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Indian Government in Canada:

The Requirement For Federal and Constitutional Change

by

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Abstract

Aboriginal and treaty rights are recognized by the Constitution Act 1982. Indian government is the paramount right on the Indian political agenda. A series of First Ministers Conferences is mandated by the Constitution Act 1982, to discuss aboriginal and treaty rights. Entrenchment of some form of Indian government has dominated the conferences to date.

The political and academic debate has been concerned with the ways in which Indian government can be expressed, and whether it can be specifically entrenched in the Constitution. Indian political organizations argue that the right to self-government is inherent and original, and that legislated or devolved government negates this. The provincial and federal governments have indicated a policy preference for legislated Indian government.

Canadian federal structures and processes have historically been responsive to the changing needs of the Canadian state. For the Indian-preferred constitutionally entrenched self-government to be accommodated within the Canadian federal structure, the present bilateral federal order would have to become trilateral. While acknowledging that the requisite political will may be lacking, this thesis argues that evolution of these structures and processes could permit inclusion of Indian government as a third order of government.

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Introduction

Amid much fanfare, the Constitution Act 1867 was patriated from Britain to Canada in 1982. A home-grown Charter of Rights and Freedoms, with attached schedules, was incorporated into the Canadian Constitution. Section 25 of the Charter, and s.35 of the attached schedule, refer to "aboriginal and treaty rights". Inarguably, these rights now have constitutional stature. They are, however, undefined as of 1986. Because the draftors of the Charter of Rights and Freedoms drew heavily on international law and Canada's international obligations, it is expected that courts and legislators will employ international law in defining and giving force to aboriginal and treaty rights.[1] While there have been some suggestions that these rights be narrowly interpreted as hunting, fishing, and trapping rights, and access to in-school education and limited medical care where indicated by treaties, Indians are insisting that their rights be entrenched and exercised in a modern context.

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[1]Lyon, "Constitutional Issues in Native Law", Aboriginal Peoples and the Law (Bradford Morse, ed.), Carleton University Press, 1984:419; Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law", Canadian Bar Rev. 1983:267.

This has received academic support as well. Lyon says that

> ...while no new native rights are created by s.35, any existing rights are given modern status, which means that they are to be considered in the light of current conceptions of state power reflected in such sources as the UN General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[2]

Relatively new in political parlance, Indian government derives from aboriginal rights. Aboriginal rights accrue to a population by virtue of their self-governing existence from 'time immemorial'.[3] Aboriginal rights, in some cases affirmed and extended by treaty rights, are impossible to exercise if there is no agreement on their composition. First Nations may claim a right of hunting, for example. The courts and provincial governments may dispute its existence; still, it may exist. It is, however, impossible for Indian peoples to exercise such a right until there is some kind of formal recognition by the Canadian state.

Indian government, or self-government, (the two terms are interchangable) is being claimed by Indian politicians as an aboriginal right, affirmed by treaties. This seems to be accepted by the federal and provincial governments, as witnessed by the agendas of three First Ministers

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[2]Ibid:419

[3]Opekokew, The First Nations: Indian Government in the Community of Man, 1984; Tennant, "Aboriginal Rights and the Penner Report on Indian Self-Government", Aboriginal Peoples and the Law, (Bradford Morse, ed.), 1985.

Conferences[4] that have now been dedicated to that subject. For example, the First Ministers Conference - 1984 agenda included equality rights; aboriginal title and aboriginal rights, treaties and treaty rights; land and resources; and aboriginal (or self) government.[5] Tennant says that "Indian self-government may well come to be considered the pre-eminent, overarching, collective aboriginal right."[6]

Aboriginal government, or self-government, has been claimed as first among "aboriginal and treaty rights". It has been argued that these rights precede European contact and have not been ceded or otherwise eliminated. However, international law would suggest that they are circumscribed by the **real politik** of the contemporary Canadian state, and must be expressed in that context. Self-government has been implicitly recognized by the federal and provincial governments;[7] self-government has been the major topic of discussion at three First Ministers Conferences held to clarify sections 25 and

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[4]These conferences were held further to section 37(2) of the Constitution Act 1982.

[5]First Ministers Conference Document 800-18/011 1984

[6]Op.cit.321

[7]Tennant, "Aboriginal Rights and the Penner Report on Indian Self-Government", The Quest for Justice (Boldt and Long, eds.) University of Toronto Press, 1985.

35 of the Constitution Act 1982.[8] Indian government shall, for the purpose of this thesis, refer to the exercise by Indian First Nations of self-governing authority that derives from inherent political rights. The term "First Nations" was first popularized by the Special Parliamentary Committee on Indian Government, chaired by Member of Parliament Keith Penner. The term was used by some First Nations prior to the Penner Report, and is even more frequently used now. It refers to the primacy of native occupation, which confers aboriginal rights.

The federal government, and to a lesser extent the provincial governments, have been quick to endorse Indian government. Even superficial scrutiny of the official positions, however, shows clearly that Indian nations and Canadian governments are not contemplating the same thing when they discuss Indian government. The latter have co-opted the terminology of Indian leaders, but changed the definitions. The three categories of participants in these conferences -- the federal and provincial governments and the major representative native organizations -- have fundamentally different views of what self-government means.

The first two participants have viewed self-government as a delegated,

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[8]S.C. 1982. Sections 25 & 35 refer to "aboriginal and treaty rights"; s. 37 requires that a series of First Ministers Conferences be held on that subject.

legislated authority exercised by bands in accordance with enabling legislation. Indian organizations have objected to the notion that the right to self-government can be delegated, arguing instead that it is inherent, and can only be recognized and facilitated by legislation. Additionally, Indian organizations have argued for specific constitutional recognition of this right, to formally acknowledge its inherent nature and so prevent subsequent legislation from denigrating self-government to a power conferred and limited by the federal or provincial governments.

Status Indian participants in the First Ministers Conferences have argued that their inherent right to self-government must be constitutionally entrenched. This view of Indian government is premised on the possibility of revising existing Canadian political structures, to permit the inclusion of a third order, Indian government. These revisions would have to encompass development of mechanisms to afford Indian governments a means of participating in the intergovernmental and constitutional processes. This participation would require **a priori** economic support; constitutional recognition; Indian political development; and extension of extra-constitutional mechanisms and forums to this third order of Indian government. This model would include substantial institutional and constitutional change. It is the requirement for changes, and possible manifestations, which this thesis

will address.

This thesis suggests that, while institutional and constitutional problems currently attend any possibility of a third order of government, these problems are not insurmountable. The political will to examine the potential for a third order of government is necessary; then, the political will to enable constitutional and structural revision is required. Since political will cannot be generated by a thesis, I will show that the constitutional and institutional revisions are within the realm of possibility. It may be, however, that they will continue to remain outside of the realm of political probability.

Suggestions that the constitutional/federal **status quo** cannot accommodate Indian government deny the option of change by refusing to contemplate change. Though many will question the political probability of trilateral federalism, it is my intention to examine that option as a mechanism to facilitate Indian government.

In order to obtain a constitutional amendment specifically recognizing Indian government, three conditions must be met. One condition concerns the necessity for provincial and federal agreement. Agreement must be reached between the provinces and the federal government on the nature of Indian government. This is required by the constitutional amending formula. There is entrenched provincial opposition to original, substantive Indian

government. The provinces have vested interests to protect; implementation of Indian government would require some provincial sacrifice, as Indian governments would claim lands, resources, and funds. As Boldt and Long have observed,

> At the core of any attempt to deal with aboriginal peoples is the conflict of federal and provincial interests and jurisdictions. ... (These centre) on three important issues: land claims, self-government, and financial liability.[9]

The full assertion of Indian sovereignty, including resource control and jurisdiction over Indian land, is a "major policy cleavage" between Indian nations and the federal and provincial governments.[10]

A second condition is that agreement be obtained from the majority of Indian nations. Any amendment would lack political legitimacy if this condition were not met.

Finally, a model or models must be drafted, showing how this Indian government would function in co-operation and co-ordination with other Canadian governmental structures. Essentially, this will mean a formalized method for First Nations to share in the Canadian political and economic pie.

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[9]"Epilogue", Quest for Justice, Long and Boldt (eds.), 1985:346

[10]Romanow, "Aboriginal Rights in the Constitutional Process", Quest for Justice, Long and Boldt (eds), University of Toronto Press, 1985

There are many options for the exercise of Indian government within the Canadian polity. These range from the extremes of full sovereignty exercised by territorial and ethnic enclaves, to the delegated form of government owing its legitimacy to the provincial and federal governments. Both extremes have been rejected by most Indian leaders, and so will not be addressed by this thesis.

Indian government of the form referred to by the Penner Report,[11] by the Assembly of First Nations (AFN), the Prairie Treaty Nations Alliance (PTNA), the Coalition of First Nations and many individual bands, is premised on the assumption that the authority of Indian governments is original and inherent. When speaking of its origins, many First Nations say that this authority derives from the Creator. There is a much greater role for Indian constitutions with this kind of government. Structural and constitutional changes in the Canadian political **status quo** would be required so that this kind of government could become part of the Canadian federation. The best comparison of the kind of relationship that would be

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[11]Report of the Special Committee on Indian Self-Government, Queen's Printers, 1983. The mandate of the Committee was to examine the current legal and political reality of Indian bands; the relationship of these to DIAND; the Indian women's status issue; and to make recommendations, taking into account s.91(24) of the Constitution Act 1867 and the government's policy of fiscal restraint. While not binding on government, the recommendations are pursuasive in that they spring from a parliamentary body, further to its mandate. The Committee process included receiving oral testimony, written recommendations, and commissioned research. Participation was obtained from bands across Canada.

created by original Indian government is with a model of an expanded, tripartite federal structure.

In the territories, where aboriginal populations form a significant percentage of the population and where no reserves exist, proposals have been developed for regional governments with membership open to all regardless of race. In the south, where Indians are very much ethnic minorities, proposals have been made for Indian government on a land base, with political rights reserved for members only.[12] This thesis examines the self-government issue south of the 60th degree parallel only.

The most likely compromise will be a model recognizing exclusive Indian jurisdiction on specific matters within Indian lands, and some form of Indian nation participation within the Canadian political forum.

The History of Indian Status

To understand the current debate about Indian government, it is necessary to be familiar with the historical context which gave rise to the present situation. Too often non-Indian politicians and academics have neglected this historical context, and, as a consequence, have provided poorer policies and analysis than might be expected. The historical relationship of

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[12]Boisvert, Forms of Aboriginal Self-Government, The Institute for Intergovernmental Relations, Queen's University, 1985:32

native and non-native peoples is grounded in colonialism; the relationship today is a consequence of colonialism. Hurlich and Lee warn that

> . . . by ignoring the colonial system, social scientists fail to comprehend the most crucial social forces that are transforming the lives of the very subjects of their research.[13]

It is section 91(24) of the British North America Act (now the Constitution Act 1867) which gives the federal government alone, the right to deal with "Indians and lands reserved for Indians".[14] This section does not define Indian, nor does it state how the federal government shall deal with these people. The Indian Act[15] was passed to define who would be treated as Indian for the purposes of the federal government, thereby excluding many Indian people. The first Indian Act of that name was passed by the government of then-Prime Minister Mackenzie; it was preceded by others similar in intent as far back as 1850. The Act stressed assimilation **via** enfranchisement - the term meaning the capacity to vote. To obtain this right, Indians had to forswear any connection with their culture and legal status; legally, they ceased to be Indian.

Missionaries operated hand in hand with the government towards the

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[13] in Jamieson, "Sisters Under the Skin". Canadian Ethnic Studies, XIII,1,1981:137.

[14] s.91(24) of the Constitution Act 1867.

[15] Ibid

goal of Indian assimilation. Church groups were given the responsibility for educating and christianizing. They were also given permanent land grants from the reserve holdings. There were no administrative or legislative means for monitoring their activities. Missionaries lobbied for the legal prohibition of all Indian political activity, since it seemed that the religious and political aspects of Indian cultures were inseparable. Religious ceremonies such as the Sun Dance and the Potlatch were banned. Any work on land claims was forbidden by law. School children were forbidden to speak their own languages. This resulted in destruction of family cohesion, as children, alienated from their culture and strangers to their language, returned from boarding schools, convinced of the superiority of the European culture and ashamed of the physical and cultural signs of their 'Indian-ness'.

Dependency was taught by the Indian Act. A pass had to be obtained from the Indian Agent if one wished to leave the reserve. Individuals could not sell their farm produce or any other reserve resource without permission from the Agent. Social events occurred only with the blessing of the Department of Indian Affairs.[16] In this way Indians were taught that they did not control their own communities, and that 'their' land was not their

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[16]The Department of Indian Affairs has been shuttled amongst a number of federal departments since 1867, and so the acronym DIAND, for Department of Indian and Northern Affairs, is correct only for recent times. However, for ease of reference, I will use 'DIAND' throughout, to refer to the Department of Indian Affairs.

own.

