

**SUBJUGATION, SELF-MANAGEMENT AND  
SELF-GOVERNMENT OF ABORIGINAL  
LANDS AND RESOURCES IN CANADA**

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## PREFACE

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Section 37 of the *Constitution Act, 1982* (as amended) requires the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." Discussion leading up to and during the First Ministers' Conferences on Aboriginal Constitutional Matters quickly focused on the task of making constitutional provisions for aboriginal self-government. Many involved in the process openly questioned the meaning of "aboriginal self-government".

In view of the importance of this subject, in May of 1984 the Institute of Intergovernmental Relations launched a research project on "Aboriginal Peoples and Constitutional Reform". Phase One of the project responded to concerns that emerged at the outset of the constitutional negotiating process. As indicated by its title, "Aboriginal Self-Government: What Does It Mean?", Phase One examined various models, forms and proposals for aboriginal self-government. This included an exploration of the citizenship rights of aboriginal peoples, the experience of aboriginal self-government in other nations, and a review of Canadian developments over the past few years. The results of these investigations were compared to the positions taken by parties to the constitutional negotiations, in an effort to identify areas of emerging conflict and consensus. These findings were elaborated in five Background Papers, a Discussion Paper and a Workshop, which was held two months prior to the 1985 First Ministers' Conference (FMC).

Developments in 1985, subsequent to the First Ministers' Conference, may have a dramatic impact on the constitutional negotiation process. At a meeting of government ministers and aboriginal leaders held in June, 1985, several governments indicated their intention to pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution (the "bottom-up" approach). This contrasts with the proposal, which has thus far dominated discussions, to entrench the right to aboriginal self-government in the constitution, and then to negotiate individual agreements (the "principles first" approach). The result is that, in addition to multilateral negotiations at the national level, negotiations will now proceed on a bilateral or trilateral basis, at the local, regional and provincial/territorial levels.

Phase Two of the project is entitled "Aboriginal Self-Government: Can It Be Implemented?", and responds to concerns now emerging in the negotiations. This phase of the Institute's project therefore will focus initially on arrangements for the design and administration of public services by and to aboriginal peoples. The research will examine the practical problems in designing mechanisms and making arrangements for implementing self-government agreements. Clearly, the "bottom-up" approach could have a major effect on the process of constitutional reform as it relates to aboriginal peoples in Canada.

As the 1987 FMC approaches, attention will become more concentrated on the multilateral constitutional forum (the FMC). The 1987 FMC may consider the constitutional entrenchment of individual agreements previously negotiated, or it may attempt to reach agreement on a "principles first" approach for defining and entrenching aboriginal rights in the constitution, especially those relating to aboriginal self-government. The research agenda in the second year of Phase Two anticipates this shift in preoccupation, with the focus turning to the search for a constitutional accommodation in 1987. If this search is to be successful, it will be necessary first to inquire into, and then to resolve or assuage a number of genuine concerns about aboriginal

self-government and its implications for federal, provincial and territorial governments. Research in this part of the project will explore these concerns.

The Institute wishes to acknowledge the financial support it received for Phase Two of the project from the Donner Canadian Foundation, the Canadian Studies program (Secretary of State) of the Government of Canada, the Government of Ontario, the Government of Quebec, the Government of Alberta, the Government of Manitoba, the Government of New Brunswick, the Government of Yukon, the Assembly of First Nations, the Inuit Committee on National Issues, the Metis National Council and the Native Council of Canada.

The extent of aboriginal control in various policy sectors is not well documented. Richard Bartlett's paper on *Subjugation, Self-Management and Self-Government of Aboriginal Lands and Resources in Canada* provides a comprehensive review of the existing control (or lack thereof) exercised by aboriginal peoples in this field. He finds that existing aboriginal powers over land and resources are severely circumscribed by federal and provincial laws, and proposes a number of approaches (including the constitutional entrenchment of the right to aboriginal self-government, and measures to secure the tenure of aboriginal lands) to ameliorate this situation. However, he also discerns an established pattern of "self-management and municipal government" underlying current policy, which will make such approaches difficult to implement.

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## ABSTRACT

The paper provides a survey of the law respecting self-government of aboriginal lands and resources. An aboriginal community is considered to be self-governing if it is fully empowered to act, and its powers are entrenched, with respect to the administration of aboriginal lands and resources, including use, access, control, management, disposition and taxation. It is concluded that self-government of aboriginal lands and resources has not, and does not yet, exist in Canada. Past arrangements, including the *Indian Act*, the *Metis Betterment Act* and existing Federal-Provincial agreements have subjugated aboriginal lands and resources. Contemporary arrangements including the *James Bay Agreement* and *Cree-Naskapi (of Quebec) Act*, the *Sechelt Indian Band Self-Government Act* and the *Inuvialuit Final Agreement (Western Arctic)* provide for "self-management" and municipal government, not self-government. Indeed, it is suggested that a pattern of self-management and municipal government is emerging that may be difficult to break. Negotiations with the Nishnawbe-Aski in Ontario or the aboriginal peoples in British Columbia may break such pattern, but only an examination of the substance of the powers conferred and not merely of their form and styling, will reveal if governments truly contemplate the recognition of aboriginal self-government.

## SOMMAIRE

*Cette étude est un aperçu des droits concernant l'autonomie politique des terres et ressources autochtones. On dit qu'une communauté autochtone jouit de l'autonomie politique si elle possède entièrement le pouvoir d'exécution et si ses pouvoirs sont soutenus dans l'administration de ses terres et de ses ressources y compris leur utilisation, accès, contrôle, administration, disposition et imposition. L'étude montre que l'autonomie politique des terres et ressources autochtones n'existe pas encore au Canada. Des accords antécédents incluant*

*l'Indian Act, le Metis Betterment Act et les accords actuels fédéraux et provinciaux ont subjugué terres et ressources autochtones. Aujourd'hui des accords incluant le James Bay Agreement et le Cree-Naskapi (of Quebec) Act, le Sechelt Indian Band Self-Government Act et le Inuvialuit Final Agreement (Western Arctic) fournissent une méthode d'"auto-gestion" et de gouvernement municipal et non pas d'autonomie politique. En effet, il est possible qu'un type de gestion autonome et de gouvernement municipal, qui pourrait être difficile à dissoudre, soit en train de prendre forme. Des négociations avec les Nishnawbe-Aski en Ontario ou avec les peuples autochtones en Colombie Britannique pourraient dissoudre un tel modèle, mais seul un examen de l'essentiel des pouvoirs légués et non seulement de leurs forme et style, révélera si vraiment les gouvernements ont l'intention de reconnaître l'autonomie politique autochtone.*

## **1 SUBJUGATION, SELF-MANAGEMENT AND SELF-GOVERNMENT**

It is we who must protect our aboriginal right to self-determination as a nation and our right to develop and use the resources of the land free of interference and intimidation. We have an obligation to preserve the rights granted to us by our Creator.<sup>1</sup> Fred Plain

The object of this paper is to consider the state in law of Aboriginal self-government of lands and resources in Canada. It is a survey which seeks to consider past and contemporary patterns and problems.

As the quotation of Fred Plain indicates, it is necessary to consider two elements in assessing the extent of Aboriginal self-government recognized in law:

- (1) the degree of protection from "interference and intimidation" under other governmental authority, or from another perspective, the extent and reach of federal and provincial jurisdiction; and

(2) the nature of the rights possessed with respect to lands and resources.

It is also necessary to offer some preliminary indication of the meaning to be accorded to terms, in particular "self-government". The following meaning, and pattern of evolution, is suggested:

a. Subjugation

- no or little protection from "interference and intimidation" under other governmental authority, and the invasion of aboriginal lands
- no or few powers to administer land and resources

b. Self-management and municipal government

- little protection from "interference and intimidation"
- the power to administer aboriginal land and resources as any other owner but subject to "general laws of application"; citizens, but not "citizens plus".
- "self-management" is a term chosen by the Liberal-Country Federal Government of Australia to describe its policy in 1978:

In essence, the policy of self-management requires that Aborigines, and individuals and communities, be in a position to make the same kind of decisions about their future as other Australians customarily make, and to accept responsibility for the results flowing from these decisions.<sup>2</sup>

- powers of "municipal government" may be conferred

c. Self-government

- entrenched protection from "interference and intimidation" under federal and provincial jurisdiction, and
- full power to administer aboriginal lands and resources

The term "aboriginal self-government" will accordingly be considered appropriate with respect to an aboriginal community that is not subject to the requirements or demands imposed under the constitutional authority of other governments, and which is fully empowered to act with respect to the administration of aboriginal lands and resources. Such powers should include use, access, control, management, disposition and taxation, so as to ensure that all use and development with respect to its land and resources is in accord with, and provides the maximum benefit, for the interests of the community. It is not considered significant whether such powers are exercised by executive or legislative action. The significant issue is whether or not such powers are vested in the aboriginal community.

Municipal government is associated with forms of government which are termed 'subjugation' or 'self-management'. The term "municipal government" is assumed to contemplate limited powers of local government. The scope of power is that usually associated with Canadian municipalities (e.g., property but not income taxation). Municipal governments are also subordinate to Federal and Provincial laws and jurisdiction.

Canada assumed jurisdiction upon conquest and settlement and subjugated the aboriginal peoples, land and resources. The Federal and Provincial Governments relied upon their powers as distributed under the *Constitution Act, 1867* to deny self-government to aboriginal communities. This paper examines the denial of self-government by the Federal Government under section 91(24); the denial of self-government by the Provincial Governments by their reliance on their powers, in particular over "public lands" under section 92(5); and contemporary arrangements which seek to resolve Federal, Provincial, and aboriginal interests. The *James Bay and Northeastern Quebec Agreements*, The *Indian Self-Government Bill C-52, 1984* and the *Sechelt Indian Band Self-Government Act, Bill C-93, 1986* are considered under the latter head. The establishment of aboriginal communities and lands by the Provinces on Provincial lands, the Metis settlements in Alberta; and

by the Federal Government on Federal lands, the Inuvialuit, are considered separately.

## 2 THE DENIAL OF SELF-GOVERNMENT BY THE FEDERAL GOVERNMENT: SUBJUGATION UNDER THE INDIAN ACT

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Section 91(24) of the *Constitution Act, 1867* conferred exclusive jurisdiction upon the Federal Government in relation to "Indians and lands reserved for Indians". The Federal Government exercised that authority to subjugate Indian peoples, lands and their resources. It provided little protection from "interference and intimidation" under federal and provincial jurisdiction and did not recognize any substance to the powers of Indian bands with respect to lands and resources.

### A. An absence of protection from "interference and intimidation": Entrenched federal jurisdiction and the application of provincial laws

Subject to Federal-Provincial agreements and other constitutional arrangements, the Federal Government has exclusive jurisdiction over Indian reserve lands and resources. As the Alberta Court of Appeal observed in *Re Stony Plain Indian Reserve*:<sup>3</sup>

We accept the general proposition that Provincial Legislation relating to use of reserved lands is inapplicable to lands that are found to be reserved

for Indians: *Cardinal v. Attorney General Alberta.*"

The Federal Government is generally fettered only by section 35 of the *Constitution Act, 1982* in its ability to legislate with respect to "Indians and lands reserved for Indians". Indians and Indian lands are subject to the entrenched jurisdiction of the Federal Government. The *Constitution Act, 1867* made no provision for Indian self-government.

In the absence of special provision, federal laws of general application apply to "Indians and lands reserved for Indians". Thus the federal *Income Tax Act* is applicable on Indian reserves. The operations of a non-Indian or any corporation on a reserve are fully subject to such tax. The reach of such federal laws of general application is a dominant factor in the denial of aboriginal self-government of reserve lands and resources.

Federal Government policy has historically looked forward to the day when Indian lands would become municipalities under the jurisdiction of the provinces. To this end the Federal Government has always accepted, and sought to extend, the jurisdiction to the provinces. The *Indian Act* and the Regulations have been drafted in accordance with such policy.

Prior to 1951, the application of provincial legislation to Indians tended to depend on whether the incident concerned took place on or off a reserve. The courts assumed broad provincial power and a narrow notion of an occupied field regarding Indians off the reserve. Conversely, the court tended to allow very limited provincial jurisdiction and a broad notion of an occupied field on the reserve.

In 1951, section 88 of the *Indian Act* was introduced;

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 order,



rule, 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.

Until recently it had not been decided whether section 88 provided for referential incorporation of provincial law or merely a statement of accepted law. In *Natural Parents v. Superintendent of Child Welfare*,<sup>5</sup> Chief Justice Laskin asserted that in enacting section 88 Parliament "cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which, per se, would not apply to Indians under the *Indian Act* unless given force by federal reference." Justice Martland maintained that "the wording of section 88 does not purport to incorporate the laws of each province into the *Indian Act* so as to make them a matter of federal legislation. The section is a statement of the extent to which provincial laws apply to Indians".<sup>6</sup>

In 1985 in *Dick v. R.*<sup>7</sup> the Supreme Court of Canada unanimously declared its agreement with the opinion of Chief Justice Laskin. Beetz J. for the Court observed:

I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them qua Indians.

Laws of the first category, in my opinion, continue to apply to Indians ex proprio vigore as they always did before the enactment of s.88 in 1951, and quite apart from s.88.

. . . .

I have come to the view that it is to the laws of the second category that s.88 refers. I agree with what Laskin C.J. wrote in the *Natural Parents* case . . .

In *R. v. Dick* the Supreme Court of Canada thereby recognized that section 88 was not a mere statement of provincial jurisdiction that would in any event exist, it was a deliberate grant of jurisdiction to Provinces over Indians and their lands.

Section 88 applies provincial laws of general application "to Indians". It does not refer to "lands reserved for Indians", but it must be recognized that the application of provincial laws to "Indians" must to some degree regulate the use of reserve lands. The most obvious instance is with respect to access. The application of provincial child welfare legislation on reserves necessarily confers rights of access on provincial child welfare offices.

It is unsettled to what extent section 88 applies provincial laws to Indian lands and resources.<sup>8</sup> It may be that provincial laws are inapplicable, despite section 88, to the extent that they provide for matters integral to or "of the essence" of Indian lands and resources. The Federal Government has sought to dispell such uncertainty and apply provincial standards and rules in the area of resource development on reserve lands. The *Indian Timber Regulations, Mining Regulations and Oil and Gas Regulations* all provide for the application of provincial laws with respect to forest, mining and oil and gas development on reserve lands.

Section 87 of the *Indian Act*, the exemption from taxation, was also drafted in contemplation of the exercise of provincial jurisdiction on Indian reserve lands. Albeit services are not provided by the municipalities in respect of the taxes collected, a consistent line of authority has upheld provincial municipal real property taxation of non-Indian occupation of reserve lands. In the leading case of *City of Vancouver v. Chow Chee*,<sup>9</sup> the British Columbia Court of Appeal adopted the explanation of Viscount Haldane in *Smith v. Vermillion Hills*.<sup>10</sup>

the appellant is sought to be taxed in respect of his occupation of land the fee of which is in the Crown, the operation of the statute imposing the tax is limited to the appellant's own interest.

Local, property taxes are construed as a tax upon the occupier's interest and not upon the land itself, despite the reduction in "the power of the Federal Government and the band council to control and direct economic development activity on Indian reserve land". Macdonald J.A. for the British Columbia Court of Appeal dismissed as immaterial "the contention that the lands in question would necessarily bring a lower rental if the occupant is subject to taxation, than they would otherwise bring".<sup>11</sup> Section 87 was drafted in 1951 so as to accommodate the existing jurisprudence and only exempt the "interest of an Indian or a band" and not that of a non-Indian occupier. The taxation of non-Indian occupants of reserve lands has presented the most severe problems in British Columbia, where they were exacerbated by the action of the provincial government in 1973 by reorganizing municipal boundaries so as to include reserve lands in many instances. Such provincial taxation policies are a clear obstacle to effective self-government and economic development upon reserve lands. As observed in the Fields-Stanbury Report:<sup>12</sup>

Indians continue to fail to obtain maximum potential benefit from their reserve lands when they lease them to non-Indians. The effects of such leases is that the rents received by the Band are reduced by the amount of the taxes paid by the lessee to the municipality or the Province.

Provincial taxation of reserve lands is not confined to municipal taxation. The *Saskatchewan Freehold Oil and Gas Production Tax Act* purports to provide authority for the taxation of production of oil and gas from Indian reserves. The Regulations under the Act "exempt" such production at present. The *Mineral Resources Tax Act* in British Columbia and the *Mining Tax Act* in Ontario purport to apply to production of minerals on Indian reserves.

If Indian bands are to secure self-government with respect to their lands and resources, then protection from intrusion by Provincial Governments must be

provided. In *R. v. Dick*, Beetz<sup>13</sup> declared for the Supreme Court of Canada:

It would not be open to Parliament in my view to make the Indian Act paramount over provincial laws simply because the Indian Act occupied the field. Operational conflict would be required to this end. But Parliament could validly provide for any type of paramountcy of the Indian Act over other provisions which it alone could enact, referentially or otherwise.

The Supreme Court of Canada thereby recognized the power of Parliament to deny the application of provincial laws with respect to Indian reserve lands and resources. Any such approach would require a rejection of a provision such as section 88 and substantial changes to the Indian Act and Regulations. But the Supreme Court of Canada has at least made it clear that Parliament can declare the paramountcy of the powers of band councils.

#### B. Limited Security of Tenure

The fact of federal jurisdiction affords some protection from the taking or "rescission" of Indian reserve lands.<sup>14</sup> The Provinces, and the local interests they represent, are incapable of taking or abrogating reserve lands without federal concurrence. Further, the *Indian Act*, in section 37, maintains the long-established principle that a surrender by the Band to the Crown is required before any disposition by the Federal Government can take place.

This appearance of security is significantly impaired by the power of the Governor-in-Council to allow expropriation by provinces, municipalities or corporations. As the Department has all too clearly explained:<sup>15</sup>

The principle established is that the Governor in Council decides in any particular case whether the public interest shall be paramount to the band interest.

Such "protection" as exists by the fact of federal jurisdiction, and the requirement of a surrender under the Indian Act, did not in the past assist an Indian band in the face of federal legislation. There was no protection from the taking of Indian lands under such legislation (e.g., Sydney Reserve, Nova Scotia). In *Kruger v. The Queen* an action for breach of fiduciary duty brought by the Penticton Band for expropriation of reserve lands for an airport against the Band wishes was dismissed.

It is suggested that section 35 of the *Constitution Act, 1982* now provides protection from special federal legislation, and substantially enhances the security of tenure of Indian bands. It does not, however, deny the power of expropriation of the Federal Government which existed in 1982.

### C. The denial of rights and powers to bands

The Federal Government has never provided for the self-government of Indian reserves. *The Indian Act*,<sup>16</sup> and the *Indian Oil and Gas Act*,<sup>17</sup> and their regulations make special provision for the control, management and disposition of Indian lands and resources. They vest such powers in the Department of Indian Affairs. The Acts and Regulations do not allow for aboriginal self-government or self-management.

Today 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>18</sup>

- 1876 Annual Report, Department of the Interior.

The manner of Federal Government control and administration of reserve lands is essentially unchanged from that declared in 1876 at the time of the first consolidation of legislation termed the Indian Act. The Minister of Indian Affairs, then described as the Superintendent General, was empowered to approve who might be allotted reserve lands by the band, to remove persons unlawfully occupying reserve lands, to punish those removing timber, hay, stone, soil, minerals, metals or other valuables, and to direct surveys and the

construction of roads, bridges, ditches and fences. No reserve or portion thereof including minerals, might be disposed of without a surrender. Upon such surrender the Act provided that the lands should be "managed, leased and sold as the Governor-in-Council may direct, subject to the conditions of surrender". The Superintendent General was empowered to issue licenses to cut timber in accordance with the regulations established by the Governor-in-Council, and to remove timber, hay, stone and gravel with the consent of the band, without a surrender. "Proceeds arising from the sale or lease of any Indian lands, or from the timber, hay, stone, minerals or other valuables thereon, on a reserve" were directed to be "paid to the Receiver General to the credit of the Indian fund." The band council was empowered to make rules and regulations, but subject to confirmation by the Governor-in-Council, and only with respect to cattle trespass, maintenance of roads, bridges, ditches and fences, and the allocation of lands on the reserves.

The above-described provisions remain almost entirely unchanged to the present. The band council still has little power to control or administer reserve lands. Such power continues to be vested in the Minister of Indian Affairs. In some instances, the powers vested in the Minister of Indian Affairs have become more extensive or have become more detailed.

#### *i. Land use*

The Minister may direct the use of reserve lands for schools, administration, burial grounds, health projects, and with the consent of the band council, for any other purpose for the general welfare of the band. He may survey and subdivide the land, and direct the construction of roads that the band must maintain in accordance with his instruction. If land is uncultivated on a reserve, the Minister may direct its cultivation by lease or otherwise with the consent of the band council - no such consent is necessary for the operation of farms on the reserve.

Recognition of the management prerogative of the Minister is manifest in section 60 of the *Indian Act*, which provides:

(1) The Governor-in-Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor-in-Council considers desirable.

(2) The Governor-in-Council may at any time withdraw from a band a right conferred upon the band under subsection (1).

The discretion of the Governor-in-Council in the ambit of rights granted and in the power to revoke any grant underlines the denial of self-management and self-government by the Act.

#### *ii. Disposition*

Reserve lands cannot generally be alienated without a surrender. It is only in the right to withhold a surrender or to attach conditions thereto that the Band is able to exercise any powers in the development of reserve lands. The surrender mechanism is more in the nature of protection than government, but it acts to limit the prerogatives of the Minister.

Section 53 declares that;

The Minister or a person appointed by him for the purpose may manage, sell, lease or otherwise dispose of surrendered lands in accordance with this Act and the terms of the surrender.

The attachment of conditions to the surrender enables the Band to control the use to which lands are put and the nature of any disposition. Although the Band may specify such conditions the Minister, however, administers the conditions, manages the lands and issues any disposition.

The Minister may issue permits for the use of reserve lands for up to one year, or issue leases of lands held

by individual band members under Certificates of Possession without band council consent or surrender. The Minister has issued successive one year permits. Band council consent is only required for longer term permits, or where the leased lands are held by the band in common.

*iii. Land allotment to members*

The only significant power of the band council under the Act with respect to reserve land is the power to allot possession of that land to band members. Such allotments are, however, subject to the approval of the Minister. The Minister issues a Certificate of Possession when approval is given, and a Certificate of Occupation when the approval given is conditional. Particulars of the Certificates are entered in a Reserve Land Register maintained by the Department of Indian Affairs. An Indian may also transfer a right to possession to another member of the band subject, of course, to the Minister's approval. Such power of allotment is, of course, subject to the Minister's power under other provisions of the Act to take lands or to authorize other uses.

Many bands on the Prairies have sought to evade the supervision of the Minister in the allotment of reserve lands. They allot lands to individuals at the pleasure of the Band Council. The Minister does not approve such allotments because of "the impossibility within the framework of the legislation for the Minister to protect the individual and/or Band interest in such circumstances."<sup>19</sup> The occupation of the lands is entirely at the discretion of the band council and can be revoked at any time. The band is lawfully entitled to possession. The band member authorized to occupy reserve land by the band council, but not approved by the Minister, is not in lawful possession of the land. By allotments at the pleasure by the Band Council the band retains some powers of management over the use of reserve lands without the requirement of the approval of the Minister. The powers are only exercised, however, at the cost of an inappropriate legal regime which denies any protection to the individual band member.



#### *iv. Residence*

The amendments to the *Indian Act* of 1985 authorized the Band Council to make by-laws with respect to "the residence of band members and other persons on their reserve".<sup>20</sup> Such power is, however, like all other Band Council powers to make by-laws, except with respect to liquor, subject to disallowance by the Minister. The Minister has disallowed such by-laws which seek to retain discretion to the Council and do not provide for appeal mechanisms. The Minister also imposes the Department's interpretation of the requirements of the Charter of Rights and Freedoms. The Minister will only allow by-laws which closely circumscribe the exercise of Band Council power with respect to residence. There is no appeal against the disallowance of a by-law by the Minister.

#### *v. Access*

The Act prohibits trespass on a reserve. Such provision merely affirms the right at common law of the party entitled to possession to exclude others. The band council may seek to deny entry to those areas to which the band is entitled to possession. Any attempt to make by-laws which provide for entry permits and the exercise of discretion by the band council is, however, subject to consideration and disallowance by the Minister, as in the case of residence by-laws. In any event, the band council cannot deny entry to all those entitled to enter pursuant to federal or applicable provincial authority (e.g. police, child welfare workers).

#### *vi. "Municipal powers" and taxation*

The band council may make by-laws with respect to construction of public works, buildings, water supplies, and with respect to land use and zoning. Such power is, of course, subject to the Minister's power of disallowance.

Band Councils may make money by-laws "where the Governor-in-Council declares that a band has reached an advanced stage of development", and subject to the approval of the Minister. The money by-law power extends to

(1) (a) the raising of money by

(i) the assessment and taxation of interests in land in the reserve of persons lawfully in possession thereof...

The power was introduced as part of the provision for municipal government of reserves. The power is confined to taxation of reserve lands occupied by band members, and accordingly does not enable Band control of development by non-band members on reserve lands.

In the Budget Speech of February 26, 1986 the Minister of Finance announced that:<sup>21</sup>

The Minister of Indian Affairs and Northern Development will introduce amendments to the Indian Act which will allow bands to levy municipal-type taxes on Indian lands.

The amendment presumably contemplates taxation of non-band members, but does not contemplate anything other than "municipal-type taxes." The Federal Government remains reluctant to contemplate anything other than "municipal" powers for Band councils.

#### *vii. Resource Development*

Control and management of resource development on Indian reserves is firmly vested in the Department of Indian Affairs. Historically the requirement of a surrender, which conferred the ability to veto development upon the band, has been sought to be circumvented or undermined. Resource development has not except in very recent years provided substantial benefits to the bands.

#### *a. Timber*

The administration and disposition of the timber resource of reserve lands is vested in the Department of Indian Affairs under regulations made under the Indian Act. Section 57 provides:

The Governor in council may make regulations:

(a) authorizing the Minister to grant licenses to cut timber on surrendered lands, or, with the consent of the council of the band, on reserve lands;

(g) imposing terms, conditions and restrictions with respect to the exercise of rights conferred by licences granted under paragraph (a).

Fifty per cent of the proceeds from the sale of surrendered lands may be distributed, if authorized by the Minister, per capita to members of the band. Such provision was applied to timber sales in 1918 in order to encourage the surrender of timber. The Annual Report of the Department of 1918-19 explained:

On several occasions the Indians have refused to surrender their timber, notwithstanding the fact that it would be in the interests both of themselves and the public, unless upon condition that a larger portion than ten per cent of the proceeds would be distributed amongst them. This amendment has been passed, therefore, with the object of facilitating such surrenders.

The regulations<sup>22</sup> have remained essentially unchanged since 1893. They provide for two forms of timber tenement - the permit for Indian logging and the license. Both are issued by the Department of Indian Affairs, not the Band, and are issued at the discretion of the Department.

There is no right to renewal. The regulations, however, provide and have long provided that licenses "may be renewed annually in accordance with the terms of the sale of timber." A 1976 Report observed:<sup>23</sup>

Before 1949, professional forestry advice was seldom made available to Indian bands. The band councils (sic) would allow logging companies to cut timber at an agreed price per cord or per 1000 board feet....Some licenses were renewed

repeatedly over a long period without any change in price.

The management of forest lands on reserves, in addition to the issuance of rights to cut timber, is vested in the Department. The Assistant Deputy Minister determines which trees are to be left standing, may consent to removal before payment of dues, may require compliance with provincial laws, and generally administers the terms and conditions of licences. The Minister may forfeit the rights of a licensee and issue orders for the "effective administration" of the regulation. Further, a superintendent, police officer or fire ranger may "for the purpose of controlling and extinguishing any fire...use any privately owned equipment and may employ or summon the assistance of any male person on the reserve between the age of 18 and 60 years".

Forest fire protection and suppression are generally carried out by provincial agencies. The 1976 Report seeks to explain:<sup>24</sup>

Since forest protection and supervision in forested areas are provincial responsibilities, the Minister of Indian and Northern Affairs signs a separate agreement with each province for the reserves that ask for this coverage.

No powers of management whatever are conferred on the band or band council.

The history of the management of the forest resource on Indian reserves was recently described as follows:<sup>25</sup>

Over the years, Indian forest lands have been severely mismanaged. They have suffered from overcutting, lack of reforestation, and inadequate tending. There are numerous reasons for this mismanagement and for the fact that the Indian people have not enjoyed the full range of benefits inherent in the ownership of their lands. One of the more obvious reasons relates to the way the trust responsibility of the Federal Government was

implemented: i.e. with little consultation or involvement from Indian People.

In February 1984 a working group composed of representatives from the Department, the Canadian Forestry Service, and the Assembly of First Nations, issued a report entitled "A Comprehensive Indian Forestry Program". Its main recommendations have been summarized:<sup>26</sup>

- (1) Indian control of administration and implementation,
- (2) negotiation of a Canada-AFN bilateral forestry development agreement to establish funding, support and performance levels for the program,
- (3) immediate implementation of an interim (1 to 1 1/2 years) forest management program through a joint AFN/CFS/INAC management committee with something like \$25 million in funding,
- (4) \$375 million in total funding over ten years,
- (5) revision of the Indian Timber Regulations.

b. Minerals

Minerals on Indian reserves, other than stone and gravel, have always required a surrender prior to their disposition. Surrendered lands and minerals were subject to management and disposition by the Department of Indian Affairs "as the Governor-in-Council may direct", and to the conditions of the surrender.

In 1961 the *Indian Mining Regulations* were adopted in the form of those in effect today. The 1961 changes were explained as follows:

The practice of making surrendered mining rights available for staking has been abandoned in favour of disposing of permits or leases by public competition. A licence to carry out reconnaissance investigations may be obtained without competition,

but it gives the holder no prior right to a permit or lease. The main reason for the change is to secure revenue for the Indians in the disposal of mining rights, something that did not occur under the former Quartz Mining Regulations.<sup>27</sup>

In 1968 the regulations were amended to provide a more flexible regime for the disposition of minerals, and to allow for the "increasing interest of Band Councils in the development of minerals." The amendments were described by the Department as providing for "Indian Band Councils to negotiate mining contracts with developers, as an alternate to disposal by public tender...other changes...greater flexibility in setting rates for rental, royalty and assessment work."<sup>28</sup>

The *Indian Mining Regulations*<sup>29</sup> continue to provide for the administration and disposition of minerals on an Indian reserve by the Chief of the Mineral Division. The only reference to the Band Council in the Regulations is with respect to the consent and approval of the Band Council in the Regulations to terms and conditions which are specially negotiated. The Department may issue permits and leases upon public tender without consultation, let alone approval, of the Band Council. The administration and enforcement of the mining tenements is entirely the responsibility of the Department. The principal manner in which the Band can control the management and disposition of minerals on its lands is by refusing to surrender the minerals and thereby vetoing development, or to impose conditions upon the surrender. Section 53 of the *Indian Act* requires that the management and disposition of surrendered lands, including minerals, be in accordance "with the terms of the surrender".

The Regulations introduce provincial standards and requirements where they do not conflict. Regulation 4:

Every permittee and every lessee shall comply with the laws of the province in which his permit area or lease area is situated where such laws relate to exploration for, or development, production,

treatment and marketing of minerals and do not conflict with these Regulations.

Regulation 4 would require compliance, *inter alia*, with provincial laws regarding the environment, health and safety, and marketing. The Department has apparently concluded that regulation 4 also requires a prospector on an Indian reserve to hold a provincial license to prospect where such are issued (e.g., New Brunswick). The Director of Indian Minerals (East) recently observed that a prospector "must also be licensed by the provincial authorities".

c. Sand and Gravel

The *Indian Mining Regulations* do not apply to petroleum, gas, or any "unconsolidated minerals such as placer deposits, gravel, sand, clay, earth, ash, marl and peat". Section 57(4) of the *Indian Act* provides that such materials may be disposed of by the Minister without a surrender provided the consent of the band council is obtained. Such consent may be dispensed with, however, where "such consent cannot be obtained without undue difficulty or delay."

d. Oil and Gas

The *Indian Oil and Gas Act and Regulations*<sup>30</sup> vests the administration and disposition of oil and gas resources on reserve lands in the Department, albeit the consent or approval of the Band Council is required for the issuance or variation of a disposition.

The *Indian Oil and Gas Act* declares the authority of the Governor-in-Council to make regulations *inter alia* respecting the granting of interests in oil and gas, interests incidental thereto, royalties, and generally "for the exploitation of oil and gas" on reserve lands.

The *Indian Oil and Gas Regulations* provide for the issuance of dispositions by the Manager of the Indian Minerals Division of the Department. Prior approval of the disposition and the terms and conditions thereof by the Band Council must be obtained. Disposition of rights to produce oil and gas may be by tender or ad hoc negotiation.

Nigel Bankes has observed that "Indian Minerals generally advises bands not to negotiate" and "competitive tenders represent the norm" because:

a) Indian minerals takes the view that it would be difficult to improve financial returns to the bands from the royalties and cash bonuses provided for by the regulations. Negotiation would likely compromise a strong bargaining position based on royalties established by statute.

b) The tender method does permit a certain amount of flexibility by attaching terms and conditions to the lease.

c) The negotiation of terms may be a severe drain on the time and resources of Indian Minerals personnel. Not only must they attend negotiating sessions, but they must also provide the band council with sufficient information so that it may make an educated decision on proposals.

d) Any variation on the "rental-plus-royalty-plus-cash bonus" formula will inevitably increase the resources required to implement and monitor the lease. This is particularly true if the band negotiates a working interest or joint venture agreement.<sup>31</sup>

The Regulations introduce provincial standards and rely on the operations of provincial agencies. Specific instances are as follows:

1. holding a provincial exploratory licence;
2. conforming with provincial reporting of results requirements; and
3. holding a provincial well licence.

Every operator under a disposition is also required to comply with:



(d) unless otherwise directed by the Minister in writing, the applicable laws of the province in which a contract area is situated and with any orders or regulations made from time to time thereunder relating to the environment and the exploration for, development, treatment, conservation and equitable production of oil and gas.

The provision thereby imposes provincial standards relating to the environment, health and safety, methods of exploration, development and treatment, and "conservation and equitable production". The latter requirement subjects Indian oil production to the "allowable level of production" set by the Energy Resources Conservation Board of Alberta and the Department of Energy and Mines of Saskatchewan.

The *Indian Oil and Gas Act* does not contemplate the administration and disposition of the oil and gas by the bands, but by the Department. Section 7 declares that the Minister of Indian Affairs "in administering this Act, shall consult, on a continuing basis, persons representative of the Indian bands most directly affected thereby". The bands must be consulted but do not administer the oil and gas under their lands. Control by the bands can arise, as with other minerals, in the imposition of terms and conditions upon surrender. Oil and gas must be surrendered before disposition, and the power of the Department to manage and dispose of oil and gas under section 53 of the Indian Act is subject "to the terms of the surrender". Upon surrender the Indian Oil and Gas Regulations apply, but the power of the band council is restricted to withholding consent or approval to the issuance or variation of a disposition. The Regulations add little to the powers of the band arising from the surrender procedures.

On April 26, 1986, the *Edmonton Journal* reported the support of the Chiefs of the Samson and Sawridge Band for more band control of oil and gas development. The comments were made in the context of an action by the Saddle Lake-Goodfish Lake Band against the Federal Government for mismanagement of resource income.

#### e. Wildlife

The *Indian Act* affords some potential for the management by a band council of wildlife under the supervision of the Minister and the Governor-in-Council on Indian reserves outside the Prairie Provinces.

Paragraph 73(1)(a) of the *Indian Act* provides that the Governor-in-Council may make regulations "for the protection and preservation of fur-bearing animals, fish and other game on reserves". Paragraph 81(o) provides that a band council, subject to the Act and regulations made thereunder, may make by-laws for "the preservation, protection and management of furbearing animals, fish and other game on the reserve". The Governor in Council has not made regulations under paragraph 73(1)(a).

In *Cardinal v. Attorney General of Alberta*,<sup>32</sup> the Supreme Court of Canada held that the *Constitution Act, 1930* applied provincial game legislation to Indians on reserves in the Prairie provinces "notwithstanding anything contained in...any Federal statute". Paragraph 81(o) affords no power to manage hunting and trapping in the Prairie Provinces. *R. v. Isaac*<sup>33</sup> suggested that provincial game legislation was not applicable to Indians on reserve lands elsewhere in Canada.

In 1977 it was argued that the enabling provisions of the *Indian Act*, paragraphs 73(1)(a) and 81(o), barred the application of the federal *Fisheries Act* and *Regulations* to Indians fishing on Indian reserves. The British Columbia Court of Appeal rejected the argument in *R. v. Billy*,<sup>34</sup> and asserted that the language of the *Fisheries Regulations* admitted of no exceptions whether in favour of Indians or not, and whether the offence was committed on or off a reserve. The Court also suggested that a "complete answer" was that there was no inconsistency between the *Fisheries Act* and *Regulations* and the *Indian Act* because no regulations or by-laws had been made under the latter Act. The decision in *Billy* was followed by the New Brunswick Queen's Bench in *R. v. Sacobie*,<sup>35</sup> *R. v. Saulis*<sup>36</sup> and *R. v. Perley*,<sup>37</sup> the latter case concerning fishing on a reserve. In none of those cases had any regulations or by-laws been made under the *Indian Act*.

In *R. v. Baker*,<sup>38</sup> in the British Columbia County Court, in 1983 it was held that a by-law made under section 81(o) would be effective to displace Federal fishery regulations to the extent that "two sets of regulations" were in conflict:

...the Indian band by-law is effective within the boundaries of the Reserve and that the application of the Fisheries Act and regulations in a case where a properly drafted and enacted Indian band by-law is in existence ceases at the boundary of the reserve if the two are in conflict.

The making of a by-law under section 81(o) is, of course, subject to the power of disallowance of the Minister.

The jurisdiction of a by-law is of course confined to a reserve. Such power is often meaningless in terms of wildlife management which requires consideration of on- and off-reserve movements. The Indian Act does not confer any power with respect to off-reserve wildlife.

#### f. Water

Nowhere is the restriction of Band Council jurisdiction to on-reserve activity more pointed than in the regulation and utilization of water resources. Section 81(f) and (l) empower a Band Council to make by-laws with respect to the construction of water courses and works and the regulation of water supplies on the reserve. But such powers are of no avail in the event of off-reserve water diversion, impoundment or use. Such powers are ineffective to prevent a Provincial Government constructing a dam upstream from an Indian reserve. The band must rely on whatever treaty or riparian rights it may assert and which the Province has no authority to abrogate.

It is to be observed that if it was desired to build a hydro-electric dam on a reserve against the wishes of a band, the Federal Government has merely to expropriate the land and water-bed.

#### **D. Summation**

The subjugation of Indian lands and resources under the Indian Act has three elements. Firstly, the denial of protection from governmental intrusion. The Federal Government has jurisdiction to legislate with respect to Indians and reserves and has sought to grant jurisdiction to the Provinces. The Provinces can levy taxes upon Indian resources and can authorize access to Indian reserves. They can expropriate Indian reserve lands with federal consent. The second element is the denial of any substance to the powers accorded the bands. The degree of federal administration and supervision is acute with respect to every aspect of land and resource use and development. The third element is the absence of provision for any powers with respect to off-reserve land use and development. Indian bands cannot levy taxes on off-reserve resources as the Province can do on Indian reserves. Indian bands need not be consulted on developments which are potentially damaging to the environment. The problem is particularly great with respect to water, fisheries and wildlife, none of which respect legal boundaries.

The principal power vested in Bands is vested in the membership, not the Band Councils. It is the negative power to veto the development of lands or resources by refusing their surrender. The current provision for the distribution of fifty per cent of the proceeds of a surrender was the product of a deliberate attempt to corrupt the exercise of that power.

### 3 THE DENIAL OF SELF-GOVERNMENT BY THE PROVINCES: SUBJUGATION UNDER EXISTING CONSTITUTIONAL AGREEMENTS

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The exclusive federal jurisdiction over "Indians and lands reserved for Indians" has not discouraged the Provinces from asserting claims to Indian lands, resources and jurisdiction based on Provincial powers over "public lands".

The 1837 Report of the Select Committee of the House of Commons on the Aborigines of the British Settlement declared that:<sup>39</sup>

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 proper 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 the settled opinions of the great mass of the 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.

This recommendation was accepted in Canada. The grant of federal jurisdiction with respect to "Indians" and "lands reserved for Indians" in the *Constitution Act, 1867* reflects the recognition that the responsibility was "not a trust which could conveniently be confined to the local Legislatures".

It has been until now accepted, however, that such jurisdiction does not empower the Federal Government to take public lands belonging to a province for the purpose of establishing an Indian reserve. The Privy Council in *Ontario Mining v. Seybold*<sup>40</sup> in 1902 held *ultra vires* the unilateral setting apart of a reserve by the Dominion from lands in Ontario surrendered by treaty by the Indians. It declared that "the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two Governments".<sup>41</sup>

[S]ection 91(24) did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of Indian title had become the free public lands of the Province as an Indian reserve, in infringement of the proprietary rights of the province.<sup>42</sup>

The decision, requiring "joint action" in the event of the establishment of a reserve after Confederation upon provincial public lands, enabled the provinces to impose conditions upon the control and entitlement declared in federal-provincial arrangements respecting reserve lands.

The assertion of provincial interests and jurisdiction and the denial of Indian self-government has historically been most evident in British Columbia and Quebec. Neither province recognized the existence of aboriginal title and both challenged the ambit of the Indian reserve interest. Newfoundland's refusal to recognize the Conne River Reserve is in accord with such pattern. In Ontario

and in the Prairie Provinces the need to treat with respect to aboriginal title was recognized, albeit the Provinces still asserted the limits of the Indian interest. In the Maritimes reserves were established at Confederation and the need to secure Provincial agreement to set apart reserve lands was absent.

The effect of the Federal-Provincial agreements upon Indian self-government of lands and resources may generally be described as establishing provincial interests and powers on reserve lands, and affirming Federal, but not Indian, administration. Further, the agreements limit the beneficial ownership of reserve resources, particularly minerals, and thereby undermine the foundations of self-government.

No Indians are parties to the agreements. They are constitutionally entrenched arrangements which can be varied only by Federal-Provincial agreement. The denial of Indian self-government contained therein can only be varied by similar constitutional arrangements. They represent the constitutional entrenchment of the subjugation of Indian lands and resources, and have at least as equal standing as section 35.

#### **A. British Columbia**

No Province has been more adamant in pursuit of local interests to the denial of Indian interests and jurisdiction than British Columbia. In British Columbia, the Federal-Provincial agreements were shaped by the provincial assertion of the usufructuary nature of the Indian interest in reserves, the provincial ownership of precious metals, and the rights of the Province to full beneficial ownership upon surrender of the Indian usufructuary interest. The Federal Government had, of course, no power outside the Peace River Block and the Railway Belt to set apart reserve lands in the Province.

The Federal and Provincial Governments agreed in 1929 that reserve lands would be held "in trust for the use and benefit of the Indians of British Columbia, subject however to the right of the Dominion Government [Canada] to deal with the said lands in such manner as they may deem best suited for the purpose of the Indians

including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians."<sup>43</sup>

The conveyances, however, reserved certain powers to the Province:

- the right to resume one twentieth of the land for public works;
- the right to authorize water privileges for mining and agricultural purposes in the vicinity;
- the right to take construction materials for public works; and
- the reservation of all existing highways.

The reservations significantly detract from any possibility of Indian self-government of reserve lands and resources in British Columbia. They allow for the assertion of provincial power and jurisdiction to take the land and water of the Indian bands in accordance with the provincial interest.

A later agreement in 1943 granted the Province jurisdiction over Indian minerals as well. The Provincial Government asserted ownership to the precious metals upon reserve lands, and upon such basis argued for and got control of the administration and disposition of metallic minerals on reserve lands. The preamble to the *1943 British Columbia-Canada Agreement*<sup>44</sup> respecting the development of minerals on Indian reserves explained that such ownership rendered "development of all the minerals...impractical since the precious and base metals are closely associated and cannot be mined seperately." Accordingly it was agreed "as a matter of policy and convenience and for the development of such minerals" that the "Province of British Columbia should have charge of the development of all minerals and mineral claims both precious and base, in, upon or under the said Indian reserves." Section 2 of the Agreement declares:

2. The administration, control and disposal of all minerals and mineral claims, both precious and base, in, upon or under all Indian Reserves in the said Province shall be subject to the laws of the



Province which shall apply to the prospecting, staking, recording, developing, leasing, selling or otherwise disposing of or dealing with all such minerals and mineral claims;

. . .

And provided further that no prospecting or right of entry on the said Indian Reserve shall be authorized or permitted until permission so to do has been obtained from the Indian Agent for such Reserve; such permission shall be subject to such terms and conditions as the said Indian Agent may specify and shall be granted only to such persons whose application for permission has been approved by the Gold Commissioner for the Mining Division of the Province in which such Reserve is situated;

And provided further that base minerals and mineral rights shall only be subject to this agreement upon being surrendered pursuant to the Indian Act."

The Agreement confers "administration, control and disposal" of the metallic minerals on reserves upon the Province. Provincial laws respecting exploration, development and disposition are applicable. The Federal Government thereby gave up any responsibility to administer the Indian metallic mineral resources.

The Province is responsible for collecting fees and royalties and for setting the rate thereof. Clause 4 provides:

4. The Department of Mines of British Columbia or the offices thereof shall collect all revenue whether by way of purchase money, rent, recording fees, royalty or otherwise in respect of any sale or other disposition of minerals and mineral claims in, upon, or under such Reserve, together with all licence, permit or other fees.

The Federal Government is entitled to only one-half of such revenues for the benefit of the band.

6. The scale of fees, charges, royalties and other sources of revenue relating to the prospecting, staking, recording, leasing, selling or otherwise disposing of or dealing with minerals and mineral claims on Indian reserves in the said Province, in force at the date of this Agreement shall not be reduced without the consent of the Governor-General-in-Council.

The Manager, Lands Division, Indian Minerals (West) has explained:<sup>45</sup>

Since B.C. depends largely on a mineral tax for revenues, and these taxes are not considered to be subject to the fifty per cent split, bands could be in a position to receive fifty per cent of nothing.

The effect of the grant of the "administration, control and disposal" of minerals, including the setting of royalty rates, has been to enable the Province to deny any benefit to the Indian bands. The Department has observed it is "exploring the possibility of renegotiating the Agreement to secure improved benefits for the Indian people" and to declare that "it is not federal policy to promote mineral development on B.C. Indian reserves other than for oil and gas, while the 1943 Agreement is still in force."<sup>46</sup>

The disposition of the minerals subject to the 1943 Agreement is conducted under the terms of the *Mineral Act* of British Columbia, and the mining tenements are issued by the Province under such authority. Under the 1943 Agreement only those persons may apply to prospect on a reserve who have been "approved by the Gold Commissioner for the Mining Division." The Province thereby maintains absolute control in determining who may explore or mine on a reserve. Such is in accord with the tenor of the Agreement which establishes provincial

control over all aspects of metallic mineral development on reserves.

The rights of the bands are confined to withholding a surrender of base metals. A band in British Columbia has absolutely no power in law to prevent the development of a precious metal mine on a reserve, the revenue from which would flow almost entirely to the Province.

The Agreement does require that permission for prospecting be obtained from the Indian Agent, but makes no reference whatever to the Band Council. It represents the constitutional entrenchment of the denial of powers of management or government to the Band Council, and their vesting in the Indian Agent.

The 1943 Agreement was supposed to promote development. It has effectively stopped it by its denial of Indian interests and powers of management or government.

Such denial has been affirmed in more contemporary arrangements. The resources of the Fort Nelson Band have been peculiarly made subject to Provincial control. The Province reserved the minerals upon the conveyance of lands for the benefit of the Fort Nelson Band in 1961. Such reservation was a clear violation of Treaty #8. The *1977 Fort Nelson Indian Reserve Minerals Sharing Agreement*<sup>47</sup> between the Federal Government, the Provincial Government and the band purported to "resolve this long-standing issue" by providing "*inter alia* for ownership, administration and control by the Province of coal, petroleum and any gas or gases underlying the Reserve and for equal sharing between Canada and the Province of the net profit and gross revenue from the disposition of coal, petroleum and any gas or gases". The Fort Nelson Reserve is underlain by a natural gas pool.

The 1977 Agreement essentially extends the 1943 regime to coal, petroleum and natural gas. Clause 3 of the Agreement declares that the minerals on the reserve within the meaning of the 1943 Agreement shall be administered as though subject to the Agreement.

but if any time an Indian Agent is not appointed for the reserve, the powers and duties exercisable by an Indian Agent under the said Agreement with respect to such minerals shall be exercised by the Minister of Indian Affairs and Northern Development of Canada or any person authorized to act on his behalf.

In 1977 the Province would still not acknowledge that management and government of a reserve should properly reside in the Band Council, and not the Department of Indian Affairs. Clause 6 declares with respect to coal, petroleum and natural gas:

(1) The ownership, administration, control and power of disposition of coal, petroleum and natural gas underlying the Reserve are vested in the Province and all claims and rights thereto shall be subject to the laws of the Province save as herein provided.

(2) The Province shall continue to collect all revenue from the disposition in any manner of coal, petroleum and natural gas underlying the Reserve and the claims and rights thereto, whether by way of purchase money, rent, royalty, license, drilling reservation, permit or recording fees or otherwise, and whether directly or through an agent of the Crown in right of the Province in accordance with the law from time to time in force; but this shall not include any revenue derived from disposition of the surface of the Reserve.

Coal, petroleum and natural gas on the reserve are administered and disposed of by the Province under provincial law. Like the 1943 Agreement, the 1977 Agreement provides for the sharing of revenues from the disposition of coal, petroleum and natural gas. Clause 6 continues:

(3) The net profit and gross revenue from the disposition of coal, petroleum and natural gas

underlying the Reserve and all claims and rights thereto shall be shared equally between Canada for the use and benefit of the Band, and the Province.

The Agreement endeavours to ensure the access of oil and gas developers to the reserve. Neither the Federal Government nor the Band Council can veto entry or development. "Administration and control of the surface is declared to "remain in Canada for the use and benefit of the Band", but Canada, "in its own right and on behalf of the Band", must conclude agreements providing rights of entry to those persons licensed by the Province to explore for, develop or produce oil or gas. Any dispute as to the terms of such agreement may be referred to arbitration.

The 1977 Fort Nelson Agreement provides the greatest degree of provincial control, jurisdiction and entitlement over mineral development upon any reserve lands in Canada. The Agreement is between Canada and the Province, but was conditional upon a surrender by the band of its mineral interest and the approval of the Band Council. Such surrender and approval was induced by the refusal of the Province to transfer the mineral rights except on such terms. It represents a gross violation of Treaty #8.

*Bill C-93, the Sechelt Indian Band Self-Government Act 1986*, indicates no greater willingness on the part of the Province to surrender any of its powers. The title to be transferred to the Band is subject to "any interests recognized" by the 1943 Agreement and the reservations which were agreed upon in 1929. "For greater certainty" the 1943 Agreement is declared to be applicable to the reserve. The Bill thereby provides for the continued constitutional entrenchment of the power of the Province and of the role of the Indian agent in managing reserve lands. The Province has in 1986 exhibited no inclination to modify the denial of Indian government entrenched in the 1943 Agreement.

#### **B. Ontario and the Prairie Provinces**

The *1924 Canada-Ontario Reserve Lands Agreement*<sup>48</sup> sought to provide for the confirmation of reserves set

apart in the "public lands" of the Province and the accomodation of the claim of the Province to share in reserve lands and resources.

The Agreement constitutionally entrenches the administration of Canada "for the benefit of the band" of Indian reserve lands and minerals and provide for their disposition upon a surrender. There is no reference to or contemplation of the administration of reserve lands and resources by Indian governments or band councils.

The Province agreed to confirm the reserves and federal administration only upon the establishment of Provincial powers and interests. The Agreement reserves ownership of the bed of navigable waters to the Province and provides that water power on a reserve may only be disposed of upon agreement with the Province. In the event of the extinction of a band, specifically provided for in the Agreement, the lands revert to the Province. One-half of the proceeds of all mineral dispositions, except with respect to Treaty #3 lands and reserve lands granted by patent, are payable to the Province. The Agreement provides for the introduction of Provincial standards and requirements with respect to mining. Clauses three to five provide for the requirement of a provincial licence to prospect upon Indian reserves, and the application of the provincial rules governing staking of claims. The requirement of a provincial prospector's license suggests that a member of the band for whom a reserve was set apart must obtain a provincial prospector's license in order to prospect upon the reserve. The Agreement authorizes the holder of such a license to prospect on a reserve only "upon obtaining permission so to do from the Indian agent".

Arrangements in the Prairie Provinces were modelled on the 1924 Canada-Ontario Agreement. The administration of reserves by the Federal Government is made subject to paragraphs one to six and eight of the 1924 Canada-Ontario Reserve Lands Agreement. The *Natural Resource Transfer Agreements* apply the regime of administration which applies in Ontario. Federal administration is entrenched and Indian administration denied. The Federal administration is subject to entrenched provincial powers and interests. Water power

on a reserve may only be disposed of upon agreement with the Province. In the event of the extinction of a band for whom lands were set apart after 1930, the lands revert to the Province. One half of the proceeds of mineral disposition including oil and gas, from lands set apart after 1930, are payable to the Province. Mineral dispositions on all reserves are expressed to be subject to provincial staking and claims requirements and the need for a provincial prospector's license. And, of course, the Indian agent may authorize prospecting on a reserve.

The Federal-Provincial Agreements with Ontario, Alberta, Manitoba and Saskatchewan are properly described as the constitutionally entrenched subjugation of Indian lands and resources. They entrench Federal and Provincial powers and interest over Indian lands and resources.

### C. New Brunswick and Nova Scotia

The subjugation of Indian lands and resources in the Atlantic Provinces has been so complete as to leave almost no land to the Indians. The per capita acreages and percentages of reserve land in the Provinces are: New Brunswick, eight acres and 0.2 per cent; Nova Scotia, five acres and 0.2 per cent; Prince Edward Island, four acres and 0.1 per cent; and Island of Newfoundland, one acre (Conne River) and 0.02 per cent. The extent of the intrusion on reserve lands was such that it required the Provincial Governments of New Brunswick and Nova Scotia to acknowledge the "hardship and inconvenience", on account of the uncertainty of their title, suffered by settlers on reserve lands. Agreements were reached in 1958 between Canada and New Brunswick<sup>49</sup> and Nova Scotia<sup>50</sup> which confirmed the title of the settlers and provided for the administration of reserve lands and resources.

The Agreements transfer "to Canada all rights and interests of the Province(s) in reserve lands except lands lying under public highways and minerals", and declare the application of the "mining regulations made from time to time under the Indian Act" to mineral development and

disposition, and the entitlement of the Indians to all proceeds thereof.

The Provinces refused to acknowledge Federal or Indian ownership of the highways or minerals on reserves. They also insisted on a right of reversion of the lands in the event of the extinction of a band, and a right of first refusal on any sale of reserve lands. The Agreements allow for Federal administration of reserve lands. They do not constitutionally entrench such administration to the negation of Indian administration. Nowhere is the position of the Indian Agent constitutionally entrenched, as in the *Canada-Ontario Agreement of 1924*, the *Natural Resource Transfer Agreements of 1930*, and the *Canada-British Columbia Agreement of 1943*.

The Provinces asserted their interests, even as to the tiny areas left to the Indians, with respect to highways, minerals, and future sales. The deliberate contemplation of the extinction of an Indian band in 1958 would suggest the distance that must be travelled before the Provinces acknowledge a right of self-government. The Agreements did not, however, constitutionally entrench the denial of Indian self-government over lands and resources, as had previous agreements.

#### D. Quebec

Apart from the *James Bay and Northeastern Quebec Agreements*, there are no Federal-Provincial Agreements regarding the development and alienation of reserve lands and resources in Quebec. In *Star-Chrome Mining*, the Privy Council held that a surrender for sale for the benefit of the Indians terminated the Indian interest and vested it in the Province. The Federal Government was required to pay \$140,000, the proceeds of the disposition of reserve lands, to Quebec. As a result, no surrenders are now accepted in the Province as a matter of general policy. The Department of Indian Affairs has observed:<sup>51</sup>

It is federal policy to discourage mineral development on Quebec reserves until the bands are able to receive some benefits.



And:

There is no agreement with the Province of Quebec, which claims complete jurisdiction over mineral development once a band surrenders its interest in on-reserve minerals. We are presently establishing the departmental position so that an agreement can eventually be reached with this Province, providing for full benefit to the native people.

