fact that the consequences of applying the law to Indians were more serious than with regard to non-Indians. Only where the consequences were so grave as to cross the line and begin to affect the "status and capacities" of Indians could they be said to laws that were not of general application. No criteria for assessing when this point might be reached were provided.

<sup>872</sup> Supra note 12.

<sup>873</sup> The double aspect language is from the early Privy Council decision in Hodge v. The Queen (1883) 9 A.C. 117 at 130: "subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91." This is to be contrasted with the "watertight compartments" approach in A.G. Canada v. A.G. Ontario (Labour Conventions), [1937] A.C. 326 at 354: the categories in sections 91 and 92 of the Constitution Act, 1867 are "watertight compartments" of exclusive federal and provincial authority respectively. Each level is restricted to its legislative sphere and there can be little overlap and duplication. In short, "Indians" are a federal

are a federal legislative responsibility; for purposes of the ordinary incidents of life in the province unrelated to the federal responsibility, Indians are mere provincial residents.

Thus, the Hawthorn Report view that Indians were already under provincial jurisdiction for many of the incidents of ordinary life won the day. However, this meant that section 88 appeared to be redundant, since there was no apparent need to incorporate provincial laws of general application into the federal domain. They were already operating on Indians of their own force (i.e. ex proprio vigore). Other provincial laws - those that singled out Indians for special treatment - were also dealt with on normal constitutional principles and struck down as being ultra vires. What did section 88 do then? The Court found that, in essence, the job of section 88 was to re-invigorate or breathe life back into provincial laws that, because they impair "Indianness", have strayed onto the federal domain. Instead of allowing such laws to be read down to preserve their constitutionality, section 88 will transform them into federal laws through anticipatory incorporation by reference.

The interpretation of s. 88 sanctioned by Dick amounts to a form of legislative interdelegation.<sup>874</sup> Because Dick allows referential incorporation of laws that would not independently apply to Indians on general constitutional principles, it amounts to an extension of provincial jurisdiction over matters going to the heart of federal jurisdiction. It thereby grants to provincial legislatures a power over Indians they would not otherwise have. Thus, it symbolizes the officially sanctioned diminution of the principle of federal protection that was inherited from the Imperial authorities and which was at one time central to federal Indian policy.

In summary, there are two avenues for provincial regulation of Indians: provincial laws that apply in their own right to Indians as provincial residents; and provincial laws that apply through section 88. This is an important issue for many First Nation communities. In analysing the implications of section 88, Leroy Little Bear observes that the effect of this new development has been to leave Indians "legally surrounded" and without the federal protections that they may think they have.<sup>875</sup> He concludes that Dick has narrowed the scope of section 91(24) of the Constitution Act, 1867 and that the federal government has implicitly sanctioned this by not moving to correct the situation.<sup>876</sup>

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responsibility, and the provinces may not pass legislation directly or indirect affecting them. The result is a strong doctrine of interjurisdictional immunity creating exclusive legislative "enclaves".

<sup>874</sup> With respect to incorporation by reference as permitted by section 88, Hogg states simply that "this technique is valid, despite the fact that it comes close to a delegation of federal legislative power to the provinces." Constitutional Law, supra note 9 at 27-13.

<sup>875</sup> Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians," in J. Anthony Long, Menno Boldt (eds.) Governments in Conflict: Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988) 175 at 183.

<sup>876</sup> Ibid: "It is hard not to conclude that if federal officials are aware of the erosion of their jurisdiction with regard to Indians by decisions such as the Dick Case, and no doubt they are, they have been very permissive in allowing provincial incursion."

(c) Complaints and Comparisons

The depth of Indian antipathy to a provincial role in regulating Indian communities was noted during the Lands, Revenues and Trusts Review consultations as follows:

Bands that participated in Phase II of the Review expressed strong desires to significantly reduce or eliminate any chance of provincial laws applying to Indians or Indian lands.<sup>877</sup> (emphasis in original)

Indian people have now begun to call for repeal of section 88 in light of the Dick Case and several have passed band council resolutions to this effect.<sup>878</sup> DIAND refuses to consider repeal, however, and insists that section 88 continues to provide a shield against provincial legislation that might otherwise apply. As Woodward comments, apparently, DIAND views the words following "except" in the definition as offering "a kind of special paramountcy for those federal laws which deal with the same subject matter as provincial laws affecting Indianness."<sup>879</sup> In short, absent the protections thereby offered by section 88, DIAND seems to be saying that provincial powers might completely overwhelm the sphere of law-making carved out by the Indian Act and its orders, regulations and by-laws.

Woodward refers to this as a "bootstraps argument," since the limitations on provincial authority over Indians in the second part of section 88 would not be necessary were it not for the blanket incorporation by reference of provincial authority in the first part.<sup>880</sup> This criticism is true, but it does not dispose of the entire argument that there may be an element of federal protection worth retaining in section 88. The incorporation of provincial laws may prevent the existence of a legal vacuum where federal laws and regulations and band by-laws have not covered a particular area.

From this perspective, what section 88 does is similar to the effect of early federal criminal legislation in the United States. Federally recognized tribes in the United States in theory exercise rights of inherent sovereignty. However, in many areas, Congress has imposed an extensive federal legal framework under its plenary power. This is possible because Indian (and military) reservations in American legal theory are enclaves of federal power. However, since federal law is generally linked to federal or national purposes it does not focus on areas of more local concern and sometimes has substantial gaps. The Assimilative Crimes Act<sup>881</sup> attempts to remedy this by

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<sup>877</sup> Supra note 1 at 91.

<sup>878</sup> Woodward, Native Law, supra note 20 at 109, n. 146.

<sup>879</sup> Ibid at 110.

<sup>880</sup> Ibid.

<sup>881</sup> 18 U.S.C.A. s. 13. This statute provides as follows:

permitting the federal government to "assimilate" (apply) state law to federal enclaves where no federally defined crime exists. The definition of the crime and the sentence will follow state law, while the actual trial will take place in federal district court. The goal is to ensure that, in the event the federal legal framework has gaps, no legal vacuum will result.

The argument for retaining section 88 is likely a similar one - it is to ensure that there will be no legal vacuum in the event that federal Indian law contains gaps. The regulation and by-law making powers under the Indian Act offer one way by which legal vacuums are avoided. They enable potential gaps to be filled by the exercise of delegated federal power. Section 88 ensures that where even those powers cannot fill legal gaps, there will be provincial laws to apply to local reserve matters.

Evidently, however, the importation of provincial law can only be justified by the deficiencies in the band council by-law making powers. If these powers were fuller, then band councils could fill any gaps that may exist in the federal legal framework. An expansion of band by-law making powers, or a reinterpretation of them similar to the one that occurred in the context on the Indian Reorganization Act in the United States,<sup>882</sup> would therefore obviate the need for imported provincial laws.

There is another argument for removing section 88 raised by Woodward that must be noted.<sup>883</sup> Since the Sparrow Case, federal or provincial legislation that has an impact on constitutionally protected Aboriginal and treaty rights must be justified in terms of a three part test.<sup>884</sup> To the extent that provincial laws incorporated by reference into the federal domain infringe such rights, they will be struck down on the Sparrow test. To the extent that section 88 itself permits such provincial laws to infringe such rights, it may not be valid under the Sparrow test. This issue is currently before the courts and will not be explored here except to note that section 88 appears increasingly indefensible in light of the evolution of the law of Aboriginal and treaty rights since passage of the forerunner to section 88 in 1951 - a time of vastly different policies and assumptions regarding the sustainability of self-governing Indian communities.

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Whoever within [the special territorial jurisdiction of the United States] is guilty of any act or omission which, although not made punishable by an enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

<sup>882</sup> See text at notes 27, 28, supra.

<sup>883</sup> Ibid at 110-11.

<sup>884</sup> Supra note 25.

## 10. Seizure and Taxation Exemptions

### (a) Overview and Possible Rationales for the Exemptions

The exemption of Indians from seizure and taxation under the Indian Act is a continuation of the policy of protection that has been described earlier in this paper. The logic is evident: without these exemptions indebted or insolvent Indians might have been liable to lose their lands through seizure and tax sales, thereby undermining the purpose behind the Royal Proclamation of 1763 and the early colonial land protection laws. Thus, the first Indian Act contained these exemptions and they have been carried forward into the present version. Although not written into the text of the treaties, in many cases these undertakings were part of the treaty negotiation process and were honoured as such.<sup>885</sup>

The ultimate purposes of these exemptions has been judicially considered and a number of rationales have been offered. In the leading Supreme Court of Canada case, they were described by one judge as protective and flowing from treaty undertakings,<sup>886</sup> while another judge in dissent stated that they were essentially to counter the disadvantaged economic situation of most Indians.<sup>887</sup>

Another court viewed them as a form of affirmative action for Indians.<sup>888</sup> However, as Woodward points out, so far no court appears to have considered the most probable origin of the exemptions, namely, the original sovereign status of the Aboriginal nations now described as bands under the Indian Act.<sup>889</sup>

It should be noted in this context, that if these exemptions are characterizable as an Aboriginal or treaty right, or as an integral part of the inherent right of self-government under section 35 of the Constitution Act, 1982, they will likely have been constitutionalized and will be difficult to repeal.

In any event, like the lands and wills and estates provisions in the Indian Act, the seizure exemptions are derogations from what would otherwise be provincial jurisdiction under section 92(13) "property and civil rights in the province" in Constitution Act, 1867. Woodward observes that they are analogous to the type of exemptions that accompany diplomatic immunity under international law, or the limited exemptions granted to persons who have declared bankruptcy and are permitted to reserve a certain amount of their property for themselves free of seizure by their creditors.<sup>890</sup>

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<sup>885</sup> Richard Bartlett discusses this in his chapter entitled "Taxation" in Morse, Aboriginal Peoples, *supra* note 388 at 581-82.

<sup>886</sup> *Per* LaForest J. in Mitchell v. Peguis Band [1990] 2 S.C.R. 85.

<sup>887</sup> *Per* Dickson C.J., *ibid.*

<sup>888</sup> R. v. Bob [1991] 2 C.N.L.R. 104 (Sask. C.A.).

<sup>889</sup> Native Law, *supra* note 20 at 301-02, S12-1-2.

<sup>890</sup> *Ibid* at 289.

Both the Cree-Naskapi (of Québec) Act<sup>891</sup> and the Sechelt Indian Band Self-Government Act<sup>892</sup> have continued these Indian Act protections for their band members. The former has an interesting provision that allows Cree or Naskapi beneficiaries, Indians resident on category 1A or 1A-N lands or the band itself to waive the exemption on seizure by agreement in writing. However, where the waiver deals with land, the consent of the band at a special referendum meeting must be obtained first.<sup>893</sup> As mentioned earlier, some Cree band members in northern Québec have apparently expressed a desire to be able to more easily waive their protection from seizure in order to obtain bank loans etc. on the strength of their personal assets.<sup>894</sup>

### (b) Exemption From Seizure

#### (i) Sections 29 and 89

There are two provisions giving an exemption from seizure: section 29 and 89. Section 29 is a general prohibition limited to reserve lands. It states that they are "not subject to seizure under legal process." This is a broad exemption that appears to be wider than the more specific reference to seizure in section 89. Section 29 prohibits everyone, including Indians and bands, from seizing reserve lands. Designated lands are also reserve lands and benefit from this exemption.<sup>895</sup> It is simply not known whether section 29 refers to the same exemption as that covered by section 89 with its more precise language.<sup>896</sup>

Section 89 is specific, referring both to real and personal property of Indians or of bands. This property must be "situated on a reserve" and is exempt from "charge, pledge, mortgage, attachment, levy, seizure, distress or execution", but with three exceptions:

- Indians or bands may seize real and personal property of other Indians or bands (s. 89(1));
- leasehold interests in designated lands may be "charged, pledged etc" - but not the lands themselves (s. 89 (1.1));
- personal property sold under a conditional sales or similar agreement where "the right or property or... possession" is retained by the seller may also be "charged, pledged etc." (s. 89(2)).

#### (ii) Observations and Problems

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<sup>891</sup> Supra notes 443-44.

<sup>892</sup> Supra note 470.

<sup>893</sup> Cree-Naskapi (of Québec) Act s. 193.

<sup>894</sup> See text at note 433, supra.

<sup>895</sup> See the definition of reserve in section 2(1).

<sup>896</sup> Woodward, Native Law, supra note 20 at 294.

There are a number of observations to make about this provision. In the first place, it is not restricted to status Indians under the Indian Act. Because of the deeming provision in subsection 4(1), it extends to all band members, status or not. It does not extend, however, to a corporation, since a corporation is not an "Indian." Thus, even if the corporation is Indian controlled and located on reserve, the corporate assets will not enjoy exemption from seizure under this provision.<sup>897</sup>

Second, the property must be "situated on reserve." However, because "legal" location is not always the same as physical location, this criterion is not always easy to meet. To answer the question of location, recourse must be had to section 90 and to the section 87 taxation cases that explore this issue. Section 87 will be considered below.

Section 90 states that personal property purchased by the Crown using Indian moneys or moneys appropriated by Parliament for Indians, as well as property or moneys given to Indians under treaty or agreement will always be deemed to be situated on reserve. In short, Crown obligations to Indians will not be impaired and section 90 moneys and other property off-reserve cannot be seized, garnisheed etc. Other, unprotected off-reserve property such as Indian or band accounts that are not within the section 90 deeming provision may be seized, however. In the same way, so can items such as cars, for example, that leave the reserve and are seized by creditors under legal process.

Third, property may be seized under criminal process for purposes such as evidence in courtroom proceedings. If the property is taken under a forfeiture provision in a criminal law, it will be protected by section 89, however, since that is considered a civil seizure.

Fourthly, and as mentioned, Indians or bands may seize the property of other Indians or bands under legal process. Indians need not be from the same band to seize each other's property in this way. This exception allows bands to move against band members in such situations as non-payment of band taxes under a band taxation by-law pursuant to subparagraph 83(1)(a).

The advantages of the section 89 exemption to Indians and bands is obvious. Less obvious is the major disadvantage. Since section 89 makes collection of debts from Indians and bands very difficult, lending institutions are often reluctant to make unsecured loans. For similar reasons, bonding may be refused. Even Indians living off-reserve may be disadvantaged, since, as Woodward observes "[t]he personal property of an off-reserve Indian may still be protected from seizure if it is taken to the reserve for storage."<sup>898</sup>

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<sup>897</sup> Kinookimaw Beach Association v. The Queen [1979] 6 W.W.R. 84 (Sask. C.A.). Although this was a tax exemption case, the rule would be the same for the seizure situation: Imai, Logan and Stein, Aboriginal Law Handbook, supra note 514 at 190.

<sup>898</sup> Native Law, supra note 20 at 292.

Individual Indians and bands may be exempted from the section 89 protections under subsection 4(2) of the Indian Act. Apparently, however, DIAND policy is to refuse requests for exemptions.<sup>899</sup> Woodward notes two ways by which section 89 may be avoided nonetheless. The first is to secure loans through conditional sales giving the right of possession in personal property purchased to the lender so as to bring the transaction within the section 89 exception. The second way is for a lending institution to have an Indian on staff who can be the joint lender to take advantage of the exception allowing an Indian to seize the personal property of another Indian.

### (c) Exemption from Taxation

#### (i) Section 87

The exemption from taxation in section 87 is complex, contentious and evolving, and can only be outlined in the sketchiest way here. The exemption in section 87 operates notwithstanding other federal legislation (primarily the Income Tax Act) but subject to any band taxation by-law under section 83. Thus, if the band has a taxation scheme in place, it will override the exemption in terms of levying band property on on-reserve lands. This has no effect on the overall exemptions from federal or provincial taxes in section 89, however.

Section 87 deals with four cases. Thus, there are exemptions for the following:

1. lands - an interest held by an Indian or a band in reserve or surrendered lands (s. 87(1)(a));
2. personal property - personal property of an Indian or band situated on a reserve (s. 87(1)(b));
3. Indians or bands themselves - "in respect of" the ownership, occupation, possession or use of the reserve or surrendered lands or personal property mentioned above (s. 87(2));
4. succession duties - succession duties on the reserve or surrendered lands or personal property mentioned above (s. 87(3)).

#### (ii) Observations and Problems

There are a number of observations to make about this provision. First, and as mentioned above, the exemption does not prevent bands that have passed a valid property tax by-law under section 83 from levying band taxes. However, property taxes (on land or interests in land) are the only kind of taxes permitted under that section. Thus, no band income or sales taxes etc. can be levied by bands on reserve residents under the current version of the Indian Act.

Second, section 87 supersedes the Income Tax Act, the Goods and Services Tax Act and provincial taxation legislation. However, it is less clear that it overrides the Customs Act. The latter situation is unclear due to the unresolved controversy about the scope of section 87 and the effects of the Jay Treaty of 1794 that allows free passage by Indians with their personal possessions

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<sup>899</sup> Ibid at 293.

across the Canada-United States border.<sup>900</sup>

Third, and importantly for the modern cash economy, personal property includes income from employment. Thus, where that personal property is "situated on a reserve" i.e. where that income may properly be attributed to a reserve, it is exempt from income tax. In this regard, it will be recalled that a reserve also includes designated lands.

Fourth, whether or not the personal property is "situated on a reserve" is a complex issue. As mentioned in the seizure discussion above, legal and physical location are different. Formerly, it was sufficient if the employer was physically located on a reserve. That is no longer enough. Under the recently enunciated test of the Supreme Court of Canada in the Williams Case<sup>901</sup>, the following "connecting factors" must be identified and weighed in order to determine if the income is "situated on a reserve:"

- the location of the head office;
- the residence of the employee;
- the place where the work is performed; and
- the place where the wages are paid.

The effect of the application of the connecting factors test will be to end the doubtful practice of attempting to attribute the place of employment and payment to a reserve where the work is actually performed off-reserve. This will likely work a hardship on some existing Aboriginal employment agencies and services and so the application of these factors has been delayed to allow businesses to adjust. There are unresolved issues connected to treaty undertakings, however, that are affected by this ruling. The overall issue of Indian liability to be taxed at all remain to be resolved in other, more political forums.

Fifth, the tax exemptions are not available to all band members. Only status Indians may claim all the exemptions under section 87. Band members who are non-status Indians are entitled only to the exemption on an interest in reserve or surrendered lands (s. 87(1)(a)). Thus, they will be free only of provincial and municipal property taxes and will be liable for any others.

Sixth, the real and personal property tax exemptions must be distinguished. The former is available for reserve lands and for surrendered lands, whereas the latter is available only on reserve

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<sup>900</sup> The Treaty of Amity, Commerce and Navigation between Great Britain and the United States allows Indians in article III to pass across the international border without paying customs duties on "their own proper goods and effects of whatever nature...". The United States respects this provision but Canada holds that it is not bound by it, having never implemented or ratified the treaty by domestic legislation: Francis v. R. (1956) 3 D.L.R. (2d) 641 (S.C.C., Exch.) This issue was recently re-litigated in R. v. Vincent [1993] 2 C.N.L.R. 165 (Ont. C.A.). The court held that the Jay treaty was not a "treaty" within the meaning of section 35 of the Constitution Act, 1982 and that even if it were, the rights had been extinguished well before 1982 and so were no longer "existing" when section 35 came into force.

<sup>901</sup> Williams v. Canada [1992] 3 C.N.L.R. 181 (S.C.C.).

lands. That means that income tax will be paid on the income of an Indian or band earned on surrendered land, even though the surrendered land itself will be free of tax. This raises the issue of designated lands which, it will be recalled, are considered under the Indian Act to be reserve lands since they are not surrendered absolutely. Thus, Indians on designated lands will also be exempt from provincial taxes as well as from federal tax on income that may be attributed to those lands.

However, non-Indians residing on those lands are in a somewhat ambiguous situation due to the still unresolved issue of jurisdiction over designated lands. There has been a continuing controversy over whether and to what extent merely changing the name of "conditionally surrendered lands" to "designated lands" has altered the jurisdictional framework upon surrender. Upon surrender the conventional view has been that federal legislative jurisdiction ceases, and that of the province kicks in based on the underlying provincial Crown title. If that is good law, then the provinces should be able to levy taxes on non-Indian occupiers of such lands, since the property tax exemption on surrendered lands is available only to status and non-status Indian band members resident there.<sup>902</sup>

The issue becomes important in provinces like British Columbia where there are a great many reserves that fall within municipal boundaries and where services are delivered by the municipality.<sup>903</sup> If federal legislative jurisdiction continues over designated lands, however, then as Woodward notes, "[w]here a band council passes a by-law that taxes the interests of the non-Indian occupiers of designated lands, the power of the provinces to tax such interests may be ousted."<sup>904</sup> In British Columbia at least, provincial legislation allows bands to may opt out of the system of land taxation and enter into different taxation and service purchase arrangements with municipal

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<sup>902</sup> See Woodward, Native Law, *supra* note 20 at 311, n. 67, S12-9, n. 67, for a list of cases where provincial power to tax non-Indian occupiers of conditionally surrendered lands has been upheld. He notes (at 270) that the constitutional dispute about federal jurisdiction over non-Indian occupiers of designated lands is unresolved:

One line of cases has treated the non-Indian interest in designated lands as being outside federal jurisdiction. These decisions are based partly on authorities which hold that there is no federal jurisdiction over Indian lands which are surrendered absolutely. Another line of cases regards designation as merely another use of reserve land.

<sup>903</sup> In this regard, Robert Bish describes the situation as follows in "Aboriginal Government Taxation and Service Responsibility," *supra* note 627 at 4:

There are 194 bands with over 1600 reserves in British Columbia. The reserves are small and many of the occupied reserves are located adjacent to or surrounded by areas populated by non-Aboriginals. Forty-five reserves are within the boundaries of municipal governments and the remaining reserves are within regional districts, hospital districts, school districts, and they may be included in other kinds of special districts. These local governments, at the beginning studies in 1986, all levied property taxes on leaseholds held by non-Aboriginals on reserve lands. In addition, the provincial government also levied a rural property tax on all reserve leaseholds outside of municipal boundaries.

<sup>904</sup> Native Law, *supra* note 20 at 312.

and provincial authorities so as to reduce the possibilities for conflict over these issues.<sup>905</sup>

Seventh, and as mentioned above, corporations are not considered to be an "Indian" or a "band" for purposes of the section 87 exemption, even where wholly owned by Indians or a band and located on a reserve. The courts have expressed a reluctance to "lift the corporate veil" and to thereby undermine the artificial but independent legal personality of the corporate vehicle even in Indian tax cases.<sup>906</sup> The result of this ruling is to work a hardship on bands and Indian individuals who may wish to pursue commercial opportunities on reserve. Nonetheless, there are two ways by which Indians or bands may acquire tax free status for certain purposes.

The first as described by Woodward is for a band to be considered a "municipality" with in the meaning of subparagraph 149(1)(d) of the Income Tax Act. As such, the band will be exempt from taxation under the Act.<sup>907</sup> The second way is to form a corporation that will be viewed in law as being for charitable or religious purposes so as to fall with in the definition of "charitable organization" under subparagraph 149(1)(b) of the Income Tax Act. However, as the designation indicates, corporations formed for commercial purposes are unlikely to fit within the such a definition.

Despite the absence of a specific exemption, it is apparently the policy of Revenue Canada to consider band councils as entitled to an exemption from tax on their governmental, as opposed to any of their commercial activities as a public body under subparagraph 149(1)(c) of the Income Tax Act.<sup>908</sup> The recently concluded Yukon self-government agreements explicitly exempt Yukon First Nation governments from taxation under this subparagraph.<sup>909</sup>

In summary, the advantages of the taxation exemption are evident. The following are the major exemptions:

- salaries, wages, rent, interest or other sources on income earned on reserve or attributable to a reserve on the connecting factors test set out above;
- business income from a business located on reserve - but not a corporation;
- no sales tax if the purchase is made on reserve (with "made on reserve" given a wide meaning

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<sup>905</sup> Ibid at S12-10, n. 70.1. See Bish, "Aboriginal Government Taxation," supra note 627 at 8-13 for a description of the process and options in British Columbia. There are basically three arrangements available: concurrent tax jurisdiction; exclusive band taxation jurisdiction; and band accession to the status of provincial "Indian" districts.

<sup>906</sup> Kinoosimin Beach Association v. The Queen, supra note 897.

<sup>907</sup> Native Law, supra note 20 at S12-5, page 308.

<sup>908</sup> Canada, Department of Finance, "A Working Paper on Indian Government Taxation", (Draft) (Ottawa: March, 1993) at 10.

<sup>909</sup> See, e.g. DIAND, The Teslin Tlingit Council Self-Government Agreement (1993) s. 15.1.

depending on the context);  
- no non-band property taxes on reserve property.

As Cassidy and Bish point out, because many of the persons who would otherwise be eligible for these exemptions often live and work off-reserve (and therefore pay federal and provincial income and sales taxes), the magnitude of the exemptions is difficult to ascertain. There are obvious incentives to locate businesses on reserves, however, and to this extent they are valuable for future economic development purposes. But, as they also observe, the long history of tax exemptions may also have bred an attitude among reserve-based Indians that they should not have to pay taxes at all. This will likely make it politically difficult in future for band governments to exercise their own taxation powers for reserve purposes.<sup>910</sup> Certainly this has been the experience in the United States, where tribes have used their taxation powers primarily to tax non-Indian commercial and resource development enterprises rather than to tax their own tribal members.

### (iii) Comparisons with the United States

As mentioned above, the issue of taxation is complex and so will not be explored in any depth here. However, it is important to note that as bands in Canada begin to exercise greater self-taxation powers, they may be drawn into disputes with the provinces similar to those that have emerged in recent years between federally recognized tribes and states in the United States.<sup>911</sup>

In the United States, tribes as such are not subject to taxes. Under the U.S. Internal Revenue Code, the income of individuals, estates, trusts and corporations are taxable. Indians as individuals are therefore fully taxable in what the courts have referred to "as their ordinary affairs" just as anyone else in the United States. However, Indians are not taxable on any income directly derived from property held in trust for them by the United States, whether individual allotments or tribal communal land. This is a significant exemption.

The states are barred from taxing both federally held trust land as well as any non-trust property owned by an Indian on a reservation. Nor may the state tax the income of tribal members earned on reservation. However, the states may tax non-Indians and their land in Indian country, and as a result of recent court decisions, may also tax cigarette sales to Indians not members of the tribe and non-Indian businesses in Indian country so long as the subject matter has not been preempted by federal law. The net result, though, is that the states are under impediments when it comes to levying taxes on Indians or Indian property in Indian country. There is considerable ambiguity in the leading cases, however, and the possibility of dual taxation is high. Nonetheless, the absence of an ability to raise tax revenue on reservations has been a strong disincentive to states to provide services to tribes.

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<sup>910</sup> Indian Government, *supra* note 388 at 130.

<sup>911</sup> A good summary of the conflicts engendered in this area is provided by William Canby Jr., American Indian Law in a Nutshell (St. Paul: West Publishing Co., 1986) at 201-217.

The tribes, on the other hand, have the power to tax their own members and businesses of all kinds operating within Indian country. They do not need BIA approval to exercise their powers in this regard because they flow from the very nature of inherent sovereignty. Most such taxes are levied against non-Indians engaged in economic activity and non-Indian businesses in Indian country. Few tribes tax their own members. Tribal taxation powers have only begun to be exercised relatively recently and are still encountering opposition from non-Indian businesses and the states generally.

Not only is the area contentious, but as Getches has noted, "[f]ew areas of the law are more confusing."<sup>912</sup> The result of the confusion and reluctance of tribes and states to negotiate their differences in view has been a spate of cases in all areas of taxation from cigarette sales to oil and gas royalties. Tribal-state relations have been soured by these disputes and cooperation between them has been difficult to achieve.

## 11. Legal Status and Capacity<sup>913</sup>

### (a) Governmental and Legal Powers

The band and band council powers discussed previously are properly described as "governmental." These powers have two facets. On the one hand they involve the capacity to exercise relatively intrusive powers such as the prohibition of certain behaviour, the imposition of taxes and other obligations and the general regulation of the private relationships of band members and others on reserve. On the other hand, governmental powers are also less intrusive and more enabling and include the capacity to provide services to its citizens.

Governmental powers are to be distinguished from legal powers. The latter are powers that are exercised by entities recognized in law as having the capacity to enter into legally binding relationships with each other. Individuals have such powers, as do corporations and other artificial persons. The nature of legal powers is well described in a report on band and band council powers for the DIAND Lands, Revenues and Trusts Review:

"Legal powers" refers to the powers, capacities and overall status Indian bands and band councils have to fulfil their roles as distinct entities. The authority to contract in the band's name, to sue and be sued, to hold land, to borrow money and to invest it, are examples of "powers" in this sense. Essentially, we are speaking of the power, capacity and status of a band to form binding legal relationships with other legal entities as an expression of its individual juristic personality (i.e. it can do things in its own name).<sup>914</sup>

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<sup>912</sup> David Getches, "Intergovernmental Agreements with Indian Tribes in the United States: Some Lessons for Canada," in Constitutional Entrenchment, *supra* note 627 at 34-35.

<sup>913</sup> Much of the discussion that follows is drawn directly from Alan Reed, "Powers of Bands and Band Councils: Phase II Report" prepared for the DIAND, Lands, Revenues and Trusts Review, *supra* note 1.

<sup>914</sup> *Ibid* at 5.

Governmental powers alone are generally insufficient for proper governance for the reasons that are revealed above. In order to carry out its "enabling" governmental functions and to act as a government in its own name and under its own authority, any government must have the legal status and capacity to enter into business and legal arrangements with other governments or legal entities. However, under the Indian Act the legal status and capacity of Indian bands and band councils is nowhere directly stated. Nor has the issue been resolved by the courts. As Woodward points out, judicial rulings in various contexts indicate that for legal purposes a band is not a person, corporation, unincorporated association nor a group of tenants in common.<sup>915</sup> What a band may be in the eyes of the law remains something of a mystery. A leading case has admitted the confusion in this area, stressing the "ambiguous legal character of the Council and the Band."<sup>916</sup>

Nonetheless, bands and their councils can and do enter directly or indirectly into legal relationships of various kinds as a matter of course. Nonetheless, the absence of a clear statutory or judicial statement of their precise legal status and capacity, however, tends to discourage or to complicate contractual or commercial arrangements requiring a measure of legal formality. From intergovernmental and business development perspectives the problems are sometimes compounded by the hesitation of provincial and municipal authorities and private enterprises such as commercial corporations and banks to enter into agreements with an entity that they may perceive as having no solid status in law. A DIAND study confirms this problem, noting, for example, that "because bands are not legal entities, some municipalities are reluctant to enter into contracts to extend services (e.g. sewer and water lines) to the reserve."<sup>917</sup> DIAND consultations show that this is an area about which many bands are concerned, particularly in the self-government context.<sup>918</sup>

The Indian Act uncertainty in this regard is to be contrasted with the relative clarity with which this issue has been dealt with in existing Indian self-government arrangements. Under the Cree-Naskapi (of Québec) Act, for example, the Cree and Naskapi bands are expressly constituted as corporations under provincial law with the capacity, rights, powers and privileges of a natural person (the standard legal recital in this respect). These corporate entities have replaced the Indian Act bands and operate according to a list of corporate objects specifying their roles including that of being the local government.<sup>919</sup> Although they are not provided with an enumeration of their corporate powers, these may be gleaned from the Interpretation Act<sup>920</sup> and

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<sup>915</sup> Native Law, *supra* note 20 at 19-21.

<sup>916</sup> Re Public Service Alliance of Canada v. Francis (1982) 139 D.L.R. (3d) 9 (FCA).

<sup>917</sup> Lands, Revenues and Trusts Review, *supra* note 1 at 14.

<sup>918</sup> *Ibid* at 81: "Indian communities noted during Phase II of the Review that it is impossible for their governments to function effectively without a much clearer legal statement of their authority to act."

<sup>919</sup> See text at notes 408-09, *supra*.

will include the standard corporate capacities.

Under the Sechelt Indian Band Self-Government Act, the Indian Act Sechelt band has been replaced by the Sechelt Indian Band and declared in the statute to be a legal entity with the capacity, rights, powers and privileges of a natural person - many of which are enumerated in a non-exhaustive list.<sup>921</sup> The new entity may exercise the standard corporate capacities such as entering into contracts, acquiring, holding and disposing of property (including its lands), borrowing, spending and investing money and suing and being sued in its own name.

### (b) Particular Areas of Uncertainty

#### (i) Capacity to Enter into Contractual relations

The capacity of the band to enter into contractual relations appears to be implied in several sections in the Indian Act, although never explicitly stated. For example, under sections 28 (band leases) and 32 (band sale of produce) it is implied that the band is able to enter into such arrangements, otherwise there would be no need in the sections for ministerial controls over these band activities. In the same way, section 34 (bands responsible for maintaining roads, bridges etc.) seems to assume a band capacity to, among other things, engage professional assistance to carry out these duties.

In the absence of a general provision in the Indian Act confirming band legal status and capacity, however, the courts have in the past come down on both sides of the question of band legal powers, depending on the context in which it has been raised.<sup>922</sup> The modern trend, however, has been increasingly to assume such a capacity in bands,<sup>923</sup> possibly on the basis that bands are more and more recognized as being able to sue and be sued in their own names - something that will be discussed below.

Until such time as the courts offer a definitive statement, however, the best that can be said in this area is that the issue of capacity to contract is still somewhat uncertain and context-specific. Where the issue is doubtful, a corporation may be formed to carry out transactions requiring the creation of an artificial legal person. However, as discussed earlier, corporations do not have "Indian" status and cannot claim the Indian Act exemptions from seizure and taxation that go with

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<sup>920</sup> R.S.C. 1985, c. I-2.

<sup>921</sup> See text at note 464, supra.

<sup>922</sup> In Cache Creek Motors Ltd. v. Porter (1979) 14 B.C.L.R. 13 (B.C.Co. Ct.) it was held that the band had the legal capacity to enter into a contract with the plaintiff whereby he would provide school bus transportation to reserve children. However, in Afton Band of Indians et al v. A.G.N.S. (1978) 85 D.L.R. (3d) 454 (N.S.S.C. Tr. Div.) a different result was reached by the Nova Scotia Supreme Court: the band was held not to have the legal capacity to purchase, hold and register land in fee simple in Nova Scotia because it was not a corporate body.

<sup>923</sup> Imai, Logan and Stein, supra note 514 for instance, simply state (at 190) without reference to any cases that "[t]he band is capable of entering into contracts."

it. As an alternative, individual Indians may enter into the contract on behalf of the band on trust or agency principles. This may expose them to crippling personal liability in the event of a lawsuit, however. Thus, this latter option has risks and limitations.

#### (ii) Powers Over Lands

As discussed earlier, bands do not own reserve lands. Under the theory of Aboriginal title, bands have a possessory legal interest in their lands that is sui generis, with underlying title in the provincial Crown and legislative jurisdiction in Parliament. Section 18 of the Indian Act confirms this, stating that "reserves are held by Her majesty for the use and benefit" of the band. Thus, bands must surrender their lands to the federal Crown and thereafter DIAND officials carry out most of the arrangements, albeit subject to the directions of the band as expressed in the surrender conditions.

The limits on the capacity of an Indian Act band to deal with its own lands are to be contrasted with the wide power given to the Sechelt Indian Band which owns its lands (but not the underlying resources) in fee simple under section 23 of the Sechelt Indian Band Self-Government Act. Under subsection 6(b), the Sechelt Band may "acquire and hold property or any interest therein, and sell or otherwise dispose of that property or interest."<sup>924</sup>

Evidently, there are profound policy implications for any conferral or recognition of the legal status and capacity of a band to hold and dispose of its own lands under the Indian Act. In fact, the original exercise by the "Nations or Tribes of Indians" referred to in the Royal Proclamation of 1763 of their sovereign capacity in this regard is what led to the issuance of the Proclamation in the first place, since one of its objects was to prevent the "Great Frauds and Abuses" associated with private purchases of these lands.<sup>925</sup> The modern policy implications of a band capacity to deal with reserve lands are succinctly captured in the following passage from a study of this issue commissioned by DIAND:

The historical importance of land to Indians gives rise to difficult policy issues bands must deal with in the lands area. Reserves are the land base for Indian bands. They represent the primary jurisdictional basis for band laws. They provide a resource base. Even if bands were to own outright their reserve lands, as is the case now with the Sechelt Band, power to alienate the land could compromise the collective interests of the band in those lands, both present and future. Whether title to reserve lands is conveyed outright to band members, or to outside parties, is secondary to the concern that any alienation can compromise the use of that land in the future for general band purposes.<sup>926</sup>

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<sup>924</sup> A similar power is available to the Band when operating as the provincial District Council under section 18.

<sup>925</sup> Supra note 38. The relevant part of the Proclamation reads as follows:

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians to the Great Prejudice of our Interests and to the Great Dissatisfaction of the said Indians...

<sup>926</sup> Reed, "Powers of Bands and Band Councils: Phase II Report," supra note 913 at 22.

So much for reserve lands. But what about non-reserve lands? The Afton Band Case from Nova Scotia<sup>927</sup> has held that bands are not legally capable of owning or registering land in fee simple in the provincial land registry system. The question of acquiring and disposing of land that is not reserve land as such raises different issues, the policy implications of which appear to be less serious than with respect to the disposition of reserve lands. These lands would already be within provincial jurisdiction and therefore more likely candidates for fee simple ownership for investment or development purposes unrelated to the issue of reserve lands as a band "homeland." A difficulty may arise in this regard, however, if it is found that bands are legally able to purchase lands privately and to thereby bring them into reserve status under section 36 of the Act.<sup>928</sup>

As the Westbank situation illustrates, the ability of a band to hold, manage and dispose of land in one form or another is key to many aspects of band commercial development and integration into the larger Canadian economic system. Whether a band capacity to hold and dispose of lands should extend to reserve lands is a difficult issue that confounded even the Westbank Inquiry. Ultimately, however, the recommendation was made that bands should be able to hold their reserve lands in fee simple as a function of enhanced self-government powers and greater accountability mechanisms to band membership generally.<sup>929</sup> Such a course of action would render the "reserve" - "non-reserve" lands issue moot.

### (iii) Power Over Moneys

Band capacity to hold, manage and control money is like the reserve lands situation in one respect: bands are unable to deal directly with Indian moneys under the Indian Act except in the limited context of delegated management under section 69 (revenue moneys). Otherwise, as sections 2, 61, 64 and 66 make clear, moneys are held like lands for the "use and benefit" of bands, with most decisions about what is of use and benefit made by the Crown - the GIC or the Minister.

In another respect, however, moneys are not like reserve lands because there is no Indian Act impediment to band capacity to hold, manage and control any moneys it has that do not fall within the definition of Indian moneys under the Act. However, as mentioned above, the ability of the band to acquire real property outside the reserve system will be affected by its lack of legal capacity, thereby limiting the things that a band can do with such moneys.

As mentioned earlier, bands have complained about the low rates of interest received on Indian moneys retained in the Consolidated Revenue Fund (CRF) and have requested the ability to invest these moneys elsewhere. Unfortunately, the terms of the Financial Administration Act

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<sup>927</sup> Supra note 922.

<sup>928</sup> See text at note 621, supra.

<sup>929</sup> Westbank Inquiry, supra note 650 at 440.

require that public moneys be deposited in the Consolidated Revenue Fund.<sup>930</sup> Due to the lack of judicial guidance around Indian moneys issues, it is simply unknown at this time whether trusts could be used in this area to allow the investment of these moneys in higher interest bearing securities.

The lack of capacity of Indian Act bands to hold and expend Indian moneys in their own names is to be contrasted with the clear authority of the Sechelt Indian Band under section 32 of the Sechelt Indian Band Self-Government Act which states in subsection (2) that "[m]oneys transferred under this section shall be administered in accordance with the laws and constitution of the Band." Under section 6, the Band has the legal capacity in subparagraph (c) to "expend or invest moneys". Similarly, under the Cree-Naskapi (of Québec) Act the Cree and Naskapi bands are able under their corporate objects to use and administer band moneys and assets and as corporations have the legal capacity to borrow and to do other things consistent with corporate status.<sup>931</sup>

Indian Act bands are hampered in their ability to borrow money except under the limited provisions of subparagraph 64(1)(h) (loans from capital moneys to band members under certain conditions) and subsection 70(1) (loans from the CRF for limited band infrastructure purposes) because of the exemptions from seizure of reserve and surrendered lands and personal property on reserve (section 29 and 89). Bands thus cannot easily borrow from lending institutions or private lenders. Moreover, because of their general legal incapacity to contract, they have difficulty entering into creative lending arrangements with such outside lenders.

Paradoxically, however, band capacity to borrow seems to be implied in the Band Council Borrowing Regulations which in regulation 2 provides that band councils may borrow money "for band projects or housing purposes...".<sup>932</sup> Loans made to bands may also be guaranteed by the federal government against band capital moneys pursuant to the wording of subsection 64(1) allowing expenditures in (k) for purposes "that in the opinion of the Minister is for the benefit of the band." However, it is not clear that this is a legally permissible reading by the federal government of this particular provision.<sup>933</sup>

In any event, the restricted capacity of bands to borrow money is to be contrasted with the clear authority of the Sechelt and Cree and Naskapi bands under their respective legislation.<sup>934</sup> The Cree and Naskapi bands, however, cannot borrow on a short or long term basis except in

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<sup>930</sup> R.S.C. 1985, c. F-7, s. 17.

<sup>931</sup> See text at notes 409-10, supra.

<sup>932</sup> C.R.C. 1978, c. 949.

<sup>933</sup> Reed, "Powers of Bands and Band Councils," supra note 913 at 27.

<sup>934</sup> Sechelt Indian Band Self-Government Act s. 6(d) and Cree-Naskapi (of Québec) Act ss. 96-98.

accordance with a band by-law setting out the amount, purpose, manner and terms and date or repayment. If a long term loan is contemplated, it must be authorized in addition through a vote at a special band meeting.<sup>935</sup> Furthermore, the GIC may make long term borrowing regulations to cover the Cree and Naskapi bands if it wishes.<sup>936</sup>

The inability of Indian Act band to borrow moneys is inextricably tied to their inability to grant interests in their reserve lands that will attract private financing. Commissioner Hall of the Westbank Inquiry referred to this as "[p]erhaps the most fundamental difficulty relating to the development of band lands"<sup>937</sup> and ultimately recommended the passage of a more modern and comprehensive Indian lands act, but without specifying how this difficult policy issue should be handled.<sup>938</sup> His long term recommendation, of course, was to call for eventual fee simple ownership in a self-government context.<sup>939</sup>

#### (iv) Capacity to Sue and Be Sued

Whether a band may sue and be sued in its own name is another issue on which the courts have divided in the past. As Woodward notes, most courts have agreed that bands do have this legal capacity, but there are nonetheless enough contrary decisions to render the whole area somewhat doubtful.<sup>940</sup> As a DIAND report states, this is an important issue since "capacity to sue and be sued is a normal incident of government status at municipal, provincial and federal levels."<sup>941</sup>

However, it is to be noted that governments often impose special procedural rules before allowing themselves to be sued. It will be recalled in this regard, that in the case of federally recognized American tribes as described in the Santa Clara Pueblo v. Martinez case, tribal sovereign immunity prevented the plaintiff from suing the pueblo in the federal courts where a less evidently biased decision was argued to be more likely than in the pueblo courts.<sup>942</sup>

In any event, the Sechelt and Cree and Naskapi bands are in a much clearer legal position than are Indian Act bands with regard to legal capacity in this area. This is apparent, for example, in the Sechelt Indian Band Self-Government Act where the band is given express power to "sue or be sued" (s. 6(e)) and in the Cree-Naskapi (of Québec) Act which constitutes the Cree and Naskapi

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<sup>935</sup> S. 97.

<sup>936</sup> S. 98.

<sup>937</sup> Westbank Inquiry, supra note 650 at 392.

<sup>938</sup> Ibid at 405.

<sup>939</sup> Ibid at 440.

<sup>940</sup> See Native Law, supra note 20 at 395-96, S 20-1 for cases cited there.

<sup>941</sup> Reed, "Powers of Bands and Band Councils," supra note 913 at 28.

<sup>942</sup> Supra note 18.

bands as corporations. Under the Interpretation Act, corporations have the capacity to sue and be sued.<sup>943</sup>

Since Indian Act bands are in a doubtful position, Woodward observes that the representative (class) action has become the traditional means for bands to undertake legal proceedings.<sup>944</sup> This is a procedure where a representative group of individuals is deemed to have the same interest as a larger class of persons, and, therefore acts on their behalf. Band councils are generally chosen as the representative persons. However, as Woodward goes on to note, not only do the members of a band not always have the same interests (due to differing rights to allotted and unallotted reserve lands, for example), but "[t]he interest of the band as a whole may even be opposed to or in conflict with the interests of individual Indians."<sup>945</sup> Given what has been discussed so far in this paper regarding the differing degrees to which individuals on reserve have participated in the scarce economic benefits available to Indians and bands under the Indian Act regime, such a statement should come as no surprise.

Returning to bands as such, it must also be stated that even if bands were provided with clear legal status to sue and be sued, the issue of enforceability of judgments obtained against them would have to be dealt with. As mentioned above, the real and personal property of bands and individual Indians are exempt from seizure, including execution on judgments. This raises important policy issues for, if it were considered desirable that these protections be capable of being waived, the evident problem is the possibility of a piecemeal diminution of Indian lands and assets should judgement be obtained against bands as a result of bad business deals etc. The recommendation of the Cree-Naskapi Commission that individuals be permitted to waive their seizure exemption under the Cree-Naskapi (of Québec) Act has already been mentioned earlier.<sup>946</sup>

It may be possible to develop a waiver policy that will touch only personal as opposed to real property on reserve as a way of reducing the risk to the concept of a reserve "homeland" that the Indian Act protections seem designed to safeguard. Since land is generally of much greater value, it is not clear how much comfort such a policy would provide to potential non-Indian business partners or lenders who are contemplating entering into commercial relations with bands that could end up in the courts if things do not go as planned. There appears to be no easy answer to this question.

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<sup>943</sup> R.S.C. 1985, c. I-21, s. 21(1).

<sup>944</sup> Native Law, *supra* note 20 at 396.

<sup>945</sup> Ibid.

<sup>946</sup> See text at note 433 *supra*.

## 12. Band Financing<sup>947</sup>

### (a) Band Funding: A Policy Paradox

Band and Aboriginal government financing generally is the subject of other more detailed studies being prepared for RCAP.<sup>948</sup> Thus, the following discussion will be limited to an outline of current arrangements.

DIAND administers the Indian Act and under that authority underwrites band governance and delivers or authorizes the delivery of many programs and services to bands. In some cases these services relate to treaties, as in the case of education for example. In other cases, the services are directly related to the provisions of the Indian Act such as those pertaining to reserve land and moneys management, estates administration, resource development etc., all of which have been reviewed earlier. Other services reflect those available to all persons in Canada, most notably, social assistance.<sup>949</sup>

Bands under the Indian Act receive money for their functioning and for service delivery from a variety of sources: the federal and provincial governments;<sup>950</sup> their own federal trust account earnings;<sup>951</sup> and sources more directly connected to them such as band commercial and development enterprises, leaseholds, user charges as well as the taxes they may apply to persons and businesses on reserve under their section 83 financial powers. Accurate figures are not available for the total amounts involved from all these sources. Evidently, the amounts received by individual bands will vary tremendously, depending on a number of factors.

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<sup>947</sup> The following abbreviated description is drawn primarily from the following sources: DIAND, "DIAND's Evolution From Direct Service Delivery to a Funding Agency," Background Document prepared for the Royal Commission on Aboriginal Peoples, April 1993; Michael Prince "Federal Expenditures and First Nations Experiences," in Susan D. Phillips (ed.) How Ottawa Spends 1994-95: Making Change (Ottawa: Carleton University Press, 1994) 261-99; Cassidy and Bish, Indian Government, supra note 388.

<sup>948</sup> See for example, Douglas Brown, "A Framework of Financial Options for Aboriginal Government," research paper prepared for the Royal Commission on Aboriginal Peoples, March 1994 and Vicky Barham and Robin Broadway, "Financing Aboriginal Self-Government," research paper prepared for the Royal Commission on Aboriginal Peoples, February 1995.

<sup>949</sup> In this regard, under the funding arrangements that will be described below, over 90% of bands are in control of welfare payments to their own members: *The Globe and Mail*, Tuesday, July 5, 1994 at 9. The article notes that the figures are drawn from DIAND and Statistics Canada data.

<sup>950</sup> As Cassidy and Bish note (Indian Government, supra note 388 at 120) provincial governments do have a large but variable role in band financing:

Provincial government funding policies toward Indian people vary tremendously across Canada, with some provincial governments contributing much more to band financing than others. Manitoba, for example, provides the same general grant funds to bands as it does to municipalities, while no property taxes are collected on reserves.... In British Columbia no general grants are made to bands.

<sup>951</sup> See the chapter on Indian Moneys, supra.

The bulk of band financing is received from the first source, the federal government. Total federal expenditures associated with all Aboriginal peoples (not just reserve-based Indians) in recent fiscal years have been over 5 billion dollars and have included components from a dozen different federal departments and ministries.<sup>952</sup> DIAND is, however, responsible for over 70% of the total federal Aboriginal expenditures.<sup>953</sup>

In terms of band financing, DIAND's arrangements for transferring public monies to bands are forecasted to involve nearly 4 billion dollars for the fiscal year 1994-95.<sup>954</sup> Band administered funds for services that would otherwise be delivered directly by DIAND have increased substantially over the years. In 1980-81, 41% of the expenditures for Indian and Inuit services were made by the communities themselves under this delegated federal authority. This had increased to 77% by 1991-92.<sup>955</sup> For the fiscal year 1992-93, DIAND states that band expenditures continued to account for 77% of expenditures, while a further 12% was paid out to the provinces for services delivered by them to bands and the remaining 11% was applied directly by DIAND.<sup>956</sup>

These monies will be obtained in accordance with the DIAND's estimated needs as set out in the annual Main Estimates presented by Treasury Board to Parliament and voted on pursuant to the Appropriations Act. Once appropriated, the monies will be transferred to bands to be spent by them, but pursuant to the notion of ministerial responsibility. This means that the DIAND minister is accountable to Parliament for how these public monies are spent. Thus, the minister will set the mandate for their expenditure, authorize the required financial resources and ensure that the information necessary for parliamentary reporting purposes is supplied to DIAND on a regular basis in accordance with the rules applicable to the particular financial arrangements entered into by DIAND and bands and tribal councils.<sup>957</sup>

Evidently, the net result of ministerial accountability under current arrangements is at odds with complete band fiscal autonomy. In this respect, the minister and DIAND are in the same difficult situation vis-à-vis band finances as they are with respect to the promotion of Indian

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<sup>952</sup> "DIAND's Evolution," supra note 947 at 4-5. The different federal departments and ministries include DIAND; National Health and Welfare; Canada Mortgage and Housing; Citizenship and Immigration, Industry, Science and Technology; Secretary of State; Solicitor General; Fisheries and Oceans; Public Service Commission; Justice; and National Defence.

<sup>953</sup> Ibid: DIAND spent \$3,646,500,000 as compared to an overall total of \$5,041,000,000 for all departments in 1992-93.

<sup>954</sup> "Federal Expenditures," supra note 947 at 285.

<sup>955</sup> Prince, "First Nations Funding," supra note 947 at 263.

<sup>956</sup> "DIAND's Evolution," supra note 947 at 6.

<sup>957</sup> Cassidy and Bish, Indian Government, supra note 388 at 132.

self-government. Thus is created another in the long line of paradoxes that have been referred to throughout this paper and which Prince expresses as follows:

Until the existing legislation that governs how these federal expenditures are transferred to First Nations is changed, INAC faces a policy paradox: trying to foster the autonomy and accountability of bands and tribal councils to their own people by not interfering in community affairs while, at the same time, having to tighten the Department's own administrative system in order to monitor adequately the results achieved with federal funds and report the results to Parliament.<sup>958</sup>

The transfer of public monies to bands, like the delegation of federal powers under the Indian Act, thus carries with it an implied value system and a power relationship that have clear economic effects. They also have implications for the political culture of the recipient bands. The Penner Report stated this point strongly, noting that the (then) current band funding arrangements based on highly conditional and negotiated contribution agreements with little built-in flexibility "inhibit the development of Indian self-government."<sup>959</sup> Hence the call for a complete revision of the way band financing ought to be handled if real Indian autonomy was to be achieved.<sup>960</sup> Although significant changes have been made, the system of unconditional block funding arrangements (similar to the system of equalization payments to the provinces) recommended by the Penner Report has yet to be implemented fully.

Aside from the general effects on band autonomy, the socio-political values imported along with the devolution of federal powers and spending authority also have more particular effects. The result is also something of a paradox: the more DIAND service delivery functions are devolved to bands, the more factionalism and disunity may be fostered in some band communities. Partly that is due to the lack of band accountability mechanisms for band council decisions that has been discussed earlier. Partly it also seems to be due to the fact that there may exist in many bands a social and political élite that monopolizes political and economic power and hinders the development of liberal democratic values and accountability processes on reserves.

In an early study Dosman noted the effects on reserve political culture of the dependency relationship created by political and economic structures under the Indian Act. In referring to cases studies on "leading families" in reserve communities "who allied themselves with the Indian administration [DIAND]," he noted the extent to which their privileged access to band funds often underlay their higher socio-economic status on reserve.<sup>961</sup> In his later essay Boldt supports much of

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<sup>958</sup> "First Nations Funding," supra note 947 at 287.

<sup>959</sup> Supra note 17 at 81.

<sup>960</sup> See text at notes 361-62, supra.

<sup>961</sup> Indians: the Urban Dilemma, supra note 548 at 56-67. A typical observation is as follows (at 57) regarding the purchase by DIAND of horses for the reserve in question:

what Dosman found, confirming the existence of at least two socio-economic classes on reserves, with access to the upper class largely restricted to the "compliant leading families ... tutored in the philosophies, values and norms of the DIAND."<sup>962</sup>

If these observations are true, then changes to band funding arrangements may prove to be difficult to tackle in terms not only of the political relationship between the federal and provincial governments and bands as separate political units, but also in terms of internal band politics. In short, more than a mere change in funding structures would be involved. As in the case of self-government more generally, it might entail a radical restructuring of band economic and political structures and processes that will inevitably disrupt established ways of doing things as well as the privileges and prerogatives of particular political and kinship groups on reserve.

#### (b) Band Funding Under the Indian Act

Current band financing arrangements are a function of the ongoing devolution of DIAND functions that has been noted in several earlier contexts. The most important events in the devolution process were the 1968 Treasury Board formal approval of the transfer of funds to bands for local government purposes and the 1975 introduction of block funding to allow bands to spend monies more in accordance with their own socio-economic priorities. During this period, DIAND staff also decreased in numbers from 8,000 in 1975-76 to 3,600 by 1994.<sup>963</sup> Nonetheless, most band funding arrangements have continued to be in the form of conditional contribution agreements until relatively recently.

As mentioned above, contribution agreement funding arrangements came in for criticism in the Penner Report. Even before that, however, a study of band fiscal matters by Ponting and Gibbins had put forward a number of possible directions for reform, including the block funding proposal seized on by the Penner Report.<sup>964</sup> The net result of these and other pressures was the

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Thus the band fund was used to benefit two families that were united by marriage and already economically separated from the other families. The intervention made with the objective of fostering "leading families," obviously drove a wedge between Thomas McNight and the band. To maintain this new source of power, he had to retain the favour of the Agent. The redirection of band funds into private hands subtly redefined power relationships on the reserves, isolating the "leading families" on the one hand, and redefining their relations with the white world - the farm instructor and the Agent on the other. They were favoured families, but at the price of hostility and separation from the band.

<sup>962</sup> Surviving As Indians, *supra* note 39 at 121.

<sup>963</sup> "DIAND's Evolution," *supra* note 947 at 44.

<sup>964</sup> Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada (Toronto: Butterworth, 1980). The authors set out a number of proposals (at 126) including: enhancing band managerial skills; increasing funding for important programs; changing the external accountability system so that Indian leaders would be more accountable to band membership; developing new evaluation criteria to allow bands themselves to assess the effectiveness of the block funding recommended; and promoting the diversification of funding sources so that bands could become fiscally more autonomous.

development of an enlarged range of funding arrangements designed to create different mixes of local band decision-making authority, internal and external accountability and risk of budget shortfalls. DIAND describes these new arrangements as follows in terms of a continuum that reflects the mix of elements referred to above:

At one extreme is an agreement which simply reimburses expenditures for each program area and leaves the authority, accountability and risk with DIAND. At the other extreme is a global funding model which predetermines a community's total budget for all programs for several years. In the latter case, based on the agreement, the full scope of authority, accountability and risk could rest with the recipient.<sup>965</sup>

At present and due to the doctrine of ministerial responsibility and the presence of the fiduciary obligation, the global funding model referred to by DIAND in no way passes full authority, accountability or risk to the band. This is, of course, in many ways simply a paradigm of the whole self-government dilemma described earlier: to the extent that bands operate through delegated federal legislation and within the embrace of the fiduciary relationship as currently conceived and judicially articulated, they can never escape their subordinate status within the Canadian federation.

In any event, the basic structure for DIAND financing of bands is by way of a "funding arrangement" pursuant to "funding authorities" and a "funding allocation." A funding arrangement is the actual document containing the agreement entered into by DIAND and the band in question regarding funding of band functions and service delivery. Funding authorities are the federal government rules that DIAND is obliged to follow with regard to the different funding arrangements. They refer to reporting and auditing requirements, set limits to the matters that will be funded etc. Funding allocations are the budgeting formulae or resourcing models used in the funding arrangements. There are two basic funding allocation models:

- (i) resourcing formulae (e.g. number of units X cost per unit = budget; and
- (ii) prioritization i.e. DIAND implements federal government priorities such as particular capital projects in certain regions etc.<sup>966</sup>).

The federal government will not normally transfer moneys to bands for the delivery of services to band members who are not resident on the reserve, as off-reserve band members are considered to be provincial residents for such purposes. However, these persons often "fall between the cracks" in terms of programs and services where they have not lived off the reserve long enough to meet provincial eligibility criteria.

In any event, DIAND reports that there were 1,790 funding arrangements in place in the

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<sup>965</sup> "DIAND's Evolution," *supra* note 947 at 21.

<sup>966</sup> *Ibid* at 7.

fiscal year 1991-92,<sup>967</sup> broken down into the following three categories:

1. Comprehensive Funding Arrangements (CFAs). They are also known as Master Funding Arrangements and are the most basic mechanism. They are fairly specific regarding the services to be delivered, have varying degrees of transferability of funds between budget categories and are limited to one year in duration. There were 840 such arrangements in 1991-92 falling into three sub-categories: Grants; Contributions; and Flexible Transfer Payments (FTPs).<sup>968</sup>

Grants are not subject to terms and conditions, although in order to be eligible for them certain criteria may have to be met at the outset. Thus, there is little in the way of external accountability since they do not require reports or audits and funds are fully transferable within the category of activity for which the grant has been made. There are relatively few grants (44 in 1991-92<sup>969</sup>) and most are for core funding of band governments. Accountability, to the extent it is a factor, is internal i.e. to band members for the general use of the funds.

Contribution agreements are for specific program activities and funding is provided on the basis of expenses that are eligible for reimbursement. Thus, there are financial and progress reporting requirements. Every activity or program for which monies are provided has an end-of-year audit requirement and funds are not transferable between activities. The funding levels for program activities are negotiated individually with DIAND and specific program criteria and service delivery standards must be met. Although surpluses must be returned to DIAND, by the same token deficits will be funded. Accountability is evidently mainly towards DIAND in accordance with the terms and conditions of the agreements. There were 782 contribution agreements in 191-92.<sup>970</sup>

Flexible Transfer Payments are a recent invention (introduced in 1990-91), and attempt to combine the restrictive but less risky features of contribution agreements with the more flexible nature of Alternative Funding Arrangements. Funds are provided on the basis of a fixed amount rather than on the basis of eligible expenses and while there are reporting requirements, they are less onerous than in the case of contribution agreements. The required audit is not for each activity but only for the overall financial position. While funding levels for program activities are negotiated at the outset, if the program terms and conditions are met, there is limited ability to transfer funds between activities within the agreement. Surpluses may be retained, but deficits are the responsibility of the band. Accountability is internal (to band members for services) and external (to DIAND for services and for meeting standards).

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<sup>967</sup> Ibid at 13.

<sup>968</sup> Ibid.

<sup>969</sup> Ibid.

<sup>970</sup> Ibid.

2. Alternative Funding Arrangements (AFAs). This is an optional funding mechanism that is less specific than a CFA, has a duration of up to five years, and allows more transferability of funds between budget categories. It is closer in nature to the block funding recommendation made in the Penner Report, although it is by no means unconditional. AFAs were introduced in 1986 and there were 119 such arrangements in 1991-92.<sup>971</sup> AFAs have less stringent reporting requirements but call for annual financial statements. They provide the band with considerable scope for determining its own priorities and designing its own programs so long as standards are met. AFAs therefore allow for full transferability of funds between program activities. Funding amounts are subject to negotiations and as with FTPs, surpluses are retained, but deficits are the responsibility of the band. As with FTPs, accountability is both internal and external. There are technical and managerial criteria that must be met before a band may use AFAs.

3. Self-Government Funding Arrangements (SGFAs). They are negotiated under existing self-government legislation (Sechelt etc.) and have a maximum duration of five years. There were five in 1991-92.<sup>972</sup> There are no reporting requirements but SGFAs call for audited consolidated financial statements. Funds are fully transferable between activities and as with CFAs and AFAs, surpluses are retained, but deficits are the responsibility of the band. Accountability is both to the Minister and to band membership.

As Prince observes, bands are not necessarily restricted to one arrangement (since there is some degree of overlap between them) and some may have several: "A band council may, for instance, have one CFA with INAC headquarters and another with the regional office, as well as perhaps an AFA."<sup>973</sup> In all cases there are remedial action clauses allowing the Minister to take action under a number of scenarios such as where a band is at financial risk or where the health or safety of community members is at risk etc.<sup>974</sup>

DIAND notes that the range and variety of funding arrangements and the built-in protections are designed to give bands practical experience in managing their own financial affairs, but without forcing them to take on too much responsibility all at once and with it the attendant risk of budget shortfall: "It is a means whereby First Nations may exercise increased decision-making responsibilities and progress towards self-government within familiar territory and under the protection of the Indian Act."<sup>975</sup>

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<sup>971</sup> Ibid.

<sup>972</sup> Ibid.

<sup>973</sup> "First Nations Funding," supra note 947 at 271.

<sup>974</sup> According to "DIAND's Evolution," supra note 1027 at 17, DIAND is generally entitled to take action under the following circumstances: failure to meet the terms and conditions of the agreement; the auditor's opinion shows financial problems or risk of insolvency; the band auditor gives a denial of opinion; there are third party claims arising against the Crown; the health, safety or welfare of community members is being endangered.

<sup>975</sup> Ibid at 10.

It is important to note that the process of determining the level of funding takes little account of the different abilities of bands to raise revenues on their own or of differences in their abilities to deliver the programs and services being funded. Remoteness is not a factor in the funding negotiations. Moreover, although the multi-year format of some of the arrangements should promote forward planning, the fact that all transfers are subject to parliamentary appropriations means that the amounts can and sometimes are reduced before the agreements expire.<sup>976</sup>

### (c) Observations and Criticisms

Despite the apparent advances made by DIAND in attempting to meet the criticisms of the Penner Report, the variety of funding arrangements described above continue to draw criticism from diverse quarters. The Auditor General has been consistent in this regard. In reports beginning in 1979 and continuing up until 1990-91, successive auditors general have levelled a number of criticisms and have raised a series of important questions concerning DIAND financial operations. Five major criticisms have been made:<sup>977</sup>

First, DIAND's role regarding band financing is not legislatively mandated, the result being a lack of precise policy objectives and an inadequate conception of accountability in many areas;

Second, There is a lack of control mechanisms to ensure that monies transferred to bands being spent for the purposes for which they were transferred;

Third, with particular regard to AFAs, they appear to delegate a policy-making role to bands but without specific legislative authority to do so under the Indian Act;

Fourth, bands and tribal councils themselves lack a proper accountability framework, thus necessitating an improvement in DIAND's accountability system to make up for these shortcomings in the Indian community;

Fifth, the current absence of, or deficient forms of, band leadership's accountability to band members has led band members to write directly to the Auditor General expressing their concerns, thereby raising even further questions concerning the overall nature and direction of the trend toward devolving the expenditure of public monies by bands.

At the same time, bands have also criticized the current system in a number of ways. They complain about the administrative burden on them to train people in project planning and financial management and about the potential risks involved with some of these new arrangements.

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<sup>976</sup> Barham and Broadway, "Financing Aboriginal Self-Government," supra note 948 at 39.

<sup>977</sup> This summary is from "First Nations Funding," supra note 947 at 278-80.

The administrative requirements also swallow up a significant portion of the moneys transferred to them. At the same time, bands note that while accountability to DIAND has decreased, it is still a present and onerous requirement and that the apparent freedom of AFAs, for example, is belied by the fact that budget items have to be negotiated according to fixed formulae that leave little real discretion to them. Furthermore, many bands do not believe they will be able to retain surpluses over the long term, and that the net effect of their success in generating them will be to see their overall budgets decrease in subsequent negotiations with DIAND.<sup>978</sup>

These criticisms thus serve to once again bring into stark relief the central paradox of this whole area, expressed as follows by the Auditor General in the 1990-91 report:

Under current legislation, the Minister retains ultimate accountability to Parliament for the way public funds are spent and for the results they produce. But devolution means that the Department delegates decision making to bands. The Department's dilemma is that it retains ultimate responsibility for decisions over which it has limited control.<sup>979</sup>

DIAND officials often resent these criticisms and see them as an attempt to move the mentality of the department back to an earlier era of restrictive control. Nonetheless, DIAND has tried to respond to them by consolidating agreements to reduce their overall number and make them more manageable, by standardizing the wording and by setting up an internal system of quality control regarding devolved DIAND functions. At the same time, DIAND is striving not to interfere with internal band matters and to foster greater accountability of Indian leaders to band membership.<sup>980</sup>

Whether and to what extent these incremental changes can alter the basic paradox and provide an escape from the dilemma posed above is an open question. In the area of band financing, as in the others studied so far in this paper, it appears more and more as if there is no principled escape possible from the current impasse without constitutional amendment or a substantial political or judicial re-interpretation of the many doctrines that together have brought about the unequal embrace within which bands are held by the federal government under current constitutional arrangements.

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<sup>978</sup> *Ibid* at 281-82.

<sup>979</sup> Canada, Report of the Auditor General of Canada 1990-91 (Ottawa: Supply and Services Canada, 1992) at 24.

<sup>980</sup> "Funding First Nations," *supra* note 947 at 283.

**Part III: Summary and Options For Amendment and Transition**  
**G. INTRODUCTION: DIFFICULTY OF FORMULATING INDIAN ACT POLICY**

In the preceding parts of this paper, the Indian Act has been analyzed in terms of three organizing themes: (1) its antiquated and paternalistic nature, (2) its inconsistency, and (3) its internal confusion and gaps. The analysis may be summarized as follows.

The antiquated and paternalistic nature of the Indian Act flows from the ethnocentric nineteenth century assumptions, attitudes and practices described earlier in this paper. This is widely acknowledged to have resulted in heavy doses of ministerial and bureaucratic control over Indian peoples. Paternalistic measures have, in turn, bred a dependency relationship that has often robbed Indian people of their original sense of personal and group self-reliance along with their relative political autonomy. In addition, the counterpart to paternalism - economic and political favouritism - appears on many reserves to have benefitted a relatively small élite that has become adept at working within and around the confining structures of the Act and its administration and which is often perceived, especially by Indian womens' groups, as oppressive in its own right.

The inconsistency of the Indian Act is due to fact that, since the first Indian legislation was enacted, layer upon layer of often contradictory and increasingly stifling amendments and administrative practices have accumulated, to the great frustration both of the reformers, who hoped to once and for all deal definitively with the "Indian problem," as well as those who had to live within this kafkaesque world of restrictions and measured privileges. This has been accompanied by many paradoxes, the most important being the long standing ambivalence felt by most Indians toward the Indian Act and the federal department charged with its administration. While often resentful of its strictures and its failure to reflect their sovereign sense of who they are, Indian people on reserve are nonetheless often the most resistant to any attempt to amend or reform the Act. This is due in many cases to their well-founded suspicions of ulterior motives on the part of those wishing to change the most important legislation affirming their special status within the Canadian federation.

The confusing and incomplete nature of the Act is reflected in its almost total failure to refer to treaties, especially in the crucial areas of lands and governance. Other aspects of its confusing and incomplete nature result from the fact that since the beginning the Indian Act has been subject to often uncoordinated incremental amendments and minor reforms in response to changing conditions, attitudes and policies within the federal government. Indian people were rarely consulted, and when they were, their views were usually discounted or ignored. This is well illustrated by the 1951 revision to the Act which managed to ignore Indian demands for fundamental reform in favour of what amounts to a restatement of the original philosophy of 1876.

Many of the most important sections of the Act, most notably the lands and moneys

provisions, have now become largely unworkable. To function in the modern Canadian economy, Indian communities and band councils sometimes resort to unsanctioned practices outside the structures and processes mandated by the Act. This is not a healthy political situation: it leads to accountability problems within reserve communities, undermines confidence in the integrity of band council government and breeds cynicism among both Indian people and the federal officials who are struggling to cope with the conflicting demands made on them.

The last few decades have seen a variety of official attempts to bring about more fundamental change. Studies, parliamentary reports, increasing levels of devolution, and constitutional and non-constitutional self-government initiatives have all proven to be unsuccessful at bringing about the new relationship that has been the ostensible object of these efforts. The result in the 1990s appears to be a generalized sense of impasse and frustration, with considerable mistrust and mutual recrimination on both sides. Promising initiatives have often not gone forward or, if implemented, have been caught between the conflicting political agendas of the parties and have been frustrated or made the prisoner of one of the agendas. All participants in this policy debate seem now to be intellectually exhausted. The lack of a principled and "do-able" vision for the future is reflected by this stalemate and by the relative poverty of new ideas in the various submissions to RCAP over the past years.

Part III of the paper will try to shed additional light on some of the key obstacles to change that will have to be dealt with in any further bid to reform, amend or move completely away from the Indian Act. It will assess briefly the selected provisions of the Act that have been discussed earlier in terms of the vision outlined in Partners in Confederation.<sup>981</sup> Some of the important current Indian self-government reform efforts will also be reviewed and assessed. Ultimately, a number of options for moving forward will be set out in a slightly cursory manner as a way of focusing further debate. In the absence of a generally accepted theory of Aboriginal self-government, it is extremely difficult to develop any particular option beyond a certain point; hence they must remain somewhat incomplete pending final decisions by this Commission on the direction in which it wishes to go in respect of these matters. Thus, most comments will be in reference to the most recent self-government views of the Commission as expressed in Partners in Confederation.

It cannot be overstated that there can be no movement away from the Indian Act without a substantial amount of consensus on the part of those most affected by any proposals for change - Indian people themselves - as well as a concurrent political will within the Canadian federation to alter existing practices and prerogatives. The long history of Imperial, colonial and Canadian Indian policy has created attitudes, expectations and entrenched bureaucracies on all sides of this debate about the place of Indians within the Canadian federation. Thus, nothing stated here is definitive for, if one thing is shown by the long history of the Indian Act and the various reform efforts, it is that it is a graveyard of final or definitive solutions to these problems.

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<sup>981</sup> Supra note 577.

Dosman's description of the tangled web of relationships that modern Indian policy has created seems to apply to the entire history of relations between Canadian policy makers and administrators and their Indian wards. It should give us pause before embarking on reform efforts without a thorough evaluation of where all the strands of the tangled web to which he refers may lead and without a firm and widely accepted theoretical foundation for future self-government initiatives.