Reserves were deliberately mismanaged by DIAND[17] to prevent any substantial economic base from being developed. This again furthered dependency. The government did not intend the reserves to become permanent land bases, as a strong economy would interfere with the assimilation process. DIAND assisted in the termination of reserves by facilitating the permanent alienation of land.

> Every annual report of the Department (DIA) mentions the sale of some Indian land, from a few hundred acres to several thousand .... Where land was valuable, for instance, adjoining a sizeable village, or with mineral resources, the Department encouraged Indian inhabitants to part with it ...[18]

DIAND encouraged the unconditional leasing of reserve land to non-Indian farmers, to the provinces, and to the Department of Defence.

The Canadian government's historical goal of assimilation of Indians has not changed. While more tolerant of the cultural trappings of Indian nations, the government continues to pursue a policy which has as its goal the elimination of Indian status where special status requires government

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[17]One example of this is the matter of the Blood Reserve Cattle Company, a viable concern that was disrupted and destroyed by DIAND. See "Our Betrayed Wards", written in 1921 by a disenchanted Indian Agent, R.N. Wilson. Reprinted in Western Canadian Journal of Anthropology, Vol. IV, No. 1, 1974

[18]Hanks and Hanks, 1950:36, cited in Driedger, "The Canadian Railway System and Indian Policy", unpublished, University of Lethbridge, 1981.

financial commitments.[19]

Boldt and Long analyze the current objective of federal Indian policy as "institutional assimilation". This, they say, is pursued by government efforts "to dismantle the separate legal, political, economic and administrative systems, which now apply to aborginal peoples, and incorporate them into existing federal and provincial institutional systems."[20] It is noteworthy that this rationale is remarkably like the infamous White Paper's argument,[21] favouring delivery of all services for Canadians through the same structures.[22]

Some -- notably the DIAND Director for Constitutional Affairs Audrey Doerr --[23] argue that Indian control of government structures "indianizes" them. However, a more likely consequence would be Indian administration of and participation in colonial processes. The application of DIAND policies

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[19]The leaked 1985 cabinet document colloquially known as the "Buffalo Jump of the 1980's", authored by the then - deputy Prime Minister Eric Neilson, advocated wholesale cuts in program funding for Indians. It further recommended transference of service responsibility for Indians to the provinces.

[20]"Aboriginal Self-Government: What Does It Mean?", presented to the Canadian Political Science Association, Learned Societies Conference, Winnipeg, June 1986:11.

[21]"Choosing A Path", DIAND, Queen's Printers, 1969

[22]Ibid

[23]Round Table Presentation on Indian Government to the Canadian Political Science Association, Learned Societies Conference, Winnipeg, 1986

and guidelines on reserves, by Indian bureaucrats and administrators, would create a class of Indians with a vested interest in maintaining the current political **status quo**. The current DIAND policies are not directed at community-determined needs and goals, and ethnicity of the administrators will not change policy consequences.

In spite of the best, or worst intentions of the Canadian government since Confederation, and the efforts of DIAND, Canadian Indians have not assimilated. Reserve populations are straining the capacity of the meagre land bases. Though land surrenders were quickly passed by Parliament, there is governmental reluctance to increase the size of reserves. Even where the federal government has legislated a higher reserve population, no provision is made for additional lands. For example, the recent C-31 amendments to the Indian Act[24] make it possible for Indian women, who had lost their status because of marriage to a non-status person, to regain that status. Their first-generation children are also eligible for status, and logically, for reserve residency. Yet neither C-31 nor other legislation make any arrangements for additional lands.

The consequences of decades of colonization are seen in the high levels

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[24]R.S.C. 1985

of unemployment, the life expectancy that is twenty years less than the national average, the youth suicide rate that is seventeen times the national average, and the rate of violent death at three times the national average.[25] Parnell says:

> An analysis of (Indian) subsistence levels of income, rapid rates of population increase, high disease and death rates, lack of education and development capital and generally low standard of living, bear a closer resemblance to underdeveloped nations of the third world than to the mainstream of Canadian society. This situation has developed, not by accident or simple neglect, but as a direct result of policies and actions by the dominant society. (emphasis mine)...
>
> The lack of self-determination at the community level is directly related to the inequalities of power. Services, instead of being beneficial, tend to create a controlling circle which encloses the local people[26]

The above-described unhappy Indian - non-Indian historical relationship sets the political context for the current debate about self-government. The prominent Indian politician Harold Cardinal says that

> The native people of Canada look back on generations of accumulated frustrations under conditions which can only be described as colonial, brutal and tyrannical, and look to the future with the gravest of doubts.[27]

The right to self-government, denied by colonial society, has now

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[25]Cited in Driedger and Driedger, "Social and Human Development", unpublished paper, 1982.

[26]Disposable Native, Alberta Human Rights and Civil Liberties Assoc., Edmonton, 1980:158

[27]The Unjust Society. M.G. Hurtig Ltd., Edmonton, 1969:1

assumed political primacy. To examine the debate surrounding exercise of the right, it is necessary to examine its polar positions, constitutional **versus** legislated Indian government.

Constitutional Indian Government

Inherent rights to government by Indian nations are, arguably, accepted by both federal and provincial governments. The Charter of Rights and Freedoms names "aboriginal and treaty rights" as a class of recognized and protected rights. Aboriginal and treaty rights are not specifically defined; however, the constitutional conferences held pursuant to s.37(2) of the Constitution Act 1982, have been almost exclusively devoted to discussions of Indian government. The debate has been concerned not with whether Indian government is a right, but how it shall be defined and exercised, and how it will relate to provincial and federal governments. As discussed earlier, Indian organizations and individual bands insist that the authority of Indian government is inherent. However, there is less consensus on the form it shall take.

While the media and both levels of government have played on the apparent inability of aboriginal peoples to agree on the form and content of self-government, it seems that this is more political ploy than real concern about substantive confusion. Tennant says that Indians have

> ...managed to achieve a consensus on some significant aspects of Indian government. It was agreed that the purpose of Indian government whatever its base, must be to advance the collective Indian interest; in order to do this it must have significant powers and substantial autonomy. It was also agreed that the authority base for Indian government must derive from aboriginal title to the land, not from Parliament or any other external source of authority.[28]

There are three main principles underpinning the concept of Indian government deriving from aboriginal pre-colonial sovereignty. The first principle is that the authority of Indian governments derives from their peoples' unextinguished inherent political rights. Opekokew states that "Sovereignty is inherent; it comes from within a people. It cannot be given to one group by another."[29]

The second is that ultimate fiscal and political accountability by Indian governments is owed to the reserve constituency. In order to have any real policy autonomy, Indian governments must be able to set community objectives without reference to DIAND policies (which may be at odds with Indian governments') and DIAND guidelines. This is not a revocation of accountability; however, the proper judges of First Nations spending are the First Nations themselves. Indian government requires stable and sufficient funds, for responsibility without the power to implement policy is

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[28]Op.cit.327

[29]Op.cit.11

meaningless. The most likely primary source of these funds is the federal treasury. Distribution is possible according to principles used to calculate equalization grants, and by exercise of the federal spending power, for non-Indian impoverished areas of Canada.

The third principle of Indian government is that Indian constitutions, either in the form of contemporary written codes or by traditional methods, are the only proper authoritative instruments to set forth the powers and responsibilities of Indian government.

These principles are at odds with the principles underlying legislated forms of Indian government. The following examination of legislated Indian government, both as a policy preference and as draft legislation, will show the fundamental differences between constitutional and legislative Indian government.

Legislated Indian Government

The only form of 'self' government contemplated by the existing orders of Canadian government is a delegation of power from the provincial and federal governments, to be administered by Indian governments. The argument behind the federal and provincial preference for delegated (or devolved) Indian government is premised on the assumption that authority of Indian governments derives from the Crown. In this context, Indian

governments would operate within parameters set by the federal government. Government of this kind would be an administrative exercise of guidelines set by either Treasury Board or the Department of Indian and Northern Affairs (DIAND). There is a limited role for First Nations constitutions, which would have to conform to externally-set criteria. Devolved Indian government can best be compared with the municipal model, which operates further to legislation and charters created by the original authority of the provinces.

I shall not treat delegated, legislated forms of Indian government as part of my definition of Indian government; they are not based on inherent political authority and are primarily concerned with secondary administrative authority. The model of legislated Indian government is most easily accommodated by the existing Canadian political structure. However, this thesis will address it only peripherally.

The concept of legislated (or delegated) Indian government is premised on three principles. The first is that the authority of Indian government derives from the Crown. This authority is transferred to a band or bands by specific implementing legislation, or by Indian Act amendment. This legislation will define the derivative authority of Indian government, including areas of competence, requirement of band constitutions, and Indian-federal-

provincial legal relations.

The second premise is that ultimate fiscal accountability of Indian governments is to the federal government. This may be by way of DIAND or Treasury Board, whose circulars, directives and guidelines will define the fiscal parameters of Indian government.

The third premise is that ultimate political control of legislated Indian government is retained by the legislating body, i.e. Parliament. Any exercise of Indian government will be further to the specific legislation, or further to band constitutions developed in accordance with this legislation. In effect, DIAND or Parliament has ultimate control of such constitutions, and of band government operating under these kinds of constitutions or under legislation.[30]

The federal government has indicated a policy preference for legislated Indian government, by virtue of its efforts in developing, tabling, and more recently, passing enabling legislation.[31] After several drafts, the former Liberal government of Pierre Trudeau put forth Bill C-52, the Optional Indian Government Legislation. The government was defeated in 1984,

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[30]For example, the Sechelt Indian Self-Government Act, S.C.1986, provides for a Sechelt Constitution, which must be approved by Parliament.

[31]The Sechelt Indian Band Self-Government Act, 1985; the Anishnawbe-Naskapi Act, signed with the government of Ontario; the James Bay Cree Act.

before the bill made its way into law. The Mulroney Conservatives are expected to table similar legislation in the near future. Already, the government has passed band-specific self-government legislation, for the Anishnawbe-Aski in Ontario and the Sechelt Band in British Columbia. By way of comparison, DIAND has invested no effort in examining the potential for a constitutional third order of Indian government. And, most provinces have argued for self-government by ordinary legislation rather than by Constitutional amendment.[32]

The draft Bill C-52 legislation included "clarification of the federal and provincial responsibility for programs and services provided to the aboriginal peoples of Canada, having regard to the existing and potential roles of aboriginal government."[33] The act defined the parameters of self-government. Bill C-52 was broadly criticized. The AFN rejected the legislation outright. Tennant has termed it "little more than the old band-government legislative approach decked out in a bit of verbal finery borrowed from the Indians and the Penner Report."[34] Schwartz says of the 1984 federal government's self-

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[32]Schwartz, "First Principles: Constitutional Reform With Respect to the Aboriginal Peoples of Canada". The Institute of Intergovernmental Relations, Queen's University, 1985:259

[33]Ibid:109

[34]Op.cit.331

government proposal that

> It was utterly vacuous; it contained no ideas on what self-government would look like ... no commitment to (funding), no clarification of the federal/provincial division of powers ... It was designed to be legally unenforceable.[35]

All rights of self-government were to be subject to negotiation. Any successful negotiation would result in 'ordinary legislation' - which does not have constitutional status.[36] The draft legislation would create governments municipal in character, holding powers granted by the federal government **via** the Department of Indian Affairs. This was repugnant to people claiming an inherent right to self-government.

Under C-52, delegated powers would be administered by tribal governments in much the same way the municipalities, creations of the provinces, administer their delegated powers further to provincial legal and constitutional parameters.

Delegation would result in reserves being administered further to externally-imposed federal criteria. Acceptance of delegated powers would negate any claim to Indian government as an aboriginal right deriving from inherent sovereignty. This poses an insurmountable philosophic hurdle for

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[35]Op.cit.232

[36]Ibid

those actors presently working to clarify Indian government for specific constitutional entrenchment. Romanow states that

> ...the notion that Indian self-government could be created unilaterally by federal legislation implied an unacceptable inferior constitutional position ... and contradicted the Indians' claim that they had an inherent right to self-determination, self-government, or sovereignty, as some described it.[37]

Legislative delegation of powers has been preceded by administrative delegation of bureaucratic responsibility. The federal government, pursuing its preferred Indian government option administratively as well as legally and politically, by what Boldt and Long call the "three-stream initiative",[38] has directed DIAND to pass on specific programs and services to bands for implementation. The federal and DIAND argument suggests that Indian control of these programs and services is, in fact, self-government.

But **de facto** devolution has not enhanced band control of priorities and programs. It has merely created another stage in the DIAND bureaucracy, a stage typified by government control and Indian administration. The Penner Report said that

> Devolving responsibility to Indian bands for the delivery of services, while retaining departmental control of policy through control of funding, has frustrated the declared purpose of devolution

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[37] "Aboriginal Rights in the Constitutional Process", Quest for Justice, Long and Boldt (eds.), 1985:75

[38] Op.cit.1986

...[39]

And, as Cardinal observed in 1969, "the real power, the decision-making process and the policy-implementing group, has always resided in Ottawa in the Department of Indian Affairs . . ."[40]

Despite the almost universal rejection of legislative goverment by Indian leaders, and despite the poor success rate of **de facto** devolution, the federal and provincial governments persist with policies and strategies directed at securing legislated government arrangements. For example, the 1986 federal-provincial Memorandum of Agreement, signed between Alberta and Ottawa, commit both to a process of devolution of programs without requiring Indian acquiescence. Further, DIAND continues to promote devolution of programs to selected bands, though it retains fiscal and policy control.

To understand the executive and legislative strategy pursued by some provinces, it is useful to examine provincial positions on Indian government.

Provincial Positions

There is entrenched provincial opposition to substantive, inherent Indian

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[39]Op.cit.86

[40]Op.cit.8

government.[41] Recognition of self-determination and its consequence of an original right to self-government would have "serious consequences for the provinces with respect to land and jurisdictional authority."[42]

This is a stumbling block to realization of constitutionally-recognized Indian government. The Constitution Act of 1867 gives to the federal government the authority to deal with "Indians and lands reserved to Indians".[43] The Constitution Act of 1982, however, contains an amending formula which requires seven provinces with at least fifty percent of the Canadian population, to accede to constitutional changes. The amending formula makes it possible for the provinces to block what is, arguably, a matter outside of their constitutional competence: constitutional entrenchment of Indian government.

The Penner Report reflected the aspirations of Canadian Indians in its recommendation that Indian self-government be recognized as an aboriginal right and entrenched in the Constitution. The provinces have not supported the Report or its concept of Indian self-government. They have introduced

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[41]See provincial presentations to the 1985 First Ministers Conference, particularly those of B.C., Alberta, and Saskatchewan.

[42]Romanow, op.cit.78

[43]Constitution Act 1867, s.91(24)

various arguments against Indian self-government, with similar themes: the creation of self-government on reserves would intrude on areas of provincial competence further to the Constitution, or affect self-defined provincial interests.[44] They have argued that Canadian federalism cannot withstand the shock of a third order of government. The bottom line, though, is that the provinces fear that constitutional recognition of Indian government would require them to share resources with those governments. Because of the economic and jurisdictional concerns of the provinces with Indian government, the former could be expected to pose legal hurdles to implementation of Indian government, where implementation coincided with provincial constitutional authority. Romanow says that

> The provinces were fearful of losing their claims to resources and jurisdiction over lands within provinces, should the courts find that self-determination and consequent land settlements were an undeclared constitutional right of aboriginal people.[45]

Some provinces, including Nova Scotia and British Columbia, argued that the current constitutional distribution of powers is exhaustive between the provinces and the federal government. They argued that formal recognition of aboriginal self-government would require entrenchment as a

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[44]Statements presented by the premiers at the First Ministers Conference, March, 1984 and Attorneys-General Conferences.

[45]Op.cit.78

third order of government, and its powers would detract from present allocated powers or be an assumption of delegated authority from the provinces or federal government.[46]

Alberta, Saskatchewan, and Nova Scotia argued for a delegation of powers as Indian self-government.[47] This argument implicitly denies the concept of inherent aboriginal sovereignty, whose authority could never be properly assumed by other governments. It refuses to contemplate a tripartite federalism, wherein each order of government could exercise all of its power within its proper sphere.

The Indian response to such amendments is that self-government could not take from the provincial and federal powers that which the latter never legitimately held; further, federal and provincial governments cannot delegate power which is not properly theirs.

The most extreme provincial position was articulated at the First Ministers Conference in March of 1985, at which B.C.'s Intergovernmental Affairs Minister Garde Gardom, speaking for Premier Bill Bennett, said that agreement on self-government would be immediately forthcoming if all

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[46]Document 800-18/008, Feb. 13-14, 1984: Final Report from Meeting of Working Group 4 - Aboriginal or Self-Government. Presented at the First Ministers Conference, March 1984.

[47]Ibid:9; See also provincial presentations to the 1985 First Ministers Conference, particularly those of B.C., Alberta, and Saskatchewan.

present were agreed that "Indian government is not, never was, and never will be sovereignty".[48] This is unequivocal rejection of the aboriginal position that original native sovereignty has not been legally surrendered or militarily extinguished -- and that pre-colonial exercise of Indian government was a sovereign expression by people politically and legally endowed with the capacity for such an exercise.

The Province of Alberta has opposed the calls of Alberta's indigenous peoples for self-determination at every opportunity, most critically during the First Ministers Conference Series, and by insisting on the inclusion of the word 'existing' in section 25 of the Charter of Rights and Freedoms.[49] This has been construed as an attempt to restrict identification of such rights to those supported by law, and runs counter to Indian and Metis claims that both natural law and liberal democratic notions of justice call for a more generous interpretation of aboriginal rights.

The preoccupation of Alberta with the judicial interpretation of aboriginal rights is seen again in the 1971 party platform:[50] the Progressive

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[48]Televised debate of the Canadian Broadcasting Corporation of the First Ministers Conference, March, 1985

[49]"Existing" was inserted into s.25 of the Charter of Rights and Freedoms, allegedly at the insistence of the then-Premier Peter Lougheed.

[50]New Directions for Alberta in the Seventies: The Platform of the Alberta Progressive Conservative Party and its Candidates - Alberta Provincial Election 1971.

Conservatives promised "To back up the Native People in their legitimate demands for recognition of Treaty Rights by all levels of government."[51] "Legitimate" may well translate into **stare decisis**[52] further to legal precedent, which amounts to the narrowest possible interpretation of treaty and aboriginal rights.

In the party platform in 1980, the Alberta Progressive Conservatives addressed a number of matters not within provincial constitutional jurisdiction, such as local band autonomy from DIAND, amendment of the Indian Act, and the like. These amount to motherhood issues, though the provincial government has no constitutional basis to address them. It is noteworthy that matters which the province could have addressed - such as extending benefits given to other Albertans to Indian Albertans on reserves as a right of provincial residency - were ignored.

The Natural Resources Transfer Agreement (NRTA) of 1930 transferred control and administration of federal Crown lands to the prairie provinces, excepting only national parks, defence lands, and Indian reserves. Section 10 of the NRTA for Alberta and Saskatchewan and Section II for Manitoba say that

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[51]Ibid

[52]Legal precedent established by case law.

> the Province will ... set aside ... such further areas...to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada ...

Clearly, satisfaction of land claims pursuant to treaty would force the prairie provinces to surrender land, and jurisdiction over land. Despite the clear wording of the NRTA (which has constitutional force) the provinces have been notoriously reluctant to comply with its provisions. For example, in Alberta the claim of the Lubicon Lake Cree Band has been recognized legally; it must be satisfied under the NRTA. The claim has stood, unfulfilled, for over 50 years. Because the province is reluctant to surrender claims to the sub-surface rights -- the area contains oil reserves -- the Lubicons have yet to realize their constitutionally-protected treaty right to land. All other reserves include mineral rights for the benefit of their bands.

In B.C., where no treaties were signed (excepting only a small part of northeast B.C.) and where aboriginal rights claims are unextinguished, the ramifications of constitutionally-recognized Indian government, in the form advocated here and in the Penner Report, are much more serious. The province stands to lose jurisdiction over large tracts of land and its resources.

The crux of all provincial opposition to Indian government is the view

that Indian governments will make claims against provincially-controlled land and resources to settle outstanding land claims, and will require infusions of capital from the federal government for community development and government operation. Even with the operational funds presently used by DIAND re-allocated to Indian governments, additional monies would be required for Indian government and community needs. The monies presently given to the provinces as conditional, unconditional, and equalization grants, may have to be spread more thinly to cover the additional claims of Indian government.[53] The prospects for a revised federalism recognizing a third order of government are slim, given current political configurations and philosophic convictions held by the federal and provincial participants in the debate, and given the constitutional requirement of provincial participation in constitutional amendment.

Examination of representative Indian positions will serve to highlight the points of divergence with the provinces and with the federal goverment. Additionally, these Indian positions will clarify the claims being articulated, both through the courts and from political platforms such as the First Ministers Conferences.

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[53]Boldt and Long, op.cit. 1985

Indian Positions

It must be pointed out that there is no single Indian position. The semantic confusion associated with the term "Indian" has persisted since Columbus first misapplied the label. Canadian "Indians" are several hundreds of bands, belonging to many disparate cultures, having different histories, and holding different political objectives. The Assembly of First Nations is the largest and most representative of Indian political organizations. It is mandated to pursue constitutionally-entrenched Indian government, along with specific aboriginal and treaty rights. Because of its large membership and long-term participation in the political arena, it will serve to provide the following discussion of "Indian" positions.

Assembly of First Nations Position

The AFN position presented at the First Ministers Conference, March 1984, attempted to make general statements on the validity of Indian claims to self-government, and avoid specifics of how this might come about. This is understandable in light of the large and politically disparate constituency the AFN represented.

Within the AFN's member organizations there are several different historical and political experiences. There are treaty nations and non-treaty nations. Further divisions come from this. Some of the treaty people have

treaty liaison with the provincial government; for example, some Ontario treaties are tripartite agreements between Indian nations, the federal government and the province of Ontario. However, most treaties were signed soley between Indian nations and the Queen's representative. This results in a political division on whether or not provinces should be allowed to participate in discussions of Indian self-government. Further divisions exist within the two groups on this matter as well: some groups argue that in the interests of political reality, the provinces must participate in constitutional discussions concerning Indian government. Others say that constitutionally and historically the provinces have no role in matters concerning Indian peoples. Finally, non-treaty areas pursue aboriginal rights arguments, which are often neglected by treaty areas in favour of rights consequent to treaty.

Several Indian nations want general principles of self-government constitutionally entrenched, with subsequent discussions to determine the exact nature of this self-government. Others argue that legislative means can be enacted which would afford the means for self-government now, and that entrenchment is a more distant goal which must be defined first.

The lack of consensus within the Indian community has alarmed some observors; the media and federal and provincial politicians are quick to

suggest that "the Indians can't agree" and "the Indians don't know what they want". By way of comparison, no such requirement of unanimity is placed on federal or provincial governments before policy is drafted or laws passed; nor are all Canadian governments required to agree on policy objectives at First Ministers Meetings.

The AFN position suggests a goal of self-government for Indian First Nations within the Canadian federation. The then-National Chief David Ahenakew told the Penner Committee:

> ...there appear to be only two directions which we can choose. One points the way to termination of Indian collective rights and title, along the lines (of the White Paper). ...The other leads to an affirmation and entrenchment of Indian collective rights and title in constitutional terms, and to a solid constitutional basis for Indian self-government within Confederation.[54]

The AFN sees constitutional entrenchment of specific rights as protection for Indian people. Chief Ahenakew said "What we are striving for, is to disallow you... (Canada) from ever again violating, breaching, the rights of the first nations of this country."[55]

At this point it is useful to provide further political background for the AFN, and for the more recent Prairie Treaty Nations Alliance (PTNA). In

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[54]Minutes of the Penner Committee, 3:4-3:5, 1984

[55]Minutes of the Penner Committee, 3:9

1985, most of the prairie treaty First Nations (from Alberta, Saskatchewan and Manitoba) split from the AFN. The move was precipitated by the leadership change that took place at the AFN General Assembly. The former National Chief, David Ahenakew, lost the election to Georges Erasmus. The prairie treaty nation leaders held (and hold) a deep personal antipathy for Erasmus. The treaty people also held a general perception that treaty interests were being inadequately represented at the constitutional First Ministers Conferences. The fault for this was attributed to the predominance of non-treaty nations in the AFN. The above two grievances solidified support for the prairie nations separatist movement.

Blood Tribe Position

The Blood Tribe has the largest reserve in Canada, situtated in southern Alberta. The Blood population exceeds 6,000; the reserve is relatively well-off and is politically influential. Blood Tribe documents cited here were prepared when the Bloods held AFN membership. The Bloods were part of the PTNA split at the 1985 AFN General Assembly, and continue to shun the AFN while supporting the PTNA. However, the Blood position on Indian government has not changed. Because of the tribe's physical and political prominence, and because of its adherence to the PTNA, it was selected to provide an Indian view other than the AFN's.

The Blood Tribe has a more cohesive and specific position.[56] This is possible because, of course, the Blood government need address only Blood concerns. The Bloods claim sovereignty: they assert that this sovereignty, while suspended by historical events, was not surrendered: it can and should be reassumed. The demand, while not specifically articulated, appears to be for Blood government within Confederation, as a third order of government.