The Province has refused to accommodate any disposition of the Indian interest for the benefit of the Indians. The refusal has precluded the development of resources on Indian reserves in Quebec. The refusal amounts to an assertion of provincial ownership and jurisdiction of reserve resources. The Federal Government has not agreed to such assertion, as it has to varying extents elsewhere, but the assertion has prevented development nonetheless. It has effectively denied management or governance of resource development to Indian bands.

#### E. Aboriginal Title and Future Agreements with the Provinces

It is suggested that the provinces could not, after 1867, extinguish aboriginal title which power lies exclusively within the jurisdiction of the Federal Government. Such a limitation upon the powers of the province of Quebec was assumed in the *James Bay Hydro case*<sup>52</sup> by the Quebec Superior Court and the Court of Appeal. The British Columbia Court of Appeal recently declared similar doubts as to the power of that province to extinguish aboriginal title. In *McMillan Bloedel v. Mullin; Martin v. R. in Right of B.C. (the Meares Island Case)*<sup>53</sup> the plaintiff Indian bands sought a declaration that "no law of British Columbia has any force or effect in contravention of the said aboriginal title with respect to Meares Island". All five members of the court considered that there was "a serious question to be tried", and three were in favour of the issuance of an interlocutory injunction to prevent the logging of the island until trial. A conclusion that aboriginal title was extant would entail

a substantial diminution of provincial powers over public lands and suggest the need for a treaty or agreement between the province, the Federal Government and the Indians to provide for the management and development of reserve and other lands.

Future agreements, demanded by the need to provide for aboriginal title, will undoubtedly seek to eliminate Provincial powers and interests over reserve lands and resources, and to that extent promote self-management and self-government.

#### 4 SELF-MANAGEMENT AND MUNICIPAL GOVERNMENT UNDER CONTEMPORARY AD HOC AGREEMENTS

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An examination of contemporary arrangements with respect to the administration of aboriginal lands and resources and the accommodation of provincial interests suggests a pattern of self-management and municipal government. Powers are conferred upon the aboriginal community to administer its own land and resources, but subject to "laws of general application". The aboriginal community is able to administer its land and resources as any other owner. And like any other owner, the community has little or no protection from "interference or intimidation" by the Federal or Provincial Governments under "laws of general application". The grant of powers of municipal government generally conferred upon any community are associated with the recognition of powers of self-management.

The *James Bay Agreement of 1975* set a pattern of self-management and municipal government which was adopted in the *Northeastern Quebec Agreement of 1978*, the *Indian Self-Government Bill of 1984* and the *Sechelt Indian Band Self-Government Bill of 1986*.

##### A. The James Bay (1975)<sup>54</sup> and Northeastern Quebec (1978)<sup>55</sup> Agreements

The *James Bay (1975)* and *Northeastern Quebec Agreements (1978)* were entered into following the

issuance of an injunction restraining development by the Province in Northern Quebec. The Agreements provide for the surrender of aboriginal title by the Cree-Naskapi and Inuit of the region. The Inuit, the Cree, the Government of Quebec, the Government of Canada, and the provincial crown corporations engaged in the development were parties to the James Bay Agreement. The Naskapi, the Government of Quebec and the Government of Canada were parties to the Northeastern Quebec Agreement.

*i. The entrenchment of federal and provincial jurisdiction.*

The terms of the Agreements are entrenched and given legislative and constitutional authority by parallel federal and provincial legislation and section 35 of the Constitution. If the Agreements declared the abrogation of federal and provincial authority over aboriginal lands such would be entrenched. The Agreements do not deny federal and provincial authority, rather they entrench it.

All except Category 1A and 1A-N lands, the lands granted to the Cree-Naskapi, are declared to be subject to the exclusive legislative jurisdiction of the Province. It has been observed that Quebec manifested "its will to recover the effective control of its northern territories and to include the native populations living there in the common destiny of the people of Quebec".<sup>56</sup> All Category 1 land set apart for the Inuit are under provincial jurisdiction. The Category 1B and 1B-N lands set apart for the Cree and Naskapi are administered by "public corporations of a municipal character" under provincial jurisdiction. Category 1A and 1A-N lands are expressly declared to be subject to "the administration, management and control of Canada". In the event of a disposition of Category 1A or 1A-N lands to a non-native for a period in excess of five years, the lands become subject to provincial jurisdiction. The Agreement contemplates the overriding jurisdiction of the Federal and Provincial Governments, in their respective areas, subject only to such rights and powers accorded the aboriginal communities.

*ii. The denial of land and resources and the limited security of tenure*

The *James Bay Agreement* provided a per capita allocation of approximately 210 acres to the Cree, and one square mile to the Inuit. Such allocations amount to approximately one per cent of the area surrendered. Even with respect to that one per cent, the Province was recognized as owner of the mineral and subsurface rights; and the Inuit, Cree and Naskapi renounced all claims with respect to revenues arising from any development and exploitation in return for financial compensation. Existing interests, including mineral dispositions, and the "seashore, beds and shores of the lakes and rivers" were also excluded from Category I lands. The Agreement did not contemplate economic development founded on the land and resources of Category I lands. "The region remains firmly locked into a transfer payment economy".<sup>57</sup>

The right to land and resources (such as they are), granted to the Cree, Naskapi and Inuit are constitutionally protected, and to that extent security of tenure is provided. Such tenure is, however, subject to the terms of the Agreements. The Agreements recognize extensive powers to take and use Category I lands by the Province and the Federal Government.<sup>58</sup> The Agreements expressly recognize the power of the Province and Canada to expropriate.

Further, the Agreements affirm a governmental concern with extinction of Indian bands, and provide that Category 1A and 1A-N lands shall revert in the Province in such event.

*iii. Provincial administration of resource development*

Resource development on all Category I lands is administered by the province under the Agreements. All mining exploration and development on Category I lands is subject to "specific authorization from Quebec according to conditions specified in Quebec mining laws and regulations," although the consent of the interested community must be obtained and payment of compensation agreed upon for surface rights over such lands. Existing mining interests are excluded from such requirement.

Lands subject to existing mining interests are Category III lands, and subject to provincial administration exclusively.

A permit must be obtained from Quebec to use "gravel and other similar material generally used for earthworks" for personal and community use, although such permit cannot be withheld if all the provincial regulations are observed.

Commercial forest exploitation by Cree communities requires the obtaining of cutting rights or permits from the Quebec Department of Lands and Forests. The Department cannot withhold the grant of such rights but they must be exercised in accordance with its development and marketing plan. All cutting is subject to the "general regime for forest protection".

In the result, it is the Province that administers and disposes of the forest and mineral resources of the lands set apart for the Inuit and the Cree Naskapi. They do not have powers of management or government with respect thereto. They can veto mineral development, but only with respect to other than existing interests.

#### *iv. Limited Self-Management of surface rights on Category I lands*

The principal power conferred upon the Cree, Naskapi and Inuit is the power to grant leases, servitudes, usufructs and other surface rights on Category I lands. Such power may properly be termed self-management.

The power is, however, circumscribed. Alienation of Category I lands is subject to the general restraint that "[n]o Category I lands may be sold or otherwise ceded except to the Crown in Right of Quebec." Extensive rights of residence and access are guaranteed to non-aboriginal persons, including rights of access of those exercising a public function, and owners of mineral rights. Only subject to the Agreement may the Cree-Naskapi make by-laws so as to regulate residence and access. Rights of access on Inuit Category I lands are declared to be subject to provincial laws of general application.

The aboriginal community has only limited power with respect to wildlife on Category I lands. It is empowered to make by-laws regarding the allocation of quotas and hunting, fishing and trapping generally, but subject always to the power of the federal and Provincial Governments to make regulations with respect to the protection of wildlife, including setting quotas, and the power of disallowance by such governments of such by-laws. The "management of the wildlife resource" is the responsibility of the Federal and Provincial Governments - not the aboriginal local governments.

Under the *Cree-Naskapi (of Quebec) Act*,<sup>59</sup> a band is empowered to make by-laws respecting "the protection of the environment, including natural resources", the prevention of pollution, "land and resource use and planning", and "zoning". The "land use" and zoning by-laws require approval by the band electors. Such powers confer a measure of control on development on Category I-A lands. But they are outweighed by the control of mineral and forest development by the Province, and by the application of provincial jurisdiction in the event of a disposition to a non-Indian for more than five years. Any major non-Indian development will be controlled by the Province and be subject to provincial laws, including those governing the environment.

Further, the Cree-Naskapi and the Inuit are required by the Agreements to consult with Quebec prior to allowing non-aboriginal development of a "project of regional or provincial interest" on Category I lands.

It is to be observed that the aboriginal communities do not even have a veto with respect to the most likely form of development in the region. Category I lands may be expropriated for hydro-electric development.

#### *v. Municipal Government*

a. *Cree Naskapi: The Cree-Naskapi (of Quebec) Act*  
The Agreements contemplated the recognition of only municipal powers of government. The Cree and Naskapi are subject to the provincial *Cree Villages Act*<sup>60</sup> with respect to the municipal government of 1B lands of each community. The Agreement specifically referred to

"corporations of a municipal character", and the Act provides for the application of the provincial *Cities and Towns Act*. In accordance with the Agreement, the Act does provide for the power to make by-laws respecting the protection of the environment and the "protection and use of natural resources, but such by-laws are subject to the approval of the Province, must not restrict existing development or developments outside the municipality, and must be more stringent than the laws otherwise applicable."

Further, such special powers to make by-laws are subject to the ownership by the Province of sub-surface resources and provincial legislation respecting resource developments. Lands subject to existing mining interests are, of course, excluded from Category I lands.

The Cree Regional Authority, created by provincial legislation, has no powers of government beyond those delegated to it by Cree Villages or Bands. The Cree Regional Authority does appoint three of the six members of the James Bay Regional Zone Council. The Council has municipal jurisdiction, pursuant to the Agreement and provincial legislation, over the James Bay Region. The other three members are appointed by the James Bay Municipality.

The Agreements provided for Federal "special" legislation "concerning local government" for the Cree and Naskapi Category 1A and 1A-N lands to be enacted following discussions between Canada and the Cree and Naskapi. The powers to be conferred on band councils, subject to the Agreements, included the powers of a band council under the *Indian Act*, most of the powers of the Governor-in-Council under section 73 of that Act, "powers of taxation for community purposes" as agreed upon, powers respecting allotment for individual and public use, regulation and licensing of trades and work, residence, access, "certain defined powers relating to land use and environmental and social protection", and "powers of the band council relating to the protection and use of natural resources consistent with and subject to applicable laws and regulations and in conformity with the terms of the Agreement".



The powers are clearly more extensive than that contemplated by the *Indian Act*. But they remain "local" and "municipal" in character. Moreover, the Agreement contemplated "general powers of the Minister of Indian Affairs ... to supervise the administration of Category 1A lands."

The *Cree-Naskapi (of Quebec) Act* was assented to on June 14, 1984.<sup>61</sup> Grand Chief Ted Moses has observed that it:

"gives the eight Cree bands in the James Bay area more self-rule powers than those being proposed in current negotiations with bands such as the Sechelt."

The Act supplants the regime for the government of reserve lands provided for in the *Indian Act*. It does not however, exclude federal laws, or provincial laws of general application, except to the extent of inconsistency therewith. The Act thereby recognizes the continued jurisdiction of the Federal and Provincial Governments on Category I lands as, of course, is required by the Agreements. Only to the extent that the Act establishes Indian self-government is federal and provincial jurisdiction excluded. The Act does not and, under the terms of the Agreements, cannot do so. It is a misconstruction for the Minister of Indian Affairs to suggest on April 15, 1986 that "the *Cree-Naskapi (of Quebec) Act* responded to Cree and Naskapi needs as they identified them in 1984".<sup>62</sup> The *Cree-Naskapi Act* was dictated by and subject to the terms of the *James Bay (1975)* and *Northeastern Quebec Agreements (1978)*.

The powers of "local government" conferred on the bands include the power to "make by-laws of a local nature for the good government of its Category 1A or 1A-N land and of the inhabitants of such land, and for the general welfare of the members of the band". Such power to make by-laws respecting "good government" is that normally conferred upon municipalities. Normally the principal limit upon such power is the application of federal and provincial laws. Provincial laws are excluded

to the extent of inconsistency with a by-law, and to that extent the power *prima facie* appears to have significant potential. The Act, however, is subject to the Agreement and cannot deny the provincial powers with respect to resource development declared therein. Further, the reference to by-laws of a "local nature" in conjunction with the powers particularized in the Act suggests a restriction to powers of a municipal nature. The particular powers conferred upon the bands include the power to make by-laws respecting the "administration of band affairs", the "regulation of buildings", "roads, traffic and transportation", and "the establishment, maintenance, and operation of local services".

A band is empowered to impose "taxation for local purposes" upon interests in Category IA and IA-N lands and upon Indian and non-Indian occupiers of Category I land. It cannot, however, levy an income tax, nor levy a tax on the Federal or Provincial Governments. Moreover, any such local tax must be approved by the band electors and must be in accordance with regulations made by the Governor-in-Council. The power to fully tax the use and development of land and resources is an essential element of self-government. It enables an aboriginal community to secure the full benefit of land and resources for the community and can fund the operation of government. The *Cree-Naskapi (of Quebec) Act* denies any such power to tax to the bands. The power to tax conferred is that of municipal property taxation, and even that is subject to conformity with Governor-in-Council requirements. Other governments have levied taxation indirectly by means of "user charges" for services. The Act specifically bars such practice by requiring that any such charges be levied on an "equitable basis", and by precluding the raising of money beyond anticipated costs.

A band may expropriate interests in Category IA and IA-N lands, but again only in accordance with regulations made by the Governor-in-Council.

The Act does confer powers on a band with respect to "protection of the environment, including natural resources", land use, zoning, and hunting, fishing and trapping. They have been described above. They are

limited by the power of the Province to control resource development, and by the responsibility of the Federal and Provincial Governments for the protection of wildlife.

The band may also make by-laws respecting access and residence, but subject, of course, to the rights declared in the Agreement.

The Minister is entitled to appoint an administrator if "of the opinion that the financial affairs of the band are in serious disorder". The administrator is confined to administering "the financial affairs of the band." There is no general provision for disallowance of band by-laws.

In the result, the Act confers slightly more extensive powers of local government than those conferred by the Indian Act, in particular with respect to the environment and the local taxation of non-Indians. More significantly, the Federal responsibility for management and administration of Category IA and IA-N lands has been deleted and the general power of disallowance of by-laws abolished. In its place the Federal Government has required the approval of band electors for the making of the more significant by-laws respecting land use and taxation. With respect to local taxation and expropriation, it has made local by-laws subject to Governor-in-Council regulations.

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* 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.

#### b. Inuit

The Agreement provided for the enactment by the Province of legislation establishing municipal community government and municipal regional government. The Agreement included a draft Act entitled "*An Act respecting Certain Municipalities and the Regional Government of Northern Quebec*". The "*Act concerning Northern Villages and the Kativik Regional Government*"<sup>63</sup> was assented to on 23 June 1978.

The Act provides for the establishment of Inuit communities as "northern village municipalities". The municipalities are empowered to make by-laws respecting public security, public health, town planning and land development, public resources, recreation and culture, local property taxation, and other by-laws, not inconsistent with the Act or any other law, with respect to "the peace, order, good government health, general welfare and improvement of the municipality". The Quebec Minister of Municipal Affairs is empowered to disallow any by-law.

The Act further establishes the Kativik Regional Government to "act as a municipal corporation" with respect to that part of the territory not within a northern village, and to have jurisdiction over the whole of the territory with respect to "local administration including control of pollution and sewage by municipalities, transport and communications, police, and manpower training and utilization". The Quebec Minister of Municipal Affairs is empowered to disallow any by-law. The Regional Government is empowered to make by-laws regarding hunting, trapping and fishing, but subject to Federal and Provincial regulations and the power of disallowance of those governments. The "management of the wildlife resource" is the responsibility of the Federal and Provincial Governments, not the Regional Government. The Regional Government does not have control or management of the lands or resources of the region.

The Agreement and the Act provide for municipal government under provincial administration and jurisdiction of the Inuit lands.

*vi. Aboriginal advisory powers with respect to wildlife and the environment outside Category I lands*

The Agreements confer only advisory powers upon the aboriginal communities with respect to the conservation of wildlife and the environment outside Category I lands.

On Category II lands, the Cree-Naskapi and Inuit have the exclusive right of hunting, trapping and fishing. The Federal or Provincial Government, according to their respective jurisdictions, may make regulations

governing the conservation of wildlife, including the setting of quotas, after consideration of the recommendations of a Co-ordinating Committee (six of whom are appointed by the aboriginal peoples and six by the Governments). Subject to such regulations, the Cree/Naskapi local governments and the Inuit regional government may make regulations, including the allocation of quotas. All such regulations are subject to disallowance by the appropriate government.

Development on all lands in the Territory is subject to consideration by the James Bay Advisory Committee on the Environment (on lands South of the 55th parallel) and the Environmental Quality Commission (on lands north of the 55th parallel). The Cree may appoint four members of the 13 member James Bay Committee, and the Inuit five of the nine member Environmental Quality Commission. Both bodies are advisory to the Provincial and Federal Governments. The Agreements also provide for environmental and social impact assessment and review of all developments, and for representation of the aboriginal peoples upon review panels.

## **B. The Indian Self-Government Bill, 1984, C-52**

### *1. The Penner Report 1983*

The (Penner) 1983 Report of the Special Committee on Indian Self-Government<sup>64</sup> recommended that "the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada....Indian First Nations Government would form a distinct order of government in Canada".

The Report rejected the Department of Indian Affairs' proposal of band government as merely contemplating "municipal governments", and for failing "to take account of the origins and rights of Indian First Nations in Canada". Pending the constitutional entrenchment of Indian self-government, the Committee recommended that Parliament "should move to occupy the field of legislation in relation to 'Indians and lands reserved for Indians' and then vacate those areas of jurisdiction to recognized Indian governments." The legislation would authorize "the Federal Government to enter into agreements with

recognized Indian First Nations as to the jurisdiction that each government wishes to occupy."

The Committee recommended that the powers would include "full control over the territory and resources within the boundaries of Indian lands", including land and resource use, revenue raising, and economic and commercial development. It urged the "provision of an adequate land and resource base" to provide the foundation of economic development which was considered to be "essential for the effective exercise of Indian self-government".

The *Indian Self-Government Bill* was given first reading in the House of Commons on June 27, 1984. It "died" with the dissolution of Parliament. The Bill was the Federal Government response to the Penner Report. It fell far short of adopting the recommendations of the Report. It bears similarities to the *Cree-Naskapi (of Quebec) Act* of 1984, which was assented to on June 14, 1984.

#### ii. *The objects of the Bill*

The preamble to the *Indian Self-Government Bill* does not declare that its object is to confer self-government on Indian communities. Rather, it vaguely declares that:

Parliament and the government of Canada are committed to continuing and strengthening Indian government on lands reserved for the Indians by providing for the recognition of the constitutions of Indian Nations and the powers of their governments.

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 - 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.

The Bill provided that bands or tribes could seek recognition under the Bill as "Indian Nations", upon the approval of a panel appointed by the Governor-in-

Council. Such recognition could only be granted if a written constitution provided *inter alia*, "for the protection of individual and collective rights", and "an independent system of reviewing executive decisions of the government of the Indian Nation on the grounds that they are illegal, unreasonable or unfair."

The objects of the government of an "Indian Nation" included the ability:

(a) to act as the government authority within the lands of the Indian nation in accordance with this Act; ...

(e) to use, manage, develop, administer and regulate the lands and resources of the Indian Nation.

It is difficult to conclude that the Bill truly contemplated the achievement of such objects since it also provided for the continued jurisdiction of the Federal and Provincial Government, and the retention of powers of superintendance and disallowance.

### *iii. The continued jurisdiction of the Federal and Provincial Governments*

The Bill declared the continued jurisdiction of the Federal Government and the application of the Indian Act and federal laws of general application, except to the extent of inconsistency with the constitution or powers of an Indian Nation under the Bill. Similarly, Provincial laws of general application were expressed to be excluded only to the extent of such inconsistency. Section 88 of the Indian Act would not be applicable, but such would not deny the application of provincial laws of general application unless they were integral to a matter relating to "Indians or lands reserved for Indians". The jurisdiction of the Provincial Governments was continued as under the *Cree-Naskapi (of Quebec) Act 1984*. The recommendations of the Penner Report - that provincial laws be excluded except by the agreement of the Indian Nation - was not adopted. In the result, Indian Nations under the Bill would be in essentially the same position

as bands under the Indian Act, unless substantial powers were conferred by the Bill.

*iv. The powers conferred upon Indian Nations upon recognition under the Bill*

Upon recognition, an Indian Nation would have "executive powers" with respect to:

(a) the management and administration of the lands; ...

(e) the economic development of the Indian nation...

But the "grant" of executive power with respect to "the management and administration of the lands" was not intended to put an end to the requirement of a surrender to the Crown, or to confer powers of disposition. Nor does it appear that the grant of such power would displace the administration of Indian minerals, oil and gas, and timber by the Department. Further, the holder of a pre-existing interest was entitled "to continue to exercise his rights thereunder until the end of the term fixed therein."

The executive powers with respect to land conferred upon an Indian nation upon recognition under the Bill appear no more substantial than those which might be granted under the Indian Act. They could be conferred under section 60 of the Indian Act.

Indeed, the Bill includes a provision analogous to section 60 of the Indian Act. Section 63(3) provides for the transfer of "powers, duties or functions of the Minister" to the Indian Nation by the Governor-in-Council pursuant to regulations made by the Governor-in-Council. The provision, like section 60, allows for management by the Indian Nation but only under superintendence by the Federal Government.

An Indian nation under the Bill would be empowered to legislate in respect of "taxation for local purposes levied on real property" and "charges for the use of public service provided". But, as under the *Cree-Naskapi (of Quebec) Act*, such laws would be



subject to regulations made by the Governor-in-Council. Moreover, any law of an Indian nation was subject to disallowance by the Governor-in-Council at any time. Such power to tax is so circumscribed as to be almost illusory when considered in the context of self-government. It does allow for a broader base of taxation than under the Indian Act, inasmuch as non-Indian occupiers of reserve lands might be taxed.

*v. The acquisition of additional powers by agreement*

The Bill contemplated the grant of additional powers by "agreement" with the Minister and the approval of the Governor-in-Council, "subject to such limitations as are set out in the Agreement".

The legislative powers which might be obtained upon "agreement" had significant potential, including: "zoning and land use planning"; "the environment"; "renewable and non-renewable resources, including wildlife"; property rights; expropriation; access; residence; and "matters of a purely local or private nature for the good government of the Indian Nation". The bill also provided for legislative powers "in respect of taxation" upon agreement with the Minister of Finance; and outside the lands of an Indian Nation in respect of the environment, wildlife and hunting, gathering, trapping and fishing, upon agreement with the appropriate government. Additional executive powers which might be obtained upon agreement with the Minister included "the exploitation of land and of renewable and non-renewable resources, including wildlife", and "undertaking activities" with respect to which the Indian Nation had legislative powers.

The powers with respect to the environment and resources, land use, zoning and wildlife are similar to those conferred upon bands under the *Cree-Naskapi (of Quebec) Act*. Under that Act, the powers are limited by the provincial control of resource development and the ambit of provincial jurisdiction. The powers which could be conferred upon agreement under the Bill represent significant increments beyond those contemplated in that Act. The conferment of such powers would exclude federal and provincial jurisdiction in those

respects. For example, potentially the band could levy an income tax on a non-Indian developer on reserve lands, who would be required to comply with Indian Nation environmental standards. The ambit of such powers is great and could afford a foundation for self-government. But such powers are subject to:

- the obtaining of an agreement;
- termination under the agreement;
- the limitations set out in the agreement;
- the approval of the Governor-in-Council of the agreement,
- the power of disallowance of the Governor-in-Council of any law made pursuant to the agreement; and
- the recognition and protection of pre-existing interests.

Such limits indicate an absence of substance to the powers described in the Bill. It was not contemplated that they could be exercised without the superintendance of the Department.

The superintendance of the Department is made explicit in section 26 of the Bill. Under that section, the Minister was empowered to suspend the powers and duties of the government of an Indian Nation and appoint an administrator where he was of "the opinion" that the government had abused its powers, was in serious financial difficulty, or was unable to perform its functions.

The Bill does not provide for self-government or even self-management. It merely provides for the possibility of the negotiation of an agreement with the Minister which could confer powers of self-management over Indian lands. If self-management was to be conferred, it would be conferred under an agreement and depend upon the terms agreed, and on the absence of limitations on the exercise of powers under the agreement. The Bill provides a framework for such agreement, but a framework that contemplates such limitations with respect to superintendance, disallowance and the application of laws of general application as not to allow for self-government.

### C. The Sechelt Indian Band Self-Government Act 1986, Bill C-93

The *Sechelt Indian Band Self-Government Act 1986, Bill C-93*, was given second reading in the House of Commons on February 7, 1986. At the time of writing it had not been enacted.

The purposes of the Act are declared to be:

to enable the Sechelt Indian Band to establish and maintain self-government for itself and its members on Sechelt lands and to obtain control over and the administration of the resources and services available to its members.

The Bill is described as "based on proposals for self-government developed by the Sechelt Band members". The Bill might also be said to be based on and derived from the *Cree-Naskapi (of Quebec) Act 1984* and the *Indian Self-Government Bill*. The *Cree-Naskapi (of Quebec) Act* suggested the ambit of powers to be granted. Bill C-93 is enabling legislation in the manner of the 1984 Bill C-52, albeit shorn of the more extreme aspects of Federal superintendence. It provides for self-management, not self-government.

#### *i. The continued jurisdiction and rights of the Federal and Provincial Governments*

The *Indian Act* and the *Indian Oil and Gas Act* and all federal laws of general application are expressed to be applicable to the Band, its members and its lands except to the extent of inconsistency with the Bill.

The Bill expressly declares that provincial laws of general application are applicable to Band members except to the extent of inconsistency with the Bill or any treaty. Section 38 of the Bill, like section 88 of the *Indian Act*, expressly recognizes and extends provincial jurisdiction on Indian lands. Neither Bill C-52 nor the *Cree-Naskapi (of Quebec) Act* expressly provided for the application and extension of provincial jurisdiction over Indian lands. The application of federal and provincial laws upon Sechelt lands suggests the status of an Indian band council under the *Indian Act*. Any different status

depends upon the substance of the powers conferred by Bill C-93.

The Bill affirms provincial interests and powers with respect to the lands and resources of the Sechelt Band. The title and powers of the Band to the lands and resources are declared to be subject to the interest of the Province in the minerals of the reserve, and the powers of management thereof of the Province recognized in the *British Columbia Indian Reserves Mineral Resources Act*. Further, the conditions attached to the provincial conveyance relating to expropriation, water rights, construction materials and highways are preserved. The Bill does not provide for the surrender by the Province of any of those powers with respect to Sechelt lands.

The Bill allows for the delegation by the Province of legislative powers to the band. There is no indication of the nature of any such powers contemplated.

#### *ii. Limited Security of Tenure*

The Bill proposes to transfer in fee simple title, subject to the Provincial interest, the Sechelt lands to the Band. The lands will remain "lands reserved for Indians" within section 91(24) and to that extent secure from provincial action. The lands will however remain subject to the Indian Act to the extent consistent with the Bill, and are accordingly subject to expropriation upon the consent of the Governor-in-Council.

#### *iii. Self-Management and Municipal Government*

Under the Bill, the Sechelt Band can only aspire to powers upon the approval of the Governor-in-Council of a written constitution which provides *inter alia* for:

(b) ...the procedures or processes to be followed by Council in exercising the Band's powers and carrying out its duties...

(f) ...rules and procedures to be followed in respect of the disposition of rights and interests in Sechelt lands...

The requirement of "an independent system of reviewing executive decisions" specified in Bill C-52 has been deleted.

The Band "has full power to dispose of any Sechelt lands and any rights or interest therein", in accordance with the rules and procedures in the constitution approved by the Governor-in-Council, and with the recognition of existing interests.

The Governor-in-Council may approve the inclusion in the constitution of the power to make by-laws with respect to access, residence, zoning and land use planning, expropriation for community purposes, use and construction of buildings and roads, protection and management of fur bearing animals, fish and game on Sechelt lands, "taxation for local purposes, of interests in Sechelt lands, and of occupants and tenants of Sechelt lands", "the administration and management of property belonging to the Band", and "the preservation and management of natural resources on Sechelt lands" and "matters related to the good government of the Band, its members or Sechelt lands."

The powers are similar to those conferred by the *Cree-Naskapi (of Quebec) Act*, whose local and municipal nature was dictated by the *James Bay Agreement*.

The powers with respect to the management of natural resources, expropriation, taxation and "good government" could not have been conferred under the Indian Act. The power with respect to natural resources is somewhat illusory because of the ambit of provincial power and interests. The ambit of the power to make laws with respect to the "good government" of the Sechelt lands is uncertain. It must be construed in the context of the enumerated powers and, accordingly, be read somewhat restrictively. It is the power to levy local property taxation that is of immediate significance. It is similar to the power conferred under the *Cree-Naskapi (of Quebec) Act 1984*. Under that Act, the bands may levy taxes but only in accord with Governor-in-Council regulations. No such conformity is required under the Sechelt Act, but approval of the grant of such power must be given by the Governor-in-Council upon consideration of the constitution. Approximately 350

non-Indians lease land from the Sechelt Band. The grant of power will enable the band to tax such interests.

Bill C-52 enumerated more substantial powers in relation to the environment, property rights, and taxation, but only upon the obtaining of an agreement with the Minister. Moreover, such powers would have been subject to the terms of such agreement and disallowance by the Governor-in-Council. No power of disallowance is conferred upon the Governor-in-Council by Bill C-93. Nor does the Bill provide for the revocation of the Constitution of the Sechelt Band. The significance of Bill C-93 is not so much in the ambit of powers which are conferred upon the Sechelt, but in the absence of federal superintendence. Upon the approval of a Constitution by the Governor-in-Council, the Sechelt Band is enabled to exercise its powers free from federal superintendence.

The ambit of powers which could be conferred under Bill C-93 is not insubstantial. But 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. If the Sechelt Band supplants the Department in the management of the Sechelt lands and resources, the regime is properly termed "self-management".

#### *iv. Powers outside Sechelt lands*

Bill C-93 enables the Band to exercise powers outside the Sechelt reserve lands, upon federal and provincial concurrence.

It provides for the Sechelt Indian Government District "which shall have jurisdiction over all Sechelt lands". Sechelt lands include those lands declared by the Governor-in-Council and the Lieutenant-Governor-in-Council of the Province to be Sechelt lands for the purposes of the Act. The powers and duties of the Band may be transferred to the District by the Governor-in-Council if provincial legislation respecting the District is in force. The conditions of the exercise of such powers emphasize the subordinate nature of the band powers contemplated by Bill C-93.

## 5 THE METIS SETTLEMENTS: ABORIGINAL COMMUNITIES ESTABLISHED UNDER PROVINCIAL JURISDICTION ON PROVINCIAL LANDS

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The unique aspect of the Metis settlements in Canada is that they were established under provincial jurisdiction on provincial lands at a time when jurisdiction over "Indians and lands reserved for Indians" resided in the Federal Government. The Federal Government denied that it had jurisdiction with respect to the Metis. It is appropriate to consider what rights and powers the government that is representative of local interests is prepared to accord descendants of the local aboriginal inhabitants, in the absence of any countervailing governmental power with acknowledged responsibility to act for the aboriginal people. The *Metis Population Betterment Act* of Alberta suggests subjugation.

In 1982, the *Constitution Act* afforded constitutional protection to the "existing aboriginal and treaty rights" of the Metis. The Act may limit unilateral action by the Province of Alberta with respect to the Metis settlements. The Province may no longer be able to unilaterally diminish the rights of the Metis with respect to the settlements. The actions and proposals of the Government of Alberta after 1982 must be considered in the context of a structure where it can no longer act irregardless of Metis interests, as it purported to be able

to do prior to that time. The proposals of the MacEwan Report of 1984 must be considered in the context of such constitutional protection. It should be observed that they could have been grouped under the prior heading: "Self-management and municipal government under contemporary ad hoc agreements".

**A. 1938 Metis Population Betterment Act of Alberta:  
Subjugation under Provincial Jurisdiction**

In 1936 the Ewing Commission,<sup>65</sup> appointed by the Legislative Assembly of Alberta, recommended the establishment of "some form of farm colonies" for the Metis to enable them to become "self-supporting citizens". The Commission rejected the notion that the Metis should be "wards of the Government", but declared that:<sup>66</sup>

The final control of these colonies must continue to rest with the Department concerned. The management will be carried out under such superintendents or instructors as may be necessary.

Each instructor was to be appointed by the Government and "in a general way he should have control of the operations of the colony and should in addition have the powers of a police magistrate". The Commission observed that:<sup>67</sup>

As matters develop it may be thought wise to provide for a council to be elected by the members of the colony and to be invested with advisory power only.

In 1938, the Legislative Assembly of Alberta sought to give effect to the Report of the Commission and enacted the Metis Population Betterment Act.<sup>68</sup> The Act authorized the Provincial Minister to promote the formation of Metis associations to co-operate in developing schemes for "settlement on lands set aside for that purpose by the Province".

The constitution of each association was subject to the approval of the Minister, and each scheme was subject



to the approval of the Lieutenant-Governor-in-Council. In 1940 a new Metis Population Betterment Act<sup>69</sup> was enacted. The 1940 Act provided for the administration of settlement lands by the Minister, and in particular for the authority to make regulations to that effect. The Act is essentially unchanged to the present.

In 1984 there were eight such settlements with an area of 1.28 million acres and a population of 3,823. The settlements are located in northern and north-central Alberta.

*i. The exclusive jurisdiction of the Province and the denial of security of tenure*

The Metis settlements were established by provincial legislation from provincial public lands. Section 6 of the 1938 and 1940 Acts provided that the "Lieutenant-Governor-in-Council may at any time and from time to time by order set aside out of any unoccupied provincial lands as defined in the Provincial Lands Act any area or areas thereof which are deemed to be suitable for the settlement of the members" of any association. The orders-in-council setting apart such lands declared that the members "shall be entitled to surface rights only, until Regulations governing the administration of the various colonies have been approved".<sup>70</sup> It is unsettled if the mineral rights were included in the areas set aside. The Province has not acknowledged the setting aside of the mineral rights, and the matter remains the subject of litigation. The issue was not particularly significant until 1982, because of the overriding power of the Province to eliminate the setting aside of settlement lands. The 1938 and 1940 Acts provided that the Lieutenant-Governor-in-Council might determine when "for any reason whatsoever the lands so set aside and withdrawn from disposal are unsuitable or are not required for the settlement of any members" of the association. The Metis settlement lands were not considered protected from abolition. They were considered to be subject exclusively to provincial jurisdiction and not within the protection of the federal jurisdiction over "Indians and lands reserved for Indians". The Federal Government never sought to

exercise any such jurisdiction. And the Provincial Government did not hesitate to eliminate the setting aside of settlement lands (e.g., Touchwood/Siebert, 1940; Marlboro, 1941; Cold Lake, 1960; and Wolf Lake, 1960). The orders-in-council rescinding the setting aside of lands at Cold Lake and Wolf Lake state "it has been found that the above described lands are unsuitable for settlement of any members of a settlement association".<sup>71</sup> Cold Lake was uninhabited but the settlement at Wolf Lake was closed against the wishes of the inhabitants.

The ability of the Province to unilaterally eliminate settlement lands effectively denied any potential for self-government. Security of tenure, and in particular protection from such Provincial Government action, is essential to self-government. Section 35 of the *Constitution Act, 1982* may have provided constitutional protection to the Metis settlement lands. The lands would appear to constitute "existing...aboriginal rights" within the meaning of section 35, and accordingly are arguably no longer subject to unilateral action by the Province.

#### *ii. The Board of the Settlement Association*

The 1938 and 1940 Acts provided that the control of the business and affairs of a Settlement Association be vested in a five person Board, the members of which would be elected from the membership of the Association. In 1952 the Act was amended<sup>72</sup> to provide that the Chairman of the Board would be the local supervisor of the area appointed by the Provincial Department, and that two of the other members of the Board would also be appointed by the Minister. Only two members of the Board hold office by virtue of their election by the membership. Such control by the Province eliminates any possibility of self-government.

#### *iii. Management by the Province*

The Provincial Minister charged with the administration of the Metis Betterment Act is responsible for the administration and management of settlement lands. The Act<sup>72</sup> empowers the Minister, by order, with the approval of the Lieutenant-Governor-in-Council, to make regulations regarding allocation of lands, land use,

disposition of timber, and rights of members to hunt, trap and fish. The powers of the Minister are all-embracing.

The Regulations provide that the Board of the Association may allocate lands to members but only "with the approval of the Minister."<sup>74</sup> A Certificate of occupancy is issued by the Minister.<sup>75</sup> The Minister may cancel an allotment or certificate if the conditions have not been met, or a member "by his conduct is interfering with the satisfactory working of the association". A certificate or allotment can only be transferred "upon the recommendation of the Supervisor of the Area, the Supervisor of Metis Colonies, and with the consent and approval of the Minister."<sup>76</sup> Further, the Minister is empowered to direct the operation of farms on settlement lands,<sup>77</sup> and to reserve lands with respect to which a certificate of occupancy has not been issued, and to permit its use for a purpose "that, in the opinion of the Minister, is for the benefit of the settlement association".<sup>78</sup> The Minister is empowered to issue grazing leases on unoccupied settlement lands to "bona fide settlers."<sup>79</sup> The Minister is empowered to grant permits to cut timber to members of the Association, on the recommendation of the board of the settlement association.<sup>80</sup>

There is no provision in the Act or regulations for disposition of the settlement lands. Mineral and oil and gas development has been undertaken on settlement lands pursuant to the *Provincial Lands Act*, the *Mines and Minerals Act* and the *Surface Rights Act*

Hunting, trapping and fishing in settlement lands is reserved to residents, but under provincial supervision and in accordance with licences issued by the Province.<sup>81</sup>

There is no power in the Board to levy taxes. The Regulations provide for the taxation of the property interests of members and mineral and resource developers on settlement lands.<sup>82</sup> But such taxes are set by the Minister and are payable to the Minister, not to the Settlement Association. Members of associations are entitled to "work out" the tax "on any community project authorized by the Supervisor".

The Minister is responsible for the administration of monies arising from settlement lands. A Metis Population Betterment Trust Account was established in 1943<sup>83</sup> as the depository of fees and dues arising from timber permits, grazing and other leases. In 1951 the order was amended to provide for "all moneys received from the sale or lease of any other of the natural resources of the said areas."<sup>84</sup> The Minister is directed "to provide for the general management and administration of such trust funds."

Any analysis of the powers of management of settlement lands must conclude that they are vested in the Provincial Minister. The powers of the Board of the settlement association are confined to allotting lands, subject to the approval of the Minister, and recommending the grant of timber permits and commercial fishing licenses to members. The substance of the powers of management and disposition of settlement lands are vested in the Provincial Department and its officers. The management regime is similar to that provided by the Indian Act with respect to Indian reserves, although the Board of the Settlement Association has even less powers to give advice or withhold consent to Ministerial action, as compared to a band council.

#### *iv. No powers of local government*

Not that the Province contemplated conferring powers of local government, let alone self-government, on the settlement associations. The 1940 Act and subsequent Acts provided that the Lieutenant Governor-in-Council might declare the settlement lands to be an "improvement district" within the meaning of and subject to the Improvement Districts Act. The Improvement District Act<sup>85</sup> confers upon the Minister the power to govern and provide services in the manner of a municipality in areas declared subject to the Act. In particular, section 16 provides that the Minister may, by order, provide for any undertaking which a municipality might by by-law or resolution have undertaken pursuant to the Municipal Government Act or Planning Act. Section 14 provides that the Minister may establish and appoint an "advisory committee" in the exercise of such powers. In the 1972

Report of the Task Force on the Metis Betterment Act, Metis Settlements and the Metis Rehabilitation Branch recommended application of the Improvement Districts Act "to build self-government at its lowest level of activity."<sup>86</sup>

The Regulations governing the Constitution of Settlement Associations<sup>87</sup> provide that the Board "may pass by-laws and regulations not inconsistent with the provisions of the constitution of the Settlement Association pertaining to the management and governing of the Settlement Association and the reserved area occupied by their Settlement Association". The powers conferred upon the Minister by the Metis Betterment Act, and contemplated by the application of the Improvement District Act, do not allow for any powers of any substance to be exercised by the Board with respect to the settlement lands. Moreover, any such by-laws and regulations are subject to the approval of the Minister.

#### **B. The 1984 Report of the MacEwan Metis-Government Committee and Alberta response: Self-Management and Municipal Government**

The 1972 Task Force Report<sup>88</sup> had recommended the application of the Improvement District Act to settlement lands as a "transitional stage of development with some specific date in mind to move into complete self-government," and "extensive negotiations on specific issues between Government and the Settlement People with the object of establishing a relatively autonomous form of self-government in the settlements." The form of "complete self-government" contemplated was "complete local self-government."

In 1982 a Committee was appointed by the Lieutenant-Governor-in-Council consisting of Dr. Grant MacEwan, an M.L.A., a representative designated by the Minister of Municipal Affairs, and two representatives designated by the Metis Settlements. The Committee was established to act in an advisory capacity "and in particular to review the Metis Betterment Act and Regulations and make recommendations to the Minister of Municipal Affairs which would allow for political, social, cultural and economic development on Metis

Settlements."<sup>89</sup> The Minister of Municipal Affairs established terms of reference which included "the development of models in terms of local government, land holding, social organization and economic opportunity on Metis Settlements".<sup>90</sup>

In 1984 The Committee<sup>91</sup> recommended: that title to settlement lands should be vested in the Metis settlements by legislation; self-management of settlement lands; and a municipal form of "local self-government." It suggested that the following principles should be applied in drafting legislation:<sup>92</sup>

(1) the Metis represent a unique cultural group in Canada, an aboriginal people recognized in the Canadian Constitution, and a group that played a major role in the development of Western Canada;

(2) because the culture and lifestyle of the Metis settlements is inextricably linked to the land, a Metis settlement land base is the cornerstone on which to build and maintain the social, cultural and economic strength of the Metis settlers;

(3) given a unique culture and the land base of the Metis Settlement Areas, the Metis can best achieve the mutual goal of self-reliant integration, without homogenization, by a legislative framework enabling the maximum practicable local self-government of the land base;

(4) it would not be practical to include in Metis settlement local government the full scope of powers required to deal with all matters of health, education, social services and economic development, but even in these cases the uniqueness of the culture and its problem solving traditions should be respected by the Government bodies exercising the power.

#### *i. Limited Security of Tenure*

Security of tenure to settlement lands was to be assured by granting "fee simple title to the surface", including

sand, gravel and timber to the settlements.<sup>93</sup> The ownership of mines and minerals was to be "resolved" by the courts. Ownership would include highways and roads subject to public rights of way. The vesting of title by provincial legislation would seem to afford certainty to the constitutional entrenchment of the Metis rights to the settlement lands provided by section 35 of the *Constitution Act, 1982*. It is in the context of such constitutional entrenchment under section 35 that the unanimous resolution of the legislative assembly of Alberta on June 3rd, 1985 should be considered.

BE IT RESOLVED THAT, THE LEGISLATIVE ASSEMBLY:

1. Endorse the commitment of the Government of Alberta to grant existing Metis Settlement lands now known as Big Prairie (Peavine), Caslan (Buffalo Lake), East Prairie, Elizabeth, Fishing Lake, Keg River (Paddle Prairie), Kikino, and Utikuma Lake (Gift Lake), to the Metis Settlement Associations, or to such appropriate Metis corporate entities as may be determined, to be held on behalf of the Metis people of Alberta;

2. Endorse the grant of existing Metis Settlement lands;

a) In fee simple reserving thereout all mines and minerals;

b) Without prejudice to existing Metis Settlement litigation;

c) Without affecting existing interests of third parties or certain specified interests of the Province of Alberta; and

d) Subject to the continuing legislative authority of the Province of Alberta; ...

5. Endorse the commitment of the Government of Alberta to introduce, once a revised Metis Betterment Act has been enacted, a resolution to amend the *Alberta Act* by proclamation issued by Her Excellency the Governor General under the Great Seal of Canada to grant an estate in fee simple in existing Metis Settlement lands to the Metis Settlement Associations or to such appropriate Metis corporate entities as may be determined on behalf of the Metis people of Alberta, in accordance with this resolution."<sup>94</sup>

The amendment of the *Alberta Act* to provide for the grant of the Metis Settlement lands would afford certainty to the constitutional entrenchment of the Metis rights to such lands. The reservation of mines and minerals, however, strikes at the economic foundations of any potential for self-government. A major gas field underlies Metis settlement lands. Further, the reservation of "certain specified interests of the Province" suggests the possibility of the vesting of substantial powers over the lands in the Province. Moreover, the "continuing legislative authority of the Province" may allow for expropriation of the lands.

#### *ii. The continued jurisdiction of the Province*

The MacEwan Report did not recommend the entrenchment of the power and jurisdiction of Metis Settlements. It contemplated the continued jurisdiction of the Province over the powers of the Metis Settlements. Section 20 of the draft Bill proposed in the Report expressly declared the invalidity of any by-law to the extent that it conflicted with provincial legislation. Nor did the Report contemplate the exclusion of federal jurisdiction from the Settlement lands.

The Government of Alberta did not indicate any preparedness to entrench the powers and jurisdiction of Metis Settlements in the resolution of June 3, 1985. Paragraph 2(d), of the resolution expressly stated that the grant of Metis Settlement lands would be "subject to the continuing legislative authority of the Province of Alberta". The retention of provincial jurisdiction is a



substantial impediment both to the grant of any form of self-government and its development. Only if the Province is prepared to amend the Alberta Act to provide for Metis self-government will its potential be developed, and allow for, in the words of the MacEwan Report, "the maximum practicable local self-government of the land base."

### *iii. Self-Management and Municipal Government*

The MacEwan Report proposed that the management and disposition of Metis Settlement lands be vested in each community.<sup>95</sup> The proposals seek to eliminate the managerial and supervisory role of the Minister. The Council of the community would be empowered to allocate lands and to issue certificates of occupancy to members. The Council might approve transfers, or cancel certificates of occupancy if conditions are not met. The Council might also cancel certificates upon payment of compensation, if "the land is being used for a purpose detrimental to the well-being of the settlement" or "the land is needed by the settlement for a public purpose". All members of the community "should be able" to reside on the settlement lands and apply for an allocation of land.

The council would be empowered to "grant any lease, licence, easement, profit a pendre or other interest in land" to non-members, but any transfer to a non-member would require the written consent of the Minister of Municipal Affairs.<sup>96</sup> The requirement of Ministerial consent is, of course, a limitation on the self-management power of the community. It is directed to ensuring the "security" of the settlement lands, and parallels the surrender requirements of the Indian Act. It is not clear if it is contemplated that lands could otherwise be transferred without a community referendum. The issuance of interests to minerals, including gravel, clay and marl, would be subject to compliance with the Trustee Resource Development Policy.

The proposals contemplate substantial Council controls over access.<sup>97</sup> Only "a Government official entering a settlement area in performance of his duties" could enter without the permission of Council. The proposals are

declared paramount to the Surface Rights Act. If the proposals were adopted the Council could veto mining and oil and gas exploration and development. Similar powers were conferred on the aboriginal communities under the James Bay and Northeastern Quebec Agreements. The Report explained:<sup>98</sup>

It is felt that a high degree of local control of access to and use of land is essential to meet the goal of providing a land base on which the Metis can preserve a culture linked to their traditional hunting, fishing, trapping and gathering pursuits. Without the power to control, non-members could soon deplete those resources.

Mineral and sand and gravel development would be subject to compliance with the Resources Development Policy developed by the Trustees of the Metis Settlements Resources Trust Fund.<sup>99</sup> Monies payable from the disposition of minerals, sand and gravel, and timber from all settlement lands would be payable to the Fund. Surface rights compensation would be split between the Fund and the communities. The Trustees would be appointed by the communities. Each community might make by-laws regarding the development of mineral resources provided they were in compliance with the Resources Development Policy. The Policy would not extend to timber. A community would be able to make a by-law respecting the disposition of timber without requiring compliance with any such policy.

The proposal recommends that "a settlement council has exclusive legislative authority to make by-laws respecting (a) hunting, (b) fishing (c) trapping (d) gathering".<sup>100</sup>

The proposal contemplates the conferment of local government on Settlement councils. It is unclear what the precise ambit of powers of government would be. Section 26 of the draft bill proposed:

(1) A council may pass by-laws that are considered necessary

(a) for the peace, order and good government of the settlement;

(b) for promoting the health, safety, morality and welfare of residents of the settlement;

(c) for the protection of life or property.

(2) In addition to the general power to make by-laws under subsection (1) the council can make by-laws on the subjects described in Schedule three of the Act.

Schedule Three was described as outlining "the detailed by-law making authority of the council", and suggested the use of "the relevant section of the Municipal Government Act" as "a legislative precedent".<sup>101</sup> It was observed that "Schedule three will enable the council to pass by-laws on traditional matters under municipal jurisdiction, for example, procedural by-laws, by-laws regulating disorderly conduct, public health, delapidated buildings, land use and planning".<sup>102</sup> Section 33 proposed that "the settlements should be given powers to assess and tax", but observed that "this whole issue requires more time for discussion".<sup>103</sup> The jurisdiction of Council would be confined to the settlement area "unless this or any other Act confers additional jurisdiction".

The powers which the proposed Act details are municipal in nature. Section 26(1), however, suggests the possibility of powers beyond those traditionally associated with municipalities, and provides the potential for such powers. Such potential cannot be realized as long as the Metis Settlements are subject to the full force of the jurisdiction and laws of the Provincial and Federal Governments. The essence of municipal government in Canada is its subordination to the other two levels of government. The invalidity of any council by-law that is inconsistent with any provincial legislation points up the subordinate status of the proposed Settlement councils. The proposed Act does suggest a mechanism for a less subordinate status. It provides that "a council

may be granted exclusive legislative authority". The Report observes that "this is a matter for further discussion between the Government and Metis Councils". Only if such "further discussion" was fruitful might a form of aboriginal self-government appear.

The Government of Alberta has not committed itself to any form of local self-government of Metis Settlement areas. The resolution of June 4, 1985 recites the Metis desire for enlarged jurisdiction, but thereafter referred to the matter as follows:

4. Endorse the commitment of the Government of Alberta to propose a revised Metis Betterment Act to the Legislative Assembly, once appropriate criteria have been established for Settlement membership, land allocation and the composition of governing bodies capable of holding land;

#### **C. Metis settlement lands in Saskatchewan**

Lands were set apart by the Province in Saskatchewan, for the settlement of Metis, from public lands under the Provincial Lands Act. Lands were described as being set apart "for the purpose of settling or re-establishing on such lands certain Metis who are eligible to be so settled or re-established by the Northern Areas Branch of the Department of Municipal Affairs with the view of providing such Metis with permanent homes and the opportunity of earning a livelihood".<sup>104</sup> Four townships, totalling 92,000 acres were withdrawn from disposition at Green Lake, and portions thereof leased to Metis settlers. The lands were administered under the authority of provincial "laws of general application". No special statutory provision was made for Metis communities or government.

## 6 THE INUVIALUIT FINAL AGREEMENT (WESTERN ARCTIC):<sup>105</sup> SELF-MANAGEMENT OF ABORIGINAL LANDS IN THE NORTH

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The *Inuvialuit Final Agreement* of 1984 demands separate consideration because it is the only contemporary settlement arrived at with respect to federal lands and exclusively under federal jurisdiction. The influence and control allowed to the Territorial Government in arriving at the Settlement was at the discretion of the Federal Government. In such respect there is a similarity to the settlements reached on the Prairies prior to 1930. What is unique to the *Inuvialuit Final Agreement*, however, is the contemplation of a local order of government, the Territorial Government, which would represent interests not necessarily "antagonistic" to the aboriginal peoples.

### A. The entrenchment of Federal and Territorial Jurisdiction

The *Inuvialuit Final Agreement* is a "land claims agreement" within the meaning of section 35(2) of the *Constitution Act, 1982*, and is to that extent constitutionally entrenched. The Agreement prevails over any other law which might otherwise apply.

The Agreement entrenches federal and territorial jurisdiction. It entrenches the potential denial of Inuvialuit self-government. Unlike the *James Bay* and

*Northeastern Quebec Agreements, the Inuvialuit Final Agreement* makes no provision for local government. The Agreement expressly declares the application of Federal and Territorial laws and ordinances:<sup>106</sup>

(97) Except as otherwise provided in this Agreement, Inuvialuit lands shall be subject to the laws of general application applicable to private lands from time to time in force, including, without restricting the generality of the foregoing, territorial laws and ordinances that apply or are made to apply generally to private lands.

The Agreement makes provision for the application of laws regulating Crown lands to be applicable to Inuvialuit lands.

(98) Without limiting the application of subsection (97), it may be agreed that laws and regulations that apply only to Crown lands shall apply to Inuvialuit lands if the Inuvialuit or the appropriate minister so request and the other party consents.

The Federal and Territorial Governments may govern and regulate Inuvialuit lands as they do other private lands, but cannot treat them as public lands subject to regulation as such without the consent of the Inuvialuit. The distinction may not be significant. There are unlikely to be large land-holdings in the North held by other than aboriginal peoples. Regulation and control by "laws of general application applicable to private lands" would seem a sufficient source of jurisdiction to enable overriding control by the Federal and Territorial Governments.

In the event of the transfer of full legislative jurisdiction to the Territories, no "protection" of Inuvialuit lands can arise under section 91(24) of the *Constitution Act, 1867*. The Agreement declares that "the Inuvialuit lands shall be considered, accepted and deemed not to be lands reserved for Indians".<sup>107</sup> The Territorial Government, subject to the Agreement and section 35 of the *Constitution Act, 1982*, will have exclusive

jurisdiction. That Government will determine the extent and ambit of forms of government allowed to Inuvialuit communities, just as the Government of Alberta did with respect to the Metis Settlements.

The Agreement specifically declares that "royalties, rents, profits and other revenues or gain derived from Inuvialuit land shall be taxable under laws of general application".<sup>108</sup> The Agreement thereby acknowledges the authority of the Federal and Territorial Government to tax economic activity on Inuvialuit lands, including the application of the Income Tax Act. The financial basis for aboriginal self-government is not present.

The Agreement affords a considerable contrast to developing arrangements in the Provinces. It provides for full aboriginal administration of Inuvialuit lands, but also contemplates complete reliance on and subjection to government by the Federal and Territorial Governments. Any powers conferred upon aboriginal communities will be determined by those governments, not by the communities. Such a pattern is, of course, explicable because of the aboriginal demographic dominance in the Northwest Territories. Unlike in the Provinces, the Territorial Government is not viewed as necessarily "antagonistic" to aboriginal interests. Such a pattern is unlikely to be appropriate in the Yukon.

#### **B. Limited security of tenure**

The Agreement provides for the grant of the largest proportion of lands ever reserved, set apart, or granted from lands traditionally occupied by an aboriginal people in Canada.

The Agreement granted title in fee simple absolute including all minerals, to blocks of seven hundred square miles at each of the six Inuvialuit communities, and a block of eight hundred square miles in Cape Bathurst pursuant to clause 7(1)(a). A further 30,000 square miles is to be granted in fee simple absolute, but excluding all minerals other than building materials, carving stones and valuable clays and earths, pursuant to clause 7(1)(b). All waters are reserved to the Crown.

Title to the Inuvialuit lands can only be conveyed to Inuvialuit individuals or corporations controlled by the

Inuvialuit or the Crown in right of Canada. No property tax is payable on Inuvialuit lands, and accordingly they are not subject to forfeiture upon non-payment of taxes, as is the case under the Alaska land claims settlement.

Title may be granted in fee simple absolute, but the security of tenure is not absolute. The Inuvialuit lands are subject to an unfettered power of expropriation by the Governor-in-Council. Further, a government or municipality may seek to expropriate Inuvialuit land for the provision of government services where it "demonstrates a need .. to meet public convenience and necessity, and such lands cannot be reasonably obtained from other sources." Such expropriation is subject to good faith, negotiation and arbitration. Lands may also be appropriated for public road rights of way upon consultation, negotiation and arbitration.

### C. Self-Management

The Agreement provides for the Inuvialuit self-management of the Inuvialuit lands and resources. The rights conferred are subject, however, to "laws of general application", rights of expropriation just mentioned, the rights of existing interests, the management of water-bodies by the Crown, controls upon the disposition of sand and gravel, and surface and access rights of non-Inuvialuit. The rights of the Inuvialuit appear akin to that of an owner subject to the ordinary laws of the land, not that of a self-governing aboriginal community.

The lands are owned by the Inuvialuit Land Corporation, 100 per cent of the shares of which are held by the Inuvialuit Regional Corporation. The Inuvialuit Regional Corporation does not have share capital and is controlled by the Inuvialuit community corporations. The Inuvialuit Regional Corporation is responsible "to administer Inuvialuit lands through its division, the Inuvialuit Land Administration, and to take responsibility for matters related to the supervision, management and administration of such lands."

The Agreement declares that:<sup>109</sup>



and other rights to use and occupy Inuvialuit lands for any purpose and dispositions of rights to explore, develop and produce resources owned by the Inuvialuit may be made by the Inuvialuit to persons or corporations in accordance with this Agreement and laws of general application.

The Agreement thereby recognizes the right of the Inuvialuit to administer and dispose of its land and resources. Such right of administration is expressly made subject to "laws of general application". Such would of course include legislation regarding environmental protection and land use. The Agreement does enable the Inuvialuit to set its own standards for environmental protection. It provides:<sup>110</sup>

Where the Inuvialuit dispose of new rights respecting oil, gas, coal, minerals, sand and gravel and rock on Inuvialuit lands, the Inuvialuit Land Administration may set terms and conditions with respect to the environment and safety that equal or exceed the standards provided for under the laws of general application...

Subject to "laws of general application", the Inuvialuit may impose terms and conditions respecting land and resource development.

The rights of the Inuvialuit are subject to the recognition and protection accorded existing oil and gas interests on clause 7(1)(a) lands, and existing quarrying rights on clause 7(1)(b) lands. The Agreement declares that the holders of such rights shall be "entitled to enjoy such rights without alteration or interruption until their termination." The Inuvialuit clause 7(1)(a) Lands about Tuktoyaktuk, Inuvik and Aklavik are subject to existing oil and gas interests held by Esso, Shell Canada and Gulf Canada. The Agreement declares that the existing interests shall continue to be administered by Canada, but the consent of the Inuvialuit is required to all discretionary decisions which must be made which affect Inuvialuit rights. Clause 7(94) declares:

(94) Canada shall, on behalf of the Inuvialuit, continue to administer their lands with respect to the holders of rights referred to in subsection (93). Where legislation allows discretionary decisions to be made with respect to such administration no decisions shall be made without the consent of the Inuvialuit where the effect thereof is to offer the Crown share for bids, to waive royalties or other payments in the nature of royalties or to prejudice the economic interest of the Inuvialuit. No other such decisions shall be made affecting Inuvialuit rights without prior consultation with the Inuvialuit Land Administration.

The administration must be transferred to the Inuvialuit upon agreement between the holder of the rights and the Inuvialuit:<sup>111</sup>

Where, however, the holder of the rights and the Inuvialuit agree that the Inuvialuit should administer the rights or a renegotiated version of the rights directly and both parties so inform the Minister in writing, the Minister shall transfer such administration to the Inuvialuit.

In December 1985 it was announced that the Inuvialuit and Esso Resources had negotiated a new lease with respect to the Tuktoyaktak Peninsular in place of the exploration agreement issued under the Canada Oil and Gas Act. The new lease, *inter alia*, provides for a signing bonus of 1 million dollars, an annual access fee of \$200,000, and advance payments on royalties of \$460,000. The Inuvialuit have an option to establish and to take production for a small refinery and gas distribution utility to serve local communities, but only if "the projects are technically and economically feasible." The lease requires compliance with regulations regarding surface restoration and damage and protection of the environment, and seeks to minimize the impact on hunting, trapping and fishing.

Ownership of all sand and gravel on all Inuvialuit lands is vested in the Inuvialuit and is subject to administration and disposition by the Inuvialuit, but in accordance with limits on royalties and obligations to supply.<sup>112</sup>

The Inuvialuit have limited control over surface and access rights. Holders of interest on Inuvialuit lands are entitled to surface rights, subject to the conclusion of a Participation Agreement; if necessary by arbitration. Such interests include those issued by Canada in the past and those issued at any time on section 7(1)(b) lands.<sup>113</sup>

Agents or employees of government have a right of access "for legitimate government purposes." The rights of entry of the Department of National Defence for military exercises under the National Defence Act are affirmed, subject to consultation and compensation. The public has a right of access on unoccupied Inuvialuit lands for emergency purposes, in furtherance of a right with respect to adjacent land, and for recreational purposes. Licensed fishermen have a right of access to clause 7(1)(b) lands. Canada reserved a right of access to 100 feet of the foreshore of navigable waters for travel, recreation and emergencies. The foregoing rights of access are a substantial intrusion on the control of the Inuvialuit over land use. They suggest more substantial limitations than would usually arise from ownership of private land. The denial of control of access to the Inuvialuit is made manifest by the provision which declares the foregoing to be an "interim measure and shall cease to have force and effect when and to the extent that laws of general application relating to private lands are made applicable to lands in the Western Arctic Region."

The grant to the Inuvialuit includes the "beds of all lakes, rivers and other water-bodies found in Inuvialuit lands." Such grant would, apart from other provisions of the Agreement, carry with it control over the construction of any water control structures on the water-bed on Inuvialuit lands. The Agreement, however, expressly declares that "Canada shall retain the right to manage and control waters, waterways, beds of river, lakes and water-bodies" for the purpose of fish and

migratory bird management, "navigation, transportation, flood control and similar matters", and protection of community water supplies. Such powers do not extend to authorizing hydro-electric development. Such a project could be authorized by expropriation.

The Inuvialuit have a preferential right to harvest all species of wildlife, except migratory non-game birds, for subsistence usage, and exclusive rights to harvest fur-bearers throughout the Inuvialuit Settlement Region. They also have exclusive rights to harvest game on Inuvialuit lands and in the National Park and Territorial Park to be established on the Yukon North Slope. The Inuvialuit rights do not include management of wildlife. The rights of the Inuvialuit are subject to the laws of general application respecting public safety and conservation. The appropriate government determines the quota applicable, though it must consider the recommendations of the Wildlife Management Advisory Council (North Slope) and the Wildlife Management Advisory Council (N.W.T.). The Councils include representatives of the Inuvialuit.

#### **D. Inuvialuit advisory powers throughout the Inuvialuit Settlement Region**

The Inuvialuit are possessed of advisory powers, but not control, with respect to developments in the Settlement Region outside Inuvialuit lands.

##### *i. Land use, the environment and wildlife*

The Agreement provides for participation by the Inuvialuit in land use planning, environmental screening, wildlife and park management on and off Inuvialuit lands throughout the Inuvialuit Settlement Region (i.e., the traditional lands of the Inuvialuit). The participation is principally advisory rather than controlling. The Inuvialuit are entitled to representation on an Environmental Impact Screening Committee and a Review Board. The Committee and the Board have powers to recommend, but the "competent governmental authority" need not accept any such recommendations with respect to a proposed development.

A Fisheries Joint Management Committee is responsible to assist the Minister of Fisheries in the administration of Inuvialuit Settlement Region fisheries. The Committee has equal representation by Canada and the Inuvialuit, and a chairman appointed by agreement. The Minister of Fisheries may, however, reject the Committee's recommendations regarding quotas, Inuvialuit commercial fishing, allocation of fishing licences and prohibited waters.

Under the Agreement, Canada agreed to the establishment of a National Park and a Territorial Park on the Yukon North Slope. Development is generally prohibited in the Parks and "any change in the character of the ... Park shall require the consent of the Inuvialuit." The Wildlife Management Advisory Council (North Slope) will "advise the appropriate minister on park planning and management" and "shall recommend a management plan for the National Park."

More substantial powers might be conferred in land use planning. The Inuvialuit are assured of equal participation to that of government on any land use planning agency established. But there is no assurance that such an agency will be established, and its powers are not defined.

## *ii. The Offshore*

The grant of lands to the Inuvialuit includes the "beds of all lakes, rivers, and other water bodies found in Inuvialuit lands." The descriptions of the lands granted, and the accompanying maps, however, exclude the off-shore from the Inuvialuit lands. All waters in the Settlement Region are reserved to the Crown. Accordingly, the power of the Inuvialuit with respect to off-shore activity and development cannot be derived from ownership of the lands, water-bed or waters. The Inuvialuit are dependent upon such powers as it may exercise generally with respect to development in the Settlement Region outside Inuvialuit lands. The Environmental Screening Committee and Review Board, however, have no jurisdiction with respect to off-shore development.<sup>114</sup> Accordingly, the Inuvialuit must rely on the operation of any land use planning agency on

which it has representation, the advisory powers of the Wildlife Management Advisory Councils and the Fisheries Joint Management Committee. The determinations of such agencies are advisory and can be rejected by the appropriate Minister. The Inuvialuit do not have control or a veto on off-shore development.

On April 11, 1986 the Federal Government tabled the *Canadian Laws Off-Shore Application Bill*. The Bill proposes to declare the sovereignty of Canada throughout the Arctic and over the off-shore, and the application of federal laws. The Minister of Justice was reported to have said that the bill would have no effect on aboriginal land claims or questions of resource ownership. It is to be observed that the absence of powers possessed by the Inuvialuit with respect to the off-shore negates the possibility of any such conflict.

## 7 CONCLUSION

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### A. Past and Present

It is the conclusion of this survey that Canadian law has not and does not provide for self-government of aboriginal lands and resources. More significantly, it is suggested that a pattern of contemporary arrangements has been established, and it is that of self-management and municipal government.

#### *1. The sovereign jurisdiction of the Federal and Provincial Governments*

The *Constitution Act, 1867* invested the Federal and Provincial Governments with sovereign powers in their respective areas of jurisdiction. It does not provide for sovereign or exclusive jurisdiction of aboriginal governments.

Section 35 of the *Constitution Act, 1982*, provides a device for the entrenchment of powers of aboriginal self-government. The James Bay, Northeastern Quebec and the Inuvialuit Agreements are constitutional documents, and to the extent that they provide for self-government, such would be entrenched. The Agreements do not so provide.

*ii. The Federal Government has accepted and extended the exercise of jurisdiction by the Provinces*

The Federal Government has historically accepted and extended the application of provincial laws. Section 88 of the *Indian Act* and the *Indian Forestry, Indian Mining and Indian Oil and Gas Regulations* all provide for the application of provincial laws. Contemporary arrangements offer little deviation from such pattern. The *Sechelt Indian Band Self-Government Bill* contains an identical provision to section 88. The *Inuvialuit Final Agreement* provides for the application of "laws of general application", including Territorial laws. The *James Bay and Northeastern Quebec Agreements* provide for exclusive provincial jurisdiction on Category I lands, except with respect to Category IA and IA-N lands.

The Federal Government has accepted provincial jurisdiction without objection or the provision of any protection. Section 87 of the *Indian Act*, the exemption from taxation, was worded so as to allow for provincial taxation. The Federal Government acquiesced in the exercise of jurisdiction over the Metis and made no move to protect Metis Settlement lands in Alberta. The *Cree-Naskapi (of Quebec) Act* and the *Indian Self-Government Bill, C-52*, follow such practice and expressly recognize, without extending, the application of provincial laws.

*iii. Federal-Provincial Agreements have constitutionally entrenched federal and provincial administration of Indian reserves*

The Provinces have relied on their jurisdiction over "public lands" to further subjugate Indian lands and resources in Federal-Provincial Agreements. The extreme is presented in British Columbia, where provincial administration of mineral resources has been entrenched, the benefit of mineral development on reserves diverted to the Province, and a panoply of other provincial rights over Indian reserves extracted. In Ontario and the Prairies, federal administration is maintained but subject to rights of the Provinces with respect to mineral and hydro developments. The Agreements go so far as to constitutionally entrench the position of the Indian agent,



not the band council. The Agreements deny full mineral ownership to the Indians in violation of the treaties, and to the detriment of an economic foundation for self-government.

*iv. No absolute security of tenure of aboriginal lands*

Canadian law has not allowed for the conferment of absolute security of tenure on lands set apart for aboriginal people. In the past, lands were abrogated without the consent of the aboriginal people under federal (e.g., Sydney Indian reserve), and provincial (e.g., Wolf Lake Metis settlement), authority. The *Constitution Act, 1982* may preclude such abrogation today, but contemporary arrangements still provide for the expropriation of lands at the behest of governments other than the aboriginal community. The Inuvialuit Final Agreement confers extensive powers of expropriation upon such governments. The denial of immunity from expropriation suggests an absence of special status for aboriginal lands. The grant of fee simple title to Metis settlements in Alberta under the "continuing legislature authority of the Government of Alberta" does not indicate any different approach.

*v. Powers of self-management in Contemporary Arrangements*

Arrangements in the past provided for the subjugation of aboriginal lands, as in the cases of the Indian Act and Metis Betterment Act. Contemporary arrangements provide for the self-management of aboriginal lands and resources as by any other owner. The *James Bay, Northeastern Quebec*, and *Inuvialuit Agreements* and the *Sechelt Indian Band Self-Government Bill* all empower the aboriginal community to manage and dispose of the aboriginal lands. But such powers are circumscribed by the application of other federal and provincial laws, such as access, environmental controls and taxation. The *Inuvialuit Final Agreement* is particularly explicit in declaring the power of the Inuvialuit to dispose of lands and resources "subject to laws of general application."

*vi. Municipal Government*

The Federal Government has always contemplated the establishment of band councils as municipal governments. The limitations upon the exercise of powers under the Indian Act, in particular the power of disallowance, were always such as to deny "government" to be a proper description. Contemporary arrangements have renounced the more extreme element of superintendance, including the power of disallowance, but have conferred only powers normally associated with municipal governments. The Minister has no power of disallowance under either the *Cree-Naskapi (of Quebec) Act* or the *Sechelt Indian Band Self-Government Bill*. Both statutes and the proposed *Metis Settlement Bill* provide the power to make by-laws for the "good government" of the community, but are subject to construction in the context of the powers particularized and the declared ambit of provincial laws. None provide for the levy of an income tax, although the *Cree-Naskapi* and *Sechelt* statutes provide for local property taxation of non-aboriginal occupants.

The Budget Speech of February 26, 1986 perhaps most clearly indicated the intentions of the Federal Government when it was announced that the Indian Act would be amended "to allow bands to levy municipal-type taxes on Indian lands."

*vii. Powers outside the boundaries of aboriginal lands*

Neither the *Indian Act* nor the *Metis Betterment Act* contemplated the exercise of any powers by the aboriginal community outside the boundaries of the community. Contemporary arrangements have amended such pattern. The *Sechelt Indian Self-Government Bill* and the proposed *Metis Settlement Bill* allow for the conferment of jurisdiction beyond the boundaries of the community, but do not further dictate or detail such power. The *James Bay and Northeastern Agreements* and the *Inuvialuit Final Agreement* dictate and detail the conferment of advisory powers upon the aboriginal communities, particularly with respect to wildlife and the environment.

viii. *Precedents: the James Bay Agreement and the Cree-Naskapi (of Quebec) Act*

The establishment of managerial and government regimes for aboriginal lands and resources has created precedents. In the past, the *Indian Act* served as a precedent for the *Metis Betterment Act*. Judd Buchanan, Minister of Indian Affairs at the time of the James Bay Agreement, and David Crombie have denied the existence of any precedent which would determine the form of contemporary arrangements. But a pattern is already emerging which suggests a different result. The *James Bay Agreement* dictated the form of the *Cree-Naskapi (of Quebec) Act*, and it suggested the form of the *Sechelt Indian Band Self-Government Bill*. It is a pattern of self-management and municipal government. Ad hoc arrangements of the kind currently favoured by Federal and Provincial Governments encourage the use of such precedents, and discourage significant or fundamental change.

B. The Future: Approaches towards self-government of aboriginal lands and resources

An examination of the past and present arrangements respecting aboriginal lands and resources reveals the substantial denial of aboriginal self-government. But it also suggests approaches towards self-government of aboriginal lands and resources.

*i. The exclusive jurisdiction of the aboriginal community* Self-government entails protection from "interference and intimidation" by Federal and Provincial Governments in the areas where it is considered the aboriginal community should have jurisdiction.

The conferment of exclusive jurisdiction requires the deletion of section 88 of the *Indian Act* and its equivalents which have sought to extend the application of provincial laws. It also requires the amendment of the Federal-Provincial Agreements which have constitutionally entrenched provincial rights and denied self-government on Indian reserves. A significant aspect of the *Sechelt Indian Band Self-Government Bill* is the affirmation of

provincial rights contained in the *Canada-British Columbia* agreements.

One can only agree with the recommendation of the Penner Report—that self-government can be most effectively brought about by the entrenchment of the right of aboriginal self-government in the Constitution. Pending such entrenchment, the Report recommended that Parliament "should move to occupy the field of legislation in relation to "Indians and lands reserved for Indians", and then "vacate those areas of jurisdiction to recognized Indian government". A variant of this that approach is that adopted in the United States in the *Indian Civil Rights Act 1968*, which allows a State to assume jurisdiction over Indian lands but only upon the consent of the Indians. The Inuvialuit Final Agreement contains a clause providing for the application of laws which would otherwise apply only to Crown lands to apply to Inuvialuit lands upon the agreement of the Inuvialuit. The approaches contemplate a negotiated ambit to Provincial, State or Territorial jurisdiction, but in the absence of agreement, no such jurisdiction.

The Treaty #8 Renovation Discussion Paper of January 31, 1986 (The Oberle Report) proposed Treaty Renovation "as a comprehensive and essentially bilateral process involving a sustained period of negotiations between a Treaty Commissioner representing the Federal Government and accountable native representatives, for the purpose of reaching accords on a broad spectrum of treaty related issues and arranging for their implementation". Treaty Renovation would be guided *inter alia* by the "spirit and intent" of the Treaty and by the understanding that "no treaty can be read to restrict by implication pre-existing rights to self-government, or property or self-preservation, unless such rights are affected in a clear and distinct manner". The Report contemplated that the renovated Treaty become the fundamental Indian charter entrenched under section 35 *Constitution Act, 1982*. The proposals of the Oberle Report affirm the call for the entrenchment of the powers of aboriginal communities in order to establish aboriginal self-government, founded upon agreement between the aboriginal peoples and other governments.

## *ii. Security of Tenure*

Security of tenure of aboriginal lands is an essential element of aboriginal self-government. Aboriginal lands and resources should not be subject to expropriation at the discretion of some other government. To provide such absolute security of tenure to the minimal areas of land left to the aboriginal peoples in no way impairs the integrity of Canada, and does go some way to recognize the special status of aboriginal peoples. Such comments are also, of course, applicable to the Metis Settlement lands. If the Government of Alberta contemplates security of title, it could provide such immunity in its amendment of the *Alberta Act*.

## *iii. Powers of Self-Government*

Self-government of aboriginal lands and resources entails the grant of exclusive jurisdiction with respect to the use, access, control, management, disposition and taxation of the land and resources, including timber, minerals, water and wildlife. No current arrangement even approaches the conferment of such power. This is particularly evident with respect to taxation. Taxation is the fiscal foundation for modern government. Aboriginal self-government must contemplate the exclusion, total or partial, of income taxation levied by other governments, and the imposition of such taxation on aboriginal and non-aboriginal occupants.

The Coolican Report<sup>115</sup> proposed that the comprehensive claims policy should allow for the negotiation of aboriginal self-government. It is not clear how much substance there was to the proposal. The "scope of negotiations" proposed did not contemplate substantially enhanced controls over access, existing interests, expropriation, taxation, mineral development or water. In particular, it emphasized the need of a mineral developer for a system that was "certain, clear and expeditious" in the acquisition of mineral rights and the resolution of disputes between aboriginal communities and mineral developers, and the "national interest" in subsurface resources. The Report further declared that water must remain a "common resource" (i.e. owned by the Crown) under Federal and/or Provincial management,

although "aboriginal groups should be given the chance to participate". Taxation was referred to only in the context of resource revenue-sharing. Access and expropriation were not referred to at all. The "scope of negotiations" proposed does not appear significantly different, except for resource revenue-sharing, from the existing policy.

*iv. Powers outside the boundaries of aboriginal lands*

Contemporary arrangements have made provision for the exercise of advisory powers outside the boundaries of aboriginal land, particularly with respect to resources which have transboundary impacts (e.g., wildlife, the environment). It is suggested that aboriginal self-government requires a decision-making part in the management and development of transboundary resources, including wildlife, the environment and water. As the Coolican Report recommended, "the decision-making structures in which [aboriginal groups] participate should have responsibilities that go beyond a merely advisory role."<sup>116</sup>

*v. Lands and Resources*

An "adequate land and resource base" is, as stated by the Penner Report, "essential" for the exercise of aboriginal self-government. The Coolican Report<sup>117</sup> observed that "modern claims agreements must help to restore and develop economically viable aboriginal communities." The Coolican Report urged that negotiations should include discussion of aboriginal ownership of sub-surface resources and sharing in resource development revenues throughout traditional areas.

The area of lands set apart in the Provinces for the aboriginal peoples of Canada ranges from 0.06 per cent on the Island of Newfoundland, to 2 per cent (including the Metis Settlement lands) in Alberta. Such forms a tenuous basis for self-government in the absence of resource revenue-sharing arrangements or guaranteed transfer payments of some kind. Provision for self-government must include its economic foundation.

The Provinces should, of course, honour the terms of the treaties, and provide the full beneficial ownership in mineral resources which has been denied in Federal-Provincial agreements in Ontario and Western Canada.

A macabre footnote is afforded by the Study Team Report to the Neilsen Task Force on Program Review.<sup>118</sup> Notably absent from the Report is any recognition of the origin of aboriginal rights or special status, or any recommendation for an enhanced land and resource base. The Report acknowledges that "while great hope has been voiced for a native economic renaissance, the "found" natural resource base for such renewal is strikingly inadequate on most reserves."<sup>119</sup> The Report *inter alia* recommends "encouraging entrepreneurial expertise", "private sector involvement, "integrating" federal with provincial programs, and "capping expenditures and turning the responsibility back on native communities to resolve their problems for themselves."<sup>120</sup>

#### *vi. Contrasting Provincial Approaches*

##### a. Ontario

On December 20, 1985 Canada, Ontario and the Indian First Nations of Ontario signed a Declaration of Political Intent:

to enter into tripartite discussions to resolve issues relating to Indian First Nations self-government and matters and arrangements with respect to the exercise of jurisdiction and powers by First Nations' governments in Ontario.

It was agreed the matters for discussion might include:

(a) the forms, institutions, legal and constitutional status, source of jurisdiction, land issues and financial base of First Nations governments in Ontario, and

(b) the clarification of areas of jurisdictional overlap and arrangements with respect to the exercise of jurisdiction by governments in Ontario.

On February 24, 1986 Canada, Ontario and the Nishnawbe-Aski Nation (formerly Grand Council of Treaty #9) agreed to commence tripartite negotiations forthwith on " (i) fishing, (ii) trapping and hunting, and (iii) band status and lands for reserves," and thereafter to commence negotiations, *inter alia*, on "(i) economic development, (ii) zones of Nishnawbe-Aski Nation Band activity; and (iii) powers and institutions of self-government." The February memorandum contemplates reaching further agreement on these matters within twelve months of the commencement of negotiations.

The agreements would appear to be the first initiative on the part of a Province to negotiate aboriginal self-government. The initial matters to be negotiated are the provision of lands and resources, and control of fish and wildlife outside the boundaries of reserves. To that extent, the negotiations will address the economic foundation of self-government. The other matters to be negotiated thereafter allow for the possibility of substantial powers with respect to land and resources being conferred on the Nishnawbe-Aski. The agreements, however, offer no real indication of the powers of aboriginal self-government that will be conferred.

The Government of Ontario contemplates that the rights and powers which are agreed upon will be entrenched. In a letter to Gordon Peters, the Ontario Regional Chief, of December 16, 1985, Ian Scott, the Attorney General of Ontario, declared that:

Ontario supports the constitutional entrenchment of rights to self-government for aboriginal peoples where those rights are set out in agreements, and the negotiation of agreements with the Federal Government and native organizations on the implementation of aboriginal self-government in Ontario.



Such a process would be effective in protecting the rights and powers of self-government of aboriginal communities.

The Ontario initiative is merely an agreement to negotiate. It creates no rights or powers. The success of the approach will depend upon the substance of rights and powers, and the manner of their protection which is agreed upon. It must go beyond municipal government and self-management. The Nishnawbe-Aski Nation might strive :

(i) for a greatly enhanced land and resource base beyond the 0.5 per cent reserved of their traditional lands;

(ii) the amendment of the *1924 Canada-Ontario Agreement* to provide for full Indian beneficial ownership and administration of their land and resources;

(iii) the exclusion of provincial laws, including taxation, except with the consent of the Nishnawbe-Aski;

(iv) the conferment of substantially enhanced powers, including use, access, management, disposition, taxation, and the exclusion of federal superintendance;

(v) the provision of powers beyond the boundaries of Nishnawbe-Aski lands with respect to fish, wildlife, the environment, and water; and

(vi) resource revenue-sharing with respect to developments outside the boundaries of Nishnawbe-Aski lands but within their traditional lands.

Only an examination of the substance of powers that are, in due course, agreed upon and constitutionally entrenched will indicate if the Government of Ontario truly contemplates the implementation of aboriginal self-government.

#### b. British Columbia

The Province of British Columbia has consistently refused to acknowledge the existence of aboriginal title, or to

accept the constitutional entrenchment of a right to aboriginal self-government. It has assumed jurisdiction over all public lands in the Province, and subjected Indian reserves to an extensive range of provincial rights and powers as condition of the creation of such reserves. In recent months, the Province has reaffirmed this stance by its refusal to negotiate logging on Meares Island and Lyell Island with the traditional Indian inhabitants. Nothing in the Sechelt Indian Band Self-Government Bill suggests any deviation from the Province's established policies.

The historical refusal of the Province of British Columbia may give rise to the most significant developments with respect to self-government of aboriginal lands and resources in any of the Provinces. If the assertion of aboriginal title on Meares Island is sustained in the Supreme Court of Canada, the Province will be compelled to negotiate a new regime for the administration of the land and resources of the Province with the Indians. The Indians will be able to negotiate from a position of considerable strength. The British Columbia Court of Appeal has already recognized that there is a "serious question to be tried." The James Bay and Northern Quebec Agreement is unlikely to be viewed as an appropriate precedent.

### C. A Final Comment

It has already been indicated that the conclusion of this paper is that aboriginal self-government of lands and resources has not and does not exist in Canada, and that a pattern of self-management and municipal government is developing in contemporary arrangements. It is hoped that this paper has given some indication of the meaning of self-government of aboriginal lands and resources, and will encourage scepticism with respect to those provinces which assert a lack of understanding of aboriginal self-government. Perhaps attention can be shifted to its proper focus, namely, whether the Federal and Provincial Governments are truly prepared to recognize the powers and jurisdiction of aboriginal communities so as to establish aboriginal self-government. Negotiations with the Nishnawbe-Aski may provide an answer.

## NOTES

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1. Fred Plain, in *Pathways to Self-Determination*, Ed. L. Little Bear, M. Boldt, J.A. Long, Univ. of Toronto Press, 1981, p. 39.
2. per Min. for Aboriginal Affairs, 24 Nov. 1978, House of Reps., Background Notes No. 7, Nov. 1980, Dept. of Aboriginal Affairs, Canberra, Australia.
3. [1982] 1 W.W.R. 302, [1982] 1 C.N.L.R. 133, 151 (Alta. C.A.).
4. [1974] S.C.R. 695, [1973] 6 W.W.R. 205.
5. [1976] 2 S.C.R. 751, 763.
6. *Ibid.*, 776.
7. [1985] 4 C.N.L.R. 55, 71 (S. Ct. Can.).
8. *Derrickson v. Derrickson* S. Ct. Can., March 27, 1986, as yet unreported.
9. [1942] 1 W.W.R. 72 (B.C.C.A.).
10. [1916] 2 A.C. 569, 574 (P.C.).
11. [1942] 1 W.W.R. 72, 74 (B.C.C.A.).
12. Fields and Stanbury, *Economic Impact of Public Sector upon Indians of British Columbia*, U.B.C. Press, Vancouver, 1973 p. iv.
13. [1985] 4 C.N.L.R. 55, 72 (S. Ct. Can.).
14. Compare the fate of Aurukun and Mornington Island Aboriginal reserves in the State of Queensland,

- Australia, or Cold Lake and Wolf Lake Metis Settlements in Alberta.
15. "Discussion Notes on the *Indian Act*," Department of Indian Affairs, Ottawa.
  16. R.S.C. 1970 c. 1-6.
  17. S.C. 1974-75-76 c.15.
  18. Report of Department of Interior, 1876, Sessional Paper No. 9.
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  20. S.C. 1985 c. 27.
  21. per. Hon. M. Wilson, Feb. 26, 1986, Budget Speech, Dept. of Finance, Canada, p. 21.
  22. C.R.C. 1978 c. 961.
  23. "Forestry on Indian Lands," Dept. of Indian Affairs, 1976 p. 11-12.
  24. *Ibid.*, p. 45-46.
  25. "Native Self-Reliance through Resource Development," Proceedings of Conference, July 1985, Vancouver p. 109, A. Hopwood.
  26. *Ibid.*, p. 113-114, Ed John.
  27. C.R.C. 1978 c. 956.
  28. Annual Report, Dept. of Indian Affairs 1961-62.
  29. Annual Report, Dept. of Indian Affairs 1968-69 p. 82.
  30. C.R.C. 1978 c. 963.
  31. N. Bankes, *Resource Leasing Options and the Settlement of Aboriginal Claims*, C.A.R.C. Ottawa, 1983, p. 99.
  32. [1974] S.C.R. 695, [1973] 6 W.W.R. 205.
  33. (1976) 13 N.S.R. (2d) 460 (N.S.C.A.).
  34. [1982] 1 C.N.L.R. 99 (1977).
  35. (1980) 30 N.B.R. (2d) 70 (N.B.Q.B.).
  36. (1980) 30 N.B.R. (2d) 146 (N.B.Q.B.).
  37. (1981) 34 N.B.R. (2d) 632 (N.B.Q.B.).
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  39. Brit. Parl. Papers "Aborigines," Vol. 2 P. 77. (1937) Irish Univ. Press.
  40. [1974] R.P. 38 reversed [1975] C.A. 66.
  41. [1985] 3 W.W.R. 577, 61 B.C.L.R. 145, [1985] 2 C.N.L.R. 26 (C.A.).
  42. [1903] A.C. 73 (P.C.).

43. *Ibid.*, 82-83.
44. *Ibid.*, 82.
45. O.C. 1036 B.C. 29th July 1938.
46. S.C. 1943-44 c. 19.
47. "Native Self-Reliance," supra n.25 p. 169, W. Dombroski.
48. *Ibid.*
49. S.C. 1980-81-82-83 c.38.
50. S.C. 1924 c. 48.
51. S.C. 1959 c. 47, S.N.B. 1958 c. 4.
52. S.C. 1959 c. 50, S.N.S. 1959 c. 4.
53. "Native Self-Reliance" supra n.25 p. 168 per W. Dombroski, p. 59 per Jean-Luc Blais.
54. *James Bay and Northern Quebec Agreement*, Editeur Officiel du Quebec, 1976 and S.C. 1976-77 c. 32, S.Q. 1976 c. 46.
55. *Northeastern Quebec Agreement*, Editeur Officiel du Quebec, 1978, S.C. 1976-77 c. 32 n.5, S.Q. 1978 c. 98.
56. *Negotiating a Way of Life*, La Rusic et al, Dept. of Indian Affairs, Oct. 1979 p. 41.
57. *Ibid.*, p. 58.
58. The Agreements declare the right of Quebec to impose servitudes for infrastructure for resource development and for public utilities, pipelines and transmission lines. The Agreements also declare the right to impose temporary servitudes for existing mining interests surrounded by or adjacent to Category I lands. The imposition of servitudes is subject to the provision of an indemnity and compensation in land or money, except where imposed in pursuance of the provision of public services to an Inuit or Cree community. Quebec may expropriate Category I lands where a servitude would not suffice to fulfill the desired purpose.
59. S.C. 1983-84 c. 18.
60. S.Q. 1978 c. 88 as amended.
61. S.C. 1983-84 c. 18.
62. Remarks to Standing Committee on Aboriginal Affairs and Northern Development on *Bill C-93, Sechelt Indian Band Self-Government Act*.
63. S.Q. 1978 c. 87 as amended.

64. *Indian Self-Government* Second Report of Special Committee of House of Commons, 1st Session, 32nd Parl., 1980-81-82-83, Oct. 1983.
65. Report of Commissioners appointed to inquire into the problems of health, education and general welfare of the Half-breed population, Govt. of Alberta, Edmonton (Ewing Report), Feb. 15, 1936.
66. *Ibid.*, p. 12.
67. *Ibid.*, p. 12.
68. S.A. 1938 c. 6.
69. S.A. 1940 c. 6.
70. E.g. Goodfish Lake, O.C.-379-39, March 29, 1939.
71. O.C. 192/60, 193/60, Feb. 10, 1960.
72. S.A. 1940 c. 6 s. 8, R.S.A 1970 c. 233 s. 8, S.A. 1982 c. 26, S.A. 1952 c. 54 C.F. Alta Reg. 56/66.
73. Alta. Reg. 110/60, April 7, 1960, Section 16 empowers the Minister to conduct surveys and reports with respect to lands allocated or proposed to be allocated.
74. Section 14(2) of Act declares that a right to exclusive occupation is not established until a certificate of occupancy is issued by the Minister.
75. R.S.A. 1970 c.233.
76. Alta. Reg. 110/60 r. 9.
77. R.S.A 1970 c. 233 s. 10.
78. *Ibid.*, sec. 14(2), 15.
79. Alta. Reg. 118/60, April 7, 1960.
80. Alta. Reg. 117/60, April 7, 1960.
81. Alta. Reg. 115/60, 116/60, April 7, 1960.
82. Alta. Reg. 113/60, 57/66, Feb. 7, 1966.
83. O.C. 1785-43, Nov. 17, 1943, now Alta. Reg. 112/60, April 7, 1960.
84. O.C. 1244/51.
85. Now R.S.A 1980 c. 1-1.
86. Roach Committee Report to Govt. of Alberta, Feb., 1972, Edmonton p.11.
87. Alta. Reg. 56/66.
88. Roach Committee Report, supra n. 88, p. 10, 12, 16.
89. O.C. 422/82.
90. Apdx. 2 to MacEwan Report.

91. Report of the MacEwan Joint Metis-Government Committee to Review the Metis Betterment Act and Regulations, *Foundations for the Future of Alberta's Metis Settlements*, July 1984, Edmonton, Alberta.
92. *Ibid.*, p. 59.
93. *Ibid.*, Part 5 of proposed Act, s. 44.
94. Resolution concerning an *Amendment to the Alberta Act*, Premier Peter Lougheed, Alberta June 3, 1985.
95. *Supra*. n.93, Part V of proposed Act.
96. *Ibid.*, s. 45, 56.
97. Part 5, Div. 4 of Proposed Act.
98. *Ibid.*, p. 43.
99. *Ibid.*, Part 3, Div. 1, and Part 6.
100. *Ibid.*, sec. 27(1).  
The Federal Government has jurisdiction with respect to fishing, migratory birds, and arguably the hunting, trapping and fishing rights of the Metis. It was explained that the "policy of the Provincial Government is ... to support the delegation to Metis settlements the right to regulate their own fishing in the lakes and streams within the settlements." Such "exclusive legislative authority" would require the agreement of the Federal Government.
101. *Ibid.*, p. 40.
102. *Ibid.*, p. 24.
103. *Ibid.*, p. 29.
104. O.C. 706/44, Sask. July 4, 1944.
105. *The Western Arctic Claims: The Inuvialuit Final Agreement*, Dept. of Indian and Northern Affairs, Ottawa, 1984.
106. *Ibid.*, cl. 7(97).
107. *Ibid.*, cl. 7(100).
108. *Ibid.*, cl. 7(48).
109. *Ibid.*, cl. 7(44).
110. *Ibid.*, cl. 7(99).
111. *Ibid.*, cl. 7(94).
112. A disposition may stipulate a royalty, but is limited by increases in Canada's gross national product. The administration of sand and gravel by the Inuvialuit is subject to the requirement that, "as a first priority", supplies are reserved to meet public community needs in the Western Arctic and Inuvik.

and "as a second priority" supplies are reserved "for the direct private and corporate needs of the Inuvialuit and not for sale", both based on 20 year forecasts. "As a third priority the Inuvialuit shall make available sand and gravel for any project approved by an appropriate governmental agency." The Inuvialuit are also required to "issue a licence to any person for personal use in amounts not exceeding 50 cubic yards annually". Further, the Inuvialuit must, in granting a licence, "ensure that sand and gravel is made available to interested parties at reasonable prices".

113. *Ibid.*, cl. 7(18), 10.

Surface rights to exercise commercial interests in or on Inuvialuit lands are subject to the negotiation of "participation agreements." The Inuvialuit are entitled to negotiate for rents "(not to include royalty revenue)" and the "nature and magnitude of the land use". A Participation Agreement may also include terms respecting inspection costs, wildlife conservation, restoration and mitigation, employment and business opportunities, education and training, and equity participation. Upon failure to reach an agreement, the matter may be referred to an arbitration board which may select the more reasonable of the parties' last proposals or make a "compromise ruling". The holders of interests issued by Canada on Inuvialuit lands are guaranteed access on and across Inuvialuit lands, subject to the conclusion of a Participation Agreement. Because the Inuvialuit do not own the minerals on section 7(1)(b) lands, the Inuvialuit have no veto on mineral development on section 7(1)(b) lands.

114. *Ibid.*, cl.11(2).

115. Report of the Task Force to Review Comprehensive Claims Policy, Dec. 1985, Dept. of Indian Affairs and Northern Development, Ottawa, p. 31, p. 53-65.

116. *Ibid.*, p. 56.

117. *Ibid.*, p. 65, 67.

118. "Indian and Native Programs," April 1985.

119. *Ibid.*, p. 24.

120. *Ibid.*, p. 29.



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