Although some may question both the validity of the new programs and the sincerity of Government administrators, no one can deny the extraordinary expansion of services that has occurred in the whole area of Indian-Metis affairs. They take root with a purpose; they spread happily like ivy; their vines intertwine; the knots and tangles become ugly and dangerous; eventually their survival is their rationale. Indians are caught within this jungle, and must somehow cope with it.<sup>982</sup>

## H. SUMMARY AND ASSESSMENT OF THE INDIAN ACT

### (1) Indian Status and Band Membership

#### (a) General Assessment

The status and membership provisions of the Act are paternalistic and antiquated. There is no role for individual or community self-identification as an Indian person or as an Indian entity respectively as the rules are externally imposed and administered. Evidently, this flies in the face of the nation to nation character of relations between Indian peoples and the Crown that is reflected in the Royal Proclamation of 1763 and in the treaties between the Crown and the "several Nations and Tribes" to which it refers.

Since non-status Indians and non-Indians do not count as part of the population base for federal funding, the power delegated to bands over their membership is of little enduring relevance because bands are penalized financially if they open their membership up to them. Moreover, the sub-text of the Indian Act status provisions - their emphasis on Indian blood and descent through the male line - reinforce a view of "Indianness" and Indian community based on nineteenth century notions of race and patriarchy that may run counter to the traditions and aspirations of particular groups of Indian people. It certainly runs counter to the provisions of international and domestic human rights instruments.

These provisions are also inconsistent: they are based primarily on the recognition of individual Indians, not of Indian political units or Indian peoples. They are not even consistent in their own terms since they exclude large numbers of persons of Indian ancestry who self-identify as Indian and who often wish to return to Indian communities or to maintain links with them. Moreover, the cumulative effect of the subsection 6(1)/6(2) distinction may be the eventual

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<sup>982</sup> Indians: The Urban Dilemma, *supra* note 548 at 99.

elimination of recognized Indian status entirely if individuals do not choose their mates as a function of this distinction. If demographic projections are accurate, there may in future be bands made up of persons who no longer fit within either the 6(1) or the 6(2) category. In addition, because of the way the rules work, the 6(1)/6(2) distinctions are arbitrary and unfair, dividing families and communities in ways that have attracted criticism from within and outside Indian reserve communities.

These provisions breed confusion and contain gaps. One should not have to verify with lawyers, genealogists or government officials in order to determine if one is part of a people, a social and political community. A community should not have to petition bureaucrats in order to be considered an Indian entity. Moreover, and in the same vein, one should not be denied treaty benefits and membership in a treaty group as a result of status/non-status distinctions developed in isolation from the historic and constitutionally recognized treaty relationship between nations within the Canadian federation.

In short, there are profound moral, legal and constitutional arguments militating against the continuance of the status and membership provisions of the Indian Act. Nonetheless, dispensing with them will not be a simple matter.

#### (b) The Indian Act: Recognized Indians in Recognized Bands

The status and membership provisions will be the first and most difficult obstacle. An entire "Indian" social, political and economic system has been erected on this foundation. Moreover, the federal, provincial and municipal governments have based their taxation, transfer payment and service delivery systems on the distinctions drawn by them. If the Cree-Naskapi, Sechelt and Yukon Indian self-government agreements are any indication (where the Indian Act status provisions have been retained), the federal government will be loathe to abandon its control over the size of the Indian service population.

The Indian Act is recognition legislation. It recognizes which individuals will be considered to be Indian for federal purposes.<sup>983</sup> It recognizes groups of individuals as bands for purposes of reserve land, moneys and related entitlements. It recognizes indirectly (by court interpretation and federal policy) which persons will be recognized as Indians for purposes of treaty rights and benefits. In the modern era, it recognizes which groups will be able to access self-government initiatives, since most federal policies (like the community-based self-government policy) are based on criteria that refer to or favour the status quo that the status and membership provisions represent.

In short, the Indian Act is the primary way by which the federal government legitimizes and de-legitimizes persons and groups as capable of accessing and vindicating "Indian" legal and

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<sup>983</sup> By the same token, by denying recognition to certain persons based on the 6(1)/6(2) criteria, it indirectly recognizes who will be considered as mere provincial residents and a corresponding charge on the provincial purse for program and service delivery.

constitutional rights. It is also the way the federal government is able to affect internal band processes, since by changing status and band membership criteria (as it did most recently in 1985) it is able to alter the internal composition of bands. In the past, Canadian policies reduced the population base of bands by removing women, their non-Indian husbands and their children from the community population. In Bill C-31 it has added to that population. In neither case was sufficient thought given to the effects of such measures on Indian communities. In the same way, by recognizing the Woodland Cree as a separate band in 1989 the federal government was able to affect internal Lubicon band processes and to de-legitimize the Lubicon land claim to the extent it drew off claimants into another "band."

As Partners in Confederation notes, official recognition of tribes and bands was originally based on the manifest political and social cohesion of autonomous Aboriginal groups. This was often confirmed by formal treaty relations.<sup>984</sup> That is no longer the case. The unique principles derived from international and Imperial constitutional law have been almost completely replaced by principles rooted in a narrower conception. Since the first definition of "Indian" appeared in 1850, recognition has been primarily on an individual and not on a group basis. In keeping with nineteenth century assumptions the original group political and social identity of Indians as distinct peoples was redefined to recast them as individual members of a racial minority on their way to absorption within the surrounding liberal democratic settler society.

In essence, the Indian Act status system has turned the original recognition equation on its head, replacing official respect for Indian group self-definition with objective criteria devised and enforced by non-Indian authorities for purposes often unrelated to the desires or goals of Indian communities. This did not really change following the 1951 revisions with its "charter member" registry approach.<sup>985</sup> It was less a recognition of bands as such than a recognition of the pre-1951 status rules carried forward and reinforced. Moreover, the strong and widely acknowledged bias in favour of descent through the male line was enhanced and accompanied by an automatic enfranchisement of Indian women who "married out." The irony of these provisions was accentuated by the fact that in many cases the men these Indian women married were often of Indian ancestry, but were unable or unwilling to register as Indian under the new Act for one reason or another.

Bill C-31 of 1985 was a belated attempt to remedy the most discriminatory aspects of historic Canadian Indian recognition policy. However, the effects of the pre-1985 rules linger on, placing the children of Indian women who married out at a disadvantage: they will almost always be 6(2) "new status" Indians. In addition, continuing ministerial power to control the recognition of

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<sup>984</sup> Partners in Confederation, *supra* note 577 at 40:

The original basis for this [self-government] right was the autonomous status of Aboriginal nations at the time they entered into association with the French and British Crowns. The right of Aboriginal nations to govern their own affairs was acknowledged in inter-societal practice and formed a tacit promise of many treaties.

<sup>985</sup> See B. Morse, J. Giokas, Do the Métis, *supra* note 16 at pp. 32-44 for a discussion of this point.

Indians and bands makes a mockery of the recently accorded power to bands to control their own membership. Studies have shown that band membership codes invariably contain blood quantum rules analogous to federal rules. The federal government thus remains the ultimate arbiter of the size of the "Indian" population and is therefore in a position to limit the amounts of money that will be spent on or transferred to a band to provide for its population under current per capita funding formulae.

United States tribal recognition policy illustrates the logical result of this dilemma. The inherent power of a tribe over its own membership, but without sufficient land or adequate financial resources to accommodate an expanding population, is easily neutralized by shifts in federal Indian recognition policy requiring a certain minimum Indian blood quantum before federal funds for Indian programs and services will be made available to tribes. Eventually tribal or band membership eligibility criteria will be harmonized with federal eligibility criteria if the tribe or band is to survive financially. Nearly all federally recognized tribes in the United States have minimum Indian blood quantum requirements for tribal membership purposes.<sup>986</sup>

This is a result that ought to be avoided in Canada, but which may be inevitable if Indian self-governing units and the Indian service population is to continue to be dependent on federal financial support. That appears to be the rationale behind the retention of the status provisions of the Act in the context of the Cree-Naskapi, Sechelt and Yukon agreements. If the American experience is anything to go by, both the federal government and Indian governments will in such cases share the same interest in restricting the recognized Indian population. This does not appear to be a recipe for the growth of thriving First Nations in this country.

#### (c) Partners in Confederation and the Indian Act

Due to their antiquated underpinnings and the injustices produced by their application, the status and band membership provisions of the Indian Act pose many philosophical and moral problems for modern policy-makers. Following the tree analogy referred to in Partners, one might say that the tree of the modern Indian "First Nation" is frequently rooted in rocky and largely foreign soil. Its natural growth has been arrested and it has not attained the self-reliant stature of First Nation trees planted prior to contact. It is nonetheless a living tree growing in a grove with other similar First Nation trees "in a complex ecological system" and "linked in various intricate ways with neighbouring governments."<sup>987</sup>

Many would agree that this tree should be replanted in better soil - the status and membership provisions ought ideally to be repealed to be replaced by self-definition and self-control over First Nation membership. However, to do so will clearly disrupt the complex ecological system in which it grows and will inevitably affect the neighbouring (non-Indian)

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<sup>986</sup> See with regard to the American experience a discussion paper by the writer on comparative Canadian and American Indian recognition criteria, "Domestic Recognition," supra note 591.

<sup>987</sup> Partners, supra note 577 at 37.

governments, which will have to nourish it initially and while it grows. They will harbour fears that it will grow in stature at their expense and with no end in sight to its growth.

Therein lies the dilemma for reformers and another reflection of the ambivalence of Indians toward the Act and its administration. The approach adopted in Partners, mirroring that of Bill C-52 of 1984 and the community-based self-government policy, proposes that recognition as a government capable of exercising law-making powers within the Canadian federation be dependent on proof by an Aboriginal group asserting third order government status of two things: first, its form of government (constitution); and second, the nature and extent of its actual or potential population (citizenship code) that is subject to those law-making powers.<sup>988</sup>

Partners in Confederation proposes therefore a return to the historic policy of recognizing distinct Indian political and social communities as the arbiters of their own membership decisions. To take the central case set out in Partners - "a group that constitutes a distinct entity and possesses its own lands"<sup>989</sup> - an already existing group of this sort is presupposed. The most obvious candidates are the Alberta Metis settlements and Indians living on reserves under the Indian Act. The latter is the residual group that has benefitted from the exclusionary nature of the status and membership provisions of the Indian Act. While this group may intend to include off-reserve band members, there are no guarantees that it will include new status (primarily Bill C-31) and non-status Indians who are not band members when the initial third order self-government decisions envisaged by Partners are to be taken. These are the people that the Penner Report saw as consigned to "tier two" status, excluded from membership in an Indian community and placed on a general Indian list maintained by Ottawa.

The Partners approach threatens, but without directly stating it, to reproduce this earlier recommendation because it leaves three important and related issues dangling ambiguously: (1) the start-up membership of the "group";<sup>990</sup> (2) the procedures for including or excluding potential or actual members;<sup>991</sup> (3) where and by whom appeals from membership decisions will be taken.<sup>992</sup> The Partners approach is not necessarily an escape from the current status and membership provisions of the Indian Act. Ironically, it may support them. Without guarantees of additional land and financial resources to provide for an increased population, there is no reason why existing

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<sup>988</sup> Ibid at 44.

<sup>989</sup> Ibid.

<sup>990</sup> Supra note 577 at 44: "In some cases it may be convenient for a group to start with its existing membership and leave the door open for new categories of members to be admitted at a later stage. In other cases the group may decide to reconstitute itself at the start, by including a broader range of people..."

<sup>991</sup> Ibid: "In all instances it is for the group to determine how it should proceed, subject to basic norms of fairness and applicable constitutional and international standards."

<sup>992</sup> Ibid at 45: "The group should then agree on an appeal procedure for cases of disputed membership."

recognized bands would open up their membership to a larger group when they are having great difficulty at current population levels. This is especially the case if their potential new members have been living away from the reserve community for several generations and have become imbued with political values at odds with, and threatening to, prevailing reserve attitudes and values.

In this latter context, the case of off-reserve Indian women and their children who have regained status and band membership through Bill C-31 comes immediately to mind. As shown by testimony and submissions to RCAP, these people are often the most adamant in calling for improved accountability mechanisms regarding band council government and for the application of the Charter to any new self-governing Indian entities.

Partners speaks to this potential criticism by reference to norms of fairness and constitutional and international standards. But without an explicit reference to them and to what they will require in practice, the tendency may be for existing bands to do as many have done in the Bill C-31 context: resort to modern cultural practices or Indian Act based standards that will exclude large numbers of potential members and perpetuate the injustices that Bill C-31 has yet to correct.

The issues to be addressed here are relatively straightforward. Do the Charter or the International Covenant of Civil and Political Rights represent the constitutional and international standards referred to? Or are there other instruments that Partners would see applied? And will the application of these norms and standards be mandatory in any membership decisions taken by the group in question? What will the application of these norms and standards require of start-up Indian governments in terms of their inclusiveness and procedures for adding to or deleting from their membership/citizenship rolls?

Evidently, an adequate and impartial appeal process having reference to the acceptable norms and standards mentioned above is the ideal way to resolve the potential difficulties raised in points (1) and (2). Once again, however, the Partners approach falls tantalizingly short of offering the certainty upon which the abandonment of the current status and membership provisions could be based. Adequate and articulated norms and standards applied by an impartial and independent tribunal might be sufficient to attract the support of on and off-reserve Indians, men and women, status and non-status Indians. All might see in it an opportunity to finally address the issues that have caused the political rifts between them and the national organizations that represent their varied and often conflicting interests.

It is never made clear in Partners what sort of appeal procedure is envisaged, however. Is it the type of internal band mechanism mandated already by subsection 10(1)(b) of the Indian Act for bands that control their own membership? Or does it refer to court-like but nonetheless internal body? Or does it refer instead to a mechanism or body that will exist outside band structures and political processes? Evidently, the first scenario will likely appeal most strongly to band political leaders and current reserve residents and will probably displease off-reserve Indians

seeking membership or residency rights. The third will likely attract the opposite reaction. The second offers a chance for compromise, but only if independence and impartiality are built into the process or structure proposed. It may also be necessary to offer a further right of appeal outside the band or First Nation courts to federal or other judicial bodies.

As graphically demonstrated by the Martinez decision reviewed earlier, similar issues have been faced and have yet to be fully resolved in the United States.<sup>993</sup> Because of the effects of this decision and the perceived weakness of many American tribal institutions, including tribal courts, the United States federal courts have developed a doctrine of abstention and exhaustion whereby litigants must first exhaust tribal court remedies before appealing to the federal courts on jurisdictional issues. While abstaining from interfering with tribal sovereign immunity, the federal courts have nonetheless kept open the possibility of re-asserting their prerogative of judicial review of all tribal court decisions.<sup>994</sup> Presumably, this includes membership decisions.

However praiseworthy such an approach may be from a political perspective, one result has been to subject litigants with possibly valid challenges to tribal court jurisdiction to the requirement of fighting through every stage of the tribal court process. Very few have the financial resources or will to endure so long and protracted a procedure. Surely, this is the type of uncertain and temporary compromise that ought to be avoided by clear and agreed principles in Canada.

#### (d) The Policy Issue Directly Stated

In many ways and despite its historic and legal complications, the issue of how to deal with the result of the Indian Act status and membership provisions boils down to three straightforward questions:

1. What is the self-governing First Nation? i.e. Which people will be recognized by the federal and provincial governments as making up the modern First Nation?
2. How is it to be determined? i.e. What recognition criteria will be applied to answer this question?
3. Who is to determine it? i.e. Who will apply those recognition criteria?

Under the Indian Act the answers, although unacceptable to Indian people due to the origins of these concepts in Canadian law, are relatively clear:

1. status Indians or those deemed to be status Indians will make up the group to be recognized as

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<sup>993</sup> See note 18 supra.

<sup>994</sup> See for example, National Farmer's Insurance Co. V. Crow Tribe 471 U.S. 845 (1985) and Iowa Mutual Insurance Co. v. LaPlante 480 U.S. 9 (1987).

an Indian band - persons of Indian ancestry who do not fit into these categories will be denied recognition;

2. the criteria in subsections 6(1) and (2) of the Act will be applied to determine whether an individual is entitled to registration as an Indian - these categories are not permanent since people can lose 6(1) and 6(2) status through marriage;
3. the federal government will apply those criteria and the Registrar and ultimately the provincial superior courts will entertain appeals from such decisions - but all appeals will be measured against the standards set out in the Indian Act and not, for example, against emerging international definitions of what comprises a "people".

Under the Partners approach clear answers cannot be given to any of the questions posed above. But unless and until these questions are answered, or a process devised to begin to answer them, as unambiguously as the current provisions of the Indian Act do, it seems politically and legally unwise to attempt to move away from the status and membership provisions of the current Indian Act. Flawed as they are, they at least provide a degree of certainty to Indians and to governments. Elaborate (albeit insufficient) structures and processes have developed around them and vested and legally enforceable interests have been created. Dispensing with the Indian Act recognition provisions too quickly may recall for status Indians on reserve the abortive 1969 White Paper exercise. They will likely cling jealously to the major recognition in Canadian law of their special constitutional status. This will also alarm the federal and provincial governments. They will want to know which level will end up paying for what and for whom in any such move.

In order to provide a more complete response, it would be desirable that any alternative to the current status and membership provisions of the Indian Act provide answers or a clear process for arriving at answers to specific questions such as the following. Will non-status Indians who were unable to acquire or re-acquire status under Bill C-31 be able to participate in group decisions under the Partners approach? What about Bill C-31 new status Indians who were unable to rejoin bands that control their membership and that have excluded them already? Will status Indian band members who are unable to acquire reserve residency rights under the current Act be able to participate in group decisions that may affect their future ability to live on reserve? The majority of the people in the latter two categories will be Indian women who married out and their descendants. Will the start-up group envisaged by the Partners approach be able to continue to exclude them?

The start-up group in the Partners scenario is the group that will draw up the group constitution. In this sense, it is something like a constituent assembly. It will have the right to devise the rules, the constitution, that will bind it into the future. This notion, of course, is borrowed directly from the Penner Report where a process "analogous to a constituent assembly" is proposed.<sup>995</sup> But will the start-up group have the political legitimacy to make these decisions if it

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<sup>995</sup> Supra note 17 at 57.

does not include all those who believe they are entitled to participate, many of whom have links to the reserve that may be covered by the federal fiduciary obligation? The narrower group represented by the Indian Act band members may well be accorded legitimacy by the federal government, which will likely support such a group limiting of membership to the current Indian service population. But will it have legitimacy in the eyes of those who are now excluded by federal status and membership and band membership rules?

In short, can such a group continue into the future on the basis of "external legitimacy" only i.e. legitimacy as determined by outsiders to the group concerned?<sup>996</sup> In possibly perpetuating the denial of internal legitimacy, could the Partners vision simply be assisting the federal government to foist the problem onto the new constitutional third order entities as the United States Congress has done with regard to federally recognized tribes?

On the other hand, the start-up group could include the larger group that now includes status Indians without band membership or band residency rights as well as non-status Indians and even non-Indians who are affiliated in some way to the band. There will in such a case be a greater likelihood of internal legitimacy. But will the federal government accord external legitimacy to such a grouping? Will it wish to accept primary responsibility under the Constitution for nurturing the return to political and economic health of an emerging third order made up of persons it has not recognized in the past as entitled to constitutional special status? Perhaps it will do as it has done in the case of existing self-government agreement: recognize the larger group for political purposes, while restricting recognition for fiscal and related purposes (like taxation and seizure exemptions) to persons recognized under the current Indian Act status provisions as "Indian."

It is the assessment of the writer that the status and membership provisions of the Indian Act are unacceptable vestiges of an earlier era and are productive of great injustice. They ought to be replaced by adequate and modern recognition criteria based on explicit norms of fairness and the constitutional and international standards referred to above. Those norms and standards should be capable of dealing unambiguously with the difficult cases set out above and part of a coherent, widely acceptable and impartially administered recognition policy. The Partners approach begins the search for the new recognition policy required, but it does not supply it.

#### (e) Recognition in Practice

Recognition also implies its opposite. Thus, in any implicit or explicit recognition policy, some persons will be recognized as belonging to Aboriginal groups, and some will not - and

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<sup>996</sup> The distinction between internal and external legitimacy is drawn from Paul Chartrand, "Aboriginal Self-Government: The Two Sides of Legitimacy" in How Ottawa Spends, Susan D. Phillips (ed.)(Carleton University Press, 1993-94) 231. Internal legitimacy refers to the legitimacy of the representatives of the Aboriginal people who will make decisions for the group: "Aboriginal peoples must freely express their own representation in the process of securing political autonomy through self-government.": ibid at 233. External legitimacy refers to the ability of Canada to influence the identity of the Aboriginal group and thereby shape the nature and scope of Aboriginal self-government since "Canada is able to grant legitimacy to the challengers [to Canadian jurisdiction].: ibid.

whether or not the recognition criteria are applied by the Aboriginal group or by some outside body or government. Not everyone, in short, can or will be included. Hard decisions based on an agreed set of criteria reflecting particular values will have to be made. The implicit Indian Act values based on patriarchy and the primacy of the nuclear family offer a graphic example of values in action in this sense. The challenge will be to devise a recognition policy equally unsatisfactory to all those with an interest in the issue.

A start can be made in the direction of developing a new recognition policy by asking the following questions. First, is the Partners vision premised on a recognition process? It seems to be, since the process whereby a group begins to assert its powers of self-government as a third order is explicitly based on section 35 of the Constitution Act, 1982. Section 35 recognizes and affirms aboriginal and treaty rights which, on the view in Partners in Confederation, contain the inherent right to self-government.<sup>997</sup> These rights prior to 1982 might have been considered to have been extinguished by federal and provincial government actions. But they have survived nonetheless in residual form and were "existing" for purposes of being "recognized and affirmed" in 1982 with the coming into force of section 35. In short, they were recognized within the federal system through the voluntary act of the other partners, the federal and provincial governments, of enshrining them within domestic constitutional government arrangements.

The language of recognition is supplemented in Partners by specific reference to a process of asserting third order powers. There are two "preconditions" to that exercise: a constitution "delineating the basic structure and power of government" and a "citizenship code identifying the group's membership."<sup>998</sup> Without these, presumably a third order government cannot exercise governmental powers. These criteria must be read with the earlier requirement to be in possession of a land base.<sup>999</sup> Thus, from Partners one obtains the following criteria: (1) a "reasonably defined membership"<sup>1000</sup>; (2) that "possesses its own lands"<sup>1001</sup>; (3) a constitution that delineates the basic structure and powers of government<sup>1002</sup> and (4) capacity to enter into relations with the two other

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<sup>997</sup> Supra note 577 at 31.

<sup>998</sup> Ibid at 44.

<sup>999</sup> Coupled with the earlier requirement to be in possession of a land base, the resemblance of the Partners criteria to the major criteria for statehood under the Montevideo Convention in international law requires little no comment. That convention requires four things: (1) a permanent population; (2) on a defined territory; (3) that is subject to its government; and (4) the capacity of entering into relations with other states: Art. 1 of the 1933 Montevideo Convention on the Rights and Duties of States. The fourth criterion is an apparent reference to a constitutive theory of recognition, since the capacity to enter into relations depends on whether or not others will recognize that capacity and actually enter into such relations.

<sup>1000</sup> Supra note 577 at 45.

<sup>1001</sup> Ibid at 44.

<sup>1002</sup> Ibid.

orders in the federal system by unilaterally exercising powers in core areas (that will inevitably subtract from theirs) and by entering into intergovernmental arrangements with them.<sup>1003</sup>

Since Partners is essentially talking about recognition, the next issue has to do with the theory of recognition it endorses. Is it a declaratory or a constitutive approach?<sup>1004</sup> The former holds recognition to be implicit in the fact of being a self-governing entity. As such, it requires no formal acknowledgement by the other self-governing entities around it. On the theory of group initiative set out in Partners, an objective act of formal recognition within the federal system would not seem to be required in order for a third order Aboriginal government to have the requisite federal legal "personality" and with it the capacity to validly exercise powers within the federal system that would have an effect on the other two powers. From this perspective, the right is self-actuating.

The constitutive approach, on the other hand, would require a formal act of recognition by the other two partners in Confederation in order to "constitute" the Aboriginal government seeking to exercise third order governmental power. The Partners the requirement that "central case" groups have their own land and the constitution and citizenship code as preconditions to the exercise of core area powers make it appear as if objective criteria must be met. Presumably some body would have to say whether or not they had been met, otherwise there is no point in calling for them. Without formal acknowledgement that they had been met, the third order Aboriginal government would not be viewed in Canadian law as acting in a lawful manner in asserting governmental powers in core areas that would subtract from those of the other two partners. From this perspective, there is no such thing as implicit recognition - an explicit act of acknowledgement is absolutely required. The right is not, therefore, self-actuating.

Partners is equivocal about which theory it endorses. In some places it reads as if Aboriginal group initiative alone is sufficient. In others it appears as if that is insufficient: objective requirements must be met in the form of lands, a constitutionally described government and a defined population over which those powers on that territory will be exercised. As a practical matter, it seems clear that a constitutive theory is the only realistic one under which to proceed since current constitutional arrangements domestic Canadian law does not admit of the existence of third order self-governing Aboriginal units. The other orders of government will insist on having a say in determining with whom they will enter into federal relations and will likely go to court to prevent third order self-governing entities from self-declaring.

It is possible, of course, that the Partners approach refers to both the declaratory and constitutive theories of recognition. In terms of Aboriginal self-government in "core areas" a

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<sup>1003</sup> In this context, it should be noted that the Partners process is also directly comparable to that proposed by the Penner Report recognition legislation and endorsed to a lesser extent in Bill C-52 of 1984, both of which were explicitly cast as recognition legislation.

<sup>1004</sup> See Giokas, "Domestic Recognition", supra note 591.

declaratory approach is implied. Any existing Aboriginal group falling into the "central case" category requires no confirmatory act whatsoever from the other two levels of government before it may exercise law-making powers over core area subjects. No outside government, in short, would have any right to tell such a group what its constitution, accountability requirements or citizenship codes must contain. These are issue of internal legitimacy alone.

It is an entirely different matter in the "outlying" or peripheral areas of jurisdiction where agreements with the federal and provincial governments would be required before Aboriginal groups could begin to exercise law-making powers unhindered. There a constitutive theory seems more applicable since the other two levels of government have a clear interest and political right to demand that Aboriginal groups meet certain criteria in terms of government institutions, accountability mechanisms and citizenship codes before they accord the recognition that entering into inter-jurisdictional arrangements implies. It is their jurisdiction that will be affected. It is Aboriginal persons resident within their territories that may become subject to the jurisdiction of third order Aboriginal governments. It is their control of resources and fiscal matters that will be affected. In short, these are issues of external legitimacy.

In terms of the constitutive theory of recognition, this raises the next issue - who decides whether the recognition criteria have been met? Will it be the federal and provincial governments directly (which can justifiably be argued not to be disinterested in the process), or will it be a more neutral body? Evidently, a neutral body is more likely to be able to mediate between the desire of Aboriginal groups explicitly to assert a (declaratory) theory<sup>1005</sup> that no one outside themselves should have the right to determine their make-up or powers, and that of the federal and provincial governments explicitly to assert a constitutive theory and to thereby control the process to a greater extent. However, unless this body is delegated recognition power by those governments, it will be restricted to recommending that recognition be accorded by them if the criteria have been met (since recognition is an executive act of government). On the model of the Penner Report and of Bill C-52, it is assumed that a neutral body would be more appropriate and more likely.

The next issue is the composition of this neutral body. Will it be an existing court, a panel or board to which members are named by Aboriginal groups and governments, or a tribunal that exists outside domestic legal arrangements? How will this be decided? Assuming on the model of the Penner Report model that a panel is chosen to be made up of members jointly appointed by the federal and provincial governments and Aboriginal groups, the next and perhaps most important issue is that of the criteria to be used in deciding on the appropriateness of the constitutions and citizenship codes required as preconditions to the exercise of powers under the Partners approach.

The Penner Report left the contents of these matters for further discussion between the federal government and Indian First Nations. Bill C-52, however, was much more explicit about

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<sup>1005</sup> On a declaratory approach they would likely claim recognized status ipso facto based on their present possession of lands and a resident population on those lands in the form of band members.

the contents of the constitution. In addition, the citizenship code was restricted in Bill C-52 essentially to bands under the Indian Act and to whatever other entities the federal government might choose to recognize. In short, in the Penner scenario these vital issues were left open, while in that of Bill C-52 they were restricted to the Indian Act status quo. As mentioned above, there is some danger that the Partners scenario may lead to the impasse presented by the Bill C-52 approach unless more precise and open membership criteria are specifically addressed.

This, of course, returns the discussion to the same issue that appears and re-appears throughout this paper: Who is the self-governing First Nation for recognition purposes? There seem to be two ways to tackle the issue. The substantive elements required could be set out, or a process described. Partners appears to choose the latter, but does not set out the process in sufficient detail. Assuming that Convention 169 of the International Labour Organization sets out appropriate criteria for recognition of a First Nation, how might these approaches work in practice? To recall, Convention 169 reads as follows:

1. This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially, by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.<sup>1006</sup>

(i) Substantive Identification Criteria for the Partners "Group"

A substantive approach might include giving a weighting to these criteria and then matching them to Canadian Indian groups for purposes of voting in the "constituent assembly" start-up group that Partners envisages. An appropriately composed start-up group would be in a better moral, legal and political position to claim both internal and external legitimacy for those decisions and to be accorded the recognition required for the exercise of third order powers.

For example, a number could be assigned to the Convention 169 criteria by way of analogy with shareholders whose shares have different voting rights in a corporation. Thus, for example, actual membership in a "tribal" unit as appears in criterion (a), (which seems to refer most clearly to

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<sup>1006</sup> Supra note 611.

bands under the special regime created by the Indian Act) would be worth a 6 (resident band member) or a 5 (off-reserve band member). In short, band members, whether DIAND or the band controlled membership would be of roughly equal worth in terms of voting in the initial decision-making process. There would be no attempt to discriminate on the basis of blood quantum, since it is actual membership that counts, even though that membership will clearly be a function of historic blood quantum and kinship factors that have been described and criticized earlier in this paper. For obvious reasons, actual residency should count for more.

"Peoples... who are regarded as indigenous due to their descent" under criterion (b) seems to refer to persons who may not now be members of a distinct political unit, but who are racial descendant of persons in such units. This would refer to status Indians who have been denied band membership by bands that control their membership, and to non-status Indians. Here blood quantum is a clear requirement, since the term "descent" is used. Those who are status Indian non-band members because a band that controls its membership now refuses to accord them membership might be assigned a weighted vote of 4, while those who are non-status Indians might be assigned a weight of 3. In both cases these persons would have to demonstrate descent through a familial connection to the "tribal unit" (band) in question where they wish to exercise their voting rights.

Self-identification in criterion (c) is another factor that must be weighted. It would not be enough to self-identify as "Indian" - it must refer to self-identification as "tribal" or "indigenous." Translating this into the language of the domestic Canadian landscape, someone who self-identifies as a member of a particular band would qualify for a weighted vote of 2, while someone who merely self-identifies by the generic term "Indian" would be entitled to a vote of 1. But how to distinguish between the two types of self-identification? It is suggested that in order to qualify for the weighting of 2, someone must have made himself or herself known to the tribal unit or to the federal or provincial government as a descendant of that unit. There must be some documentary proof of having done this or else such a person is only entitled to a weighted vote of 1. Those with weighted votes of 2 may vote in the band to which they have identified their connection. Those with 1 will vote with the band from which they are actually descended.

Thus, every individual who is a status or non-status Indian is entitled to vote and everyone will have a vote that is weighted. On reserve band members will receive 6 and 2 for a total of 8. Off reserve band members will have 5 and 2 for 7. Status Indian non-band members will have 4 and 2 for 6. Non-status Indians will have 3 and either 2 or 1, depending on whether they can satisfy the band connection criterion in the self-identification context described above. They will have therefore a weighted vote of 5 or 4. When the initial votes for ratifying the constitution and citizenship code is taken by each band, all will have therefore the right to participate, and presumably the right beforehand to form parties and lobby groups etc. to attempt to influence the shape of the constitution and citizenship code. In the process of preparing and then voting on the constitution and citizenship code, including who ought to be a citizen after third order status is attained through recognition, different people would have differently weighted votes on the formula set out above.

Evidently, the weighting assigned to each group could be more or less, and other gradations could be introduced. The crucial factors will be to allow all those who are interested in a legal sense (by way of the fiduciary relationship referred to earlier in the Corbiere context<sup>1007</sup>) to participate. In other words, the key will be to ensure a due process requirement, all the while giving appropriate primacy to the factual reality of existing reserve band communities with long standing resident populations and that have maintained the "tribal" unit to which Convention 169 refers.

Clearly, there are other models and other approaches to this issue that could have been canvassed. The foregoing is presented for illustrative purposes only and to stimulate discussion. For example, another model is that of the Indian Reorganization Act to which reference has been made earlier in this paper.<sup>1008</sup> It bases its approach on a combination of Indian blood and geographic distance from a tribal unit. Ethnological Indians who are tribal members are recognized immediately as Indians upon proof of tribal membership. Ethnological Indians who are not members but who are descended from members and who are resident within the reservation are also recognized as Indians. Evidently, they must demonstrate their descent from tribal members. Other ethnological Indians neither tribal members nor reservation residents must satisfy a fairly stringent fifty per cent Indian blood quantum, regardless of whether they are descended from tribal members and even if they live near the reservation.

Thus, this approach sets out, in effect, different criteria for recognition as an Indian depending on the degree of "closeness" to the residual unit - the tribe. Under the American approach, the first two groups had equal rights in terms of the structures that emerged under the IRA. The net result on many reservations (such as Pine Ridge in South Dakota) was that those who were not tribal members at the time the IRA was conceived were able to take part in the initial decisions and eventually took over the IRA-based tribal government. This led to problems later on between the traditional faction (mostly full-bloods living away from the major settlements) and the modern faction (mostly half-bloods and living in the reservation towns) and to the well-known incident at Wounded Knee, South Dakota.<sup>1009</sup>

#### (ii) A Process for Defining the Partners "Group"

Evidently, there are many conceptual and political difficulties with any substantive model of the types set out above. It is both politically and morally hazardous for non-Indians to assign an arbitrary value to the perceived degree of connectedness of an Indian person to an Indian group. In a sense, it reproduces the nineteenth century status and membership criteria in different form.

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<sup>1007</sup> See text at note 310, supra.

<sup>1008</sup> Supra note 590.

<sup>1009</sup> See, for example, Josephy's account in "The Sioux Will Rise Again" in Now That the Buffalo's Gone, supra note 131, and that of Vine Deloria Jr. in Behind the Trail of Broken Treaties: An Indian Declaration of Independence (Austin: University of Texas Press, 1990).

The more politically safe course will likely be to accede to the primacy of resident reserve band members who ought to be able to devise and control to some extent a process for developing the constitution and citizenship codes referred to by Partners. This will raise the issues referred to earlier, namely, by what standards are membership issues to be determined and by whom? The Penner Report, like Partners, called for the application of certain unspecified international human rights covenants. presumably in both cases the reference is to the International Covenant on Civil and Political Rights under which the Lovelace Case was decided by the Human Rights Committee under the Optional Protocol (to which Canada is a signatory).<sup>1010</sup>

The Penner Report set out the following procedure that might be the basis for discussion in the Partners context:

1. The people in each community would begin with the Indian Act list, plus those who might be reinstated by any changes in legislation.<sup>1011</sup>
2. Those people would get together to ask who might be missing and to include those they wished to include.
3. These people would agree on membership criteria and thus decide who else might be included or excluded. The criteria should be in accordance with the standards in international covenants concerned with human rights.
4. These same people would agree on appeal procedures and mechanisms.
5. The whole group would then determine their form of government and apply for recognition.<sup>1012</sup>

The resemblance to the Partners approach needs no comment. However, what does require comment is the initial assumption, namely, that one start with the current band membership and leave that almost complete discretion in its hands. Since the Penner Report in 1983, the fiduciary obligation has been recognized in Canadian law. It touches the assets of a reserve and how they are managed. Persons excluded by the current band membership from membership and thereby deprived of access to the reserve as a homeland and as an asset base in which they arguably have a share would then have a right of recourse against the federal government. Thus, it might be better if under 2. the specific list of potential "missing" members was explicitly set before the existing band membership. Thus, the names of the following would be placed before the community:

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<sup>1010</sup> See text and notes 519-21 supra with regard to the Lovelace Case and the Human Rights Committee.

<sup>1011</sup> Bill C-31 was under development at the time and came into force two years later.

<sup>1012</sup> Supra note 17 at 55.

- status Indian band members who are unable to acquire reserve residency rights under the current Act.
- Bill C-31 new status Indians who were unable to rejoin bands that control their membership that have excluded them already;
- non-status Indians who were unable to acquire or re-acquire status under Bill C-31 but who may have a connection through treaty or family to the band in question.

Decisions would be made in the specific cases as they arise and appeals could then be taken by those excluded to the appeal mechanism referred to in 4 above. As argued above, that mechanisms should be external to the community to avoid the problems faced in a similar context in the Martinez Case.<sup>1013</sup> Appeals from whatever appeal tribunal is set up could presumably go to the courts for judicial review or a further appeal.

However, even if all appeal routes were exhausted, all might not be lost for those excluded from band membership and citizenship under the new third order arrangements. The Penner Report had recommended a "general list" for Indians who could no obtain membership in an Indian First Nation.<sup>1014</sup> They would have then been eligible for federal Indian programs etc. Partners, however, contains the seeds of a more ambitious alternative for such people. Although unable to take part in the third order arrangements pertaining to the central case from which they have been excluded, they may nonetheless be able to access third order powers in a different way.

Arguably where sufficient numbers of such people exist in a particular location such as an urban centre, they could form a political unit of their own for purposes of exercising third order powers. Unlike the central case of a distinct group on a land base, this new group would be on the land base of another of the three orders of government - that of the provincial government or its delegate, the municipal government. Thus, whatever powers such a new grouping exercises may or may not "inherent" in the sense of inhering in a group that has maintained its residual powers in existence (in the section 35 sense) through the very fact of remaining a distinct group. By definition, the new urban group is made up of persons who are not members of the distinct group. It all depends on how access to the inherent right to self-government is possible - a topic beyond the scope of this paper.

Suffice it to say in conclusion that in the recognition context, the likelihood of successful political and legal challenges to the legitimacy of whatever group is eventually accorded recognition will be lessened by two things: (1) an adequate process whereby all claimants may present their case for inclusion and appeal to an impartial body any adverse decision; and (2) a reasonable alternative

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<sup>1013</sup> Supra note 18.

<sup>1014</sup> Supra note 17 at 56.

form of acceding to self-governing status should their attempt to join a central case Indian group be unsuccessful.

## **(2) Reserves and Land Management**

### **(a) General Assessment**

The reserve lands regime goes beyond protection to paternalism. The land is both legally owned and administered by the Crown for the "use and benefit" of Indians. The issue of what is of use and benefit inevitably determined by the Crown, but (since 1984) subject, of course, to the judicially articulated standard of a fiduciary. In any event, the DIAND minister performs the following functions without the requirement of obtaining the consent or approval of the band or band council:

- determines band interests by conducting or authorizing various actions regarding reserve lands such as authorizing land use or surveys etc.;
- determines individual interests by approving the allotment of reserve land under CPs and COs, transfers between Indians etc.; and,
- grants interests of outsiders in the form of permits of occupation and leases.

Given the central importance of land, it is not difficult to be sympathetic to the role assumed by the Crown as the fiduciary charged with responsibility for the good administration of reserve lands and assets. Nonetheless, the unilateral exercise by the minister or DIAND officials of such powers over what is often the remnant of traditional tribal or band territory lends credence to Indian charges of excessive ministerial and bureaucratic supervision. It also highlights the clash of perspectives and competing assertions of jurisdiction in cases where reserve lands under the Indian Act are covered by treaties. As mentioned earlier in several contexts, the Indian Act regime ignores (and to this extent "delegitimizes") the nation to nation character of treaties and the retained sovereignty Indian treaty nations claim over their lands.

The Crown discharge of its obligations and statutory duties has been inconsistent. This is reflected by the current reserve land management provisions which are complex, cumbersome and contradictory. The "majority of a majority" surrender provision, the fact that the GIC or minister may avoid the surrender requirement completely in certain case (e.g. expropriation, individual leases), the financial inducements via per capita distributions offered to band members and the presence of powerful families that sometimes monopolize reserve land have all been mentioned as conspiring to defeat the protective features of the reserve land policy.

The various confusing and self-contradictory provisions and the gaps simply add to the problem of proper administration. In modern times, the land management provisions have become hopelessly inadequate due to federal paternalism and the sheer muddle of often conflicting provisions. This inadequacy has been brought into even sharper relief by the judicial

imposition on the Crown of a fiduciary obligation drawing federal officials into a tighter relationship of oversight and protection at the very time Indian bands are seeking greater autonomy in all areas, including how they manage their own reserve lands. This is yet another of the paradoxes associated with the Indian Act.

#### (b) Reserves, Band Members and Land Use

##### (i) Recognized Indian Territories

The Indian Act reserve land provisions set out the criteria for determining the lands that will be recognized by Canada and the provinces as the territory of recognized bands of recognized Indians. Reserves, as recognized Indian lands, enjoy several immunities such as exemption from the land tenure regime of the province in which the reserve is located as well as from many of the ordinary incidents of provincial land law such as liability to property tax, seizure by non-Indians etc. Other important immunities associated with "property" in recognized Indian land include exemption from federal or provincial tax for income earned on reserve. Reserves are therefore geographic enclaves or "islands" of Indianness to a considerable extent in so far as the lands and related regimes are concerned. As the earlier discussion has shown, Indian reserves are now the scene of intense internal political and legal struggles for their control.

##### (ii) Geographic Extent of Indian Territories

It is abundantly clear that, given increasing band populations (whether through births or re-instatements under Bill C-31), the relative smallness of Canadian "postage stamp" reserves, and the failure of the federal and provincial governments to provide even the amount of lands promised in some of the treaties, most Indian reserves are simply too small to support adequately even their present populations. This is one reason for the high rate of migration by reserve Indians to urban centres - a rate that is projected to keep on increasing into the future. Ideally, measures should be taken to re-survey and augment the size of most reserves to permit them to accommodate their projected future populations. Indian land claims will also have to be settled expeditiously - something long-promised by the federal government, but yet to be delivered.

The treaty land entitlement tripartite settlement agreement with most claimant bands in Saskatchewan offers one model for increasing reserve size: transfers of land and/or cash to bands. That cash could be used to purchase new lands or for band economic development purposes. The Indian Act would not necessarily need to be amended to clarify that purchased lands will be reserve lands, since presumably the "special reserve" provision in section 36 would apply (although technically the Crown might have to actually be the purchaser of the land in question. Thus, just as the federal government participated in the enlargement of the second order of government in Canada, granting land to some provinces (Ontario, Québec and Manitoba) and creating others (Saskatchewan and Alberta), there is a precedent for federal involvement in this sort of geographic "nation-building" with respect to the third order of government in Canada.

##### (iii) Homeland Versus Asset Base

The modern Indian Act land regime reflects the history of shifting federal government policy objectives and manifests an unwieldy compromise between the twin goals of establishing a

state-protected homeland for recognized bands of Indians and providing an economic base that could be bartered, exploited, developed commercially (and ultimately merged into the surrounding provincial lands regime once Indians had been assimilated). Many of the tensions between bands and federal officials are due to the conflict between restrictive Indian Act land management provisions and the protective fiduciary obligation, and the need for band freedom to generate income for themselves using their major asset and resource. Much of the factionalism within reserve communities results from the adherence of groups to one of the two views: homeland versus asset source.

Much also results from the tensions between those who already "own" (by CP or through customary land tenure) or otherwise control large blocks of land on their respective reserves and others who wish to acquire greater power and control of lands and resources for themselves. The decision about the purpose to which reserve lands should be put is one that can only be made by the band itself. Given that on many reserves small elite groups may own substantial blocks of land and may also control reserve political matters, band decisions of this nature ought only to be made within the context of new political and accountability structures and processes that will provide assurance that any decisions taken are reflective of the wishes of the self-governing First Nation as a whole.

#### (iv) Who Decides How To Use Indian Lands?

The group with an interest in how reserve lands are used and disposed of is a potentially wide one, encompassing more people than the actual residents of any particular reserve. It certainly includes off-reserve band members. It also likely includes new status Indians (primarily through Bill C-31) who have a historic connection to the band, but who may not be band members because that band controls its membership and has chosen to exclude them. It may also include off-reserve non-status Indians who are not band members, but who may have a historic connection to the band. This historic connection may include, for example, descent from a band member signatory of any treaty to which the band in question is a party. Although federal policy is not to recognize such persons as entitled to treaty benefits, such a narrow interpretation may not survive a searching fiduciary analysis.

Decisions about the degree of control a band ought to be entitled to exercise over its own lands is intimately related to the primary issue raised in the preceding section: Who are the people who make up the band or First Nation that will make decisions about the land? The discrepancy between the actual reserve population and the wider group of people with an interest in reserve assets has been studied by parliamentary committees and other bodies that have attempted to square this particular circle. Different solutions have been proposed, but none has yet been attempted. Partners likely implies that the start-up self-governing "group" for initiating third order government, including decisions about land that it possesses, will be limited to actual band members. If that is so, there may be serious legal and political problems in permitting it to make decisions affecting the rights and interests of those not currently recognized under the Indian Act as band members.

Limiting land use decisions to the smaller group of people made up of actual reserve residents to the exclusion of others who may have an interest in such decisions appears unacceptable. But permitting off-reserve band members or others who may have no desire ever to return to the reserve to control such decisions appears equally unacceptable. The distinction drawn between political and asset management functions referred to in the Corbiere Case<sup>1015</sup> may be a useful way to resolve this dilemma. It would more than likely require amendments to the governance provisions of the Indian Act to divide band council functions between political and asset management functions, with a different voter eligibility list for each. It would also require better accountability mechanisms to ensure that band decisions are in fact collective ones and not merely the reflection of the "majority of a majority" surrender provisions discussed earlier whereby a relatively small number of people may make important decisions of this nature. However, this would be a cumbersome solution, and it is not clear that all band decisions fall easily into the neat categories of "political" or "asset management."

A more satisfactory solution would lie in a clear and adequate recognition policy of the type recommended in the preceding section requiring both a proper constitution with accountability mechanisms as well as a membership/citizenship code referring to a more representative group that would comprise the initial First Nation for self-government purposes. A wider group would be in a better position to draw a balance between the needs of actual reserve residents and off-reserve interested persons, which decisions could be reviewed through the same appeal process provided for membership/citizenship decisions (so long as such a mechanism was impartial and independent). In short, a "constituent assembly" of those interested (in a legal as well as a political sense) would have a greater degree both of internal and external legitimacy<sup>1016</sup> and would arguably be in a more secure position in terms of decisions about lands and land use.

### (c) Aboriginal Title, Reserve Land Ownership and Management

#### (i) Possession Versus Ownership

A major issue is the precise legal nature of the title through which Indians occupy their traditional and reserve lands. The law recognizes "Aboriginal title" (upon adducing proof in court sufficient to satisfy the modern test) as a possessory interest ascribed to Aboriginal people as a result of their historic occupation of their traditional lands. The Indian interest in reserve lands was held in Guerin<sup>1017</sup> to be of the same nature. Full legal title to general and to reserve lands in Canada is held by the Crown - federal or provincial.

Proprietary rights in Canadian law are thus held by the Crown, with mere possessory rights held by Indian bands. Since the Guerin Case courts now recognize Aboriginal title as a legal right. However, this cannot hide the fact that Indian people on reserve, even on their hereditary lands,

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<sup>1015</sup> Supra note 310.

<sup>1016</sup> This distinction is drawn from Chartrand, "Aboriginal Self-Government", supra note 996.

<sup>1017</sup> Supra note 24.

are not considered in Canadian law to "own" those lands. Since domestic Canadian law equally refuses to recognize Indian sovereignty over traditional or reserve lands, any sale or other loss of such lands takes them out of Indian sovereign possession forever. They then revert to the sovereignty of the ultimate proprietor, the Crown, be it federal or provincial. This is not so with respect to general lands within federal or provincial sovereignty where a purchaser comes within that sovereignty upon acquiring land.

#### (ii) Discovery and Ownership

The doctrine of discovery and settlement is at the root of the rule in Canada that Aboriginal nations do not and cannot own their own lands unless the title has been granted to them by the Crown (as in the case of the Québec Cree and Naskapi bands, the B.C. Sechelt Indian Band and the Yukon First Nations). According to this theory, the "discovering" European nation acquired the right to purchase Indian lands from the Indian nation then in possession of them. Later, discovery by Europeans came to be interpreted as meaning that, upon discovery, the legal title to the lands of the "discovered" Aboriginal nation passed through the act of discovery itself to the "discovering" European nation - a proposition that has yet to be convincingly explained in legal theory.<sup>1018</sup> In any event, discovery was complemented by settlement and the assertion of actual as opposed to potential sovereign jurisdiction over Aboriginal lands.

Nonetheless, at root the re-interpreted discovery doctrine is ultimately based on the fact that European nations refused to recognize the status of Aboriginal peoples as nations equal to themselves. In the same way they did not (except at the outset or when pressed by the need for military alliance etc.) recognize Aboriginal lands as being "owned" by Aboriginal peoples in the sense in which European lands were owned. Whatever rights to their land that Aboriginal people may have had to their lands was seen as a cloud or burden on the superior legal title of the discovering (or successor) sovereign power that could be removed in law at the pleasure of that sovereign.

Hence the failure of the Constitution Act, 1867 to refer to Aboriginal land tenure or rights. At Confederation, legislative jurisdiction over "Indians and Lands reserved for the Indians" was awarded in section 91(24) to Parliament. The provinces received legal title to land and natural resources in section 109. Any recognition of Indian land tenure must be inferred from the reference in that section to "Trusts" and to "any Interest other than that of the Province."<sup>1019</sup> Hence

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<sup>1018</sup> The classic statement of this re-interpretation is in Marshall C.J.'s judgment in Johnson v. McIntosh (1823) 21 U.S. 543 at 573: This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. Later, he came to question his own re-interpretation of the discovery notion in Worcester v. Georgia (1832) 31 U.S. 515, but by then it was too late as the re-interpreted discovery theory had been widely adopted.

<sup>1019</sup> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

the calls in some quarters for a constitutional amendment (a section 109A, in effect) to recognize Aboriginal land rights of the same nature as those recognized by section 109 for the provinces in order to overturn the interpretation of section 109 offered by the Privy Council in St. Catherine's Milling v. The Queen.<sup>1020</sup>

Given the tenuous nature of Aboriginal sovereignty and of Aboriginal title in the Canadian legal system, the surrender provisions of the Indian Act are of tremendous symbolic importance. They reflect the requirements of the Royal Proclamation of 1763 and offer a limited form of recognition of the residual sovereign power of the modern remnant of the Aboriginal nation to decide how to deal with its own territory. They have real importance too: they impose a check on the sovereign power of Canada to deal with reserved Aboriginal lands. They also prevent individual Indians from dealing with their allotted portions of the reserve lands to the detriment of the band as a whole. They are thus a reflection of the twin policy goals mentioned above: they affirm the policy of protecting Indian reserves as a homeland, while at the same time allowing land surrenders for commercial or other purposes under certain conditions.

The discovery doctrine and its concomitant, Aboriginal title, are unacceptable as the basis upon which relations between Aboriginal and non-Aboriginal peoples should be grounded. Aboriginal title has no meaningful content in Canadian law - it has served mainly as a judicial device to prevent governments from running roughshod over Aboriginal rights. In this sense, it is a verbal formula that serves as a judge-made "fence" around Aboriginal lands to prevent legal incursions by the dominant federal and provincial governments. In the same way that Partners has proposed recognizing residual Aboriginal sovereignty as a third order in the Canadian federation, there ought to be a corresponding recognition of Indian ownership of their own lands.

### (iii) New Forms Of Indian Land Tenure?

However, in one of those paradoxes that keep appearing in this area of the law, Indian people are unlikely to wish to replace the legally vague concept of Aboriginal title with a notion such as fee simple that rooted in the common law legal system and operating on different premises derived from the feudal nature of English land law. They are generally opposed to extinguishing their Aboriginal title in favour of fee simple ownership, despite the greater legal force of the latter in domestic Canadian law. Fee simple title is more easily alienable, and this raises the spectre of gradual loss of lands and with them, the loss of a homeland. The "checkerboard" pattern of land

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The new provinces of Manitoba, Saskatchewan and Alberta were placed in virtually the same position through the Constitution Act, 1930 while British Columbia was dealt with in similar terms in the 1930 constitutional amendment and in the earlier the British Columbia Terms of Union. Prince Edward Island has a similar scheme set out in the Prince Edward Island Terms of Union, as does Newfoundland in the Newfoundland Act.

<sup>1020</sup> Supra note 15 at 58 where Lord Watson disposed of Indian rights in lands within provincial boundaries after 1867 by referring to the Indian title as a mere "burden" on the underlying Crown title, characterized in terms of section 109 as "an interest other than that of the Province in the same," and therefore the complete property of the province upon surrender by the Indians to the federal Crown.

tenure within most American Indian reservations offers compelling disincentives to Canadian Indians to provide any inroads at all to non-Indian forms of land tenure such as fee simple ownership. In the United States the patchwork of communal tribal lands, trusts lands individually allotted to tribal members, fee simple land owned by Indians, fee simple lands owned by non-Indians, federal, state and county lands including state chartered towns on state land and the often differing subsurface regimes have created a jurisdictional nightmare and made unified zoning and tax regimes impossible.

However, Aboriginal title appears equally unacceptable as the basis for Indian reserve land tenure because of its lack of substantive content in Canadian law. And it is similarly unacceptable that Aboriginal people be required to extinguish it in exchange for legal title. Until a middle road can be found, it would appear to be unwise to transform Aboriginal title to legal title for most Indian reserves. Unlike the Québec Cree and Naskapi bands and the Yukon First Nations, all of which own their lands in fee simple or the equivalent and which have relatively large, relatively resource-rich tracts of lands in northern Canada far from commercial developers, most reserve-based Indian bands have small tracts of land south of the 60th parallel and are more at risk of loss as a result of commercial or development pressures. This is especially the case where reserve lands are within or immediately adjacent to urban centres.

One possible solution is to harmonize common law concepts with Aboriginal traditions such as has been attempted by the Sechelt Indian Band. While owning its land in fee simple, it nonetheless cannot sell its land except in accordance with procedures set out in its constitution in which three quarters of the Band membership must vote in favour. However, the situation of the Sechelt is anomalous, and not easily comparable to that of most Indian Act bands. There is simply too much risk of loss of land, especially given the need for improved governance and accountability mechanisms and the need to ensure that all those who are interested in reserve assets participate in decisions regarding their disposition.

A better solution and a possible middle road would be to recognize Aboriginal title exemplified by reserves as a valid form of title on a par with fee simple title, but within the third order sovereignty of self-governing Indian First Nations along the lines proposed in Partners. In short, and following the Partners approach of re-interpreting existing constitutional provisions, section 109 should be recast as a recognition of Aboriginal land and resource ownership on a par with the sovereign ownership awarded to the provinces.

If Aboriginal groups "in possession of their own lands" constitute a third order that has been forgotten or ignored but which is now entitled to resume its rightful place, then that third order government should logically have the prerogatives of the other two orders. In the area of lands, the primary prerogative power is that of recognized sovereign ownership of the lands and the resources on and under them. A compelling case for this type of re-interpretation of section 109 is most evident with respect to treaty Indian nations, although every situation where reserves have or should have been set aside would appear to fall within the category of "trust" or "interest" in terms of section 109. In this regard, section 109 and its interpretation in the St. Catherine's Milling Case

afford yet another example of the narrow type of judicial reasoning that flows from the exhaustiveness doctrine that sees all law-making space within the Canadian federation as having been divided between the federal and provincial governments in 1867.

If, on the Partners approach, sections 91 and 92 can be viewed as having preserved a zone of "core" Aboriginal law-making space, then mutatis mutandis so can section 109 be reinterpreted with regard to the nature of Aboriginal land tenure. Much law has been made in the interval between the Royal Proclamation of 1763 and the Constitution Act, 1982. Most of it has been made with no regard to the quality of Aboriginal groups as partners in a three order federation. The legal rules developed in that interval, especially those regarding lands and resources, must not be allowed to undermine the third order status of modern Aboriginal nations.

If Indian nations were viewed as having province-like sovereign ownership of their lands, non-Indians or non-citizens under such a scenario would be able to purchase such lands, but would then bring themselves within the sovereign power of the Aboriginal self-governing entity in the same way that persons purchasing land in a province come under provincial land law. The province does not lose underlying title or jurisdiction merely because someone from another province or another country has purchased a tract of land. Harmonization between Indian and provincial land tenure systems and related arrangements could be made on the basis of comity or some similar principle. Given the commercial and financial realities of Canada, there are compelling reasons for such a harmonization of tenure systems. It would be important to ensure that procedures for disposing of land were agreed to and set out in the First nation constitution, and that there could be no possibility of loss of First Nation jurisdiction or sovereignty over it if it were sold to outsiders.

Aboriginal title land that is not reserve land and which is still subject to comprehensive claims, could be dealt with according to the negotiation procedures envisaged by Professor Webber whereby the rights it would bring would reflect the circumstances, needs and desires of the negotiating Indian First Nation.<sup>1021</sup> If the land became part of the defined territory of that First Nation as a result of self-government negotiations, however, it could take on a character appropriate to third order sovereignty as mentioned above, since it would then be beyond the land law system of the other two orders of government.

Thus, it is the conclusion of the writer that the problem with reserve land status and tenure lies for the most part in the fact that Indian Act bands have no sovereign "government-like" power over them. The direction proposed above could satisfy the original policy goal of protection while permitting open dealing with reserve lands, with transactions recorded in Indian land registries operated by third order and sovereign Indian governments within the Canadian federation. In the absence of Aboriginal sovereignty, federal protection must be complete since there is no jurisdictional space for Aboriginal powers to operate. The numerous technical deficiencies noted

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<sup>1021</sup> Jeremy Webber, "Informal Discussion Paper: Aboriginal Title Issues," Research paper prepared for the Royal Commission on Aboriginal Peoples, November 30, 1994.

in Part 2 exist primarily because the structure of the Act is confused by a lack of overall policy direction that would allow those deficiencies to be corrected. There is little point in correcting them, however, without a policy blueprint aimed ultimately at restoring Indian control over their own lands through the recognition process referred to earlier.

Evidently, while bands are in the process of re-acquiring the powers they will need to manage their own lands, they may have to continue to use the Indian Act provisions out of necessity. In such a case the limitations of the Act will likely be more tolerable, since an end will be in sight.

#### (d) Balancing Interests: A Federal Role?

Where is the surrender requirement and the Crown fiduciary obligation in all this? In other words, is there still a role for federal protection of Indian territories? Under conventional understandings of domestic law that denied the existence of Aboriginal sovereignty and with it the ability of Aboriginal nations to bring land purchasers within their jurisdiction, the surrender requirements and the related fiduciary obligation were and continue to be necessary. Otherwise, Indian reserve land would have been considerably diminished or even lost during the period in Canadian history when land development and resource exploitation were key factors in prevailing non-Indian notions of social and economic progress.

Under the scenario sketched out above, federal protection will be exercised at the moment of recognition of the self-governing First Nation that draws up its constitution and citizenship code. Assuming that all the people who need to be involved in this First Nation constituent assembly, participate in the initial decisions, the federal role would appear to be simply a confirming one. The First Nation upon being recognized as such will exercise sovereign jurisdiction over its own territory: it can never be "lost" again. The constitution will set out government procedures, including accountability and other democratic mechanisms that will guarantee essential fairness on the part of First Nations regarding their dealings with their own citizens. If Canada can be satisfied that those presently covered by the Crown fiduciary obligation have recourse under their own governing structures to fair mechanisms for apportioning the benefits and sharing the obligations under First Nation self-government, then the fiduciary obligation should be satisfied.

Thus, it seems clear that the fiduciary obligation will diminish in direct proportion to the take-up by third order First Nation governments of their self-governing powers and responsibilities. But will they take them up to the ultimate exclusion of the fiduciary obligation? In other words, will there be a continuing Crown oversight and protection role? Indian reserves were and are in many respects internal colonies created under historic Canadian Indian policy. Perhaps an analogy could be drawn with the "sacred trust" assumed by UN members under Article 73 of the United Nations Charter for "non-self-governing territories" under international law.<sup>1022</sup> U.N.

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<sup>1022</sup> Article 73 of the United Nations Charter reads as follows with regard to territories in former colonial possessions:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants

members states pledge in this case to assist in the development of self-government with respect to such territories.

One of the advantages of the Article 73 example is that its international character may fit more easily with the assertions of treaty nations than do standard domestic concepts. The reference to the "sacred trust" taken on by U.N. members in this regard also serves to reinforce the fiduciary nature of the obligation in the face of the inevitable federal tendency to avoid or reduce its obligations towards Indian nations. This model also seems more appropriate to the transitional character of the relationship. In the early period of Crown-Indian relations a similarly protective relationship was embraced. Unfortunately, the Crown never permitted Indian nations to move away from tight protective embrace towards forms of local and regional autonomy appropriate to the evolving nature of the Canadian federation. Instead, Indian nations were held in check in a somewhat perverted form of the protective embrace while attempts were made to civilize and then to assimilate them. An Article 73 model would help avoid this trap by its specific reference to an obligation to "develop self-government" and to assist them in the progressive development of their free political institutions...".

In any event and leaving Article 73 aside for the moment, the answer to the question of continuing Crown oversight and responsibility depends very much on whether third order Indian Nation government can be defined as "full" self-government in the Canadian federal context. This depends on the form and extent of Indian self-government and on the nature and extent of the judicially articulated fiduciary obligation. These are not easy issues to dispose of and they are raised here simply to note that they have relevance for the land-related aspects of self-governing First Nations as well as for self-government as such. It is the view of the writer that given the relatively low status of First Nation government in relation to the other two orders in the Partners scheme, the fact that they have proportionately less territory, and the fact that they have lost the advantages that economic development would have given them had they continued to have access to the resources on and under their traditional territories, they will likely always be relatively disadvantaged and subject to a Crown duty of care and protection.

If Confederation is seen as a bargain, then theirs was and continues to be an unequal one. They will always be dependent, in short, on the two levels of government created at Confederation and reflected in the Constitution Act, 1867 and at the mercy of their discretion in many ways. In short, the fiduciary relationship will continue in revised form, and the attendant (and perhaps attenuated) obligations will take on the new form appropriate to the new relationship in which they are cast.

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of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost...the well-being of the inhabitants of these territories and to this end; (a) to ensure, with due respect for the culture of the people concerned, political, social and educational advancement, just treatment and protection against abuse; and (b) to develop self-government, to take due account of the political aspirations of the people and to assist them in the progressive development of their free political institutions according to the particular circumstances of each territory, as peoples and their various stages of development.

### (3) Resource Development

The Indian Act resource management regime is subject to the same federal protection characterizing the lands management regime. The problems with the resource regime appear to go much deeper than simply easing its paternalistic rigours, however. The simple problem is that Indians are not viewed as owning the resources on or under their lands. While the federal and provincial governments would likely have few difficulties recognizing Indian ownership of the surface of Indian lands, the resources are another question. Resolving this particular dilemma will be crucial to the success or failure of third order Indian self-government, since no government can be called even partly autonomous if it does not have access to the physical and financial resources required to pay for its own functioning.

The specific natural resources discussed earlier are timber, minerals, oil and gas, sand and gravel, water, and wildlife. The law regarding water rights is unsettled while that concerning wildlife harvesting is in turmoil due to the impact of section 35 of the Constitution Act, 1982 and the ruling in the Sparrow Case. The law around the other four is a function of the problem of Aboriginal title referred to above. Despite treaty promises and oral undertakings to the contrary in many cases, Indians are not considered to "own" timber, sand and gravel or resources under their reserves, although they usually do receive at least some of the income from their sale or exploitation. Their rights are possessory and beneficial only, and ultimately dependent on the good will of the federal government to return to them the moneys that flow from their sale or exploitation. The only real power Indians have is that of refusing to surrender or give consent to the development of the resource in question.

The same situation prevails with respect to two modern self-government agreements: the Cree-Naskapi (of Québec) Act and the Sechelt Indian Band Self-Government Act. It is different in the northern territories where federal lands are extensive and lightly populated. The final land claims agreements with the Gwich'in of the NWT and the Yukon First Nations grant subsurface resource ownership to them on settlement lands as well as a significant voice in resource management matters in the surrounding lands that are part of the settlement package. These Indian governments are therefore in a better position than their southern counterparts to finance their self-government aspirations and to maintain a proper balance between environmental and purely economic concerns.

It is unacceptable that Indians in southern Canada do not have the same sort of access to the resources underlying their reserves or a role in managing resource extraction, water rights and wildlife harvesting and conservation on the lands adjacent. Real self-government will elude them without the resources and resource co-management powers needed to support it. Provinces own land and resources (due to section 109 and similar constitutional provisions) and Indian nations as an order of government within the federation ought to be recognized as having similar rights. Otherwise, third order status in the form in which Partners conceives it is a hollow verbal formula for perpetuating and constitutionally entrenching the status quo.

However, it is equally unacceptable to quickly overturn a system of resource exploitation and management that has created third party rights and interests and which will likely lead to federal/provincial/Aboriginal political conflict. It cannot be expected that provinces like Québec and British Columbia will easily relinquish or even share control over resources upon which a large part of their own prosperity has been based. In the case of Québec in particular, it cannot be overlooked that there are no federal/provincial agreements in this area and that, because of the unusual history of reserve creation, the province claims full ownership of Indian lands and resources upon a surrender.

Evidently, there is a middle ground to be explored via the negotiations mandated by the process set out in Partners. It is the writer's view that self-governing First Nations should own their own lands and resources under them pursuant to whatever land tenure and resource extraction and exploitation scheme they agree to be bound by in their constitution. But by the same token, they should not expect to control the management of these resources outside national or provincial resource management schemes that may be in place for economic or other vital federal purposes.

In summary, if third order Indian government is to be anything more than a verbal gesture, they must be recognized as having province-like sovereign ownership of resources subject to national energy and economic policies. Otherwise, most will continue to be the poor sisters of Confederation, destined to manage nothing more substantial than their own relative poverty. Saik'uz elder Sophie Thomas sums up the current situation well:

Now, the government wants to give us self-government. With what will we govern? They have taken our land! They have taken our timber! They have taken our fish! What will we do?<sup>1023</sup>

#### **(4) Wills and Estates**

The wills and estates provisions represent one of the remnants of the initial thrust of the early civilization and assimilation policy. Designed to teach private property concepts and to reward Indian men in possession of individual allotments of land, they have survived into the modern era and present yet another paternalistic measure, thrusting the DIAND officials into the private and personal affairs of Indians. These provisions are also inconsistent. They do not adequately respect traditional or customary methods of distribution of wealth, and diminish the role of family and extended kinship groups in this and other ways. Relatively few Indians make wills and those that do are often the élite families to which reference has been made throughout this paper.

This area is confusing and replete with gaps. Wills and estates is a prime example of an area that is normally a provincial constitutional responsibility and the Indian Act provisions are a thicket of unresolved federal/provincial jurisdictional questions issues. Most of them reflect in one

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<sup>1023</sup> Statement made in response to the 1992 Charlottetown Accord proposals and cited in Edward John, "Getting out of the way: on the road to Aboriginal self-government" 37, No. 3 Canadian Public Administration 445.

way or another the larger issue of the extent of Parliament's ability to occupy the section 91(24) constitutional field to the exclusion of the provinces. They reflect the fact that no jurisdictional space has been left under conventional assumptions for inherent Indian self-governing powers or for Indian regulation of cultural practices. Thus particular questions concerning the relative jurisdiction of the DIAND minister and of provincial judges abound, to the detriment of effective and efficient estate administration.

Issues associated with wealth distribution policies inherent in estates law are important to any government and will no doubt be among the first and least contentious areas taken over in the resumption of self-governing powers under the Partners model. Few areas argue so well for being included within core areas of jurisdiction.

The extent to which this area will be taken up by Indian governments under the Partners model will depend on the extent to which they erect courts or court-like structures to decide the many difficult issues raised by estates law. This will likely be one of the matters dealt with in the constitutions to which Partners refers and will implicate the citizenship/membership code as well, since there may well be internal First Nation rules concerning eligible beneficiaries. Moreover, given that DIAND currently administers over \$170 million dollars for minor children, mental incompetents and missing heirs, it will be necessary that the First Nation have acceptable financial accountability and trust investment schemes in place as well.

In short, these are all matters that will be dealt with as a function of self-government take-up and scrutinized at that time so as to satisfy whatever Crown fiduciary obligations currently exist in the area.

#### **(5) Indian Moneys**

Indian moneys are the equivalent of reserve lands in terms of their administration. Indians do not "own" these moneys; they have a beneficial interest in them. The DIAND minister and officials are impressed with a fiduciary obligation to manage them and to ensure that they are spent for the use and benefit of the band in cases where the band has access to them. The provisions are as unwieldy and the procedures as time-consuming as are those respecting lands, and the complaints by Indians are of the same type.

The provisions are paternalistic. The minister decides whether to release capital and revenue moneys to the band and whether to grant a band the power to manage its own revenue moneys. They are also inconsistent and confusing and have significant gaps: the capital/revenue moneys distinction is not necessarily in accordance with standard accounting practice; the authority to manage revenue money does not allow actual collection of the moneys by the band; technically and legally doubtful practices have developed to overcome these problems, usually with some degree of official complicity. The provisions are inappropriate for modern band needs and actual practices may be in breach of the Act and of the fiduciary obligation. It is a difficult situation for all involved.

It is the assessment of the writer that these provisions are as inconsistent with the new relationship espoused by Partners as the lands and resources provisions and are amenable to the same solution: First Nation ownership of them subject to the provisos mentioned earlier. Thus, there ought to be an appropriate recognition policy calling for a constitution and citizenship/membership code incorporating all who should be included in the initial third order self-government decisions. In this way the Crown fiduciary obligation to deal with assets for the use and benefit of all the beneficiaries can be addressed.

Thus, as with the wills and estates provisions, there will have to be adequate financial accountability mechanisms and a trust investment scheme to safeguard the approximately \$900 million that will presumably be transferred from DIAND to the various self-governing First Nations.

### **(6) Leadership Selection/Elections**

Leadership selection procedures are more difficult to assess than some of the other provisions. One reason for this is that little is known about the custom election procedures under which nearly one half of Indian Act bands operate. DIAND elective system elections under the Act and the Indian Band Elections Regulations (IBER) are clearly paternalistic. The minister may bring any band within the elective system at will, and DIAND controls almost every aspect from beginning to end, including appeals, removing councillors and setting aside elections for various reasons. Thus, the elective system prevents bands from making and adopting their own processes and rules. As noted in the earlier discussion on leadership selection, DIAND officials have been accused of controlling to some extent the manner by which custom elections are held by threatening to bring a custom band within the elective system unless it adopts certain procedures.

The Indian Act elective system is also inconsistent. It restricts voting to persons "ordinarily resident" on reserve, even where the matters touched on (such as the disposal of band assets) affect all band members. If the Corbiere Case is upheld on appeal this voting rule may have to be amended. The two year term is too short for effective action and DIAND is in a position of potential conflict of interest: it runs the election and then rules on appeals from processes it has controlled. Other problems include allegations on some reserves of improper control of elections by influential persons or powerful families and competing power structures where a traditional system may exist in competition with the Indian Act processes.

Confusion and gaps are also present. There are no qualifications for running for chief, and IBER rules are incomplete regarding the election process. Time frames are equally unclear. If the goal is to replicate the democratic procedures elsewhere in Canada then the Act and its regulations appear to be a failure, for they provide Indians on reserve with a second class form of election procedure due to these procedural problems.

In the view of the writer, the current elective system is badly in need of an overhaul. The custom system too may need review to the extent that it too has been unduly and indirectly influenced or controlled by DIAND. But at the same time, it does not appear to be legitimate for

another group of outsiders to impose different structures on bands that have become accustomed to using either elective or custom procedures under the Act. Although originally imposed from the outside, elective band councils may now be a more or less permanent part of modern Indian governance structures on many reserves. The band research director of the Walpole Island band confirmed this for his band a few years ago when he remarked as follows with respect to the Indian Act system: "Whatever our traditions were before, after more than a century, these are now our traditions."<sup>1024</sup> Thus, it seems beyond argument that this is an area where the people concerned have the fullest right and the clearest interest in developing their own solutions.

The ideal solution is a more fundamental rethinking of the type proposed by Partners. Its notion of an initial group that would draw up a constitution and citizenship/membership code is a worthwhile one - provided that the initial group was appropriately inclusive. Assuming an adequate recognition policy to ensure such inclusivity at the outset, the deliberations and early self-government decisions of this group would take on something of the character of a constituent assembly. At this time the leadership selection procedures could be fully debated and decisions could be taken that the constitution would reflect. Failing an inclusive initial group and so thoroughgoing a review, it is difficult to conceive of another manner by which legitimate change could be brought about to the leadership selection process except in the most incremental way.

### (7) Governance

The governance provisions of the Indian Act bring together all the analytical themes used in this paper in a particular compelling way. They are paternalistic in the extreme. The inherent self-governing authority of Indian nations is entirely ignored. Band councils are accorded the narrowest of by-law powers over, in many cases, the most trivial of subject matters. Most by-laws are subject either to ministerial disallowance or approval procedures. They are also subject to any GIC regulations in the same area. Although compared by the courts to federal municipalities in some cases, in other cases bands and band councils are also, and more accurately from a strictly legal viewpoint, characterized as agents of the DIAND minister because of the subordinate nature of their law-making powers.

The governance provisions are also inconsistent. On the one hand they purport to grant local law-making powers. On the other hand, they stymie the exercise of those powers by the heavy overlay of ministerial control. They are also confusing and have significant gaps. The scope of many of the powers is simply unknown. Their ability to override competing provisions from other federal legislation is an issue that is evolving in the courts. In addition, sometimes the same area may be regulated by the band by-law and by GIC regulations passed under s. 73. Provincial laws incorporated by reference by section 88 may also compete with band by-laws in the same area, so long as they are not inconsistent with each other in a constitutional sense (i.e. telling the same person to do different things). Many important governance powers have simply not

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<sup>1024</sup> Reported in John Leonard Taylor, Indian Band Self-Government in the 1960s: A Case Study of Walpole Island (Ottawa: DIAND Treaties and Historical Research Centre, 1984) at 37.

been granted to bands. They cannot, for example, necessarily create a band civil service, nor can they establish or staff local by-law enforcement tribunals or courts. In short, under the Indian Act bands have the facade of government, but without the powers needed to make it a reality.

In summary, the by-law powers and band council decision making structure are almost totally inadequate for the task of restoring meaningful Indian nation self-government to bands. They are the vestiges of an earlier era of almost complete subordination to administrative directives from DIAND and are in themselves a paradigm of the inadequacy and paternalism of the Indian Act. It is these provisions that argue most strongly for the type of new beginning that Partners seems to call for.

Although not mentioned in the Partners analysis, one of the issues to be dealt with in the initial period when the constitution and citizenship/membership code is drawn up is that of listing law-making powers. From the Partners perspective, Indian self-governing powers are inherent in origin and may be exercised within Canada in core areas without the benefit of agreement with the federal or provincial governments. But that does not necessarily mean that they will not have to list their powers in the constitution for the benefit of their own citizens or members. Any system of internal political and administrative accountability will require some clarity for its own purposes and a list will for these reasons be required.

#### **(8) Accountability**

Accountability mechanisms are present in the Indian Act and in its administration, but they are almost entirely external to the band and directed towards the DIAND minister and federal officials. In terms of political accountability, there is really only one mechanism by which band members can call their public officials to task: under the elective system, elections every two years. It is not clear what the equivalent might be in the case of custom procedures that do not involve elections as such. There are no administrative or financial accountability mechanisms in favour of the band membership.

The band council by-law system discussed above demonstrates the extent to which band councils are accountable to the DIAND minister for their political decisions. In the same way, by the terms of whatever financial arrangements the band may have, there is a considerable amount of financial accountability to the DIAND minister or to whatever federal department may be funding a particular program or service.

It is unacceptable that band members have no way of knowing about or challenging decisions or actions by band councils or band officials without going through agencies and officials external to their community. This is another example of the paternalism of the Indian Act and its administration. It is also inconsistent with the development of good government that those who are affected by government decisions have no way of controlling government outside periodic elections. The failure of the Act to address such matters is perhaps its most glaring gap if the intention behind the governance provisions was that band councils become a local model of responsible government. Moreover, the failure of the Act to deal with such matters is causing

internal political and social problems for some reserve communities, and has led to a judicial inquiry in the case of the Westbank Band. Just as the elective system brings second class elections to bands, so too the band council system brings a second class form of government.

This is yet another area that can best be dealt with through the new beginning advocated in Partners. The initial group that has been referred to in this paper as a sort of constituent assembly will be in the best position to design and enshrine in the constitution the most appropriate and acceptable mechanism. The question for the recognition process will be the extent to which the government structures and processes proposed by the start-up groups envisaged by Partners will resemble those of the federal, provincial and municipal governments in Canada, or whether more traditionally "Indian" institutions and processes will be recognized.

This issue, of course, recalls others such as the debate between many on-reserve and off-reserve band members and band councils and Indian womens' groups about the necessity that an individual rights regime such as the Charter apply or whether more group oriented and arguably traditional mechanisms could substitute for them in a modern government context. Under the Partners approach, the Charter would apply to the internal workings of a third order Indian government. This does not, however, dispose of the need for accountability mechanisms in other areas.

#### **(9) Incorporation of Provincial Laws By Reference: Section 88**

Section 88 of the Indian Act is a confusing and complicated provision that has generated much controversy and which is the source of strong criticism by academic commentators and Indian leaders. It stands alongside the general constitutional rule that Indians may be regulated by both the federal and provincial governments: for some purposes Indians are an exclusive federal matter; for others they are provincial residents like any others. This view of the Constitution began to take root after the Second World War and was explicitly endorsed by the Hawthorn Commission in the 1960s. How to differentiate the "federal" as opposed to the "provincial" parts of what it means to be an Indian living on a reserve in Canada is not an easy issue to resolve.

From one perspective, section 88 may be viewed as standing for the proposition that there cannot be an independently "Indian" part of what it means to be an Indian in Canada. As Little Bear has so aptly put it, Indians are "legally surrounded" by federal and provincial laws as a result of this provision.<sup>1025</sup>

Although at one time federal jurisdiction over Indians was viewed as exclusive, as a result of judicial interpretation, section 88 is conceived as having substantially narrowed the exclusively federal regulatory zone. It allows provincial laws that would ordinarily be constitutionally inapplicable to Indians to apply to them. Section 88 incorporates and thereby "federalizes" them, making them part of the Indian Act regulatory regime. In effect, it indirectly expands the "provincial" side of what it means to be an Indian on reserve in Canada. This allows the federal

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<sup>1025</sup> Supra note 875.

government to avoid having to pass laws to deal with the many inconsistencies and gaps in the federal Indian law regime, since provincial law will presumably fill the vacuum. Section 88 thus continues the historic process of bringing Indians within the provincial sphere by removing them from federal protection and regulation.

The DIAND argument in favour of retaining section 88 is that it nonetheless provides some protection against provincial laws. The argument seems to be that section 88 allows Indian Act provisions, regulations and by-laws to occupy the area regulated without the need for the kind of "operational" conflict required in other federal/provincial constitutional disputes. In other words, it is not necessary for the provincial law and the federal law, regulation or by-law to actually collide, it is enough if the federal law, regulation or by-law exists in a particular area. However, there would be no need for section 88 at all if the Indian Act by-law powers were wide enough to allow regulation of the areas that the provincial laws cover. In short, there would be no vacuum of law-making powers if the band council powers were truly those of a government and not a mere administrative arm of DIAND.

However, under the Indian Act as presently interpreted, that is exactly what they are.

Despite the possibility of a legal vacuum, the legal complexity and confusion and ill-will generated by section 88 appears on balance to outweigh its usefulness as a method of filling the legal vacuum caused by the incomplete nature of the Indian Act, the reluctance of the federal government to pass laws filling the gaps and the unwillingness of the courts to recognize the plenary nature of inherent Aboriginal self-government powers. Indians are already provincial residents for a host of the ordinary incidents of life on reserve in Canada (e.g. traffic regulation) and the extreme intrusion of even more provincial laws into the life of Indian communities allowed by section 88 is increasingly unacceptable. First in their occupation of the Canadian land mass, Aboriginal peoples should not be third in the occupation of law-making powers over themselves and their territories merely because it is inconvenient to overturn legal conventions about jurisdiction developed without their participation.

The ideal solution to this particular dilemma was provided by the Penner Report: federal occupation of the whole Indian constitutional area and then evacuation in favour of inherent Indian First Nation powers. However, it is not clear that this is good constitutional law, and it is certainly not good constitutional politics. A better solution appears in the approach proposed by Partners: in core areas First Nation law-making powers would prevail over competing federal and provincial laws on normal constitutional grounds. Federal paramountcy over third order Indian government laws would require satisfying the Sparrow test, otherwise the Indian government laws would prevail in the case of conflict. In the interim, transitional period, provincial laws could be incorporated by third order Indian governments until they are ready to enact their own in the same area.

#### **(10) Seizure and Taxation Exemptions**

These exemptions are carryovers from the period when Indian policy was directed towards protection of Indian land and assets. It was also likely a response to the residual sovereignty that

bands maintained at the beginning of the development of the reserve system. These provisions are easier to evaluate than others because they have generally been advantageous to Indians and to bands and appear to enjoy the continuing support of some branches of the federal government. Thus, they have been retained in the self-government context for the Cree and Naskapi of Québec and the Sechelt Indian Band. A relatively recent federal government discussion paper on Indian taxation issues proposes that the taxation exemption be retained in any future self-government scenario.<sup>1026</sup>

The major disadvantage to the exemption from seizure is that it hinders Indians and bands from providing collateral for loans. The only interest that can be pledged on land is a lease, which means that lending institutions are often loathe to advance money to Indians or bands without a guarantee from the federal government. This problem might be alleviated to some extent by the establishment of Indian operated banks on reserve, although it is likely that their seed financing would have to come from the federal government.

There are few major disadvantages to the taxation exemption. In many ways it is negligible for the vast majority of reserve based Indians due to the high unemployment and underemployment levels. According to some commentators, it tends to foster the continued dominance of those with money, namely, the élite families. That being said, it is clear that the status Indian exemption from taxation is not supported by most provincial governments or by large segments of the public. However, imposing federal or provincial taxes on them would not necessarily be an advantage to the reserve, since the money would be taken by a non-Indian government. Perhaps, as some have observed, the only real objection to it is that it may be leading to an attitude in reserve communities that will make it difficult in future for Indian governments to levy income and sales taxes on their own citizens\members. This has been the experience in the United States, where tribes are extremely reluctant to tax their own members, a large proportion of whom are impoverished in any event.

In the third order arrangements that Partners pictures, there is no mention of the continuation of Indian Act taxation exemption provisions. Assuming that functioning third order governments impose their own taxes on their own citizens/members and harmonize them with the tax systems of the surrounding federal and provincial governments, there seems no reason why these particular provisions would be retained. There could in such cases be intergovernmental arrangements whereby the federal government might collect the taxes, for example, and remit the appropriate share to the self-governing Indian first nation in the same way as is now done in the federal/provincial tax context. Presumably, exemption from taxes to the other two levels of government or some kind of preferential tax room arrangements will supersede the need for the taxation exemption in section 89. In any event, this is a topic that engages elements of the fiscal arrangements in third order self-government that go beyond the scope of this paper.

With regard to the seizure exemption and assuming Indian lands will be subject to the

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<sup>1026</sup> Department of Finance, "A Working Paper on Indian Government Taxation" supra note 908 at 20.

sovereignty of the Indian government, there should be no fear of them being lost to outsiders. However, if Indian lands are not dealt with the way that has been proposed here, and continue to be viewed through the lens of common law concepts and therefore amenable to being lost to Indian jurisdiction, the exemptions from seizure of land should be retained. In the view of the writer, there is simply too little reserve land to take the risk of further loss.

Regarding the personal property seizure exemption, there ought to be no reason in future to retain it. However, assuming third order self-government, proceedings for the recovery of the property or for the money equivalent ought to be brought in the courts or equivalent tribunals of the self-governing Indian First Nation to ensure that the proper balance is drawn between the rights of the lender or vendor and the potential need to protect Indian assets.

### **(11) Legal Status and Capacity**

The governance powers exercised by the band and band council are only one half of the governance equation. In order to carry out its functions, a government needs the status and capacity in law to enter into legally binding relationships of various kinds such as entering into contracts, dealing with lands, borrowing money and suing and being sued. Unlike the legislative regime providing such powers to the Québec Cree and Naskapi bands, the Sechelt Indian Band and the Yukon First Nations, the Indian Act is silent with respect to these matters.

In terms of governance, one of the primary paradoxes of the Indian Act governance regime is that on the one hand it empowers local reserve governments while on the other placing them under such strict and stifling ministerial and bureaucratic control as to render them almost powerless. That is why, as mentioned earlier, judges have sometimes characterized bands as federal municipalities and band councils as their governments, and at other times characterized them as mere unincorporated associations and as administrative arms of the DIAND minister.

A similar ambiguity colours the question of the legal status and capacity of bands and band councils. Many provisions of the Indian Act, for example, seem to assume that bands and band councils can enter into contractual relations in their own right. The courts have split on the issue, however, some cases denying such a capacity while others recognize it. In the same way, some courts recognize band capacity to sue and be sued, some do not. Similarly, the Act and its band borrowing regulations may be read as recognizing bands capacity to borrow money. Generally, however, the Indian moneys regime prevents bands and band councils from freely dealing with Indian moneys, and their inability to pledge reserve lands or on-reserve personal property means that their effective capacity to borrow from lending institutions is practically nil.

In no case has a band or band council been found to have the capacity to deal with reserve land, except to participate in surrenders or to give consent to certain transactions carried out by the Crown. This is because of the unique nature of Indian land tenure under the Act, namely, Aboriginal title. Nor can bands necessarily deal with non-reserve fee simple lands. In the same way, because of the Indian Act exemption from seizure of reserve land or personal property on reserve, the judicial recognition of a capacity to be sued is somewhat hollow, since successfully

litigants are unable to execute judgment against them except against off-reserve lands and property, if any.

It is clear that recognizing a full legal status and capacity in bands and band councils to contract, deal with land, borrow money and sue and be sued affects many of the protective provisions of the Indian Act. If bands were in no danger of losing lands then there ought to be no impediment to their legal capacity to deal with them. In short, if concerns about these issues could be addressed, there ought in principle to be no reason to continue to deny Indian bands a full legal status and capacity.

Under the approach proposed by Partners, of course, there appears to be no question that the third order government envisaged will be accompanied by the status and capacity that all other governments in Canada possess. The only issue - and the one that arises again and again in any discussion of Indian rights and privileges - is that of dealing with the lands constituting the territory and major asset base of Indian First Nations. Different approaches to this issue have been suggested earlier in the discussion of the Aboriginal title regime of Indian Act reserve lands.

In conclusion, the denial of legal status and capacity to bands parallels the denial to them of a fuller range of self-governing powers under the current Indian Act governance regime. One cannot be addressed without dealing with the other. Neither of these matters can be addressed without a principled resolution of the issue of reserve land tenure. This in turn calls into question the historic Crown role of protection and the requirements of the Royal Proclamation of 1763. Ultimately, the resolution of all these issues turns on the proper conception of third order Aboriginal sovereignty of the type proposed by Partners.

### **(12) Band Financing**

The bulk of band financing is now administered directly by bands or Indian run agencies (like child welfare agencies), whether the money is received from DIAND, another federal department or from one of the provinces that contributes to band functioning in one way or another. Thus, the question of financing is intimately connected to the Indian Act governance regime, and engages considerations that have been noted elsewhere. Band financing reflects a paradox similar to that involving governance. Financial transfers to bands are designed to promote autonomy and accountability by band councils to band membership. At the same time they must meet stringent external accountability requirements in the name of ministerial responsibility to Parliament for public moneys that militate against band political or fiscal autonomy.

A related paradox has to do with the values that are imported into band governments by the present financing system. While ostensibly designed to promote band council accountability to band membership, the net effect may be to divert larger and larger amounts of public money into the hands of a social and political élite who are responsive more to federal requirements and DIAND norms than they are to their own membership. Given the paradox noted above,

however, it is difficult to conceive how to escape this particular dilemma, since it is precisely those band members most skilled in working within government structures who are most likely to be successful in negotiating financial transfers with federal bureaucrats.

Band administration of service and program funding has been evolving since the 1960s and particularly since the criticisms of DIAND controls in the 1983 Penner Report. Contribution agreements were then the main funding mechanism and they continue. They are the least acceptable of current mechanisms from the self-government standpoint, since they treat bands and band agencies as they do any other recipient of federal funds and impose strict and onerous external accountability requirements. Alternative Funding Arrangements are the most acceptable from a self-government standpoint, since they are a multi-year block funding arrangement that allow transferability of funds between activity categories with less onerous external accountability requirements and some internal accountability conditions. Flexible Transfer Payments are a multi-year compromise between the two: with a limited ability to transfers amounts between activities, reduced external accountability requirements and some internal accountability conditions.

Aside from what has been mentioned above, the main differences between them lie in the ability of the administering band to absorb budget surpluses and to be responsible for budget shortfalls. Contribution agreements require the return of surpluses, but allow reimbursement for many forms of shortfall. Alternative Funding Arrangements allow surpluses to be kept, but will not reimburse for shortfalls. Flexible Transfer Payments are similar to alternative funding arrangements in this respect, but are more flexible than alternative funding arrangements in other ways that reduce the risk of shortfalls.

These various funding mechanisms appear to be genuine attempts by DIAND and other federal government officials to establish a balance between grant-like pure fiscal transfers and funding arrangements completely subject to ministerial responsibility and therefore to external accountability requirements. The Auditor General has, however, called for enhanced, not lessened external accountability requirements and for stricter enforcement. In fairness to this critique, there are ample reasons for concern regarding how many bands have actually expended the moneys transferred to them and Indian people, on and off-reserve, have often been the most critical in this respect.

Clearly, strides have been made towards providing bands with the means and the experience to conduct themselves as self-governing entities. As with the other areas canvassed, however, changes to this area without appropriate reforms elsewhere will do little. It is evident that greater accountability mechanisms - conflict of interest codes, financial statements for band members, greater openness in band government etc. - are all required. This will mean changes to the social and political culture of many bands and the development of local impartial tribunals for resolving the conflicts and dealing with the accusations that inevitably colour financial dealings in smaller, family and kinship oriented groups where a relatively few people control relatively large amounts of money and with it local employment and investment opportunities. The federal

courts are simply too distant, too costly and too remote in cultural terms to perform this task.

The approach proposed by Partners would see third order self-government on a local or regional scale emerge within the Canadian federation. Presumably transfer payments of the type already available between the federal and provincial governments and municipalities will be the primary mode of financing Indian self-government. But the relative smallness of these self-governing units will not likely change, not their family and kinship based nature and the fact that factions and conflict already exist in many of them. Hence the enhanced importance of including all who ought to be present to participate in the key start-up decisions and the vital necessity of tough and impartially enforced accountability mechanisms for political, administrative and financial decisions. In small communities these categories of accountability are not as distinct as they are in larger, more anonymous societies. Even where small communities come together as larger "nations," the locus of self-government will still likely be in the individual community if the history and example of regional and national Indian organizations is any example.

### **(13) Summary and Conclusions**

For over a century the Indian Act has dominated Indian community life through the control exercised by the federal government over Indian lands and resources and social and political life. The Indian Act provides only for the creation of band councils exercising minimal and delegated powers and represents self-administration more than it does true self-government. It has created a dependency relationship that is unacceptable as a basis for a relationship of partnership. Indian bands have long sought to change the relationship and to restore the equality that they believe the treaty and nation to nation relationship represent. Since the last major revision of the Indian Act over forty years ago this desire has not abated. The constant theme throughout the past few decades has been the demand for the resumption or restoration of Indian self-government on a nation to nation basis.

The Indian Act ignores all but the most superficial aspects of the nation to nation relationship reflected in the Royal Proclamation of 1763 and in the treaty relationship developed with many of the original Aboriginal political units now within its legislative embrace. In a similar vein, it represents the crystallization of outmoded attitudes and values and is almost completely one-sided in its approach. That is clear. What is equally clear, however, is that moving away from the Act and what it represents will not be easy despite the almost universal agreement on the necessity of doing so.

For one thing, the Indian Act is a system despite its garb as a mere piece of federal legislation. Thus changes to one part of the Act will have unintended and potentially unforeseeable effects on other parts. The example of the seizure exemption comes to mind. Its presence prevents band members from providing collateral to off-reserve lending institutions. To change it will inevitably affect the reserve land regime, itself the central core of the Act and the heart of the historical reserve system. Changes may also affect the treaty relationship as well, since the seizure exemption may refer to Crown undertakings independent of the Indian Act protective framework. In the same way, changes to the status and band membership system will inevitably

have an effect on federal per capita band funding formulae based on status.

For another thing, the Indian Act is more than a simple piece of federal legislation. It is a powerful symbol of a special relationship. It is also the major, legally effective protection of that relationship. Until 1982, it was almost the only one. In this sense, and to the extent it carries into legislative form the promises made in the Royal Proclamation of 1763 and in the treaty relationship, it is (however imperfect) like an "Indian constitution." It regulates almost every important aspect of the life of those who live under its protections and strictures. Thus, changes to the Indian Act, even of the most apparently minute kind, have vast symbolic importance and real consequences for those subject to it. A good example is provided by much of the internal resistance to reform proposals in the reserve land regime. Many Indian people fear, rightly or wrongly, that any diminution in the Minister's role in reserve land management signals and incipient abandonment of the policy of protection and strongly oppose therefore any alteration of the status quo.

In the third place, the Indian Act has created a kind of dividing line between Indian "haves" (those with status and band membership) and "have nots" (those without status and band membership). Despite the racist and sexist policies that created this distinction and the embarrassing injustices that still flow from it (borne mainly by recently re-registered Indian women and their children), an entire Indian social and political system has been built on these foundations. Not only have Indians often internalized these distinctions, they have often internalized the values underlying the Act and its administration itself. For example, the band council system may now itself be a legitimate part of Indian political culture on some reserves despite its manner of imposition and historical traditions to the contrary. Altering part of the legal regime under which the present day Indian social and economic system has developed may lead to political and social disruption.

Finally, it must be noted that the Indian Act is part of the federal/provincial geographic, jurisdictional and fiscal landscape. Both levels of government have based their own conceptions of their relative powers and responsibilities on roughly shared understandings based on the Act and its administration. There have been and continue to be disputes about the relative dividing line regarding responsibilities - particularly financial ones - but the compromise (some would call it a stalemate) between the notions of a federal enclave and that of a specially empowered and partially immune provincial municipality raised by the Hawthorn Report endure. Changes to the Act, such as, for example, including a wider number of people within the status and band members category and possibly adding to reserve land base to accommodate them will inevitably call into question this compromise. This will also equally inevitably open up other federal/provincial issues, especially if the provinces believe that increases to Indian lands, rights, privileges, immunities and powers will come at their expense.

There are no simple solutions to the problems posed by the Indian Act and its legacy. Any process to move away from it and what it represents will likely need to reflect the following principles if there is to be any chance of success. First, the process will have to be a voluntary and

optional one on the part of Indians. There can be no imposed and ready made solution - the history of Indian policy argues against it as do national and international realities. In addition, the treaty relationship in which many Indian Act bands participate compels this conclusion. Moreover, there will likely be some bands that are unwilling to move away from the Act at all in the short to medium term while they deal with fundamental social issues or questions dealing with their future membership.

Second, any process of reform will also have to be phased in order to permit an orderly transition to new arrangements. Bands will not have to move away from the Indian Act except at a pace and on terms that are acceptable to them and which allow them the time to make the necessary adjustments that will inevitably be required. It took time to move from a nation to nation relationship of rough equality in important areas to a colonial one, and it will take time to move away from the Indian Act dependency relationship to restore the original confederal partnership. This will also allow the other partners, the federal and provincial governments, to adjust, and will permit the principles of membership in the self-governing Indian communities, tribal or regional groupings to emerge through negotiations, court or tribunal decisions or otherwise.

Thirdly and most importantly, the process must not be one of delegation of powers from the other two levels of government. It must recognize the inherent powers of Indian governments and the recognition must be genuine - it cannot be a process of restating the community-based self-government policy and simply renaming it. Bill C-52 of 1984 would have been just this sort of verbal sleight-of-hand. This will mean a commitment to renewing the nation to nation approach and casting off into the unknown for the federal and provincial governments, something the first ministers' conferences of the 1980s and 1990s showed they have been reluctant to do. Care must therefore be taken to ensure that there is real jurisdictional space for self-governing Indian nations and that therefore the doctrine of exhaustiveness based on the division of powers in the Constitution Act, 1867 is well and truly laid to rest along with the other doctrines that deny Indian sovereignty over and ownership of their lands and resources. In short, there can be no putting the old wine of delegated law-making authority in the new bottle of the inherent right as governments will inevitably attempt to do.

The process must be a genuine one, allowing movement but not mandating it, and permitting the "biting off" of digestible bits of power and responsibilities by the Indian group concerned as it fleshes out its own sense of what it will need in order to function as a government. Partners envisages just this sort of process, but does not describe it or provide the level of detail that will be required if the effort is to succeed. In this regard, much can be learned by examining past and present Indian Act reform and self-government efforts for hints about what works and what doesn't. However, by the same token, it cannot be forgotten that most of these reform efforts have tended to ignore or downgrade the nation to nation relationship implied by the Royal Proclamation of 1763 and reflected by the treaty process. Like the Indian Act itself, they have gone off in directions at variance with the original partnership between Indian nations and the Crown and colonial authorities.

One promising recent initiative was built on just the sort of optional, phased and non-delegated approach to Indian self-government referred to above. Based on the approach set out in the Penner Report and Bill C-52, the Indian Act Alternatives process grew out of the DIAND Lands, Revenues and Trusts Review of the late 1980s. Because of the negative connotations placed on the DIAND-led LRT Review by many bands and Indian leaders, it was renamed and Indian Act Alternatives. Groups of chiefs and prominent Indian persons were funded and put in charge of developing alternatives to the Indian Act in several areas. Eventually, the process settled on four areas in which it was proposed to draft phased, optional legislation into which bands could opt once they had decided to exit the corresponding areas in the Indian Act.

The four opt-in areas were Indian lands, moneys, forests and governance, and they were designed to allow bands to exit the lands, moneys, forest and band council by-law provisions respectively of the Indian Act. Opting in was restricted to "first nations" defined under each of the draft acts essentially as Indian Act bands. Thus, these acts would have done little to assist off-reserve Indians who were not already members of bands.

Importantly, however, three of the four draft acts - lands, forestry and governance - were based on the recognition by the federal government of inherent first nation authority over the area in question. In each case a similar procedure was to be followed on the rough model of Bill C-52. The band would vote on a majority basis to opt in to the legislative scheme and would present its "lands charter", "forestry management plan" or "first nation government act" respectively setting out its proposed law-making or management authority in the particular area, procedures to ensure fairness, accountability mechanisms etc. These documents would have been the equivalent of the written constitution that were required in the Bill C-52 scenario as a precondition for recognition.

Recognition would have been accorded by a lands board, forestry board or governance board respectively, the members of which would have been appointed by the federal government from a list of nominees from bands. In this way it was hoped to mitigate the power of appointment to the boards that had been within the sole power of the federal government under Bill C-52 while still leaving a federal role commensurate with a recognition process.

Unlike the foregoing, the draft moneys management act was not cast as recognition legislation. It was a framework for the transfer of Indian moneys management from the Crown to bands that opted via a band referendum to take on this responsibility. Two possible ways of proceeding were envisaged. Under the first, the minister could transfer these management responsibilities to a "first nation trustee" constituted by a trust deed between the band and the trustee in question. A trust deed is a legal document setting out the trustee's management duties on behalf of the band. The band would then have been in a position to exercise a greater degree of control over how its moneys were managed. The second scenario was only for bands whose Indian moneys were less than one million dollars. In such a case, the minister could have transferred the moneys to the band council as trustee for its management.

In all four cases the law-making or management powers were not absolute and would have been exercised within the existing federal and provincial constitutional framework. Much of the delay in consulting on and drafting these acts was due to the difficult overlap and paramountcy questions that needed to be dealt with. In short, despite the description of the source of the powers as inherent in three cases, it is clear that the scope and status of the laws were required to adjust to the constitutional reality of an existing panoply of federal and provincial laws. Given that none of these draft acts is proceeding, there is little point in a detailed discussion of how each proposed to deal with these issues.

Nonetheless it is clear that the general scheme of the lands, forestry and governance drafts assumed that these subject areas were essential to inherent Indian first nation powers - from this perspective they could be said to be "core" in a sense similar to that in which Partners uses the term. Thus laws or management powers exercised in these areas of inherent authority would likely have been paramount over competing federal and provincial laws in cases of conflict subject to exceptions that are still the subject of discussion where work on these draft acts is continuing.

## I. CURRENT FEDERAL INITIATIVES

### (1) Land Management Proposal for a Group of Specific First Nations

Although these alternatives to the Indian Act never advanced beyond a certain stage, they are in theory still under consideration by DIAND and may yet resurface in improved form for public consideration. The lands proposal, the First Nations Chartered Lands Act is no longer in legislative form and has been recast as a framework agreement (FA)<sup>1027</sup> between the Indian Act bands that enter into it and the DIAND minister. Now known as the Land Management Proposal for a Group of Specific First Nations, it has been redesigned to better reflect a nation to nation approach. From this perspective, it would be an enhanced version the FAs in the area of Indian education and, latterly, in the context of the Manitoba DIAND regional office dismantling initiative. Presumably the chiefs involved in promoting this initiative see a political opening for an FA format that might not have been available for legislation.

In any event, the content of the FA scheme proposed resembles the content of the former draft legislation. However, it adds novel elements that remain to be fully assessed. As with the draft act, the scheme explicitly restricts itself to land management. Thus, the bulk of the Indian Act will continue to apply, including the status and membership provisions and section 88. With regard to the former, and like the draft act, this new proposal refers to "First Nations" as signatories to the FA. These are bands under the Indian Act. There are apparently around 15 sponsoring chiefs. From what is known, they appear to a large extent to be from bands that have either or both of Indian Act section 53 (delegated surrendered/designated land management) and 60 (delegated reserve land management) authority. These are bands that, like the Sechelt band earlier, are encountering difficulties in managing their lands and wish greater latitude so as to avoid

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<sup>1027</sup> The draft framework agreement under consideration in this portion of the paper is dated January 13, 1995.

the delays and other problems described earlier with respect to the land management regime.

The proposed process seems to be as follows. Having entered into an umbrella FA, the DIAND minister and the signatory bands will then enter into a series of individual agreements (IAs) between them that are stated to cover two things: (1) operational funding for the new arrangements and (2) the specifics of the transition of administration between the DIAND minister under the Indian Act to the signatory first nations. IAs will be developed jointly by the minister and FA signatory bands. In addition to the IA, each signatory band will draft a land code and both the IA and the land code must be ratified by band "legislation" approved by the community membership. The opting-in procedure will be verified by a neutral third party, the verifier, chosen jointly by the Crown and the interested bands. Federal legislation will ratify the FA and provide for moving out of the Indian Act land management regime.

The Indian Act will continue to apply in all areas not connected with lands management and covered by the FA and IAs. The FA is not intended to be a treaty or to create treaty rights within the meaning of section 35 of the Constitution Act, 1982. IAs will presumably not be considered to be treaties either. The whole scheme becomes effective when the verifier certifies the land code.

The process for opting in envisages a parallel federal government/band process that is akin to the signing of an instrument between states under international law. The FA is, from this perspective, like a convention, treaty or protocol. It is agreed to at an executive level by the chiefs on the one hand and the DIAND minister on the other. Confirming band council resolutions and an order in council respectively would then be passed. Each side would then pass legislation ratifying the whole arrangement, and following the verifier's certification of the land code, the whole scheme would come into effect. As mentioned, the band legislation would be required to be approved by a certain proportion of the community membership.

Having opted in via the IA and land code, FA signatory bands will be able to exercise law-making powers over development, conservation, protection, management, use and possession of "First Nations lands" that are brought within them. This will include power to manage natural resources on and under the land, but excluding oil and gas. Natural resources will also include wildlife. First Nations lands may include: (1) Indian Act reserve lands; (2) other federal Crown lands by agreement with the Crown; (3) lands covered by comprehensive claims or self-government agreements; and, (4) any other lands by way of band, federal and (if necessary) provincial or territorial government agreement.

First Nations lands will no longer be governed by the Indian Act lands regime, although reserve lands will remain reserve lands within section 2 of the Act. This means that the legal title will remain with the Crown and that the land will continue to be set aside for the use and benefit of the band. The legal title of reserve lands where the legal title is not held by the Crown (i.e. special reserves under section 36 of the Indian Act) will be unaffected by the renaming as First Nations lands. First Nations lands of all four kinds will remain subject to Constitution Act, 1867 section

91(24) and will therefore be subject to federal protection and legislative authority. In practice, the federal government will have the sole responsibility to hold and protect title to reserve lands.

Bands that opt in will be able to deal with all rights and interests in First Nation lands except that of disposing of legal title - which will continue to be held by whomever held it before the FA and IA was entered into. Thus, there appear to be a number of assurances that the intention is solely to acquire management powers over land that fall short of ownership. The First Nations Land Management Proposal now has an express provision that First Nations lands cannot be surrendered for sale.

The land code must contain the identity of the lands in question, describe how the band will grant interests in lands or expropriate them, set out conflict of interest and financial accountability rules and the procedures for delegating band land management responsibility and amending the land code, and the procedure for dealing with leasing (including setting an upper limit for lease terms). The land code will also identify the individual rights to lands already held under Indian Act certificates of possession or under band customary land tenure prior to a band entering the agreement. The land code is the equivalent of the "lands charter" that would have been required under the draft Chartered Lands Act.

As mentioned above, the land code and the IA must be approved by the band membership. The band vote may be either on the "majority of a majority" of eligible votes basis (described earlier in the context of the Indian Act surrender provisions) or on the basis that a majority of all registered voters must approve. Instead of a lands board as under the draft act, there is to be an independent person known as a verifier who will monitor the opting in process and resolve certain disputes.

The land code is to be developed by the band, but with the assistance of the lands board. The IA on the other hand will be developed jointly by the band and DIAND. It is clear that there will be some ability in the Crown to control its contents. Presumably the IA will be a negotiated agreement through which the DIAND minister will be able to assure the sufficiency of the conflict and accountability mechanisms in order to discharge the Crown fiduciary obligation.

Bands that have opted in will have legal status and capacity and the governmental authority to enter into co-management agreements with neighbouring jurisdictions. These agreements may cover the traditional lands of the band in question i.e. lands that may go beyond the reserve boundaries and which may now be under provincial or territorial jurisdiction and are therefore managed by them subject to treaty rights and the Sparrow balancing test.

Band law-making powers will cover the land management areas mentioned above (development, conservation, resource management etc.) as well as environmental matters and include that of levying fines, imposing jail or some other sanction for their violation. They will be able to appoint their own justices of the peace (JP) and establish thereby a JP court for these purposes, with appeals to go to the provincial or federal courts. Presumably jurisdiction would

extend to anyone - whether a band member or not - on First Nations land. First Nations land that is reserve land will still enjoy the Indian Act immunity from seizure, and this immunity may be extended to other First Nation land that is not reserve land. The Indian Act expropriation provision (s. 35) will no longer apply, and the federal Crown will be able to expropriate First Nation land only upon satisfying an onerous test of justifiability and national interest, convincing a third party evaluator and providing fair compensation. There will be no provincial Crown right of expropriation since these are still federally protected lands.

A lands advisory board will help draft model land codes, assist bands, propose amendments to the FA and generally serve as a resource and training facility for bands. The board will also help negotiate funding with the DIAND minister and provide an annual report to bands, the minister and Parliament on progress etc. Members of the board will be appointed by bands that have signed the FA. There are many other aspects of this proposed scheme such as the procedures for exiting back into the Indian Act regime, federal/band dispute resolution mechanisms, funding and related matters that complement the essential nature of this scheme but which will not be described here.

This is a somewhat difficult proposal to assess due to its format and the open-ended language used in the available materials. It is not draft legislation and thus precise assessments of legal implications are not easy to make. The FA format makes it seem as if these are treaty-like agreements, although it is expressly stated that it is not to be interpreted as a treaty. There is no reference to recognition of inherent land management authority or that the implementing legislation will be of a recognition nature. The legislation to give it legal force (thereby enabling it legally to override the Indian Act in the lands area) appears to be open to three possible interpretations.

On the one hand, it may make the whole scheme essentially one of delegated federal legislative authority, since the legislation would presumably incorporate the IAs by reference in order to give them legal effect. From this perspective, it is not unlike self-government agreements negotiated under the CBSG process for example. The joint DIAND/band development of the IAs within the FA context would be similar to the process by which the recent individual Yukon self-government agreements were arrived at within the context of an umbrella land claim settlement agreement.

On the other hand, and despite the assurances to the contrary, the FA and IA format may amount to a treaty. The legislation would simply ratify the FA and the IAs. In such a case it would amount to a recognition of inherent authority over lands, constitutionalized as a treaty right by section 35 of the Constitution Act, 1982. It is not clear what the ramifications would be in such a case. In the absence of further details about the scope and extent of the proposal, there will be no attempt here to unravel this particular dimension of it. Evidently, however, one consequence would be to make it impossible for the federal government to override the scheme by legislation unless it could satisfy the Sparrow justification test which presumably applies to treaty as well as Aboriginal rights.

A third view, and the one favoured by the sponsoring chiefs is that the nation to nation format is "self-actuating" by virtue of the separate but parallel legislative processes by signatory bands and the federal Crown. These separate processes converge upon certification of the land code by the verifier. A self-actuating process is something that is unknown to Canadian Indian policy. Conventional thinking has tended to characterize relations between the Crown and bands in one of two ways: either they fall into the treaty category of nation to nation relations, or they are legislated relationships. The latter are of two kinds: delegated or recognition legislation.

The precise nature of the First Nations land proposal has elements of a treaty relationship as well as both types of legislative arrangements. It really depends on the light one wishes to shed on it, as it is susceptible to all three interpretations. Perhaps this is an example of the type of sui generis relationships to which the Supreme Court has been alluding in recent years, described in recent constitutional contexts as a "made in Canada" approach that should not be subject to inappropriate analogies.

The writer is of the view that what is being attempted is a non-section 35 treaty by another name. In other words, this is essentially a nation to nation agreement that, but for the disclaimer, would likely be called and interpreted as a treaty. Of course, given the loosely defined and sui generis nature of treaties in domestic law, such an explanation hardly advances the analysis. Indian treaties have been compared to contracts and to international agreements. The contractual aspect emphasizes the intention of the parties. The international law aspect emphasizes the objective nature of the agreement as a pact between nation states. The First Nation Land Management Proposal straddles the line between these two interpretations. On the one hand, it emphasizes the intention of the parties that it not be interpreted as a treaty, on the other it specifically requires that it be in nation to nation form.

In any event, the advantage of this open-ended FA/IA format is both political and practical. On the political side, it enables bands and DIAND to refer to arrangements that have been negotiated and not imposed on a uniform basis as would have appeared to be the case had the First Nation Chartered Lands Act gone ahead as drafted. This enables the DIAND minister to point to the resulting FA and IA arrangement as being both band-led and band-negotiated and therefore more consistent with self-government. It also means that particular IAs will be developed far from the public eye and will therefore be less visible than would a draft chartered lands act. This should allow both the minister and the interested bands to avoid the opposition they have been receiving from some Indian groups and individuals.

On the practical side, it allows specific IAs to better reflect the particular circumstances of the negotiating band in question. It is not known how much latitude will actually be available, since much will depend on the form that this proposal takes when it goes to cabinet for approval and on the federal negotiating guidelines. Given the delays and other problems associated with the reserve land management regime there is evidently a commercial advantage to the bands to have additional land management authority if they are to become more administratively and

financially self-sufficient.

From one perspective the authority proposed may appear to go farther than land management as such, since it engages other matters such as resources. However, since this is a management and not an ownership exercise (since legal title will not be affected) it seems as if the intention is as it appears, simply to substitute band management for that of the federal government.

That being the case, if the resource in question is currently jointly managed by the federal and provincial governments, it would henceforth be jointly managed by the band and provincial governments instead. Minerals comes immediately to mind, since this is an area that is presently subject to joint regulation and revenue sharing. It is not known how this proposal will affect federal/provincial agreements in the area.

As mentioned above, it is somewhat difficult to assess this proposal, largely because the law is unclear on certain of the key issues raised by the initiative. For instance, one key element is the transfer of responsibility from the Crown to bands for land-related decisions taken that may lead to legal liability. The proposal is clear that the Crown is not to be liable for acts or omissions by bands, that the bands are therefore to assume those risks and to indemnify the Crown for any liability arising from their management of the First Nation lands. This appears to be consistent with current understandings of the fiduciary relationship in the context of lands, since there is no attempt to dispense with or avoid Ultimate Crown responsibility for land management decisions.

The Crown fiduciary obligation continues subject to indemnification for losses arising from the actions of the Crown agent - the band - in areas where band management may lead to a loss. There has been a shift in terms of immediate responsibility for loss, but ultimately, since the legal title is still held by the Crown, the lands are section 91(24) reserved lands and the Crown may still repeal the legislation giving effect to the arrangement and retake complete control, the fiduciary relationship appears to be intact. Evidently, the extent of that liability will diminish as a function of the degree of control exercised by the band, since the element of Crown discretion will have been reduced. The Crown's liability for past acts and omissions is not to be affected by these arrangements.

There is another aspect of the fiduciary relationship that does not appear to have been dealt with, however. Given that it is the Indian Act band that decides at the outset to opt in, and given that those legally and equitably interested in the lands and resources as assets include not only off-reserve band members but may also include status and non-status Indian non-band members with a family, historic or treaty connection to the band, it is not clear that the Crown fiduciary obligation can be satisfied at the point of opting in unless a wider group than band members is included.

This is an issue that touches the larger question raised earlier in several contexts, namely, who is the first nation for important decisions that may have ramifications for the present and for the future. If the people who are within the embrace of the fiduciary relationship are given an opportunity to participate in the decision to ratify the decision to opt in, then the fiduciary

obligation may have been sufficiently satisfied to relieve the Crown of extensive risk of liability. Evidently, all depends on how wide the fiduciary net is cast.

Perhaps the major obstacle to assessing this initiative is that it is simply unknown how it will work in practice. The proposal does not mention the Indian Act surrender/designation requirement and it is not clear what the effect may be on them. Presumably the surrender provisions of the Indian Act continue to apply in the case of absolute surrenders for sale or other purposes, since the legal title to the lands remains in the hands of the Crown or whomever else may hold it at the time of opting into this scheme. However, it is not entirely clear that the surrender procedure in the case of conditional surrenders or designations will continue to apply. The difficulty is as follows.

Under the current legal regime, reserve land management powers arise in two situations: those that may be exercised by the DIAND minister only upon absolute surrender or designation (essentially a form of conditional surrender) of reserve lands; and those that may be exercised by the minister over reserve lands that have not been surrendered or designated. The requirement for surrender or designation is due to the specific prohibition in subsection 37(2) against granting leases or other interests in "lands in a reserve." There are only two exceptions: (1) the lands may be surrendered or designated according to the procedures in section 38; or (2) "where this Act otherwise provides." The Indian Act otherwise provides in provisions described earlier in this paper where the minister has power to approve band allotments and issue CPs and COs (s. 20), to authorize someone by permit to use or occupy reserve land for up to one year (s. 28(2)), to grant leases on behalf of individuals holding reserve land by CP (s. 58(3)) etc.

The DIAND minister or the GIC may delegate reserve land management powers in two situations respectively: to a "person" where reserve lands have been surrendered or designated (s. 53); and to a "band" with respect to "lands in the reserve occupied by the band" (s. 60). The conventional interpretation is that section 60 refers to unsurrendered and undesignated reserve lands. In practice, land management authority delegated from the Crown may be exercised following a surrender or designation under section 53, or in the absence of a surrender or designation, under section 60. In either case the person or band stands in the shoes of the minister or the GIC respectively.

However, this distinction may be more apparent than real. While section 53 is clearly restricted by its wording to surrendered or designated lands, it is less clear that section 60 refers only to unsurrendered and undesignated reserve lands. On one interpretation, section 60 may be interpreted as providing an exception to the requirement that lands be surrendered or designated pursuant to subsection 37(2) before they can be managed.<sup>1028</sup> Thus, a band with section 60

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<sup>1028</sup> Subsection 37 refers to "lands in a reserve" and states that they shall not be managed until surrendered, "[e]xcept where this Act otherwise provides...". Section 60 allows the GIC to grant management powers "over lands in a reserve" to a band. The wide term, "lands in a reserve" is a common feature of both sections, and argues in favour of section 60 being an instance where the Indian Act "otherwise provides" in terms of subsection 37(2).

authority could argue that it has full management authority over its lands and need not comply with the surrender and designation procedures before it exercise management powers short of alienation over its lands. However, this is not how DIAND has interpreted the wording in practice. As mentioned, it has restricted section 60 authority to matters for which the Indian Act does not require a surrender or designation. To date, bands have been willing to respect the narrower meaning of section 60 and have not attempted to force the broader interpretation set out here.

The potential problem in the context of the current land management proposal is as follows. It will be recalled that under either the section 53 or 60 scenario, whenever someone exercises land management authority it is as the delegate of the Crown - the DIAND minister or the GIC respectively. The conventional understanding of the Indian Act recognizes no other way for a band to exercise management authority over its own lands. The First Nations lands management proposal would do away with the Indian Act land management regime and substitute its own. However, as discussed above some powers of land management can only be exercised by the Crown or its delegate following a surrender or designation. This is not mentioned in the materials describing the current First Nations lands proposal. Does this mean that the formal surrender or designation requirement is encompassed within the current proposal somewhere? Or, is it eliminated entirely?

To put it another way, does the assent of the band to the IA and land code and the passage of the legislation giving this agreement legal force operate as a surrender or designation as contemplated in subsection 37(2) so as to confer management authority on the Crown that is then delegated back to the band? Does the band stand in the place of the Crown and empowered to manage some reserve lands only after their surrender or designation? Or does the assent of the band to the IA and land code and the passage of legislation implementing the scheme simply eliminate the Indian Act surrender requirement entirely? The latter is likely the correct interpretation of the effect of this lands proposal.

However, the political and constitutional dilemma is evident. Conventional understanding of the Indian Act has been that lands must be surrendered or designated if they are to be managed on a long term or more serious basis by someone other than the minister. The wide reading of section 60 has been avoid and the symbolism of the formal surrender or designation process has been maintained. This proposal would remove the necessity of that process for all management decisions short of alienation of the land. Thus, the First Nations lands proposal gives the appearance of accomplishing something novel and apparently unprecedented. This may explain the opposition to this initiative in some quarters and the suspicion with which it has been viewed.

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The fact that it is the GIC and not merely the DIAND minister that gives the authority adds credence to the argument that a complete bypass of the Indian Act surrender provisions is intended. The fact that it is the band that has the authority is further support for this interpretation since a surrender or designation is accomplished by the band. But when it is the band that has the management authority, it makes little sense to force it to gather, accomplish a surrender and designation, and then resume its management authority.

It will therefore be very important for legal as well as for political reasons to clarify how this issue in particular will be dealt with. It is the writer's view that the First Nations lands proposal is not necessarily a dangerous one. On balance, this is a promising initiative that could well alleviate the many problems faced by commercially active bands. However, by the same token, trying to meld this initiative with the complex and inconsistent Indian Act regime may simply lead to more complications and political difficulties of the type referred to above in the surrender context. Perhaps a brand new start on the whole question of Indian lands and land tenure is required.

That having been said, however, one must begin somewhere to move away from the restrictions in the Indian Act. This initiative is an interim step in the process of fleshing out Indian self-government in one area. This is recognized by at least five provinces that have indicated their assent to this proposal, as well as by the Assembly of First Nations and by a number of financial institutions across Canada that have been contacted by the sponsoring chiefs. If, as the sponsoring chiefs maintain, this will be a true nation to nation process without section 35 implications, it could be the breakthrough needed in federal/Indian relations and may set a precedent for future efforts of a similar nature in other areas.

In the final analysis and from this viewpoint, it matters little how lawyers may choose to characterize it - treaty, non-treaty agreement, delegated or recognition legislation - for the important thing may simply be to begin the process of moving away from the Indian Act.

## **(2) Manitoba Regional DIAND Dismantling**

The Manitoba Regional DIAND Dismantling initiative is a political agreement between the DIAND minister and the Assembly of Manitoba Chiefs (AMC). It proposes an approach rather than definitive solutions to the problems encountered by AMC bands with the Indian Act and DIAND. That approach is to begin a process of study and consultation followed by implementation of the commitments in the framework agreement (FA) entered into by the minister and AMC. Generally this initiative is vague in its implications. Its format adds a number of complications that defy principled resolution due to the unknown nature of what is actually being embarked upon. The relative vagueness and openness of this approach, however, may equally be seen as a strength and not as a weakness.

The dismantling initiative has a far wider scope than may appear at first blush, since the exercise is not only (1) to devolve existing regional DIAND service and program functions to AMC bands (Manitoba First Nations, MFNs), but also (2) to "develop and recognize" MFN governments and (3) to "restore" to them certain unspecified jurisdictions. All this is to be consistent with the inherent right of self-government, itself undefined. In short, this is a potentially far reaching initiative, the ramifications of which are unknown at this time due to the unknown meanings of many of the terms used (such as inherent right of self-government) and the vague nature of the format and related process envisaged.

The format is as follows. The DIAND minister and the AMC have entered into a framework agreement (FA) under which a six part process described in the incorporated workplan will be undertaken:

1. research on existing DIAND programs
2. analysis of information acquired and development of options for change to these programs and services,
3. identify the broad governmental framework that would make up the MFN governments and consider and recommend the range of powers required,
4. design the details of the MFN structures, institutions of government and operational policies and procedures,
5. develop detailed implementation plans to guide transition from DIAND to MFN government control,
6. implement the plans within defined time periods.

As part of the overall exercise ten AMC personnel will be hired by DIAND in senior positions in order to assist information gathering and training, a joint project office will be set up with a legal team work out the technical details and an elaborate steering committee and political overview committee structure will be set up to ensure that the project goes forward at all levels. There is no time frame for the overall process; it may therefore go forward into an indefinite future. There are definite time frames for particular stages of the overall process, however, and reviews scheduled for its third, sixth and tenth years. Three projects on which AMC has already been working for a certain period of time are to be expedited so as to produce immediate progress on devolving DIAND functions: education, fire safety and capital management. During this process, DIAND and other federal departments are to conduct business as usual and any CBSG negotiations in Manitoba are not to be affected.

It is clear that neither DIAND nor the AMC knows what the future will hold. In short, this is an agreement to study, to plan and to implement - but what? No one seems to know. Nor does anyone seem to know the ramifications of the format being used - an FA - or the mechanisms that will be used to carry into legal effect the FA commitments to dismantle, develop and recognize and restore jurisdiction. This raises a number of legal and constitutional issues that remain to be resolved. For example, an FA has been entered into by the federal Crown and the AMC. It is not clear that this is not a treaty. Popular press accounts have sometimes characterized it as such, and the federal government legal advisors are apparently convinced that it may be one. The available public materials do not address the issue, but there have apparently been assurances by the AMC that it does not intend that the FA be so construed. However, this does not appear in the actual FA, unlike the case of the chartered lands act proposal described above.

In any event, after the stages of study, development of proposed MFN government structure, institutions and processes etc., the actual implementation is to begin. But how will that be done? This is not explained in the public materials. It may be by legislation, but this would be difficult, since the situation of each of the 60 bands in the AMC will differ from each other. Legislation may also be politically more difficult to square with the self-government nature of the exercise due to the risk of appearing to simply delegate legislative power to AMC. More likely then, implementation will be by way of negotiated agreements like the IAs described above. IAs will likely be the preferred format because of the jurisdictional implications of what is being implemented - recognized MFNs exercising inherent self-governing authority - and the need to accommodate the provincial concerns that will inevitably arise in many important areas of current shared jurisdiction.

This conclusion is reinforced by the reference in the FA to MFN powers via "agreements consistent with the inherent right of self-government" in areas that will not necessarily be limited to "protection and promotion of their cultures, identities, institutions, traditions, citizenship, lands, waters, economies and languages" (cl. 5.11). The reference to individual FNs as the "primary locus" of government further supports this conclusion. Will the IAs be treaties? Again, no one seems to know. If there are IAs, will they be given legal force by legislation? Again, this is in the realm of speculation.

How will the province be involved? On the surface, this appears to be a classic area of bilateral federal/Indian negotiations. However, the initiative goes beyond devolution of federal program and service delivery to encompass recognition and restoration matters that will affect provincial sensibilities and jurisdiction. The reference above to the potentially wide extent of MFN powers indicates a potential for encroachment on current provincial areas of responsibility. Child welfare is a current example. Although in Manitoba there are functioning Aboriginal child welfare agencies, they operate at present under delegated provincial authority. If the self-government powers to be recognized and restored are inherent, then child welfare would seem to be a classic case of pure MFN jurisdiction. But how will the province react? What forum will there be for addressing provincial concerns? In the particular context of child welfare in Manitoba, it is important to recall the recent political problem around the Dakota Ojibway Tribal Council Family Services Agency that was found not to be performing in an adequate manner on a recent judicial inquiry.

The FA also refers ambiguously to existing treaty rights, noting that they are to be given an interpretation "to be agreed upon by Canada and First Nations, in contemporary terms while giving full recognition of their original spirit and intent" (cl. 5.3). What this phrase means is simply unknown and unknowable at this time. Moreover, there is no indication of the relationship between the FA and IA process and the treaty rights in the original treaties to which most of the AMC bands are signatories. The most that can be said is that this agreement to agree is a microcosm of the larger "agreement to agree" nature of the entire Manitoba exercise. It seems clear, however, that the reference on the one hand to the "original spirit and intent" of treaties and

on the other to their "interpretation in contemporary terms" signals a difference in focus and opinion regarding their impact on this process between the federal government and the AMC.

Related to the studied ambiguity of the foregoing issues is the failure of the FA to refer to the potential application of the Charter to the arrangements that are designed to ensue from this exercise. Are they to apply in the case of MFNs exercising inherent powers of self-government? Once again, no one knows at this time. If past federal government self-government policy is any indication, there will be pressures in the direction of requiring conformity with the Charter.

In this context, it should be noted that the large and growing urban Indian population in Manitoba has been the source of much of the criticism to existing Manitoba Indian Act band council government and to the further devolution of federal program and service delivery responsibilities to bands. In this sense, the opposition is similar to that raised by off-reserve groups across Canada and voiced nationally by the Congress of Aboriginal Peoples and the Native Womens' Association of Canada. They are generally supportive of the application of the Charter to on-reserve self-government. It will be important for this issue to be resolved in a principled way in this first large scale self-government exercise in the context of the inherent right. The principles upon which this resolution could be based are not evident in the FA.

In a related way, there are no references in the FA to the role of women's groups or to the participation of off-reserve band members in the arrangements that will ensue from this exercise. Throughout the reference is to undefined "first nations" and the need for "[r]atification by the people of each First Nation..." (cl. 5.13). Who those people are is not clarified. Evidently, this raises the concerns about definition and recognition that have been expressed repeatedly throughout this paper. The internal legitimacy of these proposed new arrangements will undoubtedly hinge to a considerable extent on the resolution of this issue. However, no indications are given in the FA about whether or to what extent off-reserve Indians will be involved in ratifying any resulting IAs.

A final unresolved issue that will be mentioned is the effect on Manitoba bands that do not opt into the new arrangements that are supposed to flow from the initiative. The FA notes that "any First Nation will have the option to remain under the administration of the federal government" (cl. 5.13). But if the regional DIAND office has been dismantled, where will federal administration be located? Although this may seem like a quibble, it is important to note that the regional structure of DIAND permits greater flexibility in the relationship between the federal government and bands, and promotes greater knowledge on the part of federal bureaucrats of the precise circumstances of each of the client bands. This flexibility and expertise, as well as the ease of dealing with a regional office may be lost for bands that choose to remain under federal administration.

Nowhere in the FA is the issue of continuing DIAND responsibilities and a continuing DIAND presence in Manitoba dealt with. In this context it should be recalled that a similar proposal in the Penner Report to wind DIAND up did not deal with the issue of continuing

federal administration for bands that did not wish to adopt the procedures proposed in that report. It seems clear, however, that some DIAND structures will have to remain no matter what.

The Indian Act is to be amended or repealed as a function of the new relationship that will ensue from this overall exercise. That much is clear and laudable. However, less laudable is the lack of clarity about how the new relationship will be brought about, how the potential constitutional issues noted above will be dealt with if they arise, nor how this dovetails with the federal government policy on implementing the inherent right of Aboriginal self-government across Canada, currently under development.

On the one hand, the Manitoba dismantling initiative could be characterized and dismissed as a hollow political exercise unfettered by principled discussion regarding important constitutional and legal issues. On the other, it could equally be characterized and embraced as a bold new process-oriented approach designed to break the current self-government logjam. In the face of past federal Indian policies and in the absence of further details the writer is unable to determine towards which of the two stated poles the Manitoba dismantling exercise leans. As with so much in national life, the proof of the pudding will be in the eating. However, the mere fact of having signing such an open-ended agreement coupled with the fanfare that accompanied it may signal a new openness on the part of the federal government. From this perspective a measure of optimism may not be misplaced.

### **(3) Yukon Self-Government Agreements**

At the time of preparing this paper there are four Yukon First Nation (YFN) self-government agreements, all negotiated under the CBSG policy and all virtually identical.<sup>1029</sup> There is no provision for the exercise of inherent self-governing powers and so the scheme is basically one of delegated federal powers. The other agreements under negotiation will be added and given legal force by the overall implementing legislation as they are completed and signed off and will likely resemble the completed ones in essential details. However, there are provisions in the agreements allowing them to be opened up for renegotiation in the event a subsequently negotiated Yukon self-government agreement contains more favourable provisions. The Indian Act does not apply to completed agreements with the notable exception of the status provisions. In short, only citizens of the self-governing Yukon First Nation (YFNs) who are also status Indians under the Indian Act will be counted as "Indians."

Basically, the scheme establishes the individual bands as self-governing entities with legal status and capacity and in ownership of the surface and subsurface of category A and the surface of category B "settlement" lands. The hierarchy of paramountcy in the event of "inconsistency" between the laws of the federal, territorial and YFN governments is as follows. The land claims settlement or implementing legislation prevails over both the federal and Yukon legislation

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<sup>1029</sup> The agreement chosen for examination is the Teslin Tlingit Tribal Council Self-Government Agreement (Supply and Services Canada, 1993).

implementing the self-government agreements. The federal self-government implementing legislation prevails over competing federal legislation. The Yukon self-government implementing legislation prevails over competing Yukon legislation.

Federal and Yukon laws of general application will continue to apply to YFNs, subject to negotiations between Canada and the YFN regarding the circumstances in which YFN laws will be permitted to prevail. In the same way, there are provisions for harmonizing YFN and territorial laws to ensure that no conflict arises or, if it does, that mechanisms exist for resolving it. Inconsistency is defined broadly to mean that whenever a field is occupied by laws from two jurisdictions there is inconsistency. It is not necessary, in short, to have operational conflict of the type discussed earlier in the Indian Act section 88 context.<sup>1030</sup>

The YFN law-making powers are of three kinds. Exclusive jurisdiction is given over local YFN government operations and internal management, as well as the administration of the terms of the final land claims settlement. Only the federal government may affect these law-making powers. Concurrent law-making powers are given throughout the Yukon (with the Yukon territorial government) over a number of areas, most of which have to do with the delivery of services and programs to citizens of the YFN. These powers include, however, family law, wills and estates law and related civil law matters.

Thus, both the territorial and the YFN government may make laws, and presumably the citizen will have a choice as to which he or she will prefer to follow when off YFN territory and in the Yukon generally. On YFN territory itself, the YFN has power to pass laws "of a local or private nature" in the YFN territory over a range of subject matters. These matters resemble, but appear to go farther, than the by-powers given to band councils under the Indian Act. They look not unlike the powers given to the Cree, Naskapi and Sechelt bands under their respective federal acts. Laws passed under the law-making powers will apply to anyone - YFN citizen or not - on the YFN territory.

Interestingly, these powers include "administration of justice." Despite the constitutional language, the ambit of the power is likely quite narrow, since the laws must be of a "local or private nature." Moreover, "administration of justice" appears as part of a long list of powers that, like their Indian Act counterparts, are narrow in scope and local in nature. In short, it is highly unlikely that wide powers are intended and it is equally unlikely that a court would rule that criminal law and related public law powers of the type exercised by the federal and provincial governments are included within the phrase. Nonetheless, the provision is unique because it is to be defined through negotiations over the first five years following the agreement, with a further five year extension possible.

In short, it remains to be seen what will come of these negotiations and whether and to what extent quasi-criminal powers will be exercised by YFNs as a result. The negotiations are to

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<sup>1030</sup> See text at note 944, supra.

include a wide range of matters from prosecution to courts to corrections. In the meantime, YFNs have powers similar to Indian Act band councils: they may levy fines (\$5,000) and jail term (6 months) for violation of YFN laws, proceedings to be initiated in the Yukon courts. No one knows what will happen if there is no agreement after the expiry of the two five year terms.

In terms of taxation, there is provision both for property and "other modes" of taxation on YFN citizens within YFN territory. This includes income tax. These powers may be extended to non-YFN citizens on YFN territory by agreement. There is provision for agreement on sharing of tax room between YFN governments and the Yukon territorial government. In short, there is scope for the development of modern inter-governmental tax agreements - something absent from the Cree-Naskapi and Sechelt arrangements where only property taxation is permitted. In a similar way, there is provision for negotiating "a self-government transfer agreement" with the YFN. This language suggests something more extensive than the current DIAND self-government financing arrangements and it may be that arrangements similar to federal-provincial transfers are intended. Financing remains to be fully negotiated, however.

The Indian Act tax exemption for YFN citizens no longer exists. However, in compensation for giving up this exemption, the settlement moneys, and particularly the interest income on them, are given special treatment. Normally, the actual settlement moneys would not be taxable. The income generated by their investment through the YFN "settlement corporations" set up as part of the land claims settlement would be, though. Nonetheless, in the case of YFN settlement corporations no tax will be payable on the income so long as the shares and capital of the corporation are owned by the YFN, the earnings are payable only to the YFN or another exempt YFN corporation and all the corporate property is located on settlement lands. Thus, the moneys should be tax free for the YFN in perpetuity so long as the conditions continue to be met. It will be recalled that this scheme corrects the problem referred to earlier of reserve corporations being taxable despite being Indian controlled.

There are other aspects of the Yukon agreements that are too detailed for discussion here.<sup>1031</sup> In general, there is more apparent openness on the part of the federal government in these agreements than has been the case to date. However, this may be explained by the fact that these arrangements were negotiated in the north, in an area of exclusive federal jurisdiction. There is as yet no acknowledgement of the inherent right of self-government and YFN territory remains a zone of concurrent legislative jurisdiction subject to notions of future agreement to establish YFN paramountcy. In general, these agreements seem to be a strong set toward a much fuller right of self-government than has so far been seen in Canada and may perhaps indicate an expanded federal willingness to abandon the stifling Indian Act control that has been criticized in this paper.

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<sup>1031</sup> For a fuller discussion in the context of Canadian federal practice see P.W Hogg, M.E. Turpel, "Implementing Aboriginal self-Government: Constitutional and Jurisdictional Issues" prepared for RCAP, May 1994.

## J. RCAP CASE STUDIES

### (1) The Shubenacadie Band<sup>1032</sup>

The Shubenacadie or Indian Brook band of central Nova Scotia has 1755 band members, 1100 on reserve members and 655 off-reserve. The band has an elective band council under sections 74-80 of the Indian Act. Respondents were overwhelmingly (88%) of the conclusion that the band was not yet ready for self-government, although at least half of respondents believed that it would come one day. The responses were grouped, analyzed and discussed by focus groups around a number of themes.

In terms of self-government as such, it was apparent that there was very little knowledge in the community as to what it meant and might mean either in theoretical or in practical terms. There was a general feeling of ill-preparedness for it, and some respondents believed it would simply be imposed on them as so much had been under the Indian Act regime. In addition, many felt that self-government would be of little general benefit, and that the same relatively small number of persons who benefitted from the current regime would also benefit from self-government. There was agreement that more preparation was required in the form of information, training etc. before self-government could become a reality.

The lack of mechanisms to ensure proper band council accountability was also a concern. There were many suggestions as to how to remedy this, including:

- band council meetings open to the whole community
- public community meetings on a monthly basis
- publicly posting the minutes from band council meetings reasonably soon after a meeting
- a community newsletter regarding band council proceedings and containing the minutes
- more structured ways of proceeding during actual band council meetings
- better verification by the band council of what it hears directly from some community members and more and better follow-up to ensure that remedial measures are actually carried out
- the establishment of band council committees for particular matters or purposes
- greater commitment by band council members to community services such as requiring them to campaign on the portfolio they wanted etc.

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<sup>1032</sup> "The Shubenacadie Band Council and the Indian Brook Band Case Study on Self-Governance," Jean Knockwood, principal researcher, prepared for RCAP September 30, 1993.

A better organized election process and extended terms for chief and councillors were also seen as necessary, as were more and better band service delivery. There was too much hiring preference for the available jobs and greater equality of opportunity was desired. However, it was also felt that preference should be given to band members for these jobs and that non-Aboriginal persons should only be hired on limited terms and until a band member had been trained to perform the function in question. Conflict of interest was recognized as a problem, particularly that of elected officials serving as band staff.

General agreement was found that the community needed to be involved in sorting out membership issues. Micmac blood was accepted as the standard for Micmac status, with band membership to be decided through a band referendum or through a membership committee selected by the community. There was no agreement on the degree of blood or on how far back one had to go to determine blood quantum questions (through either parent or possibly going back to one's grandparents). Concerns were raised about the possibility of overpopulating the reserve and the effect this might have on services and housing. Concerns were also expressed about how to deal with the old status/new status distinction introduced by Bill C-31 of 1985, whether a non-Aboriginal child adopted by Micmac parents would become Micmac and the effect on a Nova Scotia Micmac of marriage to a Indian from the United States in light of Bill C-31. The consensus was that these and related issues require careful study and greater public knowledge and involvement in their resolution.

Financing was also considered and six possible sources were identified: DIAND and provincial government grants and contributions, taxing non-Indians who live on or do business on the reserve, the settlement of land claims, on-reserve and tax free tobacco sales, and the establishment of more band businesses. There was general agreement, however, that band members should not be taxed themselves. Off-reserve band members should receive band services where appropriate but it over half the respondents were clear that off-reserve band members should not be able to vote for chief and council.

Finally, there was broad agreement that education and training were an absolute must, with legal and literacy issues ranking at the top of the priority list. Other priorities included human resources development, business management, financial administration, and entrepreneurship. These were felt to be matters for immediate action by the present band council in preparation for the future.

## **(2) The Serpent River Band<sup>1033</sup>**

The Ontario Serpent River band is located on the north shore of Georgian Bay between Sault Ste Marie and Sudbury. It has 856 band members and, unlike Indian Brook, most (588) live off-reserve. A large proportion of the latter are Bill C-31 re-instated members. This band also uses the Indian Act elective band council provisions in sections 74-80. Generally, the respondents

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<sup>1033</sup> "Anishmabe Niigaanziwin: Structures and Procedures of the Serpent River First Nation," Serpent River First Nation, prepared for RCAP July 1993.

were asked to comment via a questionnaire on changes in specific areas. Focus groups followed up with more detailed discussions.

In general terms, the respondents felt that the band council should continue to make governance decisions and administer programs and services but that there should be more community involvement in law-making. About half of respondents wanted to change the Indian Act elective system, while half did not. Most believed that terms of office should be longer and that eligibility to run for office should continue to be confined to on-reserve residents. However, it was also believed that off-reserve and adopted band members should have voting rights, though this was a matter for further discussion and examination in the future. The need for more culturally appropriate forms of governance emerged as a concern among respondents, but by the same token there was little left of traditional forms that could easily be adapted to current conditions. More study and reflection was agreed to be required on this issue.

As with the Indian Brook study, some respondents expressed scepticism about the effect of self-government. In this vein, accountability issues also emerged as a concern, as did the role of off-reserve members in band governance and the relation of band level governance to tribal council authority. There was a generalized lack of knowledge about the specifics of self-government and what it might mean for the community and some responses called for better information dissemination and consultation within the community. A particular governance model emerged from the rest of the responses and is described below.

Chief and band council should hold office for three years but if it is decided to abandon the Indian Act system, the community itself should be involved in designing unique band election procedures which may involve traditional practices in this regard. An elders council of three persons should be created to perform an advisory role vis-à-vis the band council. It would hold office for three years and could call its own meetings and propose action on particular issues. There should in addition be a youth representative elected for a three year term to the band council. This persons would participate and provide advice as well as assist in developing a separate youth council that would parallel the elders council. Existing band committees should be formalized and provided with a chairperson, a recorder and a treasurer and they should be more accountable to the band membership for their decisions and advice. The chief and band council should still direct and be accountable for band services and programs, however.

Band council law-making powers were to include the following:

- membership
- lands and resources
- public safety
- residency
- the environment
- economic development
- creation and amalgamation of reserves

However, enforcement measures regarding band council laws were to be developed and

approved by the band membership before they could become effective. An appeal process was also desired for band council decisions and an appeal panel might have members from the elders and youth committees as well as from the appropriate band committee and the band council. Membership decisions were selected for particular emphasis and the appeal procedure proposed for such matters call for the rules of natural justice i.e. hearing from both sides, impartial final decision etc.

General community participation in band decisions would be through the following means: elections of the chief and council, service on band committees and band referenda (which would require a 70% approval rate), and attendance at band council meetings - which would be open. Minutes would be prepared quickly and publicly available so that community members could have access to the information required for meaningful participation. Band referenda would be reserved for serious decisions with long term consequences such as land surrenders, membership code changes, economic development decisions affecting collective resources, proposed governance changes, and community laws.

### (3) The Siksika Band<sup>1034</sup>

The approach to self-government of the Siksika Nation form the subject of this case study. The Siksika Nation was formerly known as Blackfoot band no. 146 and is located in south central Alberta near Gleichen. The band has extensive lands and a membership of 4,355. This figure includes 286 persons registered as members by DIAND due to Bill C-31 but not listed as members of the Siksika Nation in the case study. About one third of all band members live off-reserve. The band uses the Indian Act elective system.

This case study is less an inquiry into band members' attitudes and aspirations than a lengthy recital of Siksika Nation governance history since the signing of treaty 7 in 1877. In this context there is also a listing and discussion of the various self-government initiatives taken by the band in recent years. Four specific areas of governance - protection and defence of citizens, economic development, medical services, the provision of basic shelter - are described in terms of the continuity of Siksika Nation involvement and to disprove the notion that inherent governance functions were ever displaced by the Indian Act system.

The premise of this part of the study is that tacit consent was given by the Siksika Nation leadership to many of the measures (such as replacement in the policing area of the Blackfoot "scouts" by the RCMP, for example) and that direct jurisdiction is now being taken back. The following passage captures the spirit of the historical review and reveals the ultimate purpose of the case study itself.

The intent of analyzing specific government functions in detail is to establish a firm

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<sup>1034</sup> "The Historical, Legal and Current Basis for Siksika Nation Governance, Including Its Future Possibilities Within Canada," Andrew Bear Robe, project study coordinator, prepared for RCAP November 30, 1993.

foundation for the claim that Siksika Nation government is not a creation of the Government of Canada but an extension of the inherent rights of the Siksika Nation membership. The Government of Canada may have established rules and regulations that affected the Siksika Nation membership, but they have never been recognized as the legitimate government for the Siksika Nation....

The importance of the historical review is to substantiate the continuous existence of Siksika Nation government from pre-contact until the present. The Department of Indian Affairs and the churches certainly influenced how Siksika Nation government functioned over the past 200 years. However, the membership continued to rely on their traditional leaders to meet their needs and to maintain Siksika traditions.<sup>1035</sup>

Another purpose served by the historical review is to highlight the perspective of the Siksika Nation that the federal government has failed to fulfil its treaty obligations to fund adequately Siksika Nation governance initiatives. Statistics and other evidence is presented to show the disparities between federal funding available to non-Indian entities such as provinces, regions and municipalities and that provided over the years to the Siksika Nation. As a treaty nation, Siksika takes the view in this study that it "has always viewed Treaty 7 as an economic treaty which committed the Government of Canada to support Siksika Nation members for as long as the grass grows, the river flows and the sun shines."<sup>1036</sup> (emphasis in the original).

Having established historical continuity, the rest of the study goes on to list and discuss the ongoing governance initiatives of the Siksika Nation. They are described in some detail and in several different contexts. The federal policies supporting these initiatives have already been described earlier in this paper. The specific initiatives undertaken by Siksika are as follows:

- a series of child welfare program agreements with Alberta
- entry into alternative funding arrangements (AFA) with DIAND
- participation on the Indian Taxation Advisory Board and development of a by-law permitting the taxation of commercial interests on Siksika lands
- entry into a framework agreement for CBSG negotiations and commencement of the negotiations on the basis of existing draft self-government legislation prepared by Siksika
- entry into negotiations with the medical services branch of Health Canada to evaluate Siksika health needs and to develop a format for transfer of responsibility and funds to the Siksika nation in the health area

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<sup>1035</sup> Ibid at 56.

<sup>1036</sup> Ibid at 35.

- completion of a tri-partite policing agreement pursuant to the federal First Nations Policing Policy to develop an autonomous Siksika police force
- participation in the evaluation of the draft federal Chartered lands Act
- entry into negotiations with DIAND to seek enhanced authority under Indian Act sections 53 (surrendered/designated lands management) and 60 (reserve lands management)
- entry into negotiations with Alberta for transfer of responsibility and funds from the Native Counselling Services of Alberta to the Siksika Nation so that it may provide counselling and legal services to members in provincial court or in provincial jails
- establishment of a formal working relationship with Alberta pursuant to a memorandum of understanding to discuss financial transfers from Alberta to the Siksika Nation to assume responsibility for service delivery to off-reserve members
- signing of a protocol with Alberta regional DIAND to establish a process to discuss governance issues, primary financing, where the matter is under DIAND jurisdiction

Interestingly, the Siksika Nation is proposing an overall self-government model based on a variation of the Indian Act Alternatives First Nations Governance Recognition Act to be supplemented by opt-in sectoral legislation of a similar nature in the areas of forestry, lands, taxation etc. These federal self-government processes have been described above. The particular initiatives undertaken so far and referred to above would simply be rolled into the new self-governing arrangements that are to emerge from ongoing self-government negotiations. It is equally interesting in this context that, despite being a treaty nation theoretically capable of exercising section 35 treaty rights, Siksika has shown a pragmatic willingness to work within the federal policy framework in a way that does not detract from what it views as its treaty rights.

It seems apparent that Siksika has made substantial progress within the Indian Act framework and existing constitutional framework to lay the groundwork for a resumption in a modern context of their inherent right to self-government. It also seems clear that having come this far, they will not be denied their quest for fuller self-government and will likely continue to press for it on a variety of fronts. In this vein, one of their complaints is that current federal government funding arrangements do not permit the Siksika Nation to receive federal funds for the delivery of programs and services to Siksika Nation members living off the reserve land base.

All of the particular policies and federal initiatives that Siksika has seized upon have been described in various places throughout this paper as containing significant deficiencies in terms of true Indian self-government. For example, child welfare powers are acquired on a delegated basis from the province. AFAs have many drawbacks including high risk of funding shortfalls and increasingly stringent external audit requirements. Taxation under the Indian Act is restricted to

property tax and business licensing matters. CBSG is limited in scope and offers delegated federal and provincial authority. Policing authority is equally by way of provincial delegation of powers.

The examples could be multiplied. Nonetheless, what the Siksika approach may ultimately prove is the utility of taking advantage of whatever opportunities are available for band autonomy, despite their failure to reflect fully band aspirations. If Siksika is successful in achieving the degree of self-government to which it aspires, it may be that the cumulative effect of the incremental and seemingly unrelated initiatives undertaken will be seen in retrospect to have played a large role in achieving the final result. The whole, in short, may be more than the sum of the parts. This is a unique experiment that is ongoing and which bears watching.

## K. OPTIONS FOR MOVING AWAY FROM THE INDIAN ACT

Much of what has been discussed so far in this paper is comprised precisely of attempts to move away from the Indian Act. Many different approaches have been tried over the years. What they have in common is that so far, all have failed to accomplish the goal. There are many reasons for this aside from inherent shortcomings in the approaches themselves. Each approach has strengths and weaknesses that must be assessed in order to arrive at a new or hybrid approach that may have a better chance of succeeding than its predecessors. None of the options that will be reviewed below is entirely new. Each has been tried or at least proposed in one form or another over the years. The following is a brief review of the various approaches that are possible, with an assessment of the advantages and disadvantages of each.

### (1) Direct Action

#### (i) Just Do It

Under the Partners scenario, an Aboriginal group falling into the "central case" category may "assume control over its own affairs within the core areas of Aboriginal jurisdiction at its own initiative and without necessarily waiting for inter-governmental arrangements."<sup>1037</sup> In short, Indian Act bands may simply take action and begin by enacting laws in core areas since, under this theory, they are already governments within the federal system. These laws will displace conflicting federal and provincial laws. Absent operational conflict, they can co-exist on normal constitutional grounds.

It is not clear in Partners whether the "preconditions" referred to (constitution and citizenship code) are mandatory or not. If mandatory, that would imply the existence of a body external to the Aboriginal nation to confirm that the preconditions had been met. This, in turn, implies a constitutive theory of recognition. If the preconditions are not mandatory, then there is no need to meet them. This, in turn, implies a declaratory theory of recognition since, as already existing governments, there is no body outside of themselves they need call upon to grant them government status.

It is likely that Partners refers to the latter situation, since it refers to these preconditions as practical and not legal requirements for implementing the inherent right of self-government.<sup>1038</sup> As mentioned earlier in the section on status and membership, it may be that the preconditions apply only with regard to peripheral areas, in which case a declaratory theory of recognition would apply to "core" areas and a constitutive theory of recognition would apply to the inter-governmental agreements required in these "outlying areas" of Aboriginal inherent self-governing jurisdiction.

The ramifications of this difference in theoretical basis for Indian self-government under

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<sup>1037</sup> Supra note 577 at 43.

<sup>1038</sup> "In practice, then, what steps must an Aboriginal group take to implement its inherent right of self-government?" (emphasis added): Ibid at 44.

the Partners scenario will not be explored here. An Indian Act band arguably already has a constitution (however deficient) in any event in the form of the Indian Act provisions referring to the band council system, coupled with whatever unwritten traditions or practices it has to supplement them. In the same way, it already has a citizenship code in the form of the status and membership provisions, whether membership lists are maintained by DIAND or by itself if it has taken control of its membership under the Act.

An Indian Act band could pass all manner of laws under what it considers to be its core area, and could begin to negotiate with federal and provincial governments for jurisdiction in peripheral area as bands do now under the devolution and CBSG policies and pursuant to emerging federal policy regarding implementation of the inherent right. Partners solves the status and capacity problem currently faced by Indian Act bands through its assertion that they are already governments within the federal system. Governments have governmental and legal powers by virtue of the fact they are governments. They do not need other governments to confer this upon them. Moreover, a "do it" approach accords well with the perspective of treaty Indian nations that have never ceased to assert their nation status and with it their inherent authority over themselves and their own internal processes irrespective of the presence of other governments with which they are in a treaty relationship.

Because bands would under this theory be exercising inherent powers in core areas, there is no reason why the Indian Act provisions would have to be dispensed with all at once. Those (such as the ministerial control over land, resource and moneys decisions) that are incompatible with the exercise of inherent powers would simply no longer be relevant or legitimate. Others, such as band council powers over listed areas could continue for the time being, re-interpreted in accordance with the nature of the powers being exercised. For example, the ministerial by-law disallowance and approval powers would no longer apply, at least in present form. They could be reinterpreted as advisory views only, to be dispensed with or adopted as the band council wishes. Evidently, the power in subsection 81(1)(c) over "the observance of law and order" would also be a prime candidate for re-interpretation, especially for bands that are signatories to treaties that contain express law and order provisions.

In theory, conflicting federal and provincial laws would simply have to give way. This "do it" approach is very similar to the one employed by federally recognized Indian tribes in the United States. It will be recalled that this practice is justified in light of the Solicitor's opinion confirming their inherent powers of self-government that was issued following the passage of the Indian Reorganization Act.<sup>1039</sup> It was only after the reaffirmation of these powers in the 1959 Supreme Court case of Williams v. Lee,<sup>1040</sup> however, that American tribes began to pass wide tribal ordinances of the type the opinion said they were capable of. Since then litigation regarding the nature and extent of tribal powers has increased and the Supreme Court has been called upon again and again to untangle particular disputes and to devise general rules.

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<sup>1039</sup> Supra note 28.

<sup>1040</sup> 358 U.S. 217 (1959).

As a result of this recent judicial policy-making, American Indian law is an extremely complex and self-contradictory area. Charles F. Wilkinson notes that this increased judicial activity has not been productive of greater clarity:

Leading scholars have been severely critical of the Court's performance during the modern era.

They have attacked both the lack of coherent doctrine and the substance of doctrine.

Many of their criticisms are well-founded. Opinions have commonly been cursory and conclusory or, at the other extreme, so tediously fact-bound as to be of little assistance as precedent. Others seem to be born of an ethnocentric reluctance to allow tribal control, however limited, over non-Indians.<sup>1041</sup>

It is now commonly accepted on all sides in the United States that litigation is an inefficient and ultimately futile way to proceed to flesh out self-government powers. Tribal-state "compacts" (negotiated agreements) are being promoted to avoid courtroom policy-making, but in the absence of any requirement to negotiate, compacts have not yet supplanted litigation as the primary means of making Indian policy.<sup>1042</sup> The Canadian emphasis on negotiated arrangements in contentious areas is, in some respects, an advance over the more litigious American position. It can safely be predicted that in the absence of agreement something similar to what occurs in the United States would apply in Canada if self-governing Indian bands simply proceeded to draft and pass laws in the manner suggested by Partners, even in areas of supposed core jurisdiction.

It is clear that unilateral action of this type is not advisable, and yet it is equally clear that this may result from a strict reading of the Partners proposal. In this context it cannot be forgotten that the first century of Canada's federal life was marked by often bitter federal-provincial disputes. There is no reason to believe that the first hundred years of Indian self-government will not equally be marked by a heavy reliance on litigation as a policy-making tool. This is all the more likely in the absence of the type of legislative framework that the British parliament provided to Canada in the form of the British North America Act.

Although there are severe practical disadvantages to taking action without benefit of federal and provincial agreement, this is nonetheless an option for proceeding that cannot be discounted because of the risks and uncertainties. Given the historic reluctance of the federal and provincial governments to negotiate true power-sharing agreements with Aboriginal peoples, it may be necessary for some Aboriginal groups to take such unilateral steps or at least to have the option of so doing as a bargaining chip in the negotiations that Partners calls for as its preferred way of proceeding.

## (2) Legislation

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<sup>1041</sup> Charles Wilkinson, American Indians, Time and the Law (New Haven, Yale University Press, 1987) at 4.

<sup>1042</sup> For a discussion of tribal-state compacts see David H. Getches, "Intergovernmental Agreements," supra note 990.

Generally speaking, Indian legislation is a politically risky enterprise in the post-1982 era. In the first place and like the Indian Act itself, legislation may and likely will run counter to the perspectives and aspirations of treaty Indian nations and may, despite its benevolent intentions, actually violate existing treaty provisions and implied undertakings. In the second place, legislation presupposes sovereign Parliamentary power over third order Indian governments - something that will likely be resisted by many people whether or not they belong to a treaty Indian nation. In the third place, new legislation or even the repeal or amendment of existing legislation will require political will on the part of legislators and will necessitate a high degree of consultation with Indian people and with the provinces. Given the temper of the times, it may not be possible to meet these conditions. It cannot be predicted with confidence, therefore, that the legislative route in the post-1982 period will be easily achievable.

Notwithstanding the difficulties, legislation may nonetheless be necessary and desirable for at least two reasons. First, despite political and academic challenges to its legitimacy, Indians are already governed largely by a legislative framework - that of the Indian Act and related legislation such as the Indian Oil and Gas Act. Legislation is a known quantity. Having lived under it, Indians understand it and federal drafters are familiar with it. Legal provisions are easier to deal with to this extent than are more abstract constitutional principles or the provisions of treaties drafted more than a century ago under conditions that are no longer familiar to either side. In short, renewal of the legislative framework makes more practical sense from a certain viewpoint than does constitutional amendment or a process of treaty renewal or the establishment of a new treaty order to supplant the Indian Act and what it stands for.

Second, legislation may be necessary of third order Indian government is to be recognized within the framework of Canadian law. It is well and fine to state that Constitution Act, 1982 already recognizes Indian jurisdiction in core areas, it is quite another to convince governments and other institutions that they ought to adhere to this interpretation of abstract constitutional language. Legislation may be necessary as the concrete expression of the will of the federal sovereign that Indian entities enjoy governmental status. Legislation delivers a message, in short, in terms that are clear and familiar to the other actors in the federal system whose concurrence in the recognition exercise will be necessary on a daily basis if third order government is to be a reality.

The question then arise, of course, about who does the drafting and whether and to what extent Indian consent is required to the exercise of Parliamentary powers over entities that under the declaratory theory of recognition apparently espoused by Partners are already third order governments. It seems clear that any process of repealing or amending existing legislation or of drafting new acts must be Indian led and must conform to Indian aspirations. Nothing can be done, in short, that does not meet with the approval of those who will presumably be subject to legislative alteration of the status quo.

#### (i) Repeal of Unnecessary Indian Act Provisions

That being said, perhaps the safest and wisest short term course is simply to cull the current

Act of those provisions deemed to be most paternalistic or most unnecessary. The analytical category of "paternalistic and antiquated" adopted in this paper contains references to a number of provisions that could be deleted from the current version of the Indian Act without damaging the essential nature of the protective framework.

For example, there is little reason in principle why the Minister needs a disallowance and approval power with regard to band council by-laws. They are already limited in scope and subject to the general law. The additional step of ministerial approval seems unnecessary. If they are ultra vires a court can strike them down. In the same way, unnecessary provisions could be dropped without much negative impact on the Act. There is no reason why the Indian Act needs two sets of penalty provisions for violating the timber harvesting scheme, for example.

A list of repealable provisions could be drawn up relatively easily and submitted for consultations with Indian bands and organizations and in this way improvements could be brought about immediately. This approach could be harmonized with another, more wide-ranging option such as recognition legislation or a treaty renewal approach.

#### (ii) Incremental Indian Act Amendments

The next step beyond repealing some provisions would be to propose amendments to the provisions of the Indian Act that are currently problematical. Although this may seem unpalatable in view of the vision of third order government set out in Partners, it may be inescapable for the simple reason that no matter what option or options may be selected for moving away from the Indian Act, there will inevitably be groups that do not wish to move out of present structures and relationships, at least in the immediate future.

There may be many reasons for this, including the fact that any new arrangements will be unknown and potentially fraught with risks, real or perceived. The controversy surrounding the draft First Nations Chartered Lands Act is a good illustration of the kind of doubts many groups may have about even limited movement out of the Indian Act. Groups that decide to move away from the Act may not wish to do so all at once. They may wish to remain within certain areas for certain reasons and for particular periods of time while they adjust to the new realities and new demands that will be made on them.

Groups that decide to take direct action (to "just do it") as described above may also stay within the Indian Act and simply reinterpret the provisions in line with the inherent right of self-government. These groups may remain within the Act, interpreting the various provisions either as delegated federal authority or as reflections of inherent Indian authority, depending on their needs, aspirations and capacities to mover beyond delegated authority. For example, they might interpret some Indian Act provisions as delegated authority while interpreting others broadly and in this way operationally "opt-out" of the Act as it has been conventionally understood in a piecemeal fashion over time until eventually they are interpreting all sections in terms of their inherent powers. They would then add to those powers by simply passing by-laws or laws in areas not covered by the present provisions of the Act, gradually adding to their store of powers as they

go along until they have fleshed out a full range of governmental powers.

In all cases, therefore, daily life for band members will, to varying degrees, still be shaped by the Indian Act structures and processes. Hence, the desirability of clearing up the many inconsistencies, confusions and gaps that have been referred to in earlier portions of this paper. It would be a relatively straightforward exercise to draw up a list of potential amendments of an incremental nature that would ease the difficulties being experienced in areas such as lands and moneys management, for example, without derogating from the essential nature of the inherent right of self-government. This too is an approach that could be combined with more wide-ranging options.

That being said, however, it would not necessarily be an easy matter to actually bring about the amendments in question. For one thing, potential amendments tend to have complex potential ramifications that require deliberation and consultation before embarking on them. For another thing, in order to be seen as legitimate, any such process of incremental Indian Act amendments must be Indian-led and can only be implemented at a pace and in a way that is in conformity with the larger aspirations of Indian peoples. It will likely be necessary to involve the national as well as regional Indian organizations and possibly provincial governments. Even limited amendments may be perceived by all parties as having broader impacts that will have to be assessed, weighed and compared against the benefits to be obtained by the amendments proposed. Such a process risks revisiting the rancour and bickering of the last decade.

Despite the potential legal and political difficulties, however, there is much to be said for incremental amendment. Much necessary thinking has already been done on all sides regarding the type of amendments that are necessary. A considerable amount of legal and judicial analysis has already been done in respect of existing provisions. So long as the process was clearly seen to be an aid to transition and not an end in itself, incremental amendment has much to offer in ways that would have a positive impact on the daily lives of reserve residents.

### (iii) Particularized or Regionalized Indian Act Amendments

A variation on the theme of incremental amendments would be to particularize or regionalize the amendment process. That is to say, instead of proposing across the board amendments that would apply to all bands under the Act, a parallel amendment structure could be created. For example, amendments to the lands regime could be developed that would be specified as applying only to listed bands or to bands in certain areas or regions. Bands could be added (or deleted) from the list by order in council and recorded on a schedule to the Act as they chose to come under the amended provisions.

Something analogous already exists in the Act in the case of the elective and custom leadership selection provisions - with different rules applicable depending on what part of the Act (section 2 or sections 74-79) applies to a particular band. This approach also appears in the form of subsection 4(2) of the Act whereby the Act or portions of it (except for the status and membership and surrender provisions) may be proclaimed by the Governor in Council as

inapplicable to particular bands or reserves. It will also be recalled in this context that early versions of the Indian Act were specified as not applying to Indians in certain regions of the country and that it was only extended over time to them.

There is no question, however, that this type of approach adds not only to the flexibility of the Indian Act amendment process, but also to its complexity. However, given the likely need for incremental amendments, at least in the short to medium term, and the sheer diversity of Indian Act bands in terms of their traditions, locations, degrees of economic and political development and readiness to embrace changes to the status quo, this sort of staggered or regionalized approach to amendment ought to be considered and so it is mentioned here. It could also be combined with other more profound options for transition from the Indian Act.

#### (iv) Complete Revision of the Indian Act

At the other end of the scale of incremental amendments, however, is the notion of a full scale revision of the entire Act similar to what was attempted in 1951. If it were decided that amendments of the type proposed here are in order, there is an argument to be made for a complete overhaul in lieu of tinkering with particularly problematical sections. Any process of amendment is likely going to be a difficult, time consuming and politically risky enterprise regardless of the extent of the reforms or revisions proposed. That being the case, it might be better and easier in the long run simply to take on the whole Act. The advantage to this sort of global amendment or revision process is that a consistent philosophy could be brought to bear throughout the Act and current gaps and confusions could be eliminated in terms consistent with the overall philosophy.

For instance, instead of the uneasy balance between protection and civilization/assimilation that one finds in the Indian Act now, a consistent philosophy of protection and promotion of Indian autonomy could be adopted in explicit terms. This is already modern Indian policy, but at present it runs afoul of the paternalistic and antiquated nature of much of the Act. Provisions reflecting the assimilative thrust could be purged from the Act and replaced with others that return control over important processes to Indian people themselves.

Thus, the ministerial and governor in council powers in areas such as regulation-making and leadership selection, band council by-law oversight and others would be drastically cut back or eliminated entirely. Section 88 would be repealed and the list of band council by-law making powers vastly enlarged to cover areas of current importance. Political and financial accountability provisions would be introduced. At the same time, a better balance between ministerial control, Crown protection and band powers over land, resources and moneys management could be introduced.

Although many of the areas to be reformed are contentious, amendments or revisions would not have to be perfect or be conceived to cover each and every contingency since the whole exercise would be conducted against the backdrop of the inherent right of self-government. Thus, it would be clearly understood that no attempt would be made to make the Indian Act compatible

in every way with everyone's understanding of the inherent nature of Aboriginal and treaty rights. The Indian Act, in short, would remain a simple piece of legislation designed to serve as a transitional mechanism for bands that wish to remain within it until such time as they desire to move beyond it. It too, in short, could and would have to be combined with other transitional measures of a wider scope.

Its ultimate incompatibility with a larger vision of Indian self-government would, of necessity, be accepted at the outset. In no way would the revised Act, therefore, be considered to be anything other than a stopgap measure on the road to a fuller expression of third order Indian self-governing status within the federation. In this way the Act would be returned to its original philosophy of transition - but with the transition not to assimilation but to the original Imperial policy goal of measured and protected separation.

This, of course, is also a disadvantage to proceeding in this way, as it might be reinterpreted by Indian people as yet another attempt by government to tinker with the Indian Act but without fundamentally altering it. However, if it were acceptable to proceed in this way, it would not be necessary to consider how the revised Act would dovetail with section 35 Aboriginal and treaty rights, or with the treaty provisions with which it has been in conflict since 1876. Other processes outside the limiting structures and processes of the revised Indian Act would have to deal with these issues. The revised Indian Act would be just that - merely another but more rationally constructed version of what now exists.

It is not clear that under current fiscal restraints and in light of the vast amount of intellectual energy expended over the past decades on constitutional reform, there is sufficient intellectual left for processes that merely shore up the status quo. If intellectual energy is conceived of as a finite substance, it makes considerable sense to simply abandon the Indian Act entirely in favour of legislation more reflective of the inherent right to self-government. The question that arises, of course, is whether that abandonment should be piecemeal and phased or accomplished in one fell swoop.

#### (v) National Sectoral/Subject Area Opt-In Legislation

More fundamental reform could be accomplished by developing parallel legislation on a national level to cover areas now regulated by the Indian Act. The nearest equivalent to this approach is the Indian Act Alternatives approach described earlier. It dealt with lands, moneys, forests and governance and was supposed to provide an alternative to the lands, moneys, forest and leadership selection and band council provisions of the current Act that have been described in some detail earlier in this paper. The Indian Act Alternatives initiative became entangled in political difficulties associated with the most recent round of constitutional discussions and simply lost momentum in the period following the demise of the Charlottetown Accord.

There is no inherent reason why this approach could not be revived and expanded to encompass other relevant areas now covered by the Indian Act such as resource management more generally, wills and estates, etc. It could also cover areas now treated as under provincial

jurisdiction such as child welfare, since there would appear to be little doubt that such matters fall into the realm of inherent Aboriginal sovereign "core" jurisdiction and could have been regulated under the Indian Act. Other areas that are more contentious, justice administration being the prime example, could be reserved for separate treatment by way of federal/provincial/Aboriginal agreement on the basis that it falls into a peripheral or outlying area of jurisdiction pursuant to the Partners scheme.

Any companion legislation designed to replace the various sections of the Indian Act would have to be conceived and drafted as recognition legislation in order to have any legitimacy with Indian peoples and to be consistent with the vision in Partners. The primary advantage of this approach is that it would permit groups to selectively "exit" the Indian Act as a function of their readiness to take on the powers and the responsibilities attendant upon the exercise of inherent authority in a modern federal context.

The legislative basis for the departure of groups from the narrow confines of the Act would provide clarity and a transparent procedure that would encourage factual recognition by other governments, including municipal ones, financial institutions and Canadians more generally. There is no point in promoting Indian autonomy if it will not be recognized in practice by the other groups and institutions in the Canadian federation. The need to persuade others of the legitimacy of Indian governments was one of the reasons for the passage in the United States of federal legislation such as the 1975 Indian Self-Determination and Education Assistance Act which contains a legally unnecessary but politically and practically useful declaration of the commitment of the federal government to tribal autonomy and to the maintenance of the trust relationship.<sup>1043</sup>

This legislation is divided into two "titles" or parts. Title 1 provides for federal subcontracting of services to tribal organizations and other aspects of federal program and service delivery. Legislation was not needed to make this possible, since this was already official federal policy. One of the messages, therefore, from this legislation was that tribal governments are real and enduring features of the federal political and program and service delivery landscape. Thus, it had a public relations as well as a legal purpose. Recognition legislation in the Canadian context would likely serve a similar public relations purpose.

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<sup>1043</sup> Pub. L. No. 96-638, 88 Stat. 2203 (codified at 25 U.S.C. ss. 450-450n, 455-458e):

Sec. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.

If the recognition legislation in Canada was confined to areas that are or have been under federal legislative authority, then there ought in principle to be no problem with recognition by way of federal legislation only. However, given the fact that in areas such as lands, jurisdiction is divided between the federal and provincial levels depending on the issue (surface versus subsurface, designation versus surrender etc), the safer and possibly wiser course may be to seek concurrent federal and provincial recognition. In areas not within federal constitutional authority, it would be necessary in any event to have complementary federal and provincial recognition legislation in order to minimize the chances of litigation over jurisdiction.

The requirement of joint recognition risks renewing the sterile constitutional debates of the past decades that this approach is supposed to avoid. This is a significant drawback to the sectoral recognition approach set out here, although it is not necessarily fatal to it.

#### (vi) National Inclusive Opt-In Recognition Legislation

Given the potential difficulties of designing sectoral opt-in recognition legislation without provincial involvement, it may be easier in the long run simply to draft national and all-inclusive recognition legislation along the lines of what was recommended by the Penner Report and (ostensibly) attempted in Bill C-52. The advantages of this sort of approach lie in the relative simplicity as compared with the sectoral approach. Legislation could be drafted with political difficulties reduced to a considerable extent by the collective focus on a single piece of legislation and a single process. Moreover, a precedent exists in the form of Bill C-52, not all of which is incompatible with the Partners vision.

Moreover, there is much useful thinking in Bill C-52 that could become the basis for expanded provisions to overcome the limitations that were the subject of so much criticism by Indian peoples at the time. In particular, this draft act had lengthy provisions dealing with the conditions for recognition (s. 6), the actual process of recognition (s. 7), what powers could be exercised without further ado (s. 16) and which required agreements with federal and provincial authorities (s. 17). This distinction between the immediate exercise of powers upon recognition and exercise pursuant to a negotiated agreement corresponds roughly to the distinction in Partners between core and peripheral areas of jurisdiction - with the former exercisable now and the latter exercisable only upon the conclusion of agreements that will "particularize" the inherent right, not create it.<sup>1044</sup>

In addition, given that the immediately exercisable (or "core" areas, to use the Partners terminology) areas of Indian jurisdiction seem to correspond to currently federally regulated and local matters, federal recognition alone would probably be sufficient. Provincial adhesion to the scheme would be obtained via the negotiation process in peripheral areas.

Thus, there are real advantages to this approach. The disadvantage of this approach is that

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<sup>1044</sup> Partners, supra note 577 at 38.

it reduces somewhat the flexibility of Indian groups to pick and chose which areas they may wish to take on, since opting into the recognition framework is really only in two stages. In the first, they acquire the power to act in certain areas, while in the second they enter into negotiations to "particularize" their inherent right to self-government in other, outlying areas of Aboriginal jurisdiction. However, the inflexibility may be more apparent than real, since most important areas of jurisdiction will likely be peripheral or outlying in any event. Thus, groups will likely remain under the Indian Act during the period when they are preparing for or actually negotiating additional jurisdiction via the process set out in Bill C-52 and in Partners. This may well be another argument for incremental Indian Act amendments or even a comprehensive revision, since it is probable that for many bands the Indian Act will continue for some time to be their primary vehicle of whatever self-government they will exercise.

Of course, another disadvantage lies in the fact that, in order to avoid jurisdictional conflicts with the provinces, immediately exercisable or core areas of inherent Indian jurisdiction will have to be narrowly defined. This is the same problem referred to above in the context of sectoral recognition legislation. The classic example, of course, is lands and resources. It is hard to imagine that the provinces will easily relinquish their role in decisions that will have an impact on underlying title to land or ultimate ownership of resources, both of which are under provincial authority under conventional understandings of current Canadian constitutional arrangements. Thus, this approach may end up being perceived as providing bands with too little inherent, immediately exercisable core jurisdiction at the outset. This was the problem with the original Bill C-52 and with the subsequently announced community-based self-government policy - everything was dependent on federal and provincial agreement on the nature and extent of Indian government powers.

#### (vii) Individual Band or Regional Recognition Legislation

It may be preferable, therefore, to move on a local or regional basis and to deal with the provinces individually in the specific context of particular bands or larger groupings. A local or regional alternative to a national opt-in approach takes its inspiration from the community-based self-government policy and from the three existing variants of the local or regional self-government approach, namely the Cree-Naskapi, Sechelt and Yukon arrangements. In conformity with the Partners vision, however, local or regional arrangements would have to be cast as recognition of the inherent right of Aboriginal self-government. In the same way and for the same reasons as outlined above, it is likely that both federal and provincial recognition legislation would be required in order for a self-governing Indian nation to be confident about its law-making jurisdiction.

The primary advantage of this approach has been mentioned: it would avoid the possibility of having to take on all the provinces in a replay of the past few first ministers' conferences in an attempt to get everyone to agree to a comprehensive recognition legislative framework. It would also allow Indian bands and larger groupings such as tribal councils, provincial and regional organizations etc. to develop approaches more suited to their particular situations than a national framework can allow. The tremendous diversity in history, cultures, constitutional and legal arrangements, needs, aspirations and capacities of Indian bands, nations and other groupings

across the country militate strongly in favour of such an approach.

However, the disadvantages are equally obvious, since this approach might simply recapitulate the current situation regarding Aboriginal self-government where some provinces are more willing than others to participate. This could lead to different arrangements for similarly situated Indian groups or nations, depending on how they are divided by provincial boundaries. It would also allow the federal and provincial governments to overwhelm the much smaller band and regional groupings if a divide and conquer strategy were adopted by them.

However, recent history seems to indicate that large provincial groupings like the Assembly of Manitoba Chiefs and the Federation of Saskatchewan Indian Nations stand a far better chance of getting what they want from governments than do small and isolated bands. Moreover, given the decentralizing trends in Indian matters (with regional groupings taking positions at variance with the Assembly of First Nations for example) and within the Canadian federation more generally, there is considerable historical logic in promoting regional and provincial variations on the Indian self-government theme. To the extent that regional groupings coincide with the Partners vision of "nations", the option of sub-national recognition legislation merits consideration.

#### (viii) National/Regional/Local Staged Recognition Legislation

In another vein, and modelled on the Sechelt arrangements, there is also some logic in examining a staged approach to the acquisition and exercise of self-government powers by Indian groups. To recall, the Indian Act Sechelt band was dissolved in law to become the self-governing federal Sechelt Indian Band under its new legislative framework. It then acquired additional federal and provincial powers as the Sechelt Indian Government District. This second stage was supported by companion provincial legislation constituting the Sechelt Indian Band as a government district for purposes of provincial law.

At each of the two stages, federal self-governing Indian band and provincial municipal district, the Sechelt band not only acquired additional federal and provincial powers, it also acquired responsibility for more people. As the Sechelt Indian Band it took responsibility for federal subjects - status Indians and existing band members - while as the Sechelt Indian Government District it took on responsibility for non-Indian provincial residents within its boundaries for purposes of taxation and provincial service delivery. It delivers those services to its Indian Band membership and to non-Indian provincial residents within its boundaries either directly or through contractual arrangements with other governments and bodies.

The net result was that the original Indian Act band became a specially empowered provincial municipality while retaining important aspects of its federal status as a former Indian reserve. This seems to reflect what the Hawthorn Report seemed to be calling for: absorption of Indian bands into the provincial program and service delivery framework while still retaining some aspects of federal protection. Although neither the Hawthorn Report model nor the Sechelt approach has found much favour among Indian people generally, it might be different if law-making powers were not delegated from the federal and provincial levels of government and if

there was provision for moving beyond provincial municipal status towards true third order rank such as was called for by the Penner Report.

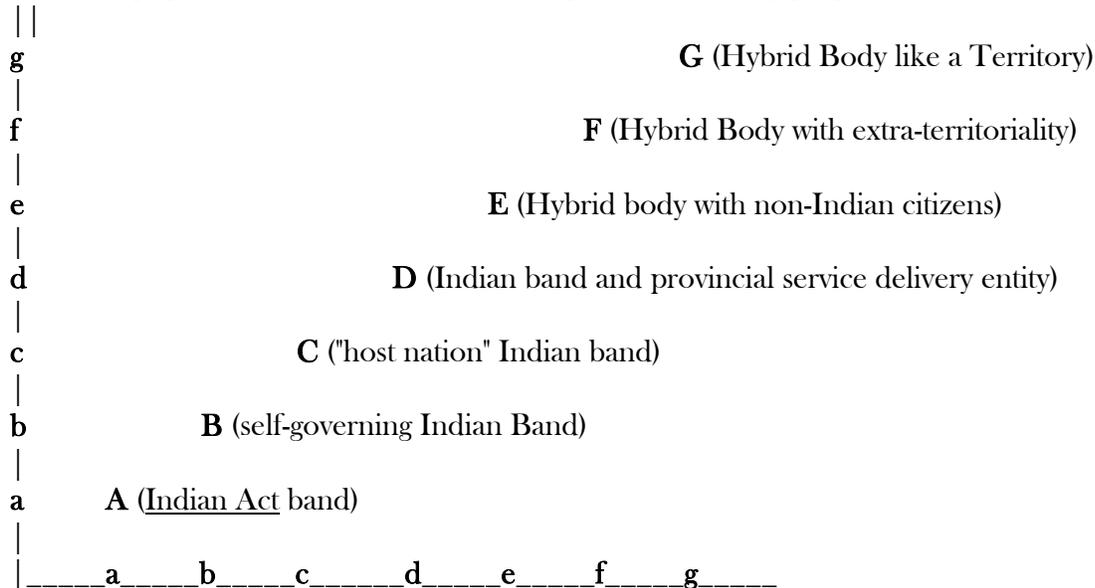
It may be possible to achieve this via matching federal and provincial legislation establishing a parallel process for a band or other Indian group to accede to an increasing range of governmental powers along a continuum. The process would be staged in terms of the status in federal and provincial law of the new entity. Thus, at each stage the Indian entity would acquire a different status in law. This would not be a delegated status: it would be complementary federal and provincial recognition of this aspect of the inherent self-governing status of that entity as a successor to the original Indian political unit.

The source of the powers exercised by the Indian entity would be outside the recognition framework. Their exercise would be a function of the recognition accorded by the federal and provincial governments. The process of acceding to the higher status and the ability to exercise a greater range of powers would be almost automatic since the legislative framework will already have been drafted. The Indian Act band need only opt in. It remains to be decided whether and to what extent the accession to a higher stage of government status should be subject to approval by a recognition panel, by federal and provincial orders in council, by automatic operation of law or by some other means. Thus the issue of the qualifying conditions for access to the next stage along the continuum in order to accede to a wider range of powers over a wider body of persons and over a wider territory is left open for the moment.

In order to accede to higher stages, the Indian band will have to include an increasingly larger group of people in its program and service delivery network and as part of its governmental structures and processes. Thus, it will also have to alter its governance documents, institutions and practices at each stage, corresponding to the increasing size of the population for which it is taking responsibility and including within it in one way or another. In the same way, at each stage, the financial arrangements in place to support self-government will have to be altered to account for the increased service population (and the increased revenues that might be generated by taxes, licenses etc.).

A graph might better illustrate the approach. The capital letters in the middle represent the type of government, ranging from A (Indian Act band) to G (quasi-public government). The vertical bar refers to different stages corresponding to the inclusion of a different population group, ranging from a (Indian Act band members) to g (non-Indian provincial residents living near the current reserve). Along the horizontal bar are phased the different institutional arrangements required in terms of the constitution and procedures ranging from a (the limited Indian Act band arrangements) through to g (third order quasi-public government arrangements similar in many ways to provinces or territories). Analogies can be dangerous. Thus the precise nature of the entity or body designated by the capital letters is deliberately left vague. These will likely be sui generis bodies with characteristics attributable to municipal, provincial, territorial and even the federal government.

Different populations included for citizenship/service delivery purposes etc.



Different stages of self-governing status from band to public government

A. Indian Act band. Thus, at vertical stage a, the population is the current band membership, whether the band has control of it or not and whether it has opened band membership up to all Bill C-31 new status Indians or not. Horizontal stage a refers to the current Indian Act band system, so that recognized government A is merely the status quo, namely, federally protected ethnic government using delegated federal powers in limited areas.

B. Self-Governing Indian Band or Nation. However, at vertical stage b the population will be required to include all those who are connected to the band by law and history. In other words, only upon the development of a citizenship code that incorporates all who should be incorporated within the emerging Indian nation (pursuant to a proper internal recognition policy) will a band accede to recognized government B. Horizontal stage b would then be a proper constitution and citizenship code replacing the Indian Act arrangements. The powers that recognized government B could exercise would be in core areas unfettered by federal supervision in the way that Partners proposes. Evidently, these core area powers would be narrowly defined so as to clearly be powers within federal jurisdiction for recognition purposes. Otherwise the danger is that there might be a need for provincial recognition - something that will only occur at recognized government stage C.

At horizontal stage b the Indian Act band, to become self-governing, would have to devise a constitution setting out its list of powers similar to those available, for example, to the Cree and Naskapi and Sechelt bands. These would be recognized inherent powers, but still within the limits of what Parliament can recognize within its section 91 list. It would have to include accountability and appeal mechanisms etc. in terms of what Partners, Penner and Bill C-52 would have required.

Thus, B will represent a new federally recognized ethnic Indian entity capable of exercising an enlarged range of powers on the basis that they are inherent but constrained by federal jurisdictional limits and whatever internal checks and balances the self-governing group includes within its constitution.

At this stage, the former Indian Act band may have united with other Indian Act bands to form a larger entity, the Indian Nation. The nation could be formed along regional, treaty, provincial or linguistic lines, according to how the Indian people themselves wish to organize their political entity. It should not make any difference except that it ought to be able to claim the mantle of a historic Aboriginal entity in order to be able to lay claim to the inherent powers of self-government that Partners says accrue to the remnants of their once autonomous Aboriginal nations.

C. Host Nation Indian band or Nation. At vertical stage c, the new population would include Aboriginal persons who are not resident within the boundaries of the self-governing entity referred to at B. These would be citizens who are resident in provincial municipalities etc. They would be accorded the right to participate in local political life in exchange for coming under the jurisdiction of the self-governing entity for certain purposes. Thus, they would agree, for example, to have their family law issues resolved in its courts, to receive certain services from it and to pay a portion of their taxes to it. All this would require that the constitution and institutions be amended, thus at horizontal stage c this would be reflected in new arrangements. Thus, at the level of recognized government C, a measure of federal and provincial recognition would be accorded to the new arrangements and the self-governing entity would acquire extra-territorial jurisdiction over non-resident citizens in a similar way to that whereby the CYI bands exercise certain powers in the Yukon off the settlement lands.

D. Indian Band or Nation and Provincial Service Delivery Entity. Vertical stage d refers to yet a larger population. To Indians and others who are referred to in the citizenship code are added non-citizens who find themselves within the territorial boundaries of the self-governing ethnic Indian entity. This new population group will receive services from and pay taxes to the self-governing Indian group. To some extent, the current Sechelt arrangements provide something of a model of this stage of development. Thus at horizontal stage d, the constitution and institutions of government of the self-governing entity would have to respond to the presence of non-citizens, according them rights of participation in law-making and related decisions. Thus, at the level of recognized government D, both the federal and provincial levels would recognize the new entity to the extent required by its program and service delivery capacity. Thus D would be a new entity, partly ethnic and federally protected, but partaking to some degree in provincial jurisdiction and to that extent part of the provincial framework. This hybrid entity would therefore enjoy different levels of recognition from the two senior levels of government in Canada.

E. Hybrid Body with Non-Indian Citizens. At vertical stage e, those non-citizens who have been receiving services etc. would have to offered citizenship or equivalent rights in the self-governing entity. They would not be required to accept them, but if they did, there would be

no effect on their rights as provincial residents and as Canadian citizens except to the limited extent required for the purposes of governance within the entity recognized at E. To some extent, this would be analogous to living in a federal district or in a municipality that enjoys special status in the province. The persons offered citizenship, if they accepted, would then be able to participate more fully in group governance decisions. Thus at horizontal stage e, the constitution and institutions would have to be altered to reflect the new rights accorded to former non-citizen residents. Thus, at E the hybrid entity would acquire a greater degree of recognition of its status from Parliament and the province in accordance with its additional responsibilities. At this stage, if it were necessary to classify the self-governing entity, it could likely be called an ethnic Indian entity with a certain number of non-ethnic Indian resident citizens or persons with rights similar to citizenship.

**F. Hybrid Body with Extra-Territoriality.** At vertical stage f the self-governing hybrid entity would begin to move away from its ethnic character by taking on responsibility for a larger population for program and service delivery capacities. It could include for these purposes non-citizen non-resident persons who live near the self-governing territory and who presently receive services from the province or the federal government directly. They could choose to receive services from the Indian self-governing entity if it were more convenient. In isolated areas of Canada it might make considerable good sense not to attempt to duplicate government services for people living in the same geographic area. Instead of maintaining both an Indian and a provincial governmental apparatus, perhaps there could be scope for a single district-style government. In this case, at horizontal stage f the constitution and institutions of the self-governing entity would have to reflect the rights and aspirations of the new population receiving services from it.

**G. Hybrid Body like a Territory.** The expansion of populations in vertical stage g would lead to the granting of citizenship or citizenship equivalent rights to these off-territory non-Indian non-citizen persons. Horizontal stage g would see the alteration of the constitution and institutions to reflect these new arrangements. Thus, at G a new federally and provincially recognized entity would have a genuine third order status - exercising exclusive and concurrent powers over persons within its own territory, exercising concurrent powers over off-territory persons of various kinds, depending on whether they are citizens, citizen-equivalents or mere recipients of services and programs.

This model is to some extent analogous to the process a territory goes through in order to acquire true self-governing status. The Yukon and Northwest Territories, for instance, have gone through an evolutionary development process through which they have gradually gained more and more jurisdiction over the persons resident within their boundaries. The processes have been different and have faced different obstacles in each territory. It can be anticipated that something similar will apply to the new Nunavut Territory once it is up and running. This staged legislative recognition approach is evidently somewhat different in that it presupposes different levels of recognition at each stage in the evolution from an Indian Act band to that of a semi-public or public government. There is nothing that forces an Indian group to move at any particular pace or even to move at all if it decides that it wishes to remain at a particular stage.

The advantage to this approach is that it permits the details of each stage of the evolution of an Indian Act band to be fleshed out a bit before the actual decision is taken to move beyond the present stage. It therefore offers a degree of certainty to Indian peoples themselves as well as to governments and to financial institutions and others with an interest in these issues. The disadvantages are also obvious. The mechanics and the details of the particular stages remain to be developed. There will also have to be a high degree of federal/provincial concurrence, for each stage requires concurrent federal and provincial recognition. Although the recognition would be built in (since the federal and provincial legislation would be twinned and passed while bands are still at the first stage), the old problem of national agreement remains.

Moreover, this is a national model, although it could be broken down and regionalized, and one that is relatively rigid in its application. It is also a totally novel approach, and may smack of federal and provincial manipulation since they will be the levels doing the drafting. Ultimately, it is also a complicate one that will be difficult to explain at the local reserve level. Its nation to nation aspect is masked by the staged process, and this alone may be enough to prevent its wide acceptance among Indian peoples. Nonetheless, it is presented here as another way of proceeding and to stimulate thought.

### (3) Agreement/Treaty

Although the Indian Act has not been analyzed in this paper from this vantage point, it seems clear that it is fundamentally at odds with the view of treaties consistently maintained by treaty Indian nations in Canada. Treaties, from their perspective, are nation to nation agreements, the nature of which precludes the law-making body of one of the nations (Canada) from making laws to govern the other without its consent. In this context, it is well to recall that treaties preceded by decades, if not centuries, the assertions of sovereignty by settler societies over Indian nations.

Treaties are an expression of mutual sovereignty by the signatories, and represent the voluntary act of mutually limiting the full expression of their sovereignties in certain areas. The Indian Act is an expression of the sovereignty by the settler society that became Canada over "the several Nations and Tribes" referred to in the Royal Proclamation of 1763 and is from the vantage point of many treaty Indian nations an illegal and unjust usurpation by Parliament of the inherent government powers of the signatory Indian nations. This is a familiar criticism by treaty nations that has been made consistently from the onset of the civilization and assimilation program in the early 1800s until the present. Its moral and legal force has not diminished simply because of the passage of time.

Even if the focus of some treaty Indian nations on the international character of treaties is misplaced in the 1990s, they nonetheless contain explicit and implicit guarantees of the rights of the treaty nations that signed them with the Crown. Since 1982 at least, those rights have been constitutionalized. Indeed, it would be surprising if they were not held to be constitutional rights by their very nature, no matter what form they may be in or when the treaties themselves were concluded. Canada acquired a great deal of its land mass and a significant element of its population by these agreements. It makes little sense to deny that they are in this respect "important, fundamental and far-reaching" and therefore part of the constitutional landscape.<sup>1045</sup>

To deny that treaties are important documents is to fall back on the self-serving discovery doctrine as the key to the acquisition by Imperial powers and Canada of the land mass now making up the country. To say that settlement and the emergence of a modern federal state have now relegated treaties to the status of historical curiosities is simply to beg the entire question.

The American experience in this regard is perhaps prove instructive in this regard. Charles Wilkinson evokes the sacred character of the treaty process in the following comment on how the American courts have come to accord judicial recognition and respect for treaties despite the pressures of the modern age and the North American tendency to relegate all things old to the scrapheap of society:

The field of Indian law rests mainly on the old treaties and treaty substitutes. To understand

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<sup>1045</sup> "The more important, fundamental and far-reaching any principle or practice is, the more likely it is to be classed as constitutional." : Salmond on Jurisprudence, P.J. Fitzgerald ed. (London: Sweet and Maxwell, 1966) at 83.

them, one must reach back to aboriginal sovereignty and forward to the epochal changes that have occurred since in law and civilization. But the inquiry usually returns to these unique documents and to their unique promises.

...

These old laws emanate a kind of morality profoundly rare in our jurisprudence. It is far more complicated than a sense of guilt or obligation, emotions frequently associated with Indian policy. Somehow, these old negotiations - typically conducted in but a few days on hot, dry plains between midlevel federal bureaucrats and seemingly ragtag Indian leaders - are tremendously evocative. Real promises were made on those plains, and the Senate of the United States approved them, making them real laws. My sense is that most judges cannot shake that. Their training, experience, and, finally, their humanity - all the things that blend into the rule of law - brought them up short when it came to signing opinions that would have obliterated those promises.<sup>1046</sup>

Although Canadian courts have been reluctant to recognize it, the situation in Canada is, in essence, little different from the United States in terms of the significance to Indian peoples and to the federal state of the treaty relations established and of the "real promises" made in the course of establishing those relations. From this point of view, any Indian legislation by its very nature is wholly or partly invalid to the extent it interferes with treaty rights. Thus, passing further legislation of a non-recognition nature without the informed consent of treaty signatory nations simply compounds the original problem of interference with constitutionally protected rights. Passing recognition legislation is somewhat better, but only to the extent that it clarifies without altering or detracting from the original treaty bargain.

Thus, it makes considerable sense to return to the original "confederal bargain" (from the Partners organic perspective) by which Indian tribes and nations became part of the Imperial order that evolved into the Canadian state. There is much to be said, therefore, for a non-legislative approach to dealing with the Indian Act, at least in so far as treaty Indian nations are concerned. Treaty renewal itself would likely be a phased process that in the view of the RCAP treaty team would require at least three stages: empowerment; specification of issues and parties (the recognition dilemma again); and clarification and implementation of the agreements reached on how to go about renewing the relationship originally established within the treaty framework.

#### (i) Treaty Clarification and Renewal Process

The numbered treaties, 1 to 11, were entered into by the Crown in Right of Canada and the bands occupying the areas covered by them between 1871 and 1921. They cover northern Ontario, all of Manitoba, Saskatchewan and Alberta, and portions of British Columbia, the Northwest Territories and the Yukon. They, along with the Robinson, Williams and Upper Canada treaties covering the rest of Ontario, constitute what has been referred to as the treaty area

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<sup>1046</sup> American Indians, *supra* note 1041 at 120-21.

of Canada. There are many other examples of treaties in Canadian history, however. For example, although the "peace and friendship" treaties of the Maritimes have traditionally been accorded lesser legal status because they were signed so much earlier and made no provision for land cessions as did the others, this conventional understanding will have to change.

Treaties are not necessarily confined to the words on a particular document or to the interpretation given to those words by the courts of one of the parties to the treaties. Treaties are evolving bilateral and multilateral relationships that are only imperfectly captured by the actual documents and by the notes taken by non-Indian observers and participants in the treaty proceedings. Treaties, like the Aboriginal rights referred to by the Supreme Court in the Sparrow Case are not frozen in time. They evolve as the relationship between the treaty parties does. Thus, the treaty relationship, like any other kind of relationship involving human actors requires continual renewal.

The early history of relations between Indian tribal nations and Imperial and colonial authorities demonstrates this. Up until 1858, it will be recalled, the official practice was to renew the treaties annually and for the Crown to distribute treaty "presents" as the symbol of that renewed relationship of alliance and protection. This practice was formally ended in central Canada a mere eighteen years prior to the passage of the first consolidated Indian Act in 1876. The failure to renew the original treaties since then and the gradual replacement of the nation to nation relationship they imply with a relationship more akin to quasi-colonial domination has been had mixed results and has led to the constitutional and political impasse in which Canada now finds itself with regard to Aboriginal peoples. As mentioned above, additional legislative initiatives, despite the possibility that they may be necessary, raise particular difficulties.

Treaty Indian nations have not ceased to insist that Canada maintain its end of the confederal bargain represented by the Royal Proclamation of 1763 and by the treaty relationship. A call to discuss treaty rights appears in every consultation with Indians beginning with the 1946-48 joint parliamentary committee hearings right up to the Charlottetown Accord. The recently concluded Manitoba regional DIAND dismantling exercise repeats this insistent desire and pledges to discuss treaty issues in the context of the dismantling. It seems clear, therefore, that treaty renewal is still of compelling interest to treaty Indian nations. This offers yet another mechanism for moving away from the Indian Act, although how exactly this might work is not yet clear.

For instance, and for the reasons mentioned earlier, a rapid move out of the Indian Act framework is not only highly unlikely but potentially fraught with all sorts of practical, legal and political difficulties. A treaty renewal process offers an appropriate context within which to discuss many related matters including a phased or selective move away from the powers exercised over treaty nations by the GIC and the Minister and DIAND officials.

On the Indian Act side of the equation, the GIC power to make a proclamation in subsection 4(2) could be used to immediately suspend the operation of provisions (except, it will

be recalled, the status and membership and land surrender provisions) with regard to the bands involved in the renewal process pursuant to any agreements reached in this regard. Treaty rights override mere legislation in any event (but presumably subject to the Sparrow balancing test) and the agreements reached in the context of treaty renewal would presumably be evidence of the treaty right in question. There would be no need therefore to repeal the offending Indian Act provision in order to assure that the GIC could not revoke its proclamation and re-instate the provisions in question.

The mechanics of such a process must remain somewhat vague since a treaty renewal process is something of an unknown in Canadian law and politics. The Manitoba regional DIAND dismantling initiative has aspects of a treaty renewal process, since treaties are one of the topics up for study and discussion. Moreover, Indian Act bands are to be empowered through being restored to their original jurisdictions and provisions of the Indian Act are to be repealed. However, this initiative has not been cast as treaty renewal and is not necessarily intended to lead to clarification of the treaty rights contained in the different numbered treaties operative in Manitoba. Nonetheless, this process provides something of a glimpse of what treaty renewal might look like.

Something that will undoubtedly figure in any treaty approach to Indian Act transition is the question of land - ownership and extent. On the ownership side, an argument has already been made earlier in this paper for a reconsideration of section 109 of the Constitution Act, 1867 that would recognize the sovereign ownership by Indian nations of their own lands, including the resources on and under them. By the same token, a treaty renewal process will likely deal with land entitlements, and challenges will be issued by treaty nations to the relative smallness of the reserves allocated to them. Failing resolution, these challenges usually end up in the courts. The non-judicial models for their resolution adopted by the federal government since 1973 call for negotiated settlements under either the comprehensive or specific claims policy.

However, because these processes occur in a pre-litigation context in which the federal government more or less controls every stage of the process, including funding, they have been roundly criticized for their basic lack of fairness. A treaty renewal process might provide the broader context in which negotiated settlements could occur in these areas as well as in the specifically governance and Indian Act contexts.

However, it is important to note one of the primary disadvantages of the treaty renewal process: its specifically constitutional impact. Treaty rights are recognized and affirmed by section 35 of the Constitution Act, 1982. This means, of course, that the renewal and clarification called for has a potential impact on the conventional practice of Canadian federalism that is already under strain. These will not be easy issues to resolve therefore, and will likely require provincial participation in any renewal process for political if not for constitutional or historic reasons. The Manitoba initiative is specifically and deliberately cast as devolution and not as treaty renewal. The province has no specific participatory role, but will no doubt be watching intently to see where the discussions go.

In other words, a specifically treaty orientation to Indian Act reform or repeal risks getting bogged down in larger constitutional issues and federal-provincial wrangles. One can imagine a scenario in the treaty renewal process involving the Mohawk communities in Québec in which land ownership and sovereign jurisdiction issues sidetrack more limited and relatively concrete issues such as repeal of the Minister's role in approving the issuance of CPs and COs, for example. Thus, while the treaty renewal process has much in its favour, there is nonetheless a considerable risk of simply repeating in a different forum the often bitter experience of the last decade with constitutional renewal more generally.

### (ii) Treaty Process With Non-Treaty Indian Nations

The proposed British Columbia treaty process offers yet another variation on the treaty theme for moving away from the Indian Act structures and processes. As with the foregoing, it is a specifically treaty orientation, thereby raising constitutional issues. However, having been put in motion by the federal and provincial governments and B.C. Aboriginal peoples, it is by definition tripartite and proceeds from an agreed basis of consensus and apparent optimism and relative good will.

Because it is to develop a new treaty relationship in areas where there were no written treaties and to add to the treaty relationship in areas where treaties exist, it may be possible to begin afresh and to open a dialogue that will be more conducive to all sorts of measures, including more limited Indian Act reform or repeal. Self-government, not just land issues as in the case of the modern land claims settlements under the comprehensive claims policy, are understood by the participants (except, apparently, the federal government) to figure in the negotiations.

However, this too is an unknown process, and may yet be destroyed by the same forces that wrecked the Aboriginal constitutional discussions of the last decade. Nonetheless, there is room for optimism because of the freshness of the approach and the presence of a treaty commission to be a "keeper of the process" and thereby to facilitate it and to serve as a sort of secretariat for reporting and information disseminating functions. In such an environment, there is good reason to believe that if self-government figures in the discussions, the Indian Act problem will be resolved as a function of the larger negotiations.

It may be useful to outline here the basic features of the B.C. Treaty Commission as a stimulus to thought about how the proposed process might mesh with transition from the Indian Act.<sup>1047</sup> As mentioned, the Commission is to be the keeper of the process. It will therefore be a neutral and independent body that will have four primary functions with respect to each set of negotiations. First, it will bring the parties together at the outset. Second, it will exercise judgment about when they are ready to begin negotiating. Although it will not enter the

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<sup>1047</sup> What follows is taken from Barbara Fisher, "The Mandate of the British Columbia Treaty Commission" 53 (Part 1) The Advocate 75-79 (January 1995). Barbara Fisher is the provincial appointee to the five persons commission. Two members are appointed by the federal and provincial governments respectively, two by B.C. First Nations, with the chairperson appointed by tripartite consensus.

negotiation process or serve as an arbitrator, its third function will be to keep the process moving in various ways. Fourth, it will serve a public reporting function on the progress in negotiations etc.

The actual process is divided into six stages. The first two have to do with readiness, while the following four engage the monitoring capacity of the Commission. The process begins upon receipt by the Commission of a statement of intent from a participating "First Nation." (The definition of "First Nation" is a circular one, unfortunately, thereby raising once again the issue of recognition<sup>1048</sup>) This statement will identify the group of Aboriginal people, their traditional territory and the name of a formal contact.

The second stage begins when the Commission calls the parties together for an initial meeting. The commission will also allocate funding to the Aboriginal group pursuant to agreed criteria so that it will have sufficient resources. At this stage readiness for negotiation will be assessed by the Commission on the basis of a set of criteria. These criteria are important for their detail and for their concern with third party interests.<sup>1049</sup> Once the negotiations begin, the Commission assumes a true monitoring function.

The third stage involves the negotiation of a framework agreement identifying the objectives to be attained by the negotiations, the timetable and any milestones the parties wish to include. At stage four an agreement in principle will be negotiated containing the main points on which agreement has been achieved. At this stage the parties must confirm their ratification procedures and begin to develop an implementation plan. The next stage, of course, is to actually negotiate the treaty itself. The sixth and final stage is to then implement the treaty.

At all stage the Treaty Commission is available to assist the parties and it will evaluate the

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<sup>1048</sup> Ibid at 79. A First Nation is defined as "an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia. It is clear that there are no criteria for recognition in this "definition."

<sup>1049</sup> Ibid at 78:

1. Each party has:
  - (a) appointed a negotiator,
  - (b) confirmed having given the negotiator a comprehensive and clear mandate,
  - (c) sufficient resources to carry out the procedure,
  - (d) adopted a ratification procedure,
  - (e) identified the substantive and procedural matters for negotiation.
2. The First Nation has identified and begun to address any overlapping territorial issues with neighbouring First Nations.
3. Canada and British Columbia have:
  - (a) obtained background information on the communities, people and interests likely to be affected by the negotiations, and
  - (b) established mechanisms for consultation with non-aboriginal interests.

progress made against any milestones agreed upon at stage three. During the actual negotiations the Commission will also help resolve any disputes arising by first assessing the problem and then providing mediators upon the request of the parties. The Commission will also keep records of all the proceedings and will report to the parties on the progress of negotiations, its own operations and other appropriate matters.

It is clear that some thought has gone into the process and the role of the Treaty Commission. However, it is equally clear that in the absence of any coercive tools, the Commission role is limited to that of "helpful fixer" and that political good will coupled with sufficient financial resources for the First Nations involved are the key ingredients to the future success of this endeavour. Nonetheless, the very fact that a commission of this nature exists provides considerable scope for optimism and perhaps points the way to the future.

This is managed treaty process that is phased, optional and appears to be able to deal with the inherent right of Indian nations to exercise self-government powers. There are plenty of opportunities to put Indian Act matters on the agenda and to negotiate transition in the larger context. Importantly, third party interests are incorporated into the process. Aside from the issues of political will and financial resources, the only other possible sticking point is the question of recognition that has been raised throughout this paper.

### (iii) National Treaty

The approach being taken in British Columbia, while designed to develop a treaty relationship where none had been acknowledged to exist before, provides the fresh impetus that may be needed to break the historical impasse that characterizes government-Aboriginal relations throughout Canada. Importantly, the B.C. process also will deal with existing treaties - Treaty 8 and the Vancouver Island Douglas treaties - as part of its mandate. It is not intended, however, to "repeal" or otherwise diminish the existing treaties, however. They are to be renovated in the context of the overall process.

Assuming self-government were included, perhaps something similar would be appropriate for all of Canada. This proposal was made during the Charlottetown Accord constitutional discussions, but received little in the way of a positive response. However, in retrospect, it is clear that many treaty Indian nations were unhappy with the format and with the outcome of the constitutional discussions and did not support the final agreement. From this one may surmise that had a specifically treaty orientation been adopted their support might have been forthcoming.

In any event, it seems clear that although a national treaty process has a clear constitutional aspect, it might nonetheless be possible to work within its framework in the way intended in B.C. by addressing the situation of treaty and non-treaty nations. In such a case, Indian Act repeal or amendment would likely find a place along the lines set out above as a function of the resolution of the self-government issue.

### (iv) Non-Treaty Framework Agreement to Devolve Indian Act Administration

The approaches taken in the Manitoba regional DIAND dismantling initiative and the land management proposal for a group of first nations (the reborn Chartered Lands Act of the Indian Act Alternatives initiative) are also of the treaty variety to the extent that they involve nation to nation negotiations within an agreed framework of discussion.

However, the advantage of these approaches is to push the treaty analogy to the background to avoid drawing too much attention to the possible constitutional implications of what has been proposed. In both the emphasis is on process and substantive matters such as the precise legal and constitutional characterization to give the approach is downplayed. While this has drawn the ire of federal government legal advisors, there is nonetheless considerable merit to sidestepping the legal debate in order to avoid the acrimony that has coloured discussion of constitutional matters over the past decade or two.

The Manitoba initiative offers a potentially promising model of how progress could be made on a number of currently contentious issues within a single framework in which the parties are constrained politically to find agreement. The framework agreement locks the parties into a process of discussion, study, consultation and ultimately negotiation. Because of the DIAND dismantling context, funding is available to the various bands through the Assembly of Manitoba Chiefs in an amount to be transferred from DIAND's operating budget. There will be no new money, therefore, at least until the later stages of the framework agreement's life. By then, the design of new Indian nation governing structures will have been completed by the specialists who will be hired in the context of the initiative to study and build upon the change in the structures and processes of Indian Act bands that must occur in program and service delivery is to be devolved from the federal government to the AMC bands.

This initiative has several advantages. In the first place, it has a precedential value, since there is one such agreement in place in Manitoba and another under discussion in Ontario with the Nishnawbe-Aski Nation. It is also sufficiently vague that all parties can read into it what they will at the outset and leave their competing interpretations for resolution later once the negotiations begin and following the study and consultation period called for during which information will be gathered that may prove useful in enabling common ground to be found. Thirdly, there is political will, at least at the federal level, for just this sort of approach right now. Fourthly, in the event that individual agreements flow from the negotiations, there is more than an even chance that they may be entitled to section 35 protection on the basis that they are treaty rights. This is a useful prod to meaningful, good faith negotiations on the federal side, something that has not always been present in other contexts reviewed in this paper.

However, it must also be admitted that this approach has some serious drawbacks. In the first place, it is merely a political agreement to seek further agreement. It is not a treaty renewal process as such and therefore lacks the protocol and dignity that would attend such a process and which might serve to prompt negotiated resolutions to long standing problems. Its constitutional and legal nature is ambiguous, and may therefore simply perpetuate in this format the divergence of viewpoints that has characterized Canadian Indian policy since the mid-nineteenth century.

Indian people may see it as a treaty renewal process while federal bureaucrats may see it as a mere political deal to be dealt with in as quick and minimalist a way as possible.

Another drawback is the absence of the provinces from the process. It will prove very difficult if not impossible to deal with many issues (land and resources spring to mind) on a negotiated basis without the provinces at the table. Finally, it does not seem to include in any tangible way off-reserve and urban Indians and Indian women's groups and appears to have aroused an unknown degree of opposition among Indian people themselves in Manitoba. It may, therefore, turn out to be another initiative that restricts itself to the status quo, namely, status Indians on reserve and which is incapable of dealing with the many issues that divide both the federal and provincial governments and on and off-reserve Indians.

## L. CONCLUSIONS

Although a number of transitional options have been set out as if they were separate from each other, that is not necessarily the case. There is always the possibility of combining them in various ways. For example, in core areas under the Partners scenario, it may be possible to proceed by way of direct action (just do it) or by way of legislation recognizing the inherent jurisdiction of Indian governments in core areas. Obviously, for outlying or peripheral areas, the treaty/agreement route would be more feasible, given the need to avoid jurisdictional disputes with the other two levels of government and to deal with broader issues of land and resources.

In all cases, the Indian Act itself could be amended as described above, by repealing the most obnoxious provisions and be amending those which would make the daily lives of Indians on reserve easier while the transition from the Indian Act regime is occurring. The mix of options available, in fact, is limited only by the desires of the participants and by the nature of "core" and "outlying" areas under the Partners approach. The resolution of what constitutes a "core" area is evidently the key to transition, as is the decision about who will be recognized as First Nation for self-government purposes. The recognition policy adopted by the federal government will be key in determining the fiscal formula for whatever funding is provided to current Indian Act bands during the various phases of transition - hence the importance of resolving this issue.

Financing arrangements, therefore, cannot be dealt with in the abstract without specific reference to the option to be adopted and the degree to which the third order Indian government wishes to take on the powers of which it is capable under the Partners scenario. As mentioned, that depends on the content to be ascribed to core areas and on the nature and extent of the powers to be shared or transferred pursuant to the agreements called for in "outlying" areas. The financing of outlying areas will no doubt figure in the intergovernmental agreements that will accompany the sharing or transfer of jurisdiction between the three orders of government. At the initial stage, the Indian Act band already has an array of financing options available to it that are subject to various degrees of risk and which are largely negotiated in any event. Issues surrounding the extent to which the federal government will continue to rely on status/non-status

distinctions for funding of "central case" Indian "groups" under the Partners scenario must be resolved.

It is assumed that bands that wish to move beyond the Indian Act will attempt to negotiate higher allocations of money from the federal government at the outset to enable them to move away from the legislative regime and possibly to include a wider array of persons within their program and service delivery mechanisms. As mentioned in various places throughout this paper, this is a recognition issue that remains to be resolved. Nonetheless, given the current fiscal crisis, perhaps the Manitoba model of transferring DIAND operating budgets to band governments may allow for the freeing up of greater amounts of money for bands. The advantage of that approach is that it leaves it up to bands to decide what they will do with the moneys (within the limits of accountability evidently). They may well decide to enlarge the program and service mandate to off-reserve Indians in Manitoba. However, there is no indication that this is the case and the amount of money involved has not been calculated on that basis.

In any event, as bands become more self-governing and gradually assume real third order status and functions financing ought logically to become a function of the broader federal transfer payment system. The Penner Report simply assumed a block funding scheme on the model of current federal funding arrangements. However, Penner also assumed that Indian First Nation governments would have similar broad third order powers. That is not likely to be the case if bands are to be permitted to move at their own paces. In any event, other financing work being done for RCAP indicates that the problem of transferring moneys to self-governing groups under current federal arrangements is fraught with potential complications that remain to be sorted out by specialists in these areas.<sup>1050</sup>

In short, these are matters that will require detailed funding formulae that will emerge either as a part of a treaty renewal or agreement format or as a result of formal discussions the level of senior officials or first ministers as part of a larger federal re-structuring. This, of course, simply adds to the potential attractiveness of a non-legislative and treaty/agreement-based approach to the whole issue of Indian Act transition.

Given the premise of this paper that the Indian Act system will not disappear overnight no matter what options for transition may be adopted, it seems clear that DIAND will be around in modified form for the foreseeable future. So will the Indian Act in some form and for an uncertain time. In terms of the other institutions and processes that will be necessary, perhaps a review of the Penner Report proposals will prove instructive. A more comprehensive list could not easily be drawn up. Thus, aside from the Indian First Nation governments, a number of other bodies would have been created at the federal level:

- Ministry of State for Indian First Nations Relationships to promote the interests of Indian First Nations, funding their governments, economic development and community infrastructure

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<sup>1050</sup> See for example, Vicky Barham, Robin Broadway "Financing Aboriginal Self-Government," supra note 948.

- improvements;
- a jointly constituted recognition panel;
  - a jointly appointed secretariat as a neutral forum for federal-Indian First Nation negotiations;
  - a jointly designed tribunal for settling disputes between Indian First Nation and other governments;
  - a negotiated monitoring and reporting body to Parliament regarding the discharge by the federal government of its obligations to Indian First Nations;
  - a federally funded advocacy office to permit Indian First Nations adequately to represent their interests in disputes concerning their rights;
  - a new land and related claims agency;
  - Indian financial institutions to manage capital moneys trust funds (where the Indian First Nation does not use a private trust company).

This is an ambitious and wide-ranging list that reflects the more optimistic period in which it was drawn up. Nonetheless, it is a useful place to start in discussing what might be called for in the 1990s.

As a final comment on the Indian Act and on transition away from it, it must be recalled that, like the Act itself, all the options canvassed are problematical in different ways. The Indian Act is an imperfect and unwieldy vehicle for almost all the purposes to which it has been turned over the years. To expect transitional mechanisms to be problem-free is unrealistic. Canadian Aboriginal law is unformed, vague and still in the process of evolving. The Supreme Court has also made it clear that it would prefer that most of these issues be resolved politically and not in the courts. Moreover, Canadian law is not even clear on what constitutes a treaty - the oldest and most important device for managing relations between the settler society that became Canada and Aboriginal peoples. As mentioned at the outset of this paper, the Indian Act itself, despite its lineage and age, is legally uncertain and constitutionally doubtful in many areas. To expect that transitional devices will not suffer from the defects in Canadian Aboriginal law and the uncertainties of the current period is to expect too much.

In the final analysis, policy is really nothing more than applied values. The Indian Act represents one set of known but unacceptable values. The policy it put into action, the practices it engendered and the effects it had on Indian people across Canada can no longer be endured by Indians or by Canadian society as a whole. Even the international community has become involved in this internal Canadian problem over the past few decades. New values must guide official policy. This will require that a clear decision be taken and that hard choices be made. A

vehicle in the form of transitional mechanisms must be embraced. This will entail assuming the known legal and political risks any such mechanism will bring in its wake. The failure of the recent series of constitutional conferences, the general economic downturn and the political malaise infecting the country mean that the eleventh hour has passed. It is too close to mid-night to avoid any longer making these choices.