The Bloods claim self-government as part of aboriginal and subsequent treaty rights. They claim that aboriginal rights derive from original occupation of the land and Blood exercise of governing institutions prior to colonization. Treaty Seven, according to the Blood understanding, recognized this right.[57] These rights extend to future generations, and may not be impaired by any one government because of the outstanding interests of future generations. Elders' oral accounts of the Treaty are consistent on the understanding of the Treaty as an agreement of peace and friendship. The elders acknowledge an agreement to share certain lands and to reserve others

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[56]Blood Position Paper presented to the Penner Committee, 1983

[57]It must be noted that there is much divergence between the written and oral versions of Treaty Seven. More extensive examinations of this can be found in Price, New Perspectives on Alberta Indian Treaties, Indian Association of Alberta, Edmonton, 1976; and Green, "Treaty Seven Implementation", unpublished paper prepared for the Indian Association of Alberta, 1981.

for exclusive Indian use. Above all, the elders say that the treaty guaranteed the signators protection of their way of life, without non-Indian interference.[58]

The Bloods argue that the treaties were agreements to share land in return for provision of services and recognition of rights in perpetuity. They argue that they fulfilled their part of the treaty -- sharing of land, and peace and friendship -- and that Canada has not fulfilled her portion, despite considerable benefit from the shared lands.

The provinces are not recognized as having a legitimate role in Constitutional discussions concerning Indian government. They are seen as acting in an advisory capacity to the federal government, not as participants.[59] The Bloods argue that their treaty, Treaty Seven, was signed between heads of state, and that the British North America (BNA) Act of 1967 never contemplated provincial jurisdiction in Indian matters. This argument does not address the fact that under the new amending formula, provincial assent is required for constitutional change.

The Bloods told the First Ministers Conference 1984 that "We do not

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[58]Ibid

[59]Blood position paper 1983, presented to the Penner Committee.

recognize the competence of ... the provincial governments to participate in any conference concerning our rights".[60] The Bloods call for suspension of all legislative proposals affecting their rights. This can be interpreted as having particular significance for the Optional Indian Government Legislation and its clones. There is a demand that the Bloods not be lumped with other aboriginal groups for purposes of classification. This again reflects the diversity of Indian nations, and the need to recognize the particular circumstances of each.

The Blood presentation to the Penner Committee reflected concerns shared by many Canadian Indian nations. Blood issues included the interpretation of s.91(24) of the Constitution Act 1867 as acknowledgement of a bilateral relationship; aboriginal rights, treaties and their implementation, the practice of co-operative federalism, and the Constitutional framework for development of Canadian law.[61] The Bloods were not confident of the Canadian government's political will to deal with their concerns. The position paper presented at the FMC 1984 said:

> We remember the attempt at legislative assimilation in the White Paper of 1969. Recent leaks revealing the (federal) strategy of embroiling native people and provincial premiers during this conference do not increase our confidence in (government's) good

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[60]Blood Position Paper presented to the FMC 1984.

[61]From Minutes of the Special Committee on Indian Self-Government, 1983, 32:6.

faith.[62]

While political will may be lacking, the structural potential for Indian goverment can still be explored. If structural mechanisms are amenable to Indian government, politicans will be unable to invoke the current political framework as a reason for rejecting inclusion of Indian government. If revision is problematic, it behooves academics and Indian and non-Indian politicians to know why and how this is so.

The Canadian Federal Structure

An examination of Canada's federal structure will show some of the specific formal impediments to a third order of constitutionally-recognized government. It will also suggest mechanisms that are amenable to revision for a third order of government.

The ideal of Canadian federalism is separate but equal governments with exclusive constitutionally-defined spheres of authority; both provincial and federal governments are sovereign within their constitutional parameters. Constitutionally, the two existing orders of government -- federal and provincial -- hold the divided powers of the Canadian state.

Reality does not conform to the ideal. The federal process is typified

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[62]Ibid

by overlapping and entangled jurisdictions, which have given rise to a number of extra-constitutional mechanisms intended to accommodate reality. An examination of the ideal and of the practice of Canadian federalism suggests that Canada's method of government is flexible; arguably, it is sufficiently flexible to extend to Indian governments.

There is a judicial assumption of the mutually exclusive and exhaustive enumeration of governmental powers in sections 91 and 92 of the Constitution Act 1867. Constitutional means of resolving jurisdictional disputes include the Peace, Order and Good Government (POGG) powers further to s.91(1) of the Act; the paramountcy rule favouring federal jurisdiction in events of national interest; the federal residual power of s.29; and s.92(13), which gives provinces jurisdiction over property and civil rights within the province.[63]

Fiscal relations and powers are also set forth by the Constitution. To the federal government falls unlimited power to raise money by any method of taxation. The provinces have limited powers of taxation, and own their natural resources.

There is general agreement that the purpose of Canadian federalism is

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[63]Hogg, Constitutional Law in Canada, Carswell, 1977.

to provide a means of government which rests authority for matters of national significance with the central government, and matters of regional significance with the provincial governments. There is less agreement on what constitutes 'national significance'.

The essence of federalism is separate but equal governments with exclusive constitutionally-defined spheres of authority. This relationship in Canada has not been static; social and political forces result in a continuing process of accommodation and co-operation, and of conflict.

Confederation of the several British colonies in 1867 set forth the first constitutional guidelines and political premises for Canadian government. Ryerson cites Sir John A. Macdonald, then involved in constitutional development for what would become Canada:

> I hope that we will be enabled to work out a constitution that will have a strong central government ... and at the same time will preserve for each province its own identity ...[64]

Van Loon and Whittington say that "A federal form of union was ultimately decided upon by the Fathers of Confederation because, unlike either an alliance or a confederal union, it vested real powers in the hands

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[64]Unequal Union. Progress Books, Toronto, 1973:348.

of a central decision-making body, the federal parliament".[65] Stevenson notes that "Although one would never know it from reading the BNA Act, Canada is clearly a rather decentralized federation, both in terms of the division of functions between the two levels of government and in terms of the division of revenues".[66]

Canadian federalism was, in 1867, a compromise between powerful cultural and economic interests wanting political unity, cultural diversity, and economic prosperity protected from American expansionism. According to Stevenson,[67] Confederation was the political response to economic and cultural interests of the diverse capitalist and colonial participants in what were then British colonies. Confederation had perhaps more economic than political ideology attached to it.[68] Ryerson argues that Confederation occurred because of capitalist pressure for expansion of the market potential **via** the railway, and exclusion of the Americans; and imperial interests intended to preserve the North American part of the British Empire.[69]

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[65]The Canadian Political System: Environment, Structures and Process (3rd), McGraw Hill Ryerson, Toronto, 1981:241.

[66]Unfulfilled Union. Gage Publishing, Toronto, 1979:145.

[67]Ibid

[68]Op.cit.343:344; Stevenson, Ibid:67

[69]Ibid

Whatever the intent of the founders of the nation, the nature of federalism has been a hotly debated topic since then. An overview of some of the most popular definitions of federalism past and present will serve to illustrate this.

Black enunciates five views of federalism: centralist, administrative, co-ordinate, compact and dualist.[70] Other scholars use different terms, but there seems to be consensus on the nature of the several categories.

Centralists view Confederation as an exercise in nation-building, with political evolution requiring a strong central government. Lesser, administrative matters would fall to the provinces. Administrative (also known as executive or co-operative) federalism is the process of accommodation and negotiation between the two orders of government. Administrative federalism uses extra-constitutional forums such as intergovernmental and federal-provincial meetings; it is arguably the federalism of the 1980s. Co-ordinate views of federalism call for strong governments autonomous within their constitutionally-defined spheres, legislating according to exclusive and exhaustive heads of power further to the Constitution. Compact theorists view federalism as a "league of states"

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[70]Divided Loyalties: Canadian Concepts of Federalism. McGill-Queen's Univ. Press, 1975.

and the federal government as a mere "creature of the provinces".[71] This is the most decentralized view of Confederation, and has little credence with most analysts. Dualists view Confederation as a political coalition of French and English colonial societies, with this fundamental cultural fact over-riding later political developments.

These concepts have been in and out of vogue since 1867; portions of each are used to support various political positions. A composite theory of federalism that incorporated all would perhaps most honestly reflect the nature of the Canadian practice of federal government.

The above views of federalism range from centripetal, favouring unity, to centrifugal, favouring diversity. Smiley advocates a middle-of-the-road view, arguing that federalism is based on equality of the two orders of government.[72] Stevenson[73] strongly advocates a central government; he cautions that this should not be unduly restrictive of the provinces. Van Loon and Whittington argue that ultimate power rests with the central

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[71]Ibid:17.

[72]Canada in Question: Federalism in the Eighties (3rd). McGraw-Hill Ryerson, Toronto, 1980.

[73]Op.cit.10

government[74] and Black[75] sees federalism as a structure for uniting forces for public national interests, while allowing for regional expression. Smiley views classic federalism (not to be confused with existing federalism) as a process based on equality of central and provincial governments, whose powers include "the most politically salient aspects of human differentiation, identification, and conflict ... related to specific territories".[76]

Hogg says that "federal states may be placed on a 'spectrum' running from a point which is close to disintegration into separate countries to a point which is close to the centralized power of a unitary state.[77] Smiley places classic federalism in the centre of this spectrum, with both orders of government having equal powers.[78] Black sees federalism as a form of constitutional organization which unites a number of diverse units for important public interest, but protects their individual areas as defined constitutionally.[79] He then goes on to suggest that the debate regarding the

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[74]Op.cit.241

[75]Op.cit.

[76]Op.cit.1

[77]Op.cit.31

[78]Op.cit.

[79]Op.cit.16

nature of Canadian federalism is

> ... a generally fruitless enterprise, because what most disputants have in mind is the ideal structure of the Canadian state; the 'real meaning' of federalism to Confederation has been of interest only to the extent to which it justifies or discredits particular policy preferences.[80]

Executive federalism concepts seem to best correspond to current Canadian practice. This executive federalism, according to Smiley, is "the relations between elected and appointed officials of the two orders of government in federal/provincial interactions and among the executives of the province in interprovincial interactions".[81]

Executive federalism facilitates the co-operation necessary for co-ordinating and accommodating federal and provincial policies. There is some deficiency in this practice of federalism, in that legislative responsibility is weakened by participation at high levels by non-elected executives.

Executive federalism is prone to conflict, nonetheless.[82] Conflict arises because Canada is not a cohesive economic community, nor is it a cohesive cultural entity. Interprovincial barriers and regional inequities, and the decline in the practical ability of the federal government to re-distribute

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[80]Ibid:7

[81]Op.cit.91

[82]Smiley, Ibid:116

wealth and services, have all contributed to regional tensions. Regional conflict is endemic to Canadian federalism. The constitutional division of powers is incomplete, inconclusive and results in federal/provincial friction.[83] The tension between centralizing and regional forces is a feature of the Canadian form of government.

Van Loon and Whittington note that the Canadian social and economic environment is not homogeneous; regions differ ethnically, culturally, geographically and economically. Canada, the authors argue, evolves from "cleavages and consensus" between the several parts. They assert that "the very existence of a federal system is predicated on the existence of regional diversity".[84] Different regions and provinces must co-operate and co-ordinate policy to maximize government equitability and responsiveness to a diverse polity.

Ryerson sees three problems attendant on Confederation: a physical geography giving rise to regionalism; the weaker Canadian capitalist establishment **vis-a-vis** the American; and the fact of two European colonial nations within the new Confederation, who have shared an unhappy past and

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[83]Ibid:214

[84]Op.cit.524

now have linked forces for a joint future.[85] That Canadian federalism has developed because of historical cultural and political differences is accepted by most writers.[86] Black states that "Cultural concerns and divergent governmental approaches to them were among the reasons Canadians adopted a federal form of government."[87]

Along with the difficulties attendant on federal government, Canada must also juggle the sometimes conflicting pressures of parliamentary democracy and federal politics. Smiley cites Dicey on the contention that the former is irreconcilable with the latter.[88] Parliament, composed of democratically elected members who generally owe allegiance to one of three political parties, is not well equipped to address matters stemming from regional diversity.

The Canadian Constitution, that package of Imperial and Canadian statutes, proclamations, convention, judicial precedent, and now the Charter

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[85]Op.cit.309:311

[86]Underhill, The Image of Confederation, CBC, Toronto, 1964; Manuel and Posluns, The Fourth World, Collier Macmillan Canada, Ltd., Don Mills, 1974; Smiley, Canada in Question, McGraw-Hill Ryerson, Toronto, 1980; Finlay and Sprague, The Structure of Canadian History, Prentice-Hall, Scarborough, 1979, among others.

[87]Op.cit.13

[88]Op.cit.113

of Rights and Freedoms, is the source of our government's legitimacy and of the supremacy of the rule of law. It is implictly intended to determine inter-governmental relationships, individual-government relationships, and to prevent arbitrariness, while guiding government within certain parameters imbued by Judeo-Christian tradition and liberal-democratic philosophy. It's operative principles derive from the divided sovereignty of the two orders of government, and the supremacy of Parliament (now somewhat modified by the patriated Constitution Act 1867 and Charter of Rights and Freedoms). The Constitution has evolved since 1867 **via** judicial review, social change, and political accommodation.[89]

There are few specific references to formal federal structures in the Canadian constitution. Smiley says that "the BNA Act does not deal with federal government in general"[90] except for an exhortation that Canada have a constitution and government 'similar in principle' to Britain's.

There is an historical and judicial assumption of mutually exclusive and exhaustive areas of federal and provincial constitutional authority. More recently, it is accepted that these areas often overlap, and that new areas come to light which were not anticipated in the old BNA Act. While

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[89]Op.cit.

[90]Op.cit.7

constitutionally residual powers go to the central or provincial government, dependent on whether the subject matter falls within the scope of S.91(1) or 92(13) of the Constitution Act 1867,[91] it appears that such matters are now subject to political negotiations between federal and provincial governments. This further supports analysis of the executive nature of Canadian federalism.

Fiscal relations (to a limited degree) and powers are also set forth by the Constitution, and contribute greatly to the tensions between the two orders of government. To the federal government falls unlimited power to raise money by any method of taxation. The provinces have limitations on taxation powers. Re-distribution of national wealth **via** conditional and unconditional transfer agreements, and equalization grants, extends central power somewhat. It has occasionally been attacked by provinces as a means of infringing on provincial jurisdictions and of interfering with provincial political agendas. Power over resources has also been a source of some constitutional friction, as the two orders of government strive to define what constitutes "their" resources. New extra-constitutional means of dealing with overlapping and new matters are being developed. These include federal-provincial intergovernmental offices and federal-provincial conferences. This

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[91]Section 91(1) of the Constitution Act 1867 is considered the residual power clause in the federal government's area of competence; s.92(13) serves the same purpose for the provinces.

contributes to a more executive federalism, and to **de facto** amendment of the Constitution.

Van Loon and Whittington caution that while the current trend towards executive federalism "fosters decentralization and exaggerates the centrifugal forces in the federation it is manifested in a heavy concentration of decision-making power in the hands of a very tiny political elite".[92] Smiley[93] also notes the lack of political accountability by these actors.

Federal states exhibit interdependence of central and regional authorities, and shared national objectives. The nature of federalism is distributed power between the central authority and several regional authorities.[94] Individuals fall into the ambit of both jurisdictions, which legislate (ideally) in separate areas of influence as constitutionally defined. "The essential characteristic of a federal constitution ... is the distribution of government power between coordinate central and regional authorities."[95]

Canadian federalism has developed because of historical cultural and

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[92]Op.cit.543

[93]Op.cit.

[94]Hogg, Op.cit.30

[95]Ibid:41

political differences.[96] Black states that "Cultural concerns and divergent governmental approaches were among the reasons Canadians adopted a federal form of government."[97] Regional conflict has long been a feature of Canadian federalism,[98] the constitutional division of powers has always been a source of friction,[99] historical diversity created the political reality that necessitated a form of federalism,[100] and resolution of problems attached to federalism is impossible, as there is constant tension between centralizing forces and regional economic and political forces.[101] Still, Canadian federalism has existed and developed, despite the best and worst efforts of some provinces at different times. Canadian federalism is based on political, economic and cultural diversity[102] and still provides a sense of national unity and purpose while allowing its diverse elements a measure of autonomy. It is the goal of federalism to balance the consequent tensions. Hogg suggests

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[96]Underhill, The Image of Confederation, Canadian Broadcasting Corporation, Toronto, 1964; Manual and Posluns, Op.cit; |miley, Op.cit; Finlay and Sprague, Op.cit.

[97]Op.cit.13

[98]Simeon in Whittington and Williams, Canadian Politics in the 1980s, Methuen, 1981:241

[99]Toner and Bregha in Whittington and Williams, Ibid:3

[100]Smiley, Op.cit.214; Finlay and Sprague, Op.cit.

[101]Smiley, Op.cit.

[102]Van Loon and Whittington, Op.cit.

that

> The regulated demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation have combined to produce what is generally described as 'cooperative federalism'. The essence of cooperative federalism is a network of relationships between the executives of the central and regional governments.[103]

The co-operation of the different governments involved in a federation overcomes the rigidity of the constitution, and the tensions posed by different interests. Federalism requires accomodation to meet changing circumstances such as national and international events, regional development or inequity, and the like. Federalism is clearly resilient; it has accommodated economic, technological and political change in Canada since 1867.

It is clear that Canadian federalism, born of political compromise for economic gain and cultural integrity, has evolved to suit the changing perceptions of Canadian society. Federalism in Canada is the politics of compromise, of co-operation and accommodation. It is not always successful. However, as Black notes, "For the Canadian state the politics of federalism are the politics of survival".[104] And to Smiley, "The essence of federalism lies not in the constitutional or institutional structure but in the society

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[103] Op.cit.55

[104] Op.cit.1

itself".[105] It is the nature of Canadian society that leads us to choose federal government - our multicultural nature; the national grounding in ambitious, frustrated capitalism; the historical reaction against the American monolith to the south, and the British colonial ties which have informed Canada's fundamental political institutions.

Tripartite Canadian Federalism

The requirement for a revised federalism designed to permit Indian participation has been contemplated by a number of scholars.[106] For example, Chamberlin says:

> In political matters, the native circumstances are inextricably interwoven with the total Canadian and American political and economic situation, which creates the body politic within which the native people must eventually work out their own priorities. Political as well as economic links must be established with the majority society, possibly through control of land resources, possibly through control of land resources, possibly even through some kind of new federal structure ...[107]

The full participation of Indian governments in the Canadian federal structure would be beneficial to Indian - non-Indian relations, and to Canadian political development generally. To date, Indian policies, created

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[105] Op.cit.3

[106] Asch, Home and Native Land, Methuen, 1984; McWhinney, Canada and the Constitution, University of Toronto Press, 1982; Chamberlin, The Harrowing of Eden, Seabury Press, 1975; Green, "Unassimilated ", Policy Options 5,6, 1984.

[107] Op. cit. 199

by non-Indian governments and administered by the almost exclusively non-Indian bureaucracies, have not ameliorated Indian - non-Indian tensions. Nor have they succeeded in furthering the specific welfare of Indian First Nations. Political, historic, economic, social and cultural differences separate Indian reality from the mainstream Canadian experience. Federalism is touted as a means of resolving differences between diverse groups existing in the same polity. Its expansion to include Indian self-government, with a land and economic base, would facilitate mediation of what have inarguably been issues of 'differentiation, identification and conflict'. McWhinney says that

> The recognition of the legal rights of the native and Indian peoples based on international and treaty law requires implementation of the principles of full political, social and economic self-determination within Canadian federalism ... The express constitutional entrenchment of the new constitutional role of the native and Indian peoples remains the necessary conclusion.[108]

Tennant has observed that the Penner Report[109] recommended that self-government be recognized as an aboriginal right, and that "If this recommendation was implemented, Indian first nation governments would form a distinct order of government in Canada."[110] Manuel and Posluns declare that

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[108] Op.cit.122

[109] Op.cit.

[110] Op.cit.328

> Our (Indian) hopes for the Fourth World (a term referring to indigenous self-determination) are at least as credible as the belief in a Canadian nation with nearly autonomous provinces, a diversity of languages and cultures, and a mutual respect for one another's view of the world.[111]

The formal negotiated entrance into Confederation of Indian nations, with suitable and explicit constitutional guarantees, would require a major evolution of the presently dualistic federalism to a trilateral federalism.

The existing formal and informal federal and constitutional structures presently are considered to encompass all political and fiscal power in Canada. Introduction of Indian government as a third order of government within the federal structure would necessitate development of mechanisms for Indian participation in this political and economic pie, along with the appropriate constitutional guarantees.

Indian self-government as recommended by the Penner Committee would have no problem meeting the requisites of federalism. It would become a third order of government, with specific powers, held independently of the federal and provincial governments. In accordance with the responsible and consistent exercise of self-government, First Nations would develop constitutions naming the mechanisms and processes of power, including election of government, administration of policy, financial

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[111] The Fourth World, Collier-Macmillan Canada, 1974:216

accountability, membership, and appeals procedure.[112] In short, these constitutions would determine internal Indian government relationships with, and responsibilities to their Indian constituents. Finally, the government of First Nations would have a direct relationship with the people, in the best tradition of federalism, as opposed to the current situation, where band councils are politically responsible to their electorates, and administratively and financially responsible to DIAND.

Institutional And Structural Revision

There remain questions concerning the external relationships Indian governments might have with provincial and federal governments. Answers to these must remain prescriptive and speculative, as the contingencies that will determine them have yet to be determined by federal, provincial, and Indian politicians.

There are a number of considerations in drafting structures for First Nation Government as a third order of government within the Canadian federal system. Some of these are as follows:[113]

1. What will be the constitutional mechanisms for recognition of self-government?

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[112]The Penner Report (op.cit.) has specific recommendations for First Nations constitutional development as regards these matters.

[113]Schwartz, Op.cit.

2. What will be the fiscal arrangements to sustain Indian government?

3. What will be the federal-provincial division of powers regarding aboriginal peoples?

4. What initial participatory rights will aboriginal people have in constitutional reform?

It is possible that these questions may be answered by way of constitutional amendment, creating a "section 93" recognizing Indian government, together with other constitutional amendments designed to reflect the rights of the third order of government, its political and economic relationship with the other two orders of government, and its relationships with other Canadian citizens. Such an amendment would have to clarify inter-governmental relationships and responsibilities, possibly by prescribed exercise of co-operative federalism. Of course, any of the above speculative developments would have to have Indian participation and approval, to be politically acceptable.

Some provinces, realizing that constitutional recognition of Indian government **via** the "section 93" option would create a third order of sovereign government, oppose this option: they are opposed to co-ordinate Indian government holding original authority and powers similar to theirs.[114]

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[114]Op.cit. 229

However, Schwartz argues that constitutionalization of Indian government could be restricted: "The section listing the powers of aboriginal governments might also include serious limitations."[115] A barrier to co-ordinate aboriginal government, he says, arises as a result of aboriginal diversity. He seems to argue that the need for diverse governments would prevent a degree of constitutional specificity.

When First Nations governments are constituted, some understanding will have to be achieved regarding their jurisdiction.[116] Jurisdiction over populations and resources has proven to be a major stumbling block in First Ministers Conferences to date.[117] Indian representations have made the claim of Indian nations to self-government, including jurisdiction over people and resources. The provinces, particularly B.C., Alberta, and Saskatchewan,[118] have made it clear that they are unwilling to contemplate Indian government claims to resources. Further, the provinces object to creation of enclaves within their physical territories which would not fall

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[115]Op.cit. 229

[116]Ibid:18

[117]Three First Ministers Conferences have been held pursuant to s.37 of the Charter of Rights and Freedoms 1982

[118]See First Ministers Conference 1984 transcript and submissions to the Conference by the three western provinces

under provincial law. Indian presentations suggest that Indian lands would fall under Indian legal jurisdiction.

At present, Indian lands are governed by federal and provincial legislation and by band by-laws. The Indian Act makes limited provisions for bands to pass by-laws for a specified list of matters; federal law applies in respect of some matters; and finally, the Indian Act[119] provides for all provincial laws of general application to apply on reserves, provided they conflict with no valid federal law.

It would be possible to resolve this difficulty by applying the same principle, but substituting valid First Nation law for federal law. In that event, provincial law would apply unless Indian First Nations acted to pass valid legislation, further to heads of powers agreed upon and constitutionalized as First Nations powers.

Discussions about the scope of self government inevitably turn to the potential jurisdictional conflicts. Provincial intrusion into areas arguably best dealt with by First Nation governments is a concern of Indian politicians. As the constitution reads now, provinces clearly have jurisdiction in many areas Indian government may want to control, for example, child welfare and

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[119]R.S.C. 1985

policing. There are several ways of dealing with this jurisdictional conflict. For example, Schwartz suggests that

> It would be possible for Parliament to use its s.91(24) power to expressly exclude the application of provincial law to the extent that they violate rights of aboriginal peoples, and Parliament has in fact done so with respect to treaty rights.[120]

Such federal action would not necessarily require constitutional amendment. Parliament could act to occupy the full field of legislative matters pertaining to Indians and Indian lands, and then legislatively delegate these matters to Indian governments expressing a desire to assume responsibility for them. However, this kind of proposal may encounter political resistance from Indian governments arguing that their inherent rights do not need to be delegated to them. Acceptance of delegation will be viewed as tacit Indian acknowledgement of a subordinate government status.

A more politically palatable mechanism may be created if the federal government, acting further to its 91(24) powers, made efforts to secure constitutional amendment acknowledging that Indian governments could assume federal 91(24) powers over reserve lands. This would limit Indian government jurisdiction to a territorial base. Indian governments not wishing to occupy a particular legislative arena could continue the existing

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[120] Op.cit.56

arrangement. Federal laws, and all provincial laws of general application, would then continue to operate.

Gibbins[121] has suggested that "recognition of self-government does not mean that Indian government is feasible or even, in some forms, desirable" because of the problems of "institutional design". He also argues that the problems of implementing self-government of several hundreds of bands with various economic bases are so great as to make implementation on a band-by-band basis physically impossible. But internal First Nations arrangements need not concern any government other than the particular Indian government; implementation problems could be dealt with by each band, as necessary. Boisvert says that

> Constitutional recognition of a right to self-government would suggest that aboriginal peoples do have a right to govern themselves without suggesting that this right had to be exercised in any particular way.[122]

He then, however, argues that implementation of this right would require enabling legislation.[123]

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[121] "Indian Government: Expanding the Horizons", presented to the Montreal Learned Societies Conference,1985:12

[122] Op.cit.40

[123] Op.cit.41

Gibbins[124] suggests that the government will deal with representative Indian governments, rather than with each band. Given the political and cultural differences between more than 550 bands, it may prove impossible to have representative governments speaking for many bands. The Canadian government may have to deal with Indian governments representing cohesive political entities, and this may well amount to a number nearly the same as the present number of reserves.

The constitutionalized principle of Indian government can be implemented through a single macro-structure. The fiscal requirements for each government will still have to be differentially calculated and administered **via** internal criteria, on a band-to-band basis. Since the bands would be doing the administrating, the federal government would face only minor logistical problems in negotiating issues and conferring funds to the First Nations.

The constitutional amendment must recognize the right of First Nations to Indian government. It must acknowledge the inherent nature of the right, and the formal relationships Indian government will have with federal and provincial governments. Its fiscal and political rights and responsibilities

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[124]Ibid

must be stipulated. This amendment will enable Indian governments to be created without defining the form their internal structures and processes must take. The particular means each First Nation might choose to exercise its right of self-government need not, and should not, be addressed in the constitutional amendment. Those internal structures and processes should be left to the First Nations constitutions.

If Indian government were to become a third constitutionally recognized form of government, with powers specified **via** constitutional amendment, some existing federal and constitutional mechanisms would have to be adapted, and some new ones created. At present, Canada's bilateral federalism functions further to heads of power allocated to each order of government, codified in the Constitution Act 1867. This is the formal structure:

CANADA

PROVINCIAL GOVERNMENT S.92	FEDERAL GOVERNMENT S.91

As discussed above, the theoretical relationship between the two governments is one of equality, and ideally, of constitutional separation. Because of inadequacies in the old BNA Act 1867, and because of the dynamic nature of Canadian federalism in practice, new structures and

informal and quasi-formal mechanisms have evolved. Perhaps the best-known structure is the federal-provincial intergovernmental affairs office, which has enhanced the practice of executive federalism. This practice is intended to achieve intergovernmental consensus and co-operation on matters affecting both orders of government. As with other federal structures, it works imperfectly but sufficiently well to be useful.

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                                CANADA
PROVINCE <--> INTERGOVERNMENTAL RELATIONS <--> FEDERAL
  GOVT        (Extra-Constitutional Process)     GOVT
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This example shows the ability of Canadian federal structures to evolve, to provide contemporary mechanisms to maintain a healthy contemporary federal governmental structure.

Trilateral federalism would operate thusly:

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                          CANADA
PROVINCE    <---------->  FEDERAL   <---------->  INDIAN
GOVT                      GOVT                    GOVT
    <-------------------------------------------->
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The arrows indicate the extension of intergovernmental mechanisms to accommodate three orders of government.

The constitutionalization of Indian government and its powers by way

of "s.93" would require clarification. For example, provincial law now extends to all persons present in the province, further to the provinces' constitutionally-specified areas. Federal law applies to all Canadians, and to non-Canadians in the country. Both jurisdictions have a geographic area to which their authority extends, further to unique constitutionally-enumerated heads of power. With the constitutionalization of Indian government, its authority and jurisdiction would have to be defined vis à vis the existing orders of governments.

Presently, all provincial law of general application applies on reserves, provided that it does not conflict with valid federal law.[125] This could easily be amended so that valid Indian law would exclude provincial law from the field. Provincial laws of general application would continue to apply unless Indian First Nations acted to pass valid legislation.

A further consideration is the terms of reference for Indian First Nations constitutions. Indian politicians claim an inherent right to self-government that may not be circumscribed by federal or provincial limitations, nor by the Charter of Rights and Freedoms. Arguably, though, Indian governments will have to conform with the Charter, as the supreme

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[125]Section 88 of the Indian Act, R.S.C. 1985

law of Canada. Indians are also Canadians, and a third order of government would be equal, not paramount, to the existing orders of government. If self-government is envisioned within the Canadian state, the Charter must apply to it. If self-government refers to autonomous states only geographically in Canada, a new debate is born -- one with no likelihood of success. To date no reputable Indian leader, or organization, has advocated secession from Canada.

Fears have been expressed by some scholars and politicians that the mechanisms required for trilateral federalism would be too complex to be practical.[126] Additionally, it has been suggested that jurisdictional uncertainty would make a third order of government unworkable.[127] However, constitutionalization of powers would ensure jurisdictional and judiciable certainty; a constitutionally-recognized amendment recognizing Indian governments as sovereign for the purpose of legislating and administering specific kinds of laws on Indian land is also necessary.

Nor should this be politically unpalatable to the provinces. The only

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[126]Gibbins, "Indian Government: Expanding the Horizons of Discussions" presented to a joint meeting of the Canadian Sociology and Anthropology Association and the Canadian Politican Science Association, Montreal, May 31, 1985; Schwartz, First Principles: Constitutional Reform With Respect to the Aboriginal Peoples of Canada 1982-1984, Queen's University, 1985

[127]Ibid

complex equation to be developed is the formula for Indian revenue participation in the nation. This will mean, at least initially, the equivalent of equalization grants for the socially and economically depressed reserves.

While the fiscal basis of aboriginal governments has been a subject at every s.37 conference, there is no agreement on the part of the federal and provincial governments as to how this shall be provided -- which is to say, from whose coffers the money shall come. Schwartz suggests that

> It may in fact be that the only way to reach constitutional agreement on fiscal arrangements will be to find language that establishes some sort of equalization norm but dodges the federal-provincial issue.[128]

To date the federal government has not dealt with the matter of levels of funding, nor of federal/provincial participation.[129] Rather, these matters were raised at the last First Ministers Conference in March, 1985, as subjects for continued study.

An argument in support of purely federal responsibility for aboriginal people suggests that "If there are local sentiments against providing special assistance for aboriginal peoples, they will tend to be felt less acutely in

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[128]Op.cit.178

[129]Ibid:179

Ottawa than by a provincial government."[130] The notion that Indian interests are best represented by the central government is not new: it has been cited as the reason s.91(24) was given to the federal government alone. The 1983 Penner Report argued for full federal funding of Indian governments. Gibbins[131] has suggested that sharing in the financial pie will place an obligation on Indian governments to contribute to the pie **via** tax revenues. He warns that failure to contribute may result in objection by the dominant society to Indian "free-rider" status.[132]

Schwartz modifies this argument somewhat, arguing that implicit treaty exemption of Indian property from taxation should not be treated as a reason for the federal government to argue the lack of Indian contributions excuses the government from a responsibility to provide services.[133] However, he goes on to say that

> Indian First Nation governments will have to accept that unless a treaty justifies their exemption, they will be expected, like any other government, to raise a certain amount of their revenue by internal taxation.[134]

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[130]Ibid:186

[131]Op.cit.

[132]Ibid:3

[133]Op.cit.145

[134]Ibid:166

This suggests a potential for different rights being recognized for treaty and non-treaty First Nations.

Gibbins[135] has suggested that existing regional equalization funding formulae, predicated on the difference between required revenue and revenue available to governments from taxation, are not amenable to Indian governments. But new equations can be developed to provide consistent and adequate funding for First Nations governments. Indeed, if the existing equation were used, and if it were calculated as though reserve governments **could** tax income earned on the reserves, the grants would be forthcoming. Reserves are so economically depressed that currently there are few real sources to tax.

Such a scenario poses problems -- none insurmountable once constitutionalization of the third order of government is undertaken. For instance, non-Indians and Indians earning income on reserves presently pay no tax to the tribal government. The non-Indians are taxed by the federal government. Clearly, the provinces and federal government would have to vacate the area of income taxation on Indian land if the new governments were to have any funding sources internally. This fiscal reality is the same

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[135]Op.cit.

for treaty and non-treaty Indian nations. The Income Tax Act would require amendment to reflect any such new arrangement. Still, these are procedural problems that are more easily dealt with when principles are clarified. Other revenue sources available to Indian governments could include taxing oil and gas and other resources produced on reserves; taxing goods on reserves; selling business licences, and any number of other possibilities.

Non-Indians would be in the same political position as landed immigrants are now in Canada. The latter pay all income taxes, but exercise no political voice in the nation. They do, however, hold civil rights.

Because of the small land base involved, and the current under-development on Indian lands, the potential for economically self-sustaining governments is lacking. Most Indian governments will never be in a position to pay the full costs of government and public services. Neither will Prince Edward Island and Newfoundland; both have been subsidized by Canada since Confederation. Still, Canada and the provinces do not argue that the acutely impoverished regions of Canada must pay their own way or amalgamate with another province or jurisdiction.

Clearly, Indian government cannot be accommodated by existing federal structure without some revision. The federal-provincial constitutional

relationship, and extra-constitutional processes such as executive federalism, are designed and developed for only the federal and provincial governments. Inclusion of a third order of government would require both a constitutional amendment, and an expansion of the existing extra-constitutional federal-provincial relationships to include the third party/parties.

One difficulty that Indian government would pose to classical federalism concerns the application of powers of all levels of government to all citizens. For this degree of co-ordination to exist, Indian government authority would have to inure to an Indian land base. All persons in that area would have to be subject to Indian government. Indians in provincial territory would fall within the jurisdiction of the provincial government. If Indian government inured to individuals and territory, there would be some difficulty with jurisdictions and authority. Little Bear, Boldt and Long say that:

> Although aboriginal land claims and the irrevocable rights to reservations are crucial concerns to Indians, their concept of self-government and nationhood is not exclusively geographically based. Because the reserves cannot support all of their people, the significant boundaries of nationhood and self-government for Indians are defined in terms of political, economic and socio-cultural criteria. Indians are asking for a special status for their people, whether on the reserve or off.[136]

This statement may confuse the claim to self-government with the claim to

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[136]Pathways to Self Determination, University of Toronto Press, 1984:xvi-xvii.

aboriginal rights generally. Special status is not restricted to the jurisdiction of Indian governments. Neither aboriginal rights claims nor the treaty provisions contain reference to **situs** as a requirement for exercising these rights. Further, as it is proposed, Indian government should address all concerns on reserves. This implicitly contemplates exclusion of the federal government from legislative areas presently within its area of competence.

Jurisdictional Issues

There is no doubt that Indian government would add another jurisdiction to the Canadian polity. Even under the Indian Act, band councils have some specified, limited powers attached to reserve lands and residents. Legislated government, such as the Sechelt Act,[137] expands the scope of matters within band council jurisdiction. Indian governments on the order addressed by this thesis stand to have a much greater jurisdictional scope than these two varieties.

Several provinces have expressed objections to potential Indian government 'encroachment' on what are now exclusively provincial matters. Some scholars have suggested that Indian government would impinge upon the extent to which Canadian citizenship and provincial residency rights are

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[137]The Sechelt Indian Band Self-Government Act, S.C. 1986

presently enjoyed by Indians.[138] Others suggest that Indian government jurisdiction over off-reserve Indians, if any, must be clarified.[139]

Aside from the concern regarding jurisdictional conflict stemming from ordinary legislation emanating from three orders of government, there is some concern regarding Charter guarantees and Indian government.

A number of Indian politicians have argued that the Charter is irrelevant on Indian land. This will not be a successful argument. A revised, i.e. trilateral federalism, or indeed, any constitutional amendment recognizing Indian government, would still assume universal fundamental individual rights as an attribute of Canadian citizenship. The Charter protects the individual rights of all Canadians. Indians are Canadians; the Charter protects the individual rights of Indian Canadians. Indian government would, in my view, be more properly concerned with the rights of the group, the membership of which is constantly changing by birth and death.. Indian governments would be primarily concerned with perpetuation of the group, further to aboriginal and treaty rights.

The issue of jurisdiction raises some specific arguments regarding Indian

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[138]Gibbins, Op.cit.2-3

[139]Schwartz, Op.cit.18

governments' parameters. Education, health care, policing, labour standards, environmental protection standards, and many other matters are potentially affected by constitutional or legislative enactment recognizing a third order of Indian government. Many of these matters require co-ordination between, and co-operation by, all governments involved, in order to have effective policy and to protect the interests of all Canadians. Finally, the dictates of economies of scale may encourage Indian governments to contract with the provinces for some services, such as health care and policing.

Many of these problems already exist. Reserves are treated for the most part as federal jurisdictions, although s.88 of the Indian Act allows all provincial laws of general application to extend to reserves. Jurisdictional duplication exists, as well. For example, with regards to education, the federal government has responsibility for providing for schools and teachers on reserves. The exception exists where bands have taken over responsibility for reserve education. Education, under the Constitution Act 1867, is a provincial responsibility, but not on reserves. This has resulted in two jurisdictions, with different standards, different hiring practices, different curricula, and qualitatively different student results. DIAND teachers are paid less than their provincial counterparts. DIAND schools receive less money per student. Students from DIAND reserve schools receive an

arguably inferior education; graduates experience some difficulty when entering universities and colleges.

Where bands have taken over education, teachers are retained by the band. The band selects and approves the curriculum. I have no data to confirm that band schools provide better or worse education than did DIAND schools; however, band schools receive the least funds per student of the three categories,[140] and have the best student success rates.

Funding Issues

The question has been raised regarding the cost of Indian governments. Some will argue that the country cannot afford the luxury of self government for so small a segment of the population. For example, Frideres[141] states that reserves are "small, isolated regional economies ... and as such are not economically viable", and therefore the costs to Canada of supporting Indian government are not warrented. However, Marule writes that

> In 1970, at the time the Canadian government was promoting its termination policy for Indians, it offered $50 million to more than 250,000 Indians through the Indian Economic Development Fund while at the same time it granted $725 million to Prince Edward Island, which has a population less than half the number of Indians in Canada and a land base only a fraction of the size of the

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[140]Canadian Education Association Statistics, 1984.

[141]Presentation to a joint session of the Canadian Sociology and Anthropology Association, Learned Societies Conference, Montreal, 1985:7

reserves in Canada.[142]

Certainly, implementing self-government in any form, and in particular as called for by the Penner Report, will cost the country in initial funding and settlement of land claims. The provinces are reluctant to surrender land and resources to fulfill land claims and outstanding treaty and aboriginal rights. In the long run, however, the cost would be less than the present horrific social cost of underdevelopment, unemployment, isolation, and their companions of family disintegration and dispair.

Since the 1950s, there has been increased joint federal-provincial activity, largely because of the exercise of the federal spending power in areas of exclusive provincial concern, and the development of intergovernmental mechanisms. This has positively influenced the range and quality of many services. (Provinces also complain that it negatively affects their ability to set long-term financial and political objectives.) As well, the federal government for several decades has made direct cash grants to the provinces, to ensure that all Canadian citizens enjoy equal social benefits throughout the country regardless of regional economic disparity -- although Indian Canadians have not benefitted from this federal spending. The

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[142]"Canada's Termination Policy", One Century Later, I. Getty and Don Smith (eds.), UBC Press, 1978:112

Penner Report[143] notes that

> ...the serious infrastructure deficiences that now predominate in most Indian communities several inhibit economic development. ...(A) high proportion of Indian communities do not have adequate water supplies, sewage systems, roads or housing.

Yet no joint federal-provincial activity has occurred to ensure equality of services to Indian Canadians. The provinces protest that the federal government has sole responsibility for reserve residents. However, the provinces are happy to extend their jurisdiction over reserves when no price penalty is attached.

Manuel and Posluns discuss the origins of Confederation in relation to Indian self-government:

> It was the demand for home rule and responsible government in Upper and Lower Canada that gave rise to an enduring partnership among the provinces of Canada and between the dominion and her mother country. When Quebec and Canada were united as one province for 25 years they discovered that responsible government without home rule is meaningless. Confederation guaranteed local autonomy, at least for the two major powers participating. The smaller and poorer Maritime provinces demanded grants that would provide them with the economic power to enjoy their local autonomy. Prince Edward Island and Newfoundland stayed out of Confederation until they achieved terms they considered favourable. The New Brunswick government, which agreed to terms its people found unfavourable, was defeated and a more responsible and representative government took its place. If the western provinces and British Columbia appear to have accepted whatever they could get at the different times they entered Confederation, they have never stopped pressing their demands since they have been allowed

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[143]Op.cit. 74

to sit at the negotiating table.[144]

These practices and the principles behind them are amenable to application to First Nations governments. The Penner Report discusses these federal-provincial fiscal arrangements, and says that "There is no reason to be any less innovative in funding Indian First Nations governments, whose diversity is even greater."[145] The Report recommends the direct grant system, because "In Canadian parliamentary practice a grant has legislative force, and Parliament takes full responsibility for the payment. This is what makes the grant so well suited to Indian self-government.[146]"

Direct cash grants would enable bands to set social and economic objectives without reference to restrictive guidelines and circulars. The latter generally are drafted to facilitate federal priorities and policy rather than the bands'. Additionally, direct grants are more stable than conditional funding further to guidelines and circulars. It has been said earlier and bears repeating: fiscal stability is vital for viable Indian government.

The Penner Report's funding principles[147] were:

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[144]Op.cit. 218

[145]Ibid:101

[146]Op.cit. 96

[147]Ibid:98-102

1. Indian governments' funds should be transferred in a single payment. Allocation for services and administration to be done internally by Indian governments.

2. Extraordinary funds should be transferred for economic development, and for upgrading community infrastructure to standard.

3. All federal programs available to individual non-Indian Canadians should be available to Indian Canadians as well.

4. Global amount of the funds above should be negotiated by a designated minister and First Nations representatives.

Cheffins and Tucker[148]note that the British North America Act provided for fiscal arrangements so that the federal government could compensate provincial governments by the payments of per capita grants, and other grants. They add that:

> There are still a wide variety of special provisions designed to assist the poorer provinces, so that they may provide for their people a standard of living comparable to that in the richer provinces.[149]

Smiley observes that "The distribution of revenues and revenue sources between the central and the state/provincial governments is crucial to any federal system."[150] He goes on to say that fiscal imbalances can be corrected by a redistribution of functional responsibilities, a redistribution of

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[148]The Constitutional Process in Canada (2d), McGraw-Hill-Ryerson, 1976

[149]Ibid:118

[150]Op.cit.163

the sources of taxation, or a redistribution of public revenues in the form of grants.[151] Indian government will likely exhibit hallmarks of Smiley's first and last redistributive mechanisms.

Indian governments, now dependent on DIAND-approved funds for DIAND-approved purposes, are unable to aggressively and freely initiate political and economic development on reserves. A trilateral federalism would of necessity include means of funding all orders of government.

Gibbins,[152] as mentioned earlier, has argued that access to equalization funds will be tied to taxation. While the present formula for calculating funding eligibility is tied to government income from a variety of bases, including taxation, the formula is not written in stone. As with constitutional and federal structures and processes, funding procedures will have to be drafted to reflect the particular needs and rights of First Nations **vis à vis** Canada. Need and eligibility can certainly be standardized and calculated from formulas not including potential tax. And, if potential tax were a criteria, First Nations would have to create mechanisms, further to the constitution entrenchment of self-government, to co-ordinate tax assessment. This may include residency of individuals on Indian land, and

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[151] Ibid

[152] Op.cit.

be tied to minimal levels of income generated. At present, with most Indians on social assistance and few making the national wage average, the taxation base would be small.

Gibbins[153] notes that the non-Indian public will likely perceive Indians to be "free-riders" if they have the elected franchise, access to funding and social programs, and self-government, yet pay no taxes. However, a cogent argument can, and probably will, be mounted, to the effect that Indian nations have given up far more than the Canadian state can hope to provide for these nations. Finally, the cost of financing the economic and social ghettos that are the reserves could conceivably be replaced by funding for viable, healthy, contributing communities under Indian government - which in the long run will be good economic news for the nation.

Canada has developed innovative fiscal arrangements to ensure that non-Indian Canadians receive comparable services throughout the country. Indian reserves are substandard with regards to the services provided for, and the quality of life expected by, the rest of Canadian citizens. There seems to be no philosophical or practical bar preventing Canada from using equally innovative means of correcting this inequity.

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[153]Ibid:3

The Penner Report[154] declared that "Indian First Nations must have the power to plan and implement economic ventures at the community level." It went on to recommend that Indian governments be granted a "strong economic base" with full control over goals, strategies, and methods, and that First Nations receive funds to correct "any serious deficiencies in community infrastructure".[155]

The Penner Report cited research findings on absorption of 'Indian' money by DIAND.

> (Coopers and Lybrand, research consultants to the Penner Committee) concluded that one-quarter of the funds expended in 1981-82 ... or about $250,000,000, went to administer it (DIAND). A further $39,102,000 was spent on general departmental administration. In their opinion, administration costs accordingly amounted to more than 25 per cent of total expenditures.[156]

The Report went on to say that

> Every 5 years the federal government submits legislation to Parliament to provide a statutory basis for annual payments under these (federal equalization payments) programs. The Committee believes that a comparable practice would be appropriate for Indian First Nation governments...[157]

In the event of an expanded federal structure, the fundamental tenets

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[154]Op.cit. 75

[155]Ibid:76

[156]Op.cit. 89

[157]Ibid:97

of federalism -- equality of the distinct orders of government and autonomy within their constitutionally defined spheres of jurisdiction -- would remain the same. The fiscal and administrative arrangements presently existing between the federal and provincial governments would have to be extended to Indian governments.

Trilateral federalism would offer the most opportunity for Indian political and economic development. It could provide the guarantees for treaty and aboriginal rights (now presently disputed by the provincial and federal governments) by means of explicit constitutional enumeration. Constitutional amendment is also required to set forth the mechanisms and parameters for Indian government.

Aboriginal Rights and Law

Aboriginal and treaty rights are only indirectly protected by the Charter. However, aboriginal and treaty rights are constitutionalized, both indirectly by s.25 and dirctly by s.35, and, perhaps, by the treaties themselves. Lysyk says that

> By recognizing and affirming existing aboriginal and treaty rights, however, s.35 may be taken to "constitutionalize" these rights to the extent at least of attracting the protection of subs 52[1] of the Constitution Act: "The Constitution Act is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or

effect."[158]

Although "aboriginal and treaty rights" are inarguably part of Canadian constitutional law, there is still some debate regarding the compulsion on government to facilitate specific implementation of these rights. As discussed earlier, self-government has assumed primacy of these rights.

An examination of international and domestic law may lend some weight to Indian claims and some impetus to the constitutional process under s.37(1) of the Charter.[159] Berger says that

> If we wish to live in a world based on the rule of law we must acknowledge that the claims of the Native peoples of the New World are not ancient, half-forgotten and specious. They are, in fact, current and contemporary. Arguments for the rule of law in international relations can never be soundly based until the nations that have dispossessed and displaced indigenous peoples accept the precepts of international law that now require a fair accommodation of indigenous peoples in their own nations.[160]

Canada will find that international law has much to say on this matter. Further, the most compelling of international laws on this subject

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[158]Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada". The Canadian Charter of Rights and Freeedoms(Tarnopolsky and Beaudoin, eds.), Carswell, Toronto, 1982:477

[159]Section 37 (1) sets forth the series of constitutional meetings designed to clarify the content of aboriginal and treaty rights.

[160]Berger, Village Journey, Collins Publishing, 1985:182

have been incorporated into Canada's domestic laws, and even into the Constitution. Accordingly, international law will be instructive for interpretation of the specific meaning to be given to these constitutionalized rights.

Indian nations have demanded rights that go beyond those generally accorded to minorities under international law, because of the claim of aboriginal rights, which confers rights additional to those of other citizens. Opekokew says that

> Minorities are accorded two collective human rights in international law: the right to physical existence and the right to preserve a separate identity. They do not however have the right of self-determination nor the right to use natural resources as other peoples do.[161]

Minority rights have traditionally not been sustained by international legal remedies.[162] For this reason, indigenous peoples have rejected classification as minorities for the purpose of international law.

The internationally-recognized right of self-determination (both the Covenant on Civil and Political Rights, and on Economic, Social and Cultural Rights, guarantee self-determination) gives to all peoples the right to choose their own government. Indian people have been hidden from the

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[161]Op.cit. 7

[162]Sanders, Op.cit. 1985:292

scrutiny of international opinion and law by the Canadian contention that Indians are a domestic minority, an enclave population beyond the pale of the covenants.

International law is very specific on the issues of self-determination and decolonization. Since World War II, the international community has recognized colonial occupation as a wrong. Numerous covenants and declarations have been passed by the United Nations General Assembly on this subject, most notably the 1960 UN Declaration on Decolonization. Canada is a signatory to these.

Sanders has suggested that "indigenous minorities can argue that they are not simply minorities but victims of colonialism".[163] He goes on to argue that "an extension of decolonization principles" to indigenous peoples "would result in the formalization of systems of local autonomy rather than the achievement of full independence".[164]

The 1978 United Nations Conference on Racism, in its final statement, said that

> (8) The Conference urges States to recognize the following rights of indigenous peoples: ...(c) To carry on within their areas of settlement their traditional structure of economy and way of life;

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[163]Ibid:293

[164]Ibid:293

> this should in no way affect their right to participate freely on an equal basis in the economic, social and political development of the country.[165]

This statement is compatible with the response of the Chiefs of Alberta to the 1969 federal policy paper "Choosing a Path"[166] (better known as the White Paper). The Chiefs' "Red Paper"[167] called for recognition of Indians as "Citizens Plus." This, they argued, meant that in addition to the rights and duties of Canadian citizenship, Indians had aboriginal and treaty rights.

The Charter of Rights and Freedoms, which protects "treaty and aboriginal rights", is based on precepts found in international law. This should cause Canada to look to its international obligations in conjunction with its constitutional obligations for guidance on principles and implementation. Cohen and Bayefsky say that

> ...the supreme law of Canada is indissoluably linked by language and ideology to important international instruments and principles to which Canada subscribes, (which) assures the inevitability of some resort to these 'external' international legal documents and ideas in order to be certain that on appropriate occasions the 'proper' meaning is given to the Charter.[168]

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[165]Cited by Sanders, "Aboriginal Rights: The Search for Recognition in International Law", Aboriginal People and the Law, Bradford Morse (ed.)1985:301

[166]Queen's Printers, Ottawa, 1969

[167]"Citizens Plus", Indian Association of Alberta, Edmonton, 1970

[168]"The Canadian Charter of Rights and Freedoms and Public International Law", Canadian Bar Review, 1983:267

The nature of Canadian federalism, with the two orders of government sovereign within their constitutional spheres, makes Canadian acquiescence to international law more difficult than for unitary states. Only the federal government may undertake international obligations and participate in supranational political fora on behalf of the nation. However, the federal government may not unilaterally undertake obligations that extend to the provincial constitutional sphere. Any such undertaking is subject to domestic legislative enactment before either the federal or provincial governments are bound. For example, a treaty signed with another state has no domestic force until it is ratified by Parliament -- and even then it may not oblige provinces to perform, or abstain from performing, actions falling within provincial constitutional juisdiction. Both orders of government must pass 'enabling and ratifying' legislation.[169]

Still, there is some pressure on the Canadian government to conform to its international obligations once it has assumed them. Brudner notes that

> It is well-established principle of customary international law that a state is obliged to make whatever domestic legal changes are necessary to comply with its international obligations. It may not, in other words, rely either on domestic statutes or on constitutional law as a defence to an allegation of non-compliance.[170]

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[169]Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework", Universit of Toronto Law Journal, 1985

[170]Ibid:221

This rule is binding only on international tribunals; domestic courts are under no absolute compulsion to follow it. However, there is in Canada a legal presumption that, in the absence of explicit statutory intent, legislators do not intend to violate their international obligations. While a state may pass domestic legislation in violation of its international obligations, courts will assume that ambiguous legislation was not intended to violate international committments.[171]

If inherent Indian government were acknowledged to be a right, substantiated by international law to which Canada subscribes, the possibility of achieving constitutionally-entrenched Indian government would be strengthened.

Brudner suggests that

> It would appear that international conventions can affect municipal rights directly only if the convention is evidence of a custom automatically assimilable into domestic law. Even then, the rule of customary law will not prevail against an inconsistent domestic statute...[172]

This means that provinces would have to prove that international law was either not ratified, could not be invoked because of constitutional incompatibility, or that it was in conflict with explicit legislation.

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[171] Ibid:232

[172] Op.cit.247

Still, with all the difficulties attendant in invoking international law in defence of constitutional Indian government, it must be remembered that the Charter was drafted with Canadian international obligations in mind.[173] As Brudner says, "Whether or not a province can, by means of a clear statute, validly legislate in violation of international law, it certainly cannot do so in violation of the Charter."[174]

McWhinney argues that

> The recognition of the legal rights of the native and Indian peoples based on international and treaty law requires implementation of the principles of full political, social and economic self-determination with Canadian federalism. ... The express constitutional entrenchment of the new constitutional role of the native and Indian peoples remains the necessary conclusion.[175]

There will be a strong presumption in favour of Charter supremacy, and of the application of the international Covenants, by the Supreme Court of Canada.

Conclusions

The many years of colonial legislation and liberal attempts to, firstly, acculturate Indians and secondly, to assimilate them, have not worked. The social, economic and political assumptions inherent in Canada's policy of

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[173]Cohen and Bayefsky, Op.cit.

[174]Op.cit.239

[175]Op.cit.122

assimilation must be revoked. Its objectives were wrong and remain so. It's effect has been unfortunate for Indians and for all Canadians. Where to date assimilation has been pursued, now cultural and political differences must be respected. The Canadian penchant for denying Indian rights, or recognizing them only in their most limited and innocuous form, must be replaced by recognition of the paramount right, that of self-government. The Penner Report notes that

> In the past the prevailing approach to indigenous peoples has been to hold up eventual self-government as a reward for adapting to the customs of the dominant society. This assumption must be turned on its head. Indigenous peoples will evolve and prosper only under self-government.[176]

Smiley[177] suggests that in a federal nation, the most politically salient aspects of human differentiation, identification and conflict are related to specific territories. The creation of Indian self-governments, with a land and economic base, would facilitate mediation of what have inarguably been issues of differentiation, identification and conflict. All policy to the present has not obliterated the difference; it has merely exacerbated the tensions. And, as Sanders points out, "... we have chosen federalism over a unitary state for the same kinds of reasons that would underlie a decision to

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[176] Op.cit.136

[177] Op.cit.

continue structural pluralism in relation to Indian Communities."[178]

Indian governments' links with federal and provincial governments could easily be adapted from existing mechanisms for federal and provincial communication. These include federal/provincial conferences, bilateral and trilateral meetings, and intergovernmental offices. Alternatively, or perhaps concurrently, new mechanisms could be developed. The Ministry of State for Indian First Nations, recommended by the Penner Report, is just such a possibility.

First Nations are diverse elements, both among themselves and with regards to the dominant society. Acceptance of this difference, and provision of political, economic and constitutional means for its healthy development and co-existence instead of for its suppression, would be to the benefit of all concerned. Smiley says that "The master-solution of federalism is to confer jurisdiction over those matters where diversity is most profound and most divisive to state or provincial governments."[179] Certainly not all matters affecting First Nations can be unilaterally dealt with by First Nations governments. For reasons of magnitude or national interest, and because of

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[178]Op.cit.272

[179]Op.cit.87

the consequences of a highly technological society, there may be some areas of government (for example, policing and health care) which would be better handled through co-operative and administrative federalism. Again, this poses no political or philosophical problem for Canadian federalism.

There is a difference between technical, fiscal and political impossibility. Boldt and Long argue that

> The main problem in regard to establishing aboriginal government is not the want of a 'feasible' abstract model; it is the want of political will on the part of provincial and federal governments to grant meaningful governing powers to aboriginal peoples.[180]

Goodin[181] says that "manipulative politicians do their best to blur the distinction, passing off self-imposed impossibilities for real ones." Political considerations range from the potential of an issue for mobilizing electoral support, to economic and technical concerns, to the relative priority of the issue with other issues of the day. Self-government has limited potential for securing non-Indian votes. While technically and constitutionally possible, it will be costly. Taxpayers will be reluctant to assume the burden, regardless of its justice.

Finally, because of the relative insignificance of the population affected,

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[180] Op.cit.9

[181] Political Theory and Public Policy, University of Chicago Press, 1982, 192:131

the issue of self-government has little potential as a priority on the political agenda. The AFN has charged that "What is missing is political will."[182] The AFN was of the opinion that if the federal government wanted to do so as a matter of priority, it would see that the goal of Indian self-government was achieved. The technical problems would be secondary.

The philosophical constructs underlying the Canadian form of government will not pose a problem for inclusion of constitutional Indian government. Canadian federalism is compatible with the arguments in favour of Indian government.[183] Parnell says of the Indian request for self-government that

> They want the same right as other Canadians to manage their own affairs and develop their own institutions. This is not separatism, but rather an accepted way of participating in the Canadian mosaic.[184]

The claim is phrased as a right, not as a privilege. It is the most important right stemming from aboriginal rights. Aboriginal rights have not been extinguished in Canada, by any means recognized in international or

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[182]Minutes of the Penner Committee, 69:16, 1983

[183]Sanders, Op.cit., 1983:272

[184]Op.cit.199

indigenous law. Goodin[185] notes that rights are meaningless if it is not possible to exercise the options rights provide. If people have rights, and make choices based on those rights, government should fulfill the requisites for realizing their choices. Goodin says that "Guaranteeing people's formal legal status is not enough to secure their self-respect. We must also stipulate something about substantive outcomes."[186]

Even while allowing indigenous peoples platforms from which to make their political positions known, the Canadian government has made no commitment to actualizing these political choices. Indigenous peoples have been the poorest of Canadians. Calls for an adequate land and economic base have met with obfuscation and implicit denial in the lack of political will to see this request even partly satisfied. Sanders notes that Canada has not yet come to terms with the political and economic implications of Indian self-government.[187]

Manual and Posluns claim that "The fastest way to bring about change among an oppressed people is to put the decision-making authority and the

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[185]Op.cit.76

[186]Ibid:90

[187]"Prior Claims: An Aboriginal People in the Constitution of Canada",Canada and the New Constitution (Beck and Bernier, eds), The Institute for Research on Public Policy, 1983

economic resources that go with it, into their own hands."[188]

Achievement of self-government will not obliterate all Indian problems overnight, or perhaps at all. Still, it is the right of those who will exercise it to make their own successes and mistakes. To Manuel and Posluns, "The Fourth World is not, after all, a Final Solution. It is not even a destination. It is the right to travel freely, not only on our own road but in our own vehicles."[189]

Towards this end, Canada must deal with the self-government issue. It must be dealt with in terms acceptable to native peoples, not **via** legislative enactments such as the Indian Act and the Optional Indian Government Legislation. Canada is an international leader in furthering equality and justice. It is time that this was substantively reflected at home, on reserves. Despite centuries of oppression, Indian nations are willing to join in Confederation, to participate in the continuing process of national development.

There are problems in achieving a constitutionally-entrenched Indian government now, over a century after colonization. The new Constitution

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[188]Op.cit.246

[189]Op.cit.

sets forth a formula for amendment that includes the provinces, even on matters outside of their constitutional competence. It is s.91(24) of the Constitution Act 1867 that gives to the federal government alone the authority to deal with "Indians and lands reserved to Indians". Indian government logically is beyond provincial constitutional authority. Yet, because of the amending formula, the provinces are involved. The provinces are committed to ensuring that Indian governments do not attain political parity with them.[190] Unwilling to open this constitutional can of worms, the federal government, while professing for over a decade that it wants self-government for Canadian Indians, will not contemplate substantive self-government based on aboriginal rights.[191] Yet, failure by Canada to come to grips with this issue could propel the nation into an era of indigenous bitterness and violence not yet seen here. Boldt and Long warn that

> The Canadian government is confronted with two choices. It can continue its thinly disguised, much despised policy of assimilation, or it can adopt a policy of meaningful self- determination for Indian tribes.[192]

There are those who say that Canada has enough problems coping with the cultural and political tensions between English and French, and with the

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[190]Boldt and Long, Op.cit. 1985

[191]Boldt and Long, Ibid:1985

[192]Ibid:346

disparity between geographic and economic regions. The nation does not, they say, need further stress deriving from myriad enclave governments on Indian reserves. But this is faulty analysis. The imposition of Canadian values and Euro-Canadian society on reserves has not created social or political congruity between reserves and the dominant society. The differences now threaten the political health of the country. Davies[193] says that

> It is now being affirmed that diversity in itself is not contrary to unity. It is also said that uniformity does not necessarily produce the desired unity. Indeed, artificially produced uniformity may be a source of weakness and hostility, while there may be strength in co-ordinated diversity with a multifaceted but harmonious whole, based on the particular characteristics of each component.

Canada's national and international moral stance and legal declarations make it incumbent on the nation to entrench and facilitate Indian government. It is clear that fundamental constitutional and federal structures will have to be revised to accommodate Indian government. We have an option to the fruitless Indian-government relationship of the last century. A trilateral federalism may serve this country well.

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[193] "Aboriginal Rights in International Law: Human Rights", Aboriginal Peoples and the Law (Bradford Morse, ed.), Carleton Univ. Press, 1985:752

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