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COMPARATIVE GOVERNANCE STRUCTURES AMONG ABORIGINAL PEOPLES IN CANADA

1. Introduction

The Royal Commission on Aboriginal Peoples summarized the criteria for effective government in a single sentence: “To be effective—to make things happen—any government must have three basic attributes: legitimacy, power and resources.”¹

More particularly, the Royal Commission explained:

- “Legitimacy refers to public confidence in and support for the government”;
- “Power is the acknowledged legal capacity to act. It includes legislative competence (the authority to make laws), executive capacity to execute the laws and carry on public administration, and judicial jurisdiction to resolve disputes”;
- “Resources consist of the physical means of acting—not only financial, economic and natural resources for security and future growth, but information and technology as well as human resources in the form of skilled and healthy people.”²

Different forms of Aboriginal³ government in Canada benefit from these attributes to varying degrees.

This paper explains the powers and resources at the disposal of Aboriginal governments recognized in Canadian law. Most of the discussion in this paper concerns First Nations in the

¹ Canada, Royal Commission on Aboriginal Peoples, *Report* (hereafter cited as “RCAP”), http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html (accessed March 28, 2008), vol. 2, *Restructuring the Relationship*, chap. 3, “Governance,” section 2.1, text corresponding to note 105.

² *Id.*

³ The term “Aboriginal” is used in this paper to refer to the Inuit and Metis, as well as those commonly referred to as Indians; when the term “First Nations” is used in this paper, it does not refer to either Inuit or Metis.

provinces. However different and useful models have been created through land claims agreements in the territories (Yukon, Northwest Territories, Nunavut) and with the Inuit (both in the territories and in Quebec and Labrador).

2. Basic principles

A. The inherent right to self-government

i. Aboriginal and government perspectives

For Aboriginal peoples, the foundation for the legitimacy of their governments is generally their inherent right to govern themselves. When presenting the Royal Commission on Aboriginal Peoples, co-chair Justice René Dussault of the Quebec Court of Appeal stated:

With regard to the establishment of Aboriginal Governance, we conclude that the right of self-determination is vested in all Aboriginal peoples of Canada. The right finds its foundation in emerging norms of international law and basic principles of public morality. By virtue of this right, Aboriginal peoples are entitled to negotiate freely the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.⁴

On the other hand, the policy adopted by the federal government consists of recognizing the inherent right of self-government based on “an approach to implementation that focuses on reaching practical and workable agreements on how self-government will be exercised, rather than trying to define it in abstract terms.”⁵ The federal approach therefore sees the legitimacy of Aboriginal self-government as arising not only from a people’s inherent right to govern themselves but also from their participation in a process that implements that right in practice.

⁴ René Dussault and Georges Erasmus, “Address for the Launch of the Report of the Royal Commission on Aboriginal Peoples,” 1996 http://www.ainc-inac.gc.ca/ch/rcap/spch_e.html (accessed March 28, 2008).

⁵ Indian Affairs and Northern Development Canada, *Federal Policy Guide: Aboriginal Self-Government; The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: 1995) (hereafter cited as “INAC, *Federal Policy Guide: Aboriginal Self-Government*”).

ii. Section 35 of the *Constitution Act, 1982*

The Supreme Court of Canada has stated that the legal basis for Aboriginal people having title to their lands is based on the fact that “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”⁶

However, the high court has not ruled on the Aboriginal right to self-government in general; instead it has held that for an Aboriginal right to be protected under section 35 of the *Constitution Act, 1982*, it must continue a practice, custom, or tradition integral to the distinctive culture of the group claiming the right dating from before European contact.⁷

When the British Columbia Supreme Court upheld the validity of the Nisga’a Treaty, it ruled that “the aboriginal peoples of Canada, including the Nisga’a, had legal systems prior to the arrival of Europeans on this continent and that these legal systems, although diminished, continued after contact.” However, the court did not have to decide anything more than whether the Nisga’a right to self-government included the power to negotiate a treaty, which was meant to give a clearer definition to their rights.⁸

A right to self-government nevertheless arises because Aboriginal rights can include a people’s regulation of their own traditional activities.⁹ Moreover, since one of the protected rights under the Constitution is Aboriginal title, the right to self-government is also exercised through a people’s decisions about use and disposition of their traditional lands.¹⁰ A right to self-government is also inherent to treaties with the Crown because “treaty rights do not belong to the individual, but are exercised by authority of the local community to which the [individual] belongs.”¹¹

⁶ *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at 328 per Judson J.

⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507

⁸ *Campbell v. Attorney-General of British Columbia*, 2000 BCSC 1123, [2000] 4 C.N.L.R. 1 at paras. 85, 169-71.

⁹ *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

¹⁰ *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at 1082-1083.

¹¹ *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 17.

B. The exercise of self-government rights through treaties**i. Historic treaties****a. Treaties of peace and friendship**

During the first two centuries of European presence in modern-day Canada—roughly from the arrival of Samuel de Champlain in 1604 until the War of 1812—the French and then the English made treaties and alliances with Aboriginal peoples for trading and military purposes.¹²

The Supreme Court of Canada has held that the practice of European powers entering into treaties of peace and friendship “clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.”¹³ Out of their desire not to endanger the alliances with Aboriginal peoples, the French and British authorities “allowed them autonomy in their internal affairs, intervening in this area as little as possible.”¹⁴

But the early treaty process was also based on at least two fundamental misunderstandings: concerning “possessory rights to the land and the authority of European monarchs or their representatives over Aboriginal peoples.” While the European powers assumed “that the monarch had, or acquired through treaty or alliance, sovereignty over the land and the people on it,” the Aboriginal peoples recognized neither.¹⁵

b. Land cession treaties

After the War of 1812 between Great Britain and the United States, imperial rivalries in North American diminished and so too did the military power of Aboriginal peoples. The old model

¹² RCAP, vol. 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at 123.

¹³ *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1053.

¹⁴ *Ibid.* at 1055.

¹⁵ RCAP, vol. 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at 124-125.

of peace and friendship treaties was abandoned by the colonial government in favour of land transactions in which “the Crown’s purpose was to secure First Nations lands for settlement and development.”¹⁶

By the 1850s a new model for treaties was set in present-day southern Ontario (then Upper Canada) and continued in the so-called numbered treaties, which by 1905 would cover most Ontario, the Prairie provinces, and even that part of British Columbia east of the Rocky Mountains. Under this model, First Nations ceded their title to land in return for the creation of reserves, the recognition of hunting and fishing rights, and certain other material benefits, such as education or money payments (annuities).¹⁷

While many First Nations still regarded those treaties that allowed for European settlement as creating a bond of peace and friendship with the Crown,¹⁸ the colonial¹⁹ and later the federal governments generally regarded them as simple cessions of land subject only to the rights reserved in the treaties.

ii. Modern treaties

a. Background

Treaty-making continued in Canada into the 1930s, but always as a continuation of the land cession model and by bringing new and more remote communities under the *Indian Act*.²⁰

¹⁶ RCAP, vol. 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at chap. “3. Treaty Making in Ontario, the West and the North”, text corresponding to note 25.

¹⁷ *Ibid*, text corresponding to notes. 25 to 30.

¹⁸ Renée Dupuis, “Les origines et les justifications des traités conclus entre la Couronne et les peuples autochtones au Canada” in Ghislain Otis, ed., *Droit, territoire et gouvernance des peuples autochtones* (Sainte-Foy, PQ: Presses de l’Université Laval, 2005), 31.

¹⁹ Treaties on Vancouver Island, referred to as the Douglas Treaties and concluded between 1850-54, provided for the purchase of lands by James Douglas, Chief Factor of Fort Victoria and Governor of the colony, for settlement and industry. In total, 14 land purchases of approximately 360 square miles around Victoria, Saanich, Sooke, Nanaimo, and Port Hardy were made.

²⁰ Canada, *The James Bay Treaty Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930* (Ottawa: Queen’s Printer, 1931), http://www.ainc-inac.gc.ca/pr/trts/trty9_e.html (accessed March 28, 2008).

First Nations were not given any options on the terms and it is not clear that they were always even able to understand the documents they were signing. For instance, after the Northwest Territories Supreme Court heard testimony in the 1970s from those still living who remembered the negotiations by which the Dene entered into Treaties 8 and 11 between 1899 and 1921, Justice Morrow held that a good case could be made that the First Nations did not agree to the written terms but understood them only as promises by the Crown of hunting and fishing rights, payment of annuities and relief, and ongoing friendship.²¹

In other parts of Canada, no treaty-making took place at all. In British Columbia, the provincial government refused to recognize any Aboriginal rights for most of the 20th century, and it would not make provincial Crown land available to create reserves through treaty (although reserves were created under federal-provincial agreements). In much of northern Canada, the federal or provincial governments saw no need to seek the surrender of Aboriginal title: this was the case in Yukon, large parts of Northwest Territories, northern Quebec, and Labrador. As a result, the federal government made no treaties whatsoever with the Inuit from the time of Confederation in 1867 until the James Bay and Northern Quebec Agreement in 1976.

b. A new era of treaty-making

The situation changed in the 1970s as Aboriginal peoples increasingly challenged governments in both the political arena and the courts. In particular, the Nisga'a of British Columbia brought the *Calder* case in which the majority of judges of the Supreme Court of Canada held that Aboriginal title was a form of property recognized in Canadian law but split on whether that title had been extinguished.²²

²¹ *Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (N.W.T. S.C.), reversed on other grounds (1975), 63 D.L.R. (3d) 1 (N.W.T.C.A.), affirmed on other grounds (1976), [1977] 2 S.C.R. 628.

²² *Calder v. Attorney-General of British Columbia*, *supra* note 6.

The federal government issued a policy statement shortly after the *Calder* judgment stating it was prepared to negotiate with Aboriginal peoples “on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest.”²³

The next year, in 1974, the Cree and Inuit of northern Quebec obtained an injunction to stop the James Bay hydroelectric development project on their territory.²⁴ After the injunction was overturned on appeal and before the case could be heard by the Supreme Court of Canada, the Cree and Inuit began negotiations with the federal and provincial governments, which resulted in the James Bay and Northern Quebec Agreement in 1976, the first modern land claims agreement.²⁵

Since then, several other land claims agreements have been reached, especially in Yukon²⁶ and Northwest Territories,²⁷ including the agreement resulting in the creation of Nunavut.²⁸ Fewer land claims agreements have been reached in the provinces: since the Naskapi of Quebec entered into a parallel treaty to the James Bay and Northern Quebec Agreement in 1978,²⁹ only the Nisga’a in British Columbia in 1999, the Tsawwassen and Maa-Nulth First

²³ As cited in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1104.

²⁴ *Gros-Louis et al. v. La Société de développement de la Baie James et al.* (1973), [1974] R.P. 38 (C.S.), 8 C.N.L.C. 188 (C.S.); injunction suspended by *James Bay Development Corporation v. Kanatewat* (1973), 8 C.N.L.C. 414 (Que. C.A.), application for leave to appeal dismissed (1973), [1975] 1 S.C.R. 48.

²⁵ *Société de développement de la Baie James et al. c. Kanatewat*, [1975] C.A. 166, application for leave to appeal granted (1975), 4 N.R. 482 (S.C.C.); appeal settled out of court by article 2.4 of James Bay and Northern Quebec Agreement and Complementary Agreements (Sainte-Foy, PQ: Les Publications du Québec, 2006), http://www.ainc-inac.gc.ca/pr/agr/que/jbnq_e.html (accessed March 28, 2008) (hereafter cited as “JBNQA”).

²⁶ Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, 1993.

²⁷ The Western Arctic Claim The Inuvialuit Final Agreement, 1984; The Gwich’in Comprehensive Land Claim Agreement, 1992; Sahtu Dene and Métis Comprehensive Land Claim Agreement, 1993; Tlicho Agreement, 2003.

²⁸ Nunavut Land Claims Agreement, 1993. In addition, the Nunavik Inuit Land Claims Agreement, 2006, recognizes the rights of Inuit resident in Quebec to lands and waters within the boundaries of Nunavut.

²⁹ The Northeastern Quebec Agreement, 1978.

Nations in 2006, and the Labrador Inuit in 2005 have successfully completed treaty negotiations.³⁰

Among Aboriginal peoples who have entered into modern treaties or land claims agreements, only the Nisga'a had a long experience with the *Indian Act* and reserves. Among the Cree of Quebec, most bands had no reserves in the 1970s;³¹ in Yukon, federal policy was to create no Indian reserves;³² and in Northwest Territories, most of the reserves promised under Treaty 11 were never created.³³ As for the Inuit, they are not subject to the *Indian Act* and therefore did not have reserves.³⁴

Finally, no modern treaty has been entered into by First Nations who are parties to one of the historic numbered treaties by which the Crown took surrender of Aboriginal title across northern Ontario, the Prairie provinces, and British Columbia east of the Rocky Mountains.³⁵ However in Northwest Territories, the Sahtu Dene and Metis, as well as the Tlicho (formerly known as Dogrib) have given up some of their rights under Treaty 11 in return for entering into new land claims agreements.³⁶

³⁰ Nisga'a Final Agreement, 1999; Tsawwassen First Nation Final Agreement, 2006; Maa-Nulth First Nations Final Agreement, 2006; Labrador Inuit Land Claims Agreement, 2005.

³¹ Jacqueline Beaulieu, *Localization of the Aboriginal Nations in Québec—Land Transactions* (Québec: Ministère des Ressources naturelles, de la Faune et des Parcs, 1998) at 48-65. The Naskapi had previously been on a reserve that was surveyed only in 1958 and created in 1960: *ibid.* at 158.

³² *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 at paras. 73, 76.

³³ Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland—A Study in Law and History* (Saskatoon: University of Saskatchewan Native Law Centre, 1990), at 47-48.

³⁴ Since 1951, Inuit are specifically excluded from the application of the statute: *Indian Act*, S.C. 1951, c. 29, s. 4(1), continued by R.S.C. 1985, c. 1-6, s.4(1).

³⁵ However the McLeod Lake Band in British Columbia has "adhered" to Treaty 8 on the grounds that its territory is situated within the treaty's boundaries, that is, to the east of the dividing line of the mountain range: McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement (1999); *McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement Act*, S.B.C. 2000, c. 8.

³⁶ Sahtu Dene and Metis Comprehensive Land Claim Agreement, 1993, ss. 3.1.10, 3.1.12; Tlicho Agreement, 2003, ss. 2.5.1, 2.6.1.

C. Consequences of the federal-provincial division of powers

i. Federal and provincial jurisdiction

The federal government has very broad authority over “Indians, and Lands reserved for the Indians” under section 91(24) of the *Constitution Act, 1867*.

Federal legislation can displace provincial rules that would otherwise apply and create special rules not just for reserve lands but also for individuals. For instance, wills and estates are normally a matter of provincial law because the provinces have jurisdiction over property and civil rights.³⁷ However the Supreme Court of Canada upheld a special system created by the *Indian Act* that makes the Minister of Indian Affairs responsible for administering the estates of status Indians who live on reserve.³⁸

In addition, the federal government has the power to enter into treaties that recognize rights for Aboriginal peoples that will apply notwithstanding provincial legislation. For instance, hunting and fishing rights under post-Confederation treaties with First Nations in Ontario take precedence over that province’s fish and game laws.³⁹

At the same time, Parliament has declined to legislate with respect to large areas of Aboriginal life. For instance, the education of First Nations children living on reserve is regulated by the *Indian Act*,⁴⁰ but not child welfare and youth protection.

Moreover, Parliament has chosen in the *Indian Act* to provide that where a matter is not regulated by federal legislation or a treaty, all provincial “laws of general application” will apply to Indians.⁴¹ For example, the provincial child welfare and youth protection system

³⁷ *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 (hereafter cited as “*Constitution Act, 1867*”), s. 92(13).

³⁸ *Attorney-General of Canada et al. v. Canard* (1975), [1976] 1 S.C.R. 170.

³⁹ *Cheechoo v. R.*, [1981] 3 C.N.L.R. 45 (Ont. District Ct.); see also *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915 at para. 43.

⁴⁰ *Indian Act*, R.S.C. 1985, c I-5 (hereafter cited as “*Indian Act*”), s. 4(3). In British Columbia, note the First Nations Jurisdiction over Education in British Columbia Act, S.C. 2006, c.10., and the First Nations Education Act, S.B.C. 2007, c.40. In Nova Scotia, note the Mi’kmaq Education Act S.C. 1998, c.24.

⁴¹ *Indian Act*, s. 88.

applies to Aboriginal children, whether or not they are status Indians and whether or not they live on reserve.⁴²

In addition, it is within a province's powers to adopt laws that affect Aboriginal peoples, provided they are not singled out by the legislation. For instance, the Supreme Court of Canada held that British Columbia's *Heritage Conservation Act* could regulate the possible presence of Native heritage sites as part of a broader scheme to protect all heritage sites.⁴³

Aboriginal peoples are therefore the constitutional responsibility of the federal government, but their interests can be affected and their members can be regulated by both levels of government.

ii. Federal and provincial roles in treaty-making

Only the federal Parliament has the power to make laws concerning "Indians, and Lands reserved for the Indians" under the Constitution.⁴⁴ In addition, Aboriginal title is an interest in land that is subject to federal jurisdiction and cannot be extinguished by a province.⁴⁵ The result is that only the federal government can take surrender of Aboriginal title or enter into treaties with Aboriginal peoples.⁴⁶

But at the same time, the provinces are presumed to own all public property (other than a few specified federal Crown lands, such as harbours or military fortifications).⁴⁷ The federal government therefore cannot set aside provincial Crown lands for Indians without the

⁴² *Director of Child Welfare for Manitoba v. B.*, [1979] 6 W.W.R. 229, [1981] 4 C.N.L.R. 62 (Man. Prov. Ct., Family Div.). The *Indian Act* does, however, regulate the administration of certain money and property to which children on reserve may be entitled: ss. 52-52.4.

⁴³ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146.

⁴⁴ *Constitution Act, 1867*, s. 91(24). For the purposes of the constitutional division of powers, Inuit are "Indians": *Re Eskimos*, [1939] S.C.R. 104.

⁴⁵ *Delgamuukw v. British Columbia*, *supra* note 10, at para. 173.

⁴⁶ *R. v. Batisse* (1978), 84 D.L.R. (3d) 377 (Ont. District Ct.).

⁴⁷ *Constitution Act, 1867*, ss. 108, 117.

province's consent.⁴⁸ On the other hand, the provinces own their Crown lands "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."⁴⁹ Since the courts have held that Aboriginal title is an existing trust that limits provincial Crown title, the provinces benefit when treaties are concluded.⁵⁰

The situation under Canadian constitutional law, therefore, is that while the federal government must be the primary treaty partner with Aboriginal peoples, the province will control most of the lands and resources the Aboriginal peoples claim.

This difficulty probably explains why since Confederation and to this day most treaty-making has taken place in Northwest Territories (which until 1905 included modern-day Alberta, Saskatchewan, and Manitoba, and until 1999 included Nunavut) and Yukon. In the territories, the federal government controls Crown lands: it could therefore offer certain interests in land to Aboriginal peoples (such as reserves) and it could receive in return the benefit of their surrender of rights or title.

3. The Indian Act model

A. Introduction

i. Origins of the Indian Act

The operation of the *Indian Act* is inextricably linked to the existence and administration of reserves. While the creation of reserves dates back to the 17th and 18th centuries and Roman Catholic missions to nations allied with the French,⁵¹ most Aboriginal peoples continued to live on their traditional territories without interference until the number of European settlers in British North America grew during the 19th century. From then on, setting aside reserves for First Nations became more common and legislation was created to administer them.

⁴⁸ *Ontario Mining Company Limited v. Seybold*, [1903] A.C. 73 (P.C.).

⁴⁹ *Constitution Act, 1867*, s. 109.

⁵⁰ *Delgamuukw v. British Columbia*, *supra* note 10, at para. 175.

⁵¹ RCAP, vol. 1, *Looking Forward Looking Back*, Part Two, *False Assumptions and a Failed Relationship*, chap. "3. Indian Policy: Protection, Civilization and Assimilation," text corresponding to note 23.

Even though land cession treaties were never negotiated in present-day southern Quebec (then Lower Canada) or the Maritimes, reserves were created for First Nations in those provinces throughout the 19th century.⁵² By the early 20th century, the creation of reserves in new areas of settlement became the norm in western Canada, with or without treaties.⁵³ At the same time, “First Nations were confined to smaller and smaller tracts, typically in areas that were least suited to European settlement, agriculture or resource extraction,” and their own traditional use of other land became increasingly difficult.⁵⁴

After Confederation in 1867, the new federal government was given responsibility for “Indians, and Lands reserved for the Indians.”⁵⁵ Whether or not they were parties to treaties, First Nations increasingly saw their traditional customs and forms of social organization interfered with by federal officials through the implementation of the *Indian Act*.

As the Royal Commission has explained, the new legislation traced only two possible paths: assimilation or marginalization.

In the [*Enfranchisement Act of 1869*], traditional governments were replaced by “municipal government,” giving minor and circumscribed powers to the band while extensive control of reserves was assigned to the federal government and its representative, the Indian affairs department.

In subsequent legislation—the *Indian Acts* of 1876 and 1880 and the *Indian Advancement Act* of 1884—the federal government took for itself the power to mould, unilaterally, every aspect of life on reserves and to create whatever infrastructure it deemed necessary to achieve the desired end—assimilation through enfranchisement and, as a consequence, the eventual disappearance of Indians as distinct peoples. It could, for example, and did in the ensuing years, control elections and the conduct of band councils, the management of reserve resources and the expenditure of revenues,

⁵² Richard H. Bartlett, *Indian Reserves in the Atlantic Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1986); *An Act to Authorise the Setting Apart of Lands for the Use of Certain Indian Tribes in Lower Canada*, S.C. 1851, c. 106.

⁵³ *British Columbia Terms of Union*, R.S.C. 1985, App. II, Article 13; *Constitution Act, 1930*, Schedule 1 (Manitoba) at para. 11, Schedule 2 (Alberta) at para. 10, Schedule 3 (Saskatchewan) at para. 1.

⁵⁴ RCAP, vol. 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at chap. 6, “3. Treaty Making in Ontario, the West and the North,” text corresponding to notes 25–30.

⁵⁵ *Constitution Act, 1867*, s. 91(24).

impose individual land holding through a “ticket of location” system, and determine the education of Indian children.

This legislation early in the life of Confederation had an even more wide-ranging impact. At Confederation two paths were laid out: one for non-Aboriginal Canadians of full participation in the affairs of their communities, province and nation; and one for the people of the First Nations, separated from provincial and national life, and henceforth to exist in communities where their traditional governments were ignored, undermined and suppressed, and whose colonization was as profound as it would prove to be immutable over the ensuing decades.⁵⁶

ii. Opposition to repeal

The record of the *Indian Act* seemed largely negative a century later when the new government of Prime Minister Pierre Trudeau proposed in 1969 to repeal the statute, thereby eliminating Indian status, federal responsibility for Indians, and protection of reserve lands. The stated goal of the so-called White Paper was to provide “the full, free and non-discriminatory participation of the Indian people in Canadian society.”⁵⁷

To the federal government’s surprise, First Nations reacted with massive protests, and the proposal was withdrawn. For as much as First Nations disliked living under the *Indian Act*, they were unwilling to lose the protection it granted to them, particularly over their reserve lands. As Harold Cardinal wrote: “No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable *Indian Act* than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than ready to help devise new Indian legislation.”⁵⁸

⁵⁶ RCAP, vol. 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at chap. “8. Extending Measures of Control and Assimilation,” text corresponding to notes 92-93.

⁵⁷ RCAP, vol. 1, *Looking Forward Looking Back*, Part Two, *False Assumptions and a Failed Relationship*, chap. “1. The Paradox of Indian Act Reform,” text corresponding to note 15.

⁵⁸ Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: Mel Hurtig Publishers, 1969; republished Douglas & McIntyre, 1999), at 140.

Since that time, the *Indian Act* has rarely been amended, though it has been replaced usually in whole and sometimes in part for those First Nations that have entered into modern treaties or self-government agreements.

B. Status of lands

i. Collective property under federal jurisdiction

A reserve is land owned by the federal Crown that has been “set apart for the use and benefit of a band.”⁵⁹ The band⁶⁰ has a collective interest in the land.⁶¹

Since reserve lands are governed by the *Indian Act* and are under federal jurisdiction, most provincial laws concerning the use of land do not apply. For instance, provincial laws concerning landlord-tenant rights⁶² or the division of family property upon divorce do not apply to housing on reserve.⁶³

ii. Lands reserved for the members of the band

Many ordinary legal rules cannot be easily applied on reserve because reserve land cannot be bought and sold like other land. The rule is that no one other than a member of the band is entitled to occupy or use any part of a reserve, except with the permission of the Minister of Indian Affairs, and the use of reserve land by anyone other than a member is the exception.⁶⁴

For members of the band to have a valid individual interest in reserve lands, possession of the land must have been allotted to them by the band council with the Minister’s approval.⁶⁵

⁵⁹ *Indian Act*, s. 2(1).

⁶⁰ When discussing *Indian Act* powers, this paper generally refers to the “band” rather than the “First Nation” because the band is the entity recognized under the Act, while for many Aboriginal peoples, their Nation is something different and sometimes a larger entity.

⁶¹ *Boyer v. R.*, [1986] 2 F.C. 393 (C.A.) at 403.

⁶² *Morin v. Canada*, [2000] 4 C.N.L.R. 218 (F.C.T.D.); 315 N.R. 108 (F.C.A.).

⁶³ *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

⁶⁴ *Indian Act*, s. 28.

⁶⁵ *Indian Act*, s. 20.

Once a “certificate of possession” is issued, it can be bought and sold freely between members without council permission, but subject to approval by the Minister.⁶⁶

Members cannot sell or lease their land to non-members,⁶⁷ nor can they mortgage it.⁶⁸ If they lose their status as members, Indians can even be forced to sell their rights of possession to a member or see the land revert to the band.⁶⁹ (Loss of membership occurs much less frequently, however, since the 1985 repeal of provisions that took away Indian women’s status if they married a non-Indian.⁷⁰)

According to the Supreme Court of Canada, “the scheme of the *Indian Act* is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve.” This applies even to lands occupied legally by an individual member under a certificate of possession.⁷¹

iii. Lands that cannot be sold except to the Crown

Another important restriction on reserve lands is that they cannot be sold and usually cannot be leased to a non-member unless the band as a whole has voted to surrender its interest in the lands to the Crown. However the federal government can expropriate reserve lands under certain circumstances, including for the benefit of a province or municipality.⁷²

⁶⁶ *Indian Act*, s. 24.

⁶⁷ *Indian Act*, s. 28. At the member’s request, however, the Minister of Indian Affairs may lease a member’s land to a non-member: *Indian Act*, s. 58(3).

⁶⁸ This is because the land is exempt from seizure under s. 29 of the *Indian Act*.

⁶⁹ *Indian Act*, s. 25. Similarly, if a member leaves his or her interest in reserve land to a non-member in his or her will, the non-member will not inherit and the certificate of possession will be sold to the highest bidder or revert to the Band: *Indian Act*, s. 50.

⁷⁰ R.S.C. 1985, c. 32 (1st Supp.) (the amendments commonly known as “Bill C-31”).

⁷¹ *R. v. Devereux*, [1965] S.C.R. 567 at 572.

⁷² *Indian Act*, ss. 35, 37.

Once a surrender has been approved by the members, it is the Minister of Indian Affairs, not the band, who carries out the sale or lease.⁷³ It is also the Minister who receives the money and authorizes its use for the benefit of the band.⁷⁴

Since a band can only surrender reserve lands to the Crown, which is then responsible for dealing with the surrendered land on the band's behalf, in any transaction the federal government has a fiduciary or trust-like obligation "to prevent the Indians from being exploited" and can be held liable for any loss.⁷⁵

C. Legislative powers

i. Limitations

The *Indian Act* is not a model favoured by most First Nations and it is not generally considered to be a form of self-government. Among other things, the *Indian Act* does not accommodate traditional or customary forms of government: it subjects the powers of the elected band councils to approval by the Minister of Indian Affairs. In addition, while many bands have formed tribal councils to represent the larger Nation, these bodies are not recognized in any way by the *Indian Act*.

Generally, the *Indian Act* only regulates lands and individuals in or on a reserve, and the powers of a band council to adopt bylaws under the Act extends only to activities on the reserve.⁷⁶ The result is that the *Indian Act* has little or no application to a First Nation's exercise of its rights on the rest of its traditional territory. For instance, the Supreme Court of Canada held that members of the Squamish Indian Band who were accused of fishing illegally on the Squamish River in an area contiguous to the reserve could not raise as defence

⁷³ *Indian Act*, s. 53(1).

⁷⁴ *Indian Act*, ss. 62, 64-66.

⁷⁵ *Guerin v. R.*, [1984] 2 S.C.R. 335 at 383-87.

⁷⁶ *Indian Act*, ss. 81(1), 83(1), 85.1.

the fact that a band council bylaw allowed the activity because the rivers themselves did not form part of the reserve.⁷⁷

For most *Indian Act* bylaws, a copy must be forwarded to the Minister of Indian Affairs within four days after it is adopted and, unless the Minister disallows it within a 40-day period, the bylaw comes into force.⁷⁸ The “money bylaws” are treated differently: rather than having a power to disallow them, the Minister of Indian Affairs must approve taxation and other money-raising bylaws in order for them to come into force.⁷⁹

ii. Special codes

1) Membership

By default, a band’s membership list is kept by the Registrar of Indians.⁸⁰ However the *Indian Act* does allow for a band to take control of its own membership list; it does so by adopting a membership code, which even allows it to include as members individuals who would not be eligible for status under the *Indian Act* (such as the children of members with status).⁸¹

2) Elections

The Minister of Indian Affairs also decides whether a band’s elections are to be conducted according either to regulations set out by the federal government or to “the custom of the band.”⁸² (If elections are by regulation, council procedure is also governed by regulation.⁸³) Historically, the Minister ordered that for most bands elections would take place according to the *Indian Act*, but in recent years he has allowed bands to revert to a “custom” system. In

⁷⁷ *R. v. Lewis*, [1996] 1 S.C.R. 921.

⁷⁸ *Indian Act*, s. 82.

⁷⁹ *Indian Act*, s. 83.

⁸⁰ *Indian Act*, s. 9.

⁸¹ *Indian Act*, ss. 4.1, 6, 10.

⁸² *Indian Act*, ss. 2(1), 74, 76; *Indian Band Election Regulations*, C.R.C., c. 952.

⁸³ *Indian Act*, s. 80; *Indian Band Council Procedure Regulations*, C.R.C., c. 950.

practice, bands have not been removed from the Minister's order unless they adopted a new written "custom," generally an election code.

3) Land management

Since 1999, the *First Nations Land Management Act* has allowed certain bands to manage their reserve lands outside the *Indian Act* by adopting a land code in accordance with a framework agreement originally signed between the federal government and the 14 communities that were originally subject to the statute.⁸⁴ The land code must receive the approval of the members in a vote, but once the Minister is informed of the verified result, law-making power is by the band without the Minister's intervention.⁸⁵

Once in effect, the land code gives a band broad authority over its reserve lands, other than the power to sell them.⁸⁶ The code sets out the general rules and procedures for use and occupancy of reserve lands, including leases and licences or the transfer of lands through inheritance, and for governing collection and management of revenues derived from natural resources obtained from reserve land.⁸⁷ It also allows the band to adopt laws concerning details of its land management, including zoning, environmental assessment and protection, and the collection of fees for local services.⁸⁸

iii. Effect of other legislation on band council legislation

Since a bylaw adopted by a band council under the *Indian Act* is a federal regulation, it "has the effect of 'rendering inoperative' provincial legislation" to the extent provincial law is

⁸⁴ *First Nations Land Management Act* (hereafter cited as "*FNLMA*"), S.C. 1999, c. 24, ss. 2(1), 6.

⁸⁵ *FNLMA*, ss. 10-15, 18.

⁸⁶ *FNLMA*, s. 26.

⁸⁷ *FNLMA*, s. 6.

⁸⁸ *FNLMA*, s. 20.

inconsistent with the bylaw.⁸⁹ In practice, however, the bylaws adopted by a band council will not usually affect matters under provincial jurisdiction.

The effect of federal legislation is more complex. Council bylaws may not contradict other statutes adopted by Parliament because they are “delegated legislation” (i.e., made possible by an Act of Parliament). As a result, the Canadian Industrial Relations Board ruled that a band council’s bylaw could not override the statutory provisions of the *Canada Labour Code* concerning unionization.⁹⁰

On the other hand, bylaws do have equal status with other federal regulations adopted by the Governor-in-Council (cabinet). As a result, an Indian who was charged with fishing on his reserve in a manner allowed for under a band council bylaw but forbidden by a regulation under the *Fisheries Act* was acquitted by the British Columbia Court of Appeal.⁹¹

The land code and the laws adopted under the *First Nations Land Management Act* are different because they take precedence over other federal legislation except in a few specific situations such as environmental protection, emergencies, and expropriations.⁹²

D. Funding

i. Federal transfers

Within the federal government, 34 different organizations fund 360 programs and services directed to Aboriginal communities. Many of the services delivered on reserve are those that in other communities would be delivered by provinces or municipalities, such as education, health care, social assistance, local infrastructure, policing, and fire prevention.⁹³ Since the

⁸⁹ *S. (E.G.) v. Spallumcheen Band Council* (1998), [1999] 2 C.N.L.R. 306 (B.C. Prov. Ct.) at para. 45, affirmed on other grounds (1998), [1999] 2 C.N.L.R. 318 (B.C.S.C.).

⁹⁰ *Re Red Bank First Nation*, [1999] C.I.R.B. No. 5 (QL) at para. 30, 33.

⁹¹ *R. v. Jimmy*, [1987] 3 C.N.L.R. 77 (B.C.C.A.).

⁹² *FNLMA*, ss. 37-43.

⁹³ Auditor General of Canada, *Status Report* (May 2006), chap. 5, “Management of Programs for First Nations,” at 147.

majority of reserves (61%) have fewer than 500 residents and since many (20.7%) are located in isolated and remote areas,⁹⁴ service delivery is challenging.

Band council budgets come from a variety of funding agreements. Under contribution agreements, the federal government “undertakes to finance all eligible expenditures associated with the provision of particular services to band members” and it “retains all control over program design and the allocation of funds, while band governments are responsible for administering the services and reporting regularly to the federal government.” Generally, only that funding which is meant for the administration of band government “is an unconditional grant, with no specific terms or conditions attached to it.” Finally, some funding is in the form of flexible transfer payments that give band governments more power to determine how to deliver specified services: “when any savings are realized through these alternative means, band governments are free to spend the surpluses generated in any manner they see fit.”⁹⁵

Some but not all communities have multi-year funding agreements with Indian and Northern Affairs Canada (INAC) or with Health Canada; some but not all agreements allow a surplus in one program to be moved to cover expenditures in another. Much of the federal government’s funding remains tied to carrying out specific projects (e.g., home construction funded by the Canada Mortgage and Housing Corporation).⁹⁶

If a band fails to meet its obligations under a funding arrangement in delivering programs or services, INAC claims the right to intervene. The intervention measures range from requiring the council to develop a remedial management plan to appointing a third-party manager to

⁹⁴ Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons: Matters of Special Importance—2002*, chap. 1, “Streamlining First Nations Reporting to Federal Organizations” at 3.

⁹⁵ RCAP, vol. 2, *Restructuring the Relationship*, chap. 3, app. 3A, “Existing Financial Arrangements for Aboriginal Governments and Regional and Territorial Governments,” text corresponding to notes 1 and 2.

⁹⁶ *Report of the Auditor General of Canada to the House of Commons: Matters of Special Importance—2002*, chap. 1, “Streamlining First Nations Reporting to Federal Organizations” at 6.

administer all of the council's funds and obligations under the agreement, usually until debts are significantly reduced.⁹⁷

ii. Taxation powers

The *Indian Act* was amended in 1988 to allow bands to tax real property (that is, interests in land) on their reserves.⁹⁸ As discussed above, tax bylaws must be approved by the Minister of Indian Affairs before they come into force.

The Supreme Court of Canada held that these provisions were "intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves."⁹⁹ However it is also clear that only interests in land that is "in the reserve" can be taxed under the *Indian Act*. This has led to major litigation to determine whether certain valuable infrastructure (such as railways) that cross the reserve are on land that still forms part of the reserve or whether the land was lost through sale or expropriation.¹⁰⁰

And council's power to tax property is not exclusive. The courts have held that a province or the municipalities it creates may tax all property interests on reserves other than those owned by Indians and band councils (since they are protected by the tax exemption in section 87 of the *Indian Act*).¹⁰¹ Municipalities have taken the position that this principle allows

⁹⁷ Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons: Matters of Special Importance—2003*, chap. 10, "Other Audit Observations", p 8. See also: *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)* (2002), [2003] 1 C.N.L.R. 153 (F.C.).

⁹⁸ *Indian Act*, s. 83, as amended S.C. 1988, c. 23, s. 1.

⁹⁹ *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 18.

¹⁰⁰ David Schulze with Peter R. Grant, "Governing Lands and Waters: Limits to Reserve Title and *Indian Act* Powers in British Columbia and Proposals for Reform" (2001) 34 *University of British Columbia Law Review* 415 at 419-24; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746.

¹⁰¹ *Tsawwassen Indian Band v. Delta (City)*, [1998] 1 C.N.L.R. 290 (B.C.C.A.); *Grammont Motel Ltée c. Corporation de la municipalité du Canton de Mann*, [1977] C.A. 399 (Que.); *Re Provincial Municipal Assessor and Rural Municipality of Harrison* (1971), 20 D.L.R. (3d) 208, 7 C.N.L.C. 291 (Man. Q.B.). This line of cases is consistent with *Smith v. Vermilion Hills Rural Council*, [1916] 2 A.C. 569 (P.C.).

double taxation on their part with the band.¹⁰² In some provinces, legislation provides for agreements to eliminate concurrent municipal taxation and allow bands to occupy the tax field alone,¹⁰³ but this obviously requires the consent of the province or the municipality.

A different property tax system was created in 2005 by the *First Nations Fiscal and Statistical Management Act* for communities that choose to use it. The new statute creates a number of institutions including the First Nations Tax Commission (to supervise the taxation of real property on reserve) and the First Nations Finance Authority (to coordinate borrowing by bands¹⁰⁴ using their property tax revenues as a form of collateral, as municipalities do).

The Minister of Indian Affairs no longer approves taxation bylaws directly for communities subject to the *First Nations Fiscal and Statistical Management Act*. Instead, once a band council has adopted a law concerning financial administration and it has been approved by the First Nations Financial Management Board,¹⁰⁵ it has a broad power to make laws concerning taxation, collection, and enforcement.¹⁰⁶ The band's laws must, however, be approved by the First Nations Tax Commission, all of whose members but one are named by the federal government.¹⁰⁷

Another new tax mechanism is the *First Nations Goods and Services Tax Act*, which allows a band to choose to collect its own sales tax, equivalent to the federal goods and services tax (GST) on reserve. In addition, in provinces where parallel legislation allows for it, the band can choose to collect its own sales taxes equivalent to provincial sales taxes. However, the

¹⁰² Theresa M. Dust, "The Impact of Aboriginal Land Claims and Self-government in Canadian Municipalities" (1997), 40 Cdn. Public Admin. 481 at 494, note 3.

¹⁰³ *Indian Self-Government Enabling Act*, R.S.B.C. 1996, c. 219; *Cities and Towns Act*, R.S.O. c. C-19, s. 29.10.1

¹⁰⁴ *First Nations Fiscal and Statistical Management Act* (hereafter cited as "FNFSMA"), S.C. 2005, c. 9, Parts 2 and 4.

¹⁰⁵ FNFSMA, s. 4.

¹⁰⁶ FNFSMA, s. 5(1).

¹⁰⁷ FNFSMA, ss. 5(2), 19, 20.

band's sales tax will apply to members and non-members alike and is not subject to the tax exemption for Indians on reserve in section 87 of the *Indian Act*.¹⁰⁸

iii. Other revenue sources

a. Indian moneys

Under the *Indian Act*, funds received by the federal government for a band are defined as "Indian moneys." These generally consist of proceeds from the sale of surrendered lands, the sale of non-renewable assets such as timber or minerals, or from the sale of renewable assets such as crops. They also include the rents collected from the lease of reserve lands or the fines collected for violation of federal regulations or band council bylaws.¹⁰⁹

These Indian moneys must be deposited into the federal government's consolidated revenue fund where they are credited to an account for the band and collect interest at a rate set by the government.¹¹⁰ The money may not be spent except with the authorization of the Minister of Indian Affairs and then only for purposes set out in the *Indian Act*, which are generally to maintain or improve facilities on the reserve.¹¹¹

The Minister has the power to give a band authority to spend its own Indian moneys, in whole or in part, but he cannot give the band authority to collect the funds¹¹² and his authorization can be revoked.¹¹³ As of 1997, some 440 bands had authority over all their Indian moneys.¹¹⁴

¹⁰⁸ *First Nations Goods and Services Tax Act*, S.C. 2003, c. 15, s. 3.

¹⁰⁹ *Indian Act*, ss. 2(1), 62, 104; Department of Indian Affairs and Northern Development Canada, *Manual for the Administration of Band Moneys* (Ottawa: DIAND, Lands and Trust Services, October 1997) at section 1.3.

¹¹⁰ *Indian Act*, s. 61; see also the *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7. The consistency of the federal government's administration of oil and gas revenue with its fiduciary duty is the subject of litigation in *Ermieskin Indian Band and Nation v. Canada* 2006 FCA 415 [2007] 3 F.C.R. 245, application for leave to appeal to the Supreme Court of Canada granted August 30, 2007, docket no. 31869.

¹¹¹ *Indian Act*, ss. 64, 65, 66; *Manual for the Administration of Band Moneys*, chaps. 4, 5, 6.

¹¹² *Indian Act*, s. 69; *Manual for the Administration of Band Moneys*, section 9.1.

¹¹³ *Manual for the Administration of Band Moneys*, chap. 10.

¹¹⁴ *Indian Bands Revenue Moneys Regulations*, C.R.C., c. 953; *Manual for the Administration of Band Moneys*, section 9.3.

b. Under a land code

Where a land code is in effect under the *First Nations Land Management Act*, a band can have full control of the revenues collected for the use of its reserve lands other than for oil and gas. These revenues then cease to be Indian moneys under the *Indian Act*.¹¹⁵ Similarly, sales tax collected under the *First Nations Goods and Services Tax Act* are not Indian moneys.¹¹⁶ Since property tax revenues collected under the *First Nations Fiscal and Statistical Management Act* are deposited to a local revenue account, it appears they are also not Indian moneys.¹¹⁷

c. Oil and gas moneys

Under the *Indian Act*, Indian moneys include funds received by the federal government for a band from oil and gas taken from a reserve.¹¹⁸ Since 2005, the *First Nations Oil and Gas and Moneys Management Act* has made it possible for certain First Nations to request a transfer of oil and gas resource management or of oil and gas revenues from the federal government.¹¹⁹

The First Nation must adopt an oil and gas code and a financial code that must be ratified by the members in a vote.¹²⁰ Once approved, transfer of oil and gas management includes the power for the First Nation to make laws concerning oil and gas exploration and exploitation on its reserve, including not just royalties, but also environmental assessment and conservation of the resource.¹²¹

¹¹⁵ *FNLMA*, s. 19.

¹¹⁶ *First Nations Goods and Services Tax Act*, s. 28

¹¹⁷ *FNFSMA*, s. 13(1).

¹¹⁸ *Indian Act*, ss. 2(1), 62, 104; Department of Indian Affairs and Northern Development Canada, *Manual for the Administration of Band Moneys* (Ottawa: DIAND, Lands and Trust Services, October 1997) at section 1.3.

¹¹⁹ *First Nations Oil and Gas and Moneys Management Act*, S.C. 2005, c. 48. Currently, the statute applies to the White Bear First Nation of Saskatchewan and the Blood Tribe and Siksika First Nation of Alberta: Schedule 1.

¹²⁰ *First Nations Oil and Gas and Moneys Management Act*, ss. 10, 11, 17-21.

¹²¹ *First Nations Oil and Gas and Moneys Management Act*, s. 35(1).

iv. Harvesting rights

The *Indian Act* does not include any protection of Aboriginal harvesting rights, such as hunting, fishing, or trapping. The fact that an Aboriginal people or a community of that people is recognized as a band will not by itself satisfy governments or the courts that its members have harvesting rights in its traditional territory outside the reserve.

On the contrary, the *Indian Act* specifically provides at section 88 that provincial laws “of general application” (i.e., laws that apply to all and do not single out Indians) will apply to Indians unless the provincial law conflicts with federal law. Provincial law regulates hunting and trapping extensively, and the Supreme Court of Canada has held that these laws apply to Indians.¹²² (Once Aboriginal rights became protected under section 35 of the *Constitution Act, 1982*, it became possible to argue that provincial law was inapplicable if it infringed on those rights, but only after proving the existence of the right.¹²³)

But section 88 of the *Indian Act* also creates an exception for treaty rights: provincial law cannot apply to Indians if it would conflict with the terms of a treaty. Recently, the Supreme Court of Canada has explained that where provincial law of general application infringes the treaty right, it is unenforceable against an Indian.¹²⁴ This is different from federal law, which until 1982 could contradict treaties and which can still limit treaty rights if the infringement is justifiable.¹²⁵

4. Self-government agreements

A. The federal policy

¹²² *Dick v. R.*, [1985] 2 S.C.R. 309.

¹²³ *R. v. Côté*, [1996] 3 S.C.R. 139.

¹²⁴ *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915. The situation is somewhat different in the Prairie provinces where in 1930 the provincial governments obtained the constitutional power to apply game law to Indians in return for protection of the Indians’ right “of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access”: Natural Resources Transfer Agreement, 1930 (*Constitution Act, 1930*, Schedule 2), para. 12; *R. v. Badger*, [1996] 1 S.C.R. 771.

¹²⁵ *R. v. George*, [1966] S.C.R. 267; *R. v. Marshall*, *supra* note 11.

In 1995, the federal government announced it was prepared to negotiate a form of self-government with First Nations that would recognize Aboriginal jurisdiction over “matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution.”¹²⁶

The federal government is mainly prepared to expand powers within “the group’s land base.” For First Nations, the term “land base” appears to be another way of referring to reserves, since its definition of “Aboriginal lands” includes *Indian Act* reserves and land claims settlement lands under direct Aboriginal jurisdiction, but not traditional territory.¹²⁷

The policy states that the federal government “has primary but not exclusive responsibility for on-reserve Indians and the Inuit, while the provinces have primary but not exclusive responsibility for other Aboriginal peoples.”¹²⁸ As a result, the policy specified that outside of the reserves, provincial consent would be required for First Nation laws to apply and for First Nation services to be provided to non-resident members. Such powers and services would also require the consent of non-residents and “would have to take into account issues of feasibility and affordability.”¹²⁹

The federal government is willing to negotiate directly over jurisdiction in the following areas where band councils have traditionally played a role, both under the *Indian Act* and federal government funding agreements:

- The establishment of government structures, including constitutions, elections, and membership
- Services such as education, health, housing, local infrastructure, and policing
- Land use and natural resource and wildlife management

¹²⁶ INAC, *Federal Policy Guide: Aboriginal Self-Government*, *supra* note 5, at 5.

¹²⁷ *Ibid.* at 18, 20, 28.

¹²⁸ *Ibid.* at 14.

¹²⁹ *Ibid.* at 18.

- Sales and property taxation

Some new areas were also added to the list, such as marriage, adoption and child welfare, and Aboriginal language, culture, and religion.¹³⁰

The federal policy also set out a list of areas that could be the subject of negotiations and where it took the view that Aboriginal laws would “tend to have impacts that go beyond individual communities.” These areas include:

- Divorce
- Labour market training
- Administration of justice
- Environmental protection and assessment
- Wildlife co-management
- Gaming
- Emergency preparedness

A condition for negotiations in these areas would be that “primary law-making authority would remain with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws.”¹³¹

B. Two models: the *Sechelt Indian Band Self-Government Act* and the Westbank First Nation Self-Government Agreement

Even before the 1995 policy, the federal government had negotiated a self-government agreement with the Sechelt Band, part of the Coast Salish of British Columbia.

The federal *Sechelt Indian Band Self-Government Act* of 1986 did not settle Sechelt claims to lands and resources beyond its existing reserves: on the contrary, negotiations by Sechelt as

¹³⁰ *Ibid.* at 5-6.

¹³¹ *Ibid.* at 6.

part of the British Columbia treaty process were interrupted indefinitely in 1999 after an agreement-in-principle with the federal and provincial governments was signed.¹³²

The band occupies 33 reserves spread over 1,000 hectares and situated only 50 kilometres from Vancouver. Because of this location, leasing of reserve lands to non-members was an important source of revenue for the band well before 1986.¹³³ Among other benefits, the self-government agreement gives Sechelt direct control of the revenues from these leases.¹³⁴

Similarly, the Westbank First Nation Self-Government Agreement of 2003,¹³⁵ which came into force in 2005,¹³⁶ is not a treaty and is “without prejudice to treaty-making in British Columbia.”¹³⁷

Westbank is one of the seven member communities of the Okanagan Nation; its reserves are adjacent to the City of Kelowna in southern British Columbia. It is similar to Sechelt in that a large number of non-members live on its reserves: 8,000 non-members compared with 628 members. In addition, a variety of businesses operate on its reserves, including several shopping centres, manufacturers, and tourist attractions.¹³⁸

No other self-government agreements have been reached with bands occupying *Indian Act* reserves in the provinces. (Note, however, that several Yukon First Nations have reached self-government agreements pursuant to their land claims agreement.¹³⁹)

C. Powers exercised under self-government agreements

¹³² British Columbia Ministry of Aboriginal Relations and Reconciliation, http://www.gov.bc.ca/arr/firstnation/sechelt_indian_band/default.html (accessed March 28, 2008).

¹³³ Carol E. Etkin, “The Sechelt Indian Band: An Analysis of a New Form of Native Self-Government” (1988) 8 *Cdn. J. of Native Studies* 73 at 78.

¹³⁴ *Sechelt Indian Band Self-Government Act* (hereafter cited as “SIBSGA”), S.C. 1986, c. 27, s. 32.

¹³⁵ Westbank First Nation Self-Government Agreement (hereafter cited as “WFNSGA,” October 3, 2003, http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wfn_index_e.html (accessed March 28, 2008).

¹³⁶ *Westbank First Nation Self-Government Act*, S.C. 2004, c. 17, s. 3(1); TR/2005-0018.

¹³⁷ WFNSGA, s. 4(a).

¹³⁸ “Community Profile”, <http://www.wfn.ca/profile.asp> (accessed March 28, 2008).

¹³⁹ Umbrella Final Agreement Between the Government of Canada, The Council for Yukon Indians and the Government of the Yukon, 1993, Chapter 24.

i. Status of lands

According to its preamble, the federal *Sechelt Indian Band Self-Government Act* was adopted so that the Band “would assume complete responsibility, in accordance with this Act, for the management, administration and control of all Sechelt lands.” These lands are no longer *Indian Act* reserves but instead have become the property of the Band in fee simple (i.e., full ownership) “for the use and benefit of the band and its members.”¹⁴⁰

Nevertheless, Sechelt lands remain “lands reserved for the Indians” within the meaning of the Constitution and remain under federal jurisdiction. In fact, the *Indian Act* continues to apply not just to the band, its council, and its members, but also to Sechelt lands, so long as it is consistent with the *Sechelt Indian Band Self-Government Act*, the Sechelt constitution, and Sechelt laws.¹⁴¹

Similarly, Westbank First Nation has “the rights, powers, responsibilities and privileges of an owner in relation to Westbank Lands and may grant Licences and interests in Westbank Lands.”¹⁴² Westbank lands are made up of the five former *Indian Act* reserves as well as any lands set apart by the federal government “as lands reserved for Westbank First Nation.”¹⁴³ These lands therefore remain under federal jurisdiction and they continue to be held by the federal government “for the use and benefit of Westbank First Nation.”¹⁴⁴

In principle, Sechelt has a broad power to “to dispose of any Sechelt lands and any rights or interests therein,” but it may only do so in accordance with the constitution of the band.¹⁴⁵ The Sechelt Band constitution provides that no land may be sold or mortgaged without the approval of three-quarters of the members voting in a referendum; lower thresholds of

¹⁴⁰ *SIBSGA*, ss. 23, 25.

¹⁴¹ *SIBSGA*, s. 35(1).

¹⁴² *WFNSGA*, s. 89.

¹⁴³ *WFNSGA*, Part I.

¹⁴⁴ *WFNSGA*, s. 87.

¹⁴⁵ *SIBSGA*, s. 26.

approval are set out for the creation of more limited interests in Sechelt lands, such as leases.¹⁴⁶

The power to dispose of Westbank lands is also limited: they “shall not be alienated except for exchange of land,” the new land must be “of greater or equivalent size or value,” and the members must give their approval.¹⁴⁷

The federal government may expropriate both Sechelt¹⁴⁸ and Westbank¹⁴⁹ lands.

ii. Legislative powers

The *Sechelt Indian Band Self-Government Act*¹⁵⁰ allows its members to adopt a constitution subject to federal government approval that sets out rules for membership in the band, for the election of its council, and for the Council’s procedure for adopting laws.¹⁵¹ Westbank First Nation also has the power to determine its own structure of government, including election rules, through its own constitution.¹⁵² As well, it has the power to determine its own membership.¹⁵³

Under the legislation and its constitution, Sechelt has much broader legislative powers than does an *Indian Act* band. It may make laws concerning the following:

- The use of Sechelt lands, such as in relation to residence, businesses, or zoning
- Natural resources and wildlife on Sechelt lands
- Education of members if they live on Sechelt lands

¹⁴⁶ Part I, Division (2), s. 4 of the *Sechelt Band Constitution, Canada Gazette*, Part I, September 12, 1987, p. 3248, as amended November 21, 1987, p. 4416, and July 9, 1988, p. 2707.

¹⁴⁷ WFNSGA, s. 92.

¹⁴⁸ *Expropriation Act*, R.S.C. 1985, c. E-21, s. 4(3).

¹⁴⁹ WFNSGA, s. 111-132.

¹⁵⁰ *SIBSGA*, s. 10.

¹⁵¹ Part I, Division (1), and Part II, Divisions (1),(2), and (5) of the *Sechelt Band Constitution*.

¹⁵² WFNSGA, ss. 42,43.

¹⁵³ WFNSGA, Part VII.

- Social and welfare services to band members anywhere, including the custody and placement of children
- Wills and estates of members resident on Sechelt lands¹⁵⁴

Westbank has a general jurisdiction “in relation to the management, administration, government, control, regulation, use and protection of Westbank Lands.”¹⁵⁵ The law-making jurisdiction includes the following:

- The creation or transfer of interests in Westbank lands, residency, zoning, and land use¹⁵⁶
- Landlord-tenant relations¹⁵⁷
- Management of renewable resources such as wildlife and timber, but not of fish and fish habitat
- Management of non-renewable resources such as oil or stone, but not of minerals¹⁵⁸
- Transfer of members’ land through wills or by estates
- Disposition of members’ land upon marital breakdown¹⁵⁹

Westbank also has jurisdiction over areas never addressed by the *Indian Act*, such as traditional Okanagan medicine,¹⁶⁰ or “preservation, promotion and development of Okanagan culture and language on Westbank Lands” including heritage sites, objects of cultural significance, and “the use, reproduction and representation of Okanagan cultural symbols and practices.”¹⁶¹

¹⁵⁴ *SIBSGA*, s. 14.

¹⁵⁵ *WFNSGA*, s. 103. See also Parts XIX-XXII.

¹⁵⁶ *WFNSGA*, s. 103.

¹⁵⁷ *WFNSGA*, Part XI.

¹⁵⁸ *WFNSGA*, Part XII. Westbank can continue to exercise *Indian Act* bylaw authority over fisheries, but federal law takes precedence: ss. 37, 274.

¹⁵⁹ *WFNSGA*, ss. 108, 109.

¹⁶⁰ *WFNSGA*, Part XVII.

¹⁶¹ *WFNSGA*, Part XV.

Sechelt's council can decide to make provincial law applicable on Sechelt lands and also to exercise any powers the province might delegate to council.¹⁶² At Westbank, the Agreement takes precedence over provincial legislation¹⁶³ since it has the force of federal law, though provincial laws of general application continue to apply to Westbank members in areas not addressed by the Agreement.¹⁶⁴

What is different from Sechelt, however, is that Westbank law generally takes precedence over federal legislation in relation to lands and resource management¹⁶⁵ except in agriculture, environmental protection, and assessment.¹⁶⁶ Westbank can conduct its own environmental assessment process but it must meet or exceed the requirements of the *Canadian Environmental Assessment Act*.¹⁶⁷

iii. Taxation and funding

Sechelt receives significant revenues from the long-term lease of lands to non-members and from the investment of those revenues. Sechelt controls those funds because they are no longer Indian moneys within the meaning of the *Indian Act*.¹⁶⁸

Under federal law, Sechelt has the power to tax interests in Sechelt lands, including leaseholds.¹⁶⁹ At the same time, the parallel recognition of the council as a municipality under provincial law assures there will be no double taxation by municipalities of property interests in Sechelt lands.¹⁷⁰ (As noted above, municipalities have the power to tax persons

¹⁶² *SIBSGA*, ss. 14(3), 15.

¹⁶³ *Westbank First Nation Self-Government Act*, ss. 3, 5; *WFNSGA*, Part V.

¹⁶⁴ *WFNSGA*, s. 34.

¹⁶⁵ *WFNSGA*, ss. 110, 140.

¹⁶⁶ *WFNSGA*, ss. 142, 150, 166.

¹⁶⁷ *WFNSGA*, ss. 159, 162.

¹⁶⁸ *SIBSGA*, s. 32.

¹⁶⁹ *SIBSGA*, s. 14(1)(e).

¹⁷⁰ *Sechelt Indian Government District Property Taxation Suspension Regulation*, B.C. Reg. 126/88.

other than an Indian or a band on the value of their the property interests in reserve land,¹⁷¹ whether or not an *Indian Act* tax bylaw is in force.)

Westbank also has control under the Agreement of all the Indian moneys previously held by the federal government for the band under the *Indian Act*.¹⁷² In addition, Westbank has the right to manage the taxes and other revenues it raises and to issue bonds in order to borrow money.¹⁷³ However, Westbank's property tax powers will continue to be governed by the *Indian Act*, which means bylaws will continue to require approval from the Minister of Indian Affairs.¹⁷⁴

Sechelt has clear legislative authority over a number of important areas, including education, social services, health care, and public security. At the same time, the Minister of Indian Affairs has broad discretion to provide funding in those areas to the band by agreement.¹⁷⁵

In practice, Sechelt has been able to benefit from more stable and more flexible funding than other bands. Sechelt signs five-year agreements to establish a base level of funding to provide for "existing standards of specified public services" such as education, health and social services, economic development, and capital funding for housing and public works. Since 1991, Sechelt has received a single lump-sum grant meant to cover the range of services to be provided, eliminating the numerous separate contribution agreements a band must often reach with various federal departments responsible for different services.¹⁷⁶

In addition, the financial affairs of Sechelt are regulated in more detail than they would be under the *Indian Act*. The band is obliged by its constitution to adopt a budget each year and

¹⁷¹ *Tsawwassen Indian Band v. Delta (City)*, [1998] 1 C.N.L.R. 290 (B.C.C.A.).

¹⁷² WFNSGA, s. 261.

¹⁷³ WFNSGA, ss. 82, 83, 84.

¹⁷⁴ WFNSGA, s. 275; *Indian Act*, s. 83(1).

¹⁷⁵ *SIBSGA*, ss. 14, 33.

¹⁷⁶ RCAP, vol. 2, *Restructuring the Relationship*, chap 3, app. 3A, "Existing Financial Arrangements for Aboriginal Governments and Regional and Territorial Governments," text following note 2; see also *Sechelt Band Constitution*, Part II, Division (6).

to submit it to the electors beforehand.¹⁷⁷ Spending in certain areas is obligatory, such as education, health, social assistance, and housing.¹⁷⁸

Finally, the municipal status of the Sechelt Indian Government District Council also allows Sechelt to benefit from all provincial subsidies available to a municipality.¹⁷⁹ The large number of non-member residents on Sechelt lands makes this more important than it might be in other communities.

For Westbank, the agreement provides negotiations with the federal government on financial transfer agreements every five years, though funding levels can be adjusted.¹⁸⁰ The Self-Government Agreement guarantees a negotiation process and the ultimate financial transfer agreement will be a separate contract.¹⁸¹

iv. Relations with the province and municipalities

Sechelt's legislation creates a Sechelt Indian Government District with a membership identical to the band council.¹⁸² The province has adopted parallel legislation that allows the Sechelt Indian Government District Council to exercise the powers otherwise granted to a municipality under provincial law.¹⁸³

At Westbank, the Agreement's preamble explicitly "recognizes the need to provide good government for all persons residing on Westbank Lands" and that Westbank "will continue to consult and may enter into agreements with neighbouring local governments to maintain good relations and coordinate activities." The statement reflects the fact that, as mentioned above, many more non-members than members live on Westbank lands.

¹⁷⁷ *Sechelt Band Constitution*, Part II, Division (7), s. 5.

¹⁷⁸ *Sechelt Band Constitution*, Part II, Division (7), ss. 8(2) and 9(2)

¹⁷⁹ *Sechelt Indian Government District Enabling Act*, s. 4; *Sechelt Indian Government District Municipal Benefits Regulation*, B.C. Reg. 243/88.

¹⁸⁰ WFNSGA, ss. 225, 243, 245.

¹⁸¹ WFNSGA, s. 241.

¹⁸² *SIBSGA*, ss. 17, 19(2), 22.

¹⁸³ *Sechelt Indian Government District Enabling Act*, R.S.B.C. 1996, c. 416.

The Agreement sets out the principle that Westbank should offer “reasonably comparable levels of public service...in comparison to other communities in southern British Columbia.” In order to meet this goal, Westbank may enter into “cooperative jurisdictional or program delivery arrangements” with other governments.¹⁸⁴

5. Modern treaty models

A. Introduction

Modern treaty-making is considerably more complex than the 19th century model in which First Nations ceded their title to land in return for reserves, recognition of hunting and fishing rights, and some other benefits.

For the federal government, the purpose of comprehensive claim settlements “is to provide certainty and clarity to ownership and use of land and resources in those areas of Canada where Aboriginal title has not been dealt with by treaty or superseded by law.” The final result “must therefore result in certainty and predictability with respect to the use and disposition of lands affected by the settlements.”¹⁸⁵

Providing certain and predictable rules on the use of all the lands subject to an agreement requires new sets of rules and institutions. While late 19th and early 20th century treaties put communities under the *Indian Act*, the result of each land claims agreement since the 1970s has been that the *Indian Act* ceased to apply to signatory First Nations.

In the territories, the effect has not been the same as in the provinces. Land claims agreements in the territories replaced the *Indian Act*, but they did not replace reserves

¹⁸⁴ WFNSGA, ss. 225, 226. See also s. 27.

¹⁸⁵ As cited in Auditor General of Canada, *September 1998 Report of the Auditor General of Canada*, at para. 14.02.

because the policy in Yukon had been not to create them,¹⁸⁶ and in Northwest Territories most of the reserves promised under Treaty 11 were never created.¹⁸⁷

Neither was the effect the same for the Inuit, to whom the *Indian Act* never applied.¹⁸⁸ Land claims agreements with the Inuit in Quebec¹⁸⁹ and Nunavut¹⁹⁰ recognized Inuit rights exercised through beneficiary organizations that are parties to the treaty;¹⁹¹ they created modified forms of public government on their territory that take Inuit interests into account.

Only a few modern treaties have been entered into with First Nations in the provinces: in Quebec, the James Bay and Northern Quebec Agreement with the Cree and the North-eastern Quebec Agreement with the Naskapi; in British Columbia, the Nisga'a Final Agreement as well as the recent Tsawwassen and Maa-nulth Agreements. Negotiations continue in the rest of British Columbia and Quebec, as well as with the Innu in Labrador.

The James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement were the first modern treaties in Canada. The Nisga'a Final Agreement was the first modern treaty in British Columbia: it was reached in 1995 after negotiations that preceded the treaty process that was established in 1992 by agreement of Canada, British Columbia, and the First Nations Summit. The Tsawwassen and Maa-Nulth First Nations completed negotiations in 2006 under the B.C. treaty process.

¹⁸⁶ *Ross River Dena Council Band*, *supra* note 31, at para. 73, 76.

¹⁸⁷ Bartlett, *Indian Reserves and Aboriginal Lands in Canada*, *supra* note 33, at 47-48.

¹⁸⁸ *Re Eskimos*, [1939] S.C.R. 104; *Indian Act*, s. 4(1).

¹⁸⁹ JBNQA, ss. 12 and 13.

¹⁹⁰ Agreement Between The Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada (1993), article 4.

¹⁹¹ *Kativik School Board v. Makivik Corp.*, [2004] 2 C.N.L.R. 49 (Que. S.C.) at para. 82.

B. Modern treaties with First Nations in the provinces

i. The Cree and the Naskapi: James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement

a. Introduction

Cree and Naskapi lands governed by the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement can be divided into three broad categories:

- Category IA and IA-N lands under federal jurisdiction and governed by the federal *Cree-Naskapi (of Quebec) Act*¹⁹² and Category IB and IB-N lands under provincial jurisdiction and governed by the provincial *Cree Villages and the Naskapi Village Act*¹⁹³
- Category II lands under provincial jurisdiction but where the Cree and Naskapi have exclusive harvesting rights¹⁹⁴
- Category III lands under provincial jurisdiction where Cree and Naskapi harvesting rights are recognized but are not the exclusive activity¹⁹⁵

b. Governance and core lands

Category IA and IA-N lands are set aside by the federal government for the use and benefit of the Cree and Naskapi bands that were previously subject to the *Indian Act* and that signed the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement. In addition, the members of these bands are constituted as corporations that own the adjoining Category IB and IB-N lands,¹⁹⁶ and the federally recognized Cree and Naskapi bands are recognized under provincial law as Cree and Naskapi villages, with jurisdiction over Category IB and IB-N lands.¹⁹⁷

¹⁹² *Cree-Naskapi (of Quebec) Act*, S.C.1984, c. 18.

¹⁹³ *Cree Villages and the Naskapi Village Act*, R.S.Q. c. V-5.1.

¹⁹⁴ JBNQA, ss. 5.2.

¹⁹⁵ JBNQA, para. 24.3.32.

¹⁹⁶ JBNQA, para. 5.1.3.

¹⁹⁷ *Cree Villages and the Naskapi Village Act*, Divisions I and II.

The Cree and Naskapi bands act as the local government authority on Category IA or IA-N land. They manage the land and its natural resources, they control the disposition of interests in those lands, and they have a broad power to “make by-laws of a local nature” for the regulation of land use, “the protection of the environment, including natural resources,” and for the interests in Category IA or IA-N lands.¹⁹⁸

The Cree and Naskapi bands have jurisdiction over “the administration of band affairs and the internal management of the band” and may “establish and administer services, programs and projects for members of the band [and] other residents.”¹⁹⁹ They may also “promote and preserve the culture, values and traditions of the Crees or Naskapis.”²⁰⁰

Category I lands cannot be sold except to the provincial government, but the Cree and Naskapi may grant rights of use and occupation. Both long-term grants and cessions of Category I lands require approval by members of the community in a referendum.²⁰¹ Both the federal and provincial governments have limited powers to expropriate Category I lands.²⁰² While the province owns the mineral rights to Category I lands, no extraction is allowed without community permission, and the Cree and Naskapi have the exclusive right to the forests.²⁰³

c. Other rights over lands and resources

Beyond their core lands, the Cree and Naskapi have exclusive harvesting rights on Category II lands, but no lands are set aside for residence. While predevelopment activities are allowed, undertakings may not interfere unreasonably with hunting, fishing, and trapping by the Cree

¹⁹⁸ *Cree-Naskapi (of Quebec) Act*, ss. 21, 45.

¹⁹⁹ *Cree-Naskapi (of Quebec) Act*, ss. 45(1)(a), 21(h).

²⁰⁰ *Cree-Naskapi (of Quebec) Act*, ss. 21(i).

²⁰¹ JBNQA, para. 5.1.13; *Cree-Naskapi (of Quebec) Act*, ss. 101-106, 132, 144.

²⁰² JBNQA, para. 5.1.8; *Cree-Naskapi (of Quebec) Act*, Part VII.

²⁰³ JBNQA, para. 5.1.10.

and Naskapi. Their harvesting rights are also recognized on Category III lands, but public access to these lands is the rule.²⁰⁴

The James Bay and Northern Quebec Agreement creates an environmental assessment regime over Category II and III lands, in which the Cree participate.²⁰⁵ The Cree and Naskapi also participate in a consultative committee that manages the hunting, fishing, and trapping on Category II and III lands.²⁰⁶ Their band councils have the power to regulate members exercising their harvesting rights on those lands.²⁰⁷

In 2002, the Agreement was modified to add a forestry regime that allows for Cree participation in management and harvesting.²⁰⁸

d. Other governance structures

The James Bay and Northern Quebec Agreement recognizes the Grand Council of the Crees (of Quebec) as the Cree party to the Agreement; it has since been incorporated as the Cree Regional Authority.²⁰⁹ The Grand Council or Cree Regional Authority is made up of the members of the Cree bands and receives the compensation paid under the Agreement.²¹⁰ Currently, the Cree Regional Authority appoints the Cree representatives to the bodies established under the Agreement and gives consent on behalf of the Cree to any changes to the Agreement.²¹¹ Under a 2007 agreement, the *Cree-Naskapi (of Quebec) Act* is to be amended to give the Cree Regional Authority bylaw-making powers similar to those of the Cree bands in order to set regional standards.²¹²

²⁰⁴ JBNQA, s. 24.

²⁰⁵ JBNQA, s. 22; NEQA, s. 14.

²⁰⁶ JBNQA, s. 24; NEQA, s. 15.

²⁰⁷ *Cree-Naskapi (of Quebec) Act*, s. 48; *An Act respecting hunting and fishing rights in the James Bay and New Québec territories*, R.S.Q., c. D-13.1, ss. 85, 86.

²⁰⁸ JBNQA, Complementary Agreement No. 14.

²⁰⁹ JBNQA, para. 1.11, s. 11A; *Act respecting the Cree Regional Authority*, R.S.Q. c. A-6.1, Division II.

²¹⁰ JBNQA, para. 26.0.1.

²¹¹ JBNQA, para. 11A.0.5.

²¹² Agreement Concerning a New Relationship between the Government of Canada and the Crees of Eeyou Istchee (consolidation of July 10, 2007), section 3.3. The parties plan as a second phase to

In addition, the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement provides that a number of programs and services would be funded in whole or in part by the province. Many of these services are provided by entities that are distinct from the bands, though controlled by the Cree or Naskapi, and operate on a regional basis. For instance, the Cree School Board is a provincial school board²¹³ that only operates on Category I lands and that promotes Cree language and culture.²¹⁴ Health and social services are provided to the Cree by the Cree Board of Health and Social Services of James Bay and to the Naskapi by the Naskapi Local Community Service Centre, both established under provincial law.²¹⁵ The Cree and Naskapi have local police forces recognized under provincial law²¹⁶ but with joint federal-provincial funding under tripartite agreements between Quebec, Canada, and the Cree Regional Authority or the Naskapi.²¹⁷

e. Taxation and funding

Under the federal *Cree-Naskapi (of Quebec) Act*, the bands have the power to impose taxes other than income tax for local purposes, but they must conform to federal regulations and they must be approved by the members at a special meeting.²¹⁸ On Category IB and IB-N lands, they also have the power to impose municipal property taxes.²¹⁹

Unlike bands subject to the *Indian Act*, the Cree and Naskapi bands administer their own funds, subject to the power of the Minister of Indian Affairs to review their financial

negotiate a self-government agreement for the Cree with the participation of the Government of Quebec: s. 3.14.

²¹³ *Commission scolaire crie and Association des enseignants du Nouveau-Québec*, [1980] 2 Can. L.B.R. 374.

²¹⁴ JBNQA, s. 16.

²¹⁵ JBNQA, s. 14; NEQA, s. 10; *Act Respecting Health Services and Social Services for Cree Native Persons*, R.S.Q. c. S-5; for the Naskapi, ss. 530.89-530.117 of the *Act Respecting Health Services and Social Services*, R.S.Q. c. S-4.2.

²¹⁶ *Police Act*, R.S.Q. c. P-13.1, ss. 94-102.

²¹⁷ JBNQA, s. 19; NEQA, section 13.

²¹⁸ *Cree-Naskapi Act*, s. 45(1)(h), (2), (3).

²¹⁹ *Cree Villages and the Naskapi Village Act*, s. 26.

documents.²²⁰ The bands can also borrow funds, subject to the federal government's power to regulate their long-term borrowing.²²¹

The financial affairs of the Cree and Naskapi Bands are more closely regulated than under the *Indian Act*: the councils are obliged to adopt a budget each year and to present it to their members at a meeting.²²² Where the Minister of Indian Affairs "is of the opinion that the financial affairs of a band are in serious disorder," he can appoint an administrator for renewable periods of four months at a time.²²³

Early on, their distinct legal status allowed the Cree and Naskapi to avoid the restrictions of federal contribution agreements for funds paid directly to the bands.²²⁴ As discussed above, a number of activities are also carried out by entities other than the Cree or Naskapi bands, such as health and education. However, the Cree role in determining the funding for these entities is protected under the Agreement, and the courts have recognized their right to negotiate equally with the federal and provincial governments, for instance in setting the budget for the Cree School Board.²²⁵

ii. Nisga'a Final Agreement

a. Introduction

The provisions of the Nisga'a Final Agreement take precedence over all other federal and provincial laws and are meant to be recognized treaty rights within the meaning of the *Constitution Act, 1982*, section 35.²²⁶ At the same time, the treaty defines the full extent of

²²⁰ *Cree-Naskapi Act*, ss. 92(2), 94

²²¹ *Cree-Naskapi Act*, ss. 96-98.

²²² *Cree-Naskapi Act*, ss. 90, 91, 92.

²²³ *Cree-Naskapi Act*, s. 100.

²²⁴ RCAP, vol. 2, *Restructuring the Relationship*, chap. 3, app. 3A, "Existing Financial Arrangements for Aboriginal Governments and Regional and Territorial Governments."

²²⁵ *Commission scolaire crie c. Canada (Procureur général)*, [2001] R.J.Q. 2128, [2002] 1 C.N.L.R. 112 (C.A.).

²²⁶ Nisga'a Final Agreement (hereafter cited "NFA"), Chapter 2, para. 1, 13.

Nisga'a Aboriginal rights, since all other rights are expressly released²²⁷ and nothing else enjoys constitutional protection.

b. Governance structures and powers

The Nisga'a Nation as a whole is governed by the Nisga'a Lisims Government, which replaces the Nisga'a Tribal Council. Nisga'a villages are governed by Nisga'a village governments, which replace *Indian Act* band councils. Both adopt their laws in accordance with the Nisga'a constitution.²²⁸ In addition, the Nisga'a Lisims Government includes representatives from Nisga'a urban locals, who are members who live in Greater Vancouver, Terrace, and Prince Rupert.²²⁹

The Nisga'a right to self-government is recognized.²³⁰ The power to make laws includes not just regulation of Nisga'a lands and property,²³¹ but also essential areas of governance such as the administration of Nisga'a public institutions and Nisga'a citizenship.²³² In addition, Nisga'a governments may regulate several important areas of jurisdiction not included in the *Indian Act*, such as adoption, the provision of child and family services, and policing and local courts.²³³

c. Title and jurisdiction over core lands

None of the Nisga'a lands are "lands reserved for the Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*,²³⁴ so they are not under exclusive federal jurisdiction. Unlike Indian reserves, therefore, they are shielded from provincial regulation only by the terms of the treaty itself. For instance, the treaty provides that provincial environmental

²²⁷ NFA, Chapter 2, para. 26, 27.

²²⁸ NFA, Chapter 8, para. 2, 9, 12.

²²⁹ NFA, Chapter 8, para. 13.

²³⁰ NFA, Chapter 11, para. 1.

²³¹ NFA, Chapter 11, para. 44-58.

²³² NFA, Chapter 11, para. 34-40.

²³³ NFA, Chapter 11, para. 89-93, 96-98; Chapter 12.

²³⁴ NFA, Chapter 2, para. 10.

assessment and protection laws apply to Nisga'a lands,²³⁵ unlike an *Indian Act* reserve where only federal legislation applies.

The lands the Nisga'a received under their treaty take three forms and are all held in fee simple (i.e., full ownership):

- Nisga'a lands, consisting of 1,930 square kilometres made up of both new lands and some former reserves, over which the Nisga'a have full jurisdiction but which are subject to the limits set out in the treaty²³⁶
- Category A of Nisga'a fee simple lands, consisting of other former reserves along with specified adjacent properties, now owned by the Nisga'a²³⁷
- Category B of the Nisga'a fee simple lands consisting of a further 250 hectares adjacent to various bodies of water, now also owned by the Nisga'a²³⁸

Unlike *Indian Act* reserve lands, Nisga'a lands or Nisga'a fee simple lands can be sold by the Nisga'a Nation or a Nisga'a village,²³⁹ but are subject to the conditions for sale set out in the Nisga'a constitution.²⁴⁰ Nisga'a lands remain part of the Regional District of Kitimat-Stikine.²⁴¹

Jurisdiction is the most important difference between the forms of landholding: Nisga'a lands retain their status and therefore remain under Nisga'a jurisdiction even after a change in ownership.²⁴² On the other hand, Nisga'a fee simple lands of both categories lose their status if "no estate or interest in that parcel is owned by the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation or a Nisga'a citizen."²⁴³ Jurisdiction over fee simple lands therefore depends on Nisga'a ownership, not boundaries.

²³⁵ NFA, Chapter 10, para. 3, 4, 11.

²³⁶ NFA, Chapter 3, para. 1-3; Chapter 10, para. 47-52.

²³⁷ NFA, Chapter 3, para. 46.

²³⁸ NFA, Chapter 3, para. 61-62.

²³⁹ NFA, Chapter 3, para. 4.

²⁴⁰ NFA, Chapter 11, para. 9(n).

²⁴¹ NFA, Chapter 18.

²⁴² NFA, Chapter 3, para. 5.

²⁴³ NFA, Chapter 3, para. 53, 67.

Only the federal government may expropriate Nisga'a lands.²⁴⁴ The province may expropriate from Category A of the Nisga'a fee simple lands²⁴⁵ and can also oblige the Nisga'a to grant new rights-of-way for roads or public utilities on Nisga'a lands, up to a maximum total area.²⁴⁶

d. Other rights over lands and resources

1) Wildlife

The treaty provides for a collective Nisga'a collective wildlife harvesting entitlement in a defined Nass Wildlife Area.²⁴⁷ The province may not sell or regulate Crown land if it would deny Nisga'a "the reasonable opportunity to harvest wildlife" or reduce their allocations.²⁴⁸ Once a tripartite wildlife committee is in place, the Nisga'a will propose annual wildlife management plans to determine issues such as the method, timing, and location of the harvest.²⁴⁹ The annual plan takes precedence over all provincial and federal legislation, but the federal and provincial ministers responsible for wildlife and migratory birds have the power to approve, reject, or vary the plan as proposed by the Nisga'a and recommended by the wildlife committee.²⁵⁰

The Nisga'a have jurisdiction over the exercise of the harvest entitlement by members, but their laws on the sale of wildlife cannot conflict with federal or provincial law.²⁵¹ For certain designated species, harvesting is subject to total allowable harvest limits that apply to all hunters.²⁵²

²⁴⁴ NFA, Chapter 3, para. 74.

²⁴⁵ NFA, Chapter 3, para. 55-60, 68-72.

²⁴⁶ NFA, Chapter 7, para. 2.

²⁴⁷ NFA, Chapter 9, para. 1, 2.

²⁴⁸ NFA, Chapter 9, para. 3.

²⁴⁹ NFA, Chapter 9, para. 45, 55.

²⁵⁰ NFA, Chapter 9, para. 65, 67.

²⁵¹ NFA, Chapter 9, para. 37-41.

²⁵² NFA, Chapter 9, para. 15-34.

2) Fish

The treaty provides for a collective Nisga'a fish entitlement in the Nass River watershed²⁵³ as determined in a harvest agreement that sets Nisga'a allocations. However the harvest agreements to be negotiated are not themselves part of the treaty protected by section 35(1) of the *Constitution Act, 1982*.²⁵⁴

Once the harvest agreement is in place, the Nisga'a will propose annual fishing plans to determine the method, timing, and location of the harvest and the terms and conditions for sale of fish.²⁵⁵ The annual plan takes precedence over all provincial and federal legislation, but the federal Minister of Fisheries has the power to approve, reject, or vary the plan as proposed by the Nisga'a.²⁵⁶

The Nisga'a have exclusive jurisdiction over distribution of the collective harvest entitlement among the members,²⁵⁷ but their laws on the sale of fish cannot conflict with federal or provincial law.²⁵⁸

e. Taxation

The Nisga'a Lisims Government, which represents the whole Nisga'a Nation, is only guaranteed the power to impose direct taxes "on Nisga'a citizens on Nisga'a Lands."²⁵⁹ The Nisga'a governments do not have any protected right to tax the property interests of any non-Nisga'a situated on Nisga'a lands.

In fact, the treaty gives Nisga'a governments less taxation power than band councils to which the *Indian Act* gives a power of "taxation for local purposes of land, or interest in land, in the

²⁵³ NFA, Chapter 8, para. 1, 2, 4, and 5.

²⁵⁴ NFA, Chapter 8, para. 22, 24.

²⁵⁵ NFA, Chapter 8, para. 84, 86.

²⁵⁶ NFA, Chapter 8, para. 92, 90.

²⁵⁷ NFA, Chapter 8, para. 69, 71.

²⁵⁸ NFA, Chapter 8, para. 72, 73.

²⁵⁹ NFA, Chapter 16, para. 1.

reserve, including rights to occupy, possess or use land in the reserve.”²⁶⁰ However, the treaty does envision negotiations with the provincial and federal governments on agreements that would give the Nisga’a “direct taxation authority over persons other than Nisga’a citizens, on Nisga’a Lands.”²⁶¹ The treaty therefore provides a right to negotiate toward an agreement that would create a non-treaty authority to tax more extensively.

f. Funding

The treaty provides for tripartite fiscal financing agreements every five years under which Canada, British Columbia, and the Nisga’a will agree on the funding required for the Nisga’a Nation to provide certain public services.²⁶² Currently, the services agreed upon are health, education, social services, local government, and housing.²⁶³

However, the financing agreements, once negotiated, are not part of the treaty protected by section 35(1) of the *Constitution Act, 1982*.²⁶⁴ Nisga’a legislative authority does not create any federal or provincial funding obligation, and the ability of the Nisga’a to contribute from their “own source revenue” will be taken into account through separate agreements negotiated every 10 years.²⁶⁵

C. The importance of modern treaties

When the British Columbia Supreme Court upheld the validity of the Nisga’a Treaty in 2000, it ruled that Aboriginal peoples governed themselves before the arrival of Europeans and that a right to self-government continued after contact. The court held that the Nisga’a right to self-government included the power to negotiate a treaty, which was meant to give a clearer definition to their rights.

²⁶⁰ *Indian Act*, s. 83(1)(a).

²⁶¹ NFA, Chapter 16, para. 3(a).

²⁶² NFA, Chapter 15, para. 3.

²⁶³ Nisga’a Nation Fiscal Financing Agreement, 2000, http://www.ainc-inac.gc.ca/pr/agr/nsga/fis_e.html (accessed March 28, 2008).

²⁶⁴ NFA, Chapter 15, para. 4.

²⁶⁵ NFA, Chapter 15, para. 5, 14-20.

Land claims agreements or modern treaties are a means of exercising the traditional right of self-government in the present. They create a new relationship with the federal and provincial governments with respect to the Aboriginal people's governing of their communities but also with respect to use of their traditional territory by all parties.

Modern treaties can provide more effective government than under the *Indian Act* because they increase the power and resources given to Aboriginal governments. As well, modern treaties—in common with self-government agreements and certain other new legislation that applies to First Nations—recognize autonomous law-making authority and do away with the requirement for approval or the possibility of disallowance by a federal Minister. With the recognized law-making authority, modern treaties generally provide more stable funding to Aboriginal governments in order to ensure that they have the means to exercise that authority.

In addition, modern treaties address the rights of an Aboriginal people to use the resources of their traditional territory beyond the core lands reserved to them under the agreements. The treaties therefore address more of the activities most important to Aboriginal people, and because the Aboriginal governments that are parties to the treaties have jurisdiction over these activities, they have greater legitimacy.

6. Metis self-government²⁶⁶

A. The history of Metis communities and scrip

As the Royal Commission on Aboriginal Peoples has explained, distinct Metis communities grew out of interaction between Aboriginal and European populations based on intermarriage and the “ways of life dictated by the resource industry,” especially the fur trade. New Metis cultures based on both Aboriginal and European languages and skills emerged, which made

²⁶⁶ This section was prepared with the assistance of Lysane Cree of Hutchins Caron & Associés.

the Metis “indispensable members of Aboriginal/non-Aboriginal economic partnerships.”²⁶⁷

Throughout the 19th century, however, the colonial and Canadian governments made a sharp distinction between communities of mixed origins and those they saw as Indians.²⁶⁸ The Metis were therefore excluded from the land surrender treaties.

At the same time that the numbered treaties were being negotiated on the Prairies, the *Manitoba Act* of 1870 set out special Metis rights to land. In addition to granting free possession of settled lands, it appropriated 1.4 million acres to be divided among the children of Metis families, “towards the extinguishment of the Indian Title of the lands in the Province.”²⁶⁹ As of 1879, the government could also “satisfy claims existing in connection with the extinguishment of the Indian title preferred by half-breeds resident in the North-West Territories outside the limit of Manitoba....”²⁷⁰

Land was granted to individuals in the form of “scrip,” which could be used to take up land but could also easily be transferred, encouraging its quick sale. There is ample evidence that this was contrary to the intention of the Metis leadership, who had expected a “reserve” of land or block grants that would allow the Metis to live together.²⁷¹

The issue of whether the resulting land distribution was contrary to the intent of the *Manitoba Act* is before the courts;²⁷² the extent to which fraud accompanied the speculation in Metis scrip has also been debated.²⁷³ What is certain is that the right to scrip was

²⁶⁷ RCAP, vol. 4, *Perspectives and Realities*, chap. 5, “Métis Perspectives.”

²⁶⁸ RCAP, vol. 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, chap. 6, “Stage Three: Displacement and Assimilation,” text corresponding to note 20.

²⁶⁹ *Manitoba Act, 1870*, ss. 32, 31.

²⁷⁰ S.C. 1879, c. 31, s. 125(e).

²⁷¹ George F.G. Stanley, “Le Journal de l’Abbé N.-J. Ritchot, 1870” (1964) 17 *Revue d’histoire de l’Amérique française* 537 at 547.

²⁷² *Manitoba Metis Federation Inc. et al. v. Attorney General of Canada et al.*, 2007 MBQB 293. See also: Paul L.A.H. Chartrand, *Manitoba’s Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan Native Law Centre, 1991).

²⁷³ Arguments on both sides are provided by Thomas Flanagan, *Metis Lands in Manitoba* (Calgary: University of Calgary Press, 1991) and D.N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo:

accompanied by the exclusion of “half-breeds” from treaties under the *Indian Act* as of 1876.²⁷⁴

Metis scrip also became a method for an individual who identified as mixed blood to give up treaty status. The *Indian Act* was amended in 1879 to allow “any half-breed who may have been admitted into a treaty” to withdraw upon receiving land or scrip from the government.²⁷⁵ To this day scrip remains important for the purposes of status under the *Indian Act* because many of the descendants of those who received or have been “allotted half-breed lands or money scrip” remain ineligible.²⁷⁶

In practice, the issuing of scrip usually consisted of rapid transfers from a relatively impoverished population to land speculators at discounted values, as well as outright fraud.²⁷⁷ In 1935, one of the founders of the Metis Association of Alberta told a provincial government commission: “In my travels through Alberta, I have found that the destitute, the most destitute people among the Metis today, are the direct descendants of the Indians who left the treaty in favour of scrip.”²⁷⁸

Wilfrid Laurier University Press, 1988). Flanagan was hired by the Department of Justice Canada and Sprague by the Manitoba Metis Federation.

²⁷⁴ S.C. 1876, c. 18, s. 3(e).

²⁷⁵ S.C. 1879, c. 34, s. 1, as amended S.C. 1884, c. 27, s. 4.

²⁷⁶ The effects of *Indian Act*, R.S.C. 1951, c. 149, s. 12(1), are preserved by *Indian Act*, R.S.C. 1985, c. I-5, s. 6(1)(a), as amended.

²⁷⁷ Joe Sawchuk, Patricia Sawchuk, and Theresa Ferguson, *Metis Land Rights in Alberta: A Political History* (Edmonton: Metis Association of Alberta, 1981) at chap. 4.

²⁷⁸ Glenbow-Alberta Institute, Jim Brady Papers, Oral Testimony of Ewing Commission Hearings at 14, as cited in Douglas Sanders, “Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation,” in Harry W. Daniels, ed., *The Forgotten People: Metis and Non-Status Indian Land Claims* (Ottawa: Native Council of Canada, 1979) 5 at 19.

B. Metis settlements in Alberta

i. Introduction

Only in Alberta do Metis communities have recognized title to significant areas of land.²⁷⁹ Alberta enacted *The Metis Population Betterment Act* in 1938, which provided for the establishment of settlements on provincial lands for associations “of members of the Metis population of the Province who are unable to secure out of their own resources a reasonable standard of living.” It defined Metis as “a person of mixed white and Indian blood but [which] does not include either an Indian or a non-treaty Indian as defined in *The Indian Act*.”²⁸⁰

The status of these settlements changed in 1990 after negotiations between the province and the Alberta Federation of Metis Settlements. The parties agreed to recognize the settlements’ title to their lands and enact new legislative provisions on membership and on democratic governance. In addition, the Federation settled a lawsuit over mineral leases in return for specified funding.²⁸¹

The *Metis Settlement Act* of 1990 includes a new definition of Metis: “an individual of Aboriginal ancestry who identifies with Metis history and culture.”²⁸² In addition, the *Constitution Act of Alberta Amendment Act* recognizes in its preamble that “the Metis were present when the Province of Alberta was established and they and the land set aside for their use form a unique part of the history and culture of the Province,” and states that “it is desired that the Metis should continue to have a land base to provide for the preservation and

²⁷⁹ The Saskatchewan government set aside farms for groups of Metis families between 1939 and 1969. See Catherine Bell, *Metis Aboriginal Title* (LL.M. Thesis, University of British Columbia, 1989) at 73; F. Laurie Barron, “The CCF and the Development of Métis Colonies in Southern Saskatchewan during the Premiership of T.C. Douglas” (1990) 10 *Cdn. J. of Native Studies* 243.

²⁸⁰ *The Metis Population Betterment Act* S.A. 1938, c. 6. The statute was amended in 1940 to add the requirement of “not less than one-quarter Indian blood,” a provision maintained in subsequent consolidations up till R.S.A. 1980, c. M-14, s. 2(a).

²⁸¹ T.C. Pocklington, *The Government and Politics of the Alberta Metis Settlements* (Regina: Canadian Plains Research Centre, 1991) at chap. 10.

²⁸² *Metis Settlements Act* (hereafter cited as “MSA”), R.S.A. 2000, c. M-14, s. 1(j). However status Indians are not eligible for membership in settlements except under special circumstances: s. 75.

enhancement of Metis culture and identity and to enable the Metis to attain self-governance under the laws of Alberta....”²⁸³

ii. Status of lands

The agreement to grant the settlements title to their land is protected by the *Constitution of Alberta Act*: the status of the land cannot be changed without the agreement of the Metis Settlements General Council, and the constitutional status of its protection can neither be amended nor repealed without the consent of a majority of settlement members in a plebiscite.²⁸⁴

The lands are held by the Metis Settlements General Council.²⁸⁵ The lands cannot be seized or mortgaged, and the underlying title cannot be expropriated, though lesser interests in the land may be the subject of expropriation under provincial law.²⁸⁶ A sale of the underlying title to land requires the consent of the province, the General Council, as well as a double majority of members of the settlement affected and of all settlement members.²⁸⁷

The intent of the Metis settlements legislation is that the only rights in land affecting settlements are those created pursuant to the legislation itself.²⁸⁸ No one may enter onto Metis settlement lands without permission, not even the provincial government. However, the lands are held subject to existing interests, including existing oil and gas leases.²⁸⁹ After 1990, the provincial Minister of Resource Development, the General Council, and the eight Metis

²⁸³ *Constitution Act of Alberta Amendment Act* (hereafter cited as “CAAAA”), R.S.A. 2000, c. C-24.

²⁸⁴ CAAAA, s. 5; MSA, ss. 5, 7. Entrenchment of the grant in fee simple to the settlements by an amendment to the *Alberta Act* was part of the failed constitutional reform of 1992: Canada, *Draft Legal Text [based on the Charlottetown Accord of August 28, 1992]* (Ottawa, October 9, 1992).

²⁸⁵ CAAAA, s. 2; *Metis Settlements Land Protection Act* (hereafter cited as “MLPA”), R.S.A. 2000, c. M-16, s. 1(1)(c).

²⁸⁶ CAAAA, ss. 3, 4; MLPA, ss. 5, 6.

²⁸⁷ MLPA, s. 4.

²⁸⁸ Catherine E. Bell, *Alberta Métis Settlements Legislation* (Regina: Canadian Plains Research Centre, 1994) at 26.

²⁸⁹ MLPA, ss. 7, 8.

settlements could enter into a co-management agreement providing for the authorization of new mineral leases.²⁹⁰

iii. Legislative powers and governance structures

Each of the eight Metis settlements has an elected council. The Metis Settlements General Council consists of all of the councillors of the settlements, as well as the officers of the General Council whom the local councillors choose from among other settlement members.²⁹¹ The *Constitution of Alberta Amendment Act, 1990* prevents the provincial legislature from repealing the laws that created the settlement councils and the General Council.²⁹²

Generally, provincial laws continue to apply to the Metis settlements, except where it has been explicitly provided that the General Council may establish policies that override particular provincial laws.²⁹³

The General Council adopts policies for issues that affect all of the settlements such as:

- The use and sale of any interest in settlement lands, including planning and land use in settlement areas
- Financial policy, including investments
- Taxation of settlement lands
- Membership
- Internal management and affairs of the General Council²⁹⁴

²⁹⁰ *MLPA*, s. 111.

²⁹¹ *MSA*, ss. 8, 214.

²⁹² *CAAA*, s. 5.

²⁹³ Bell, *supra* note 289, at 35. For example, *MSA*, s. 222(1)(v) provides that the General Council may exclude the application of provincial statutes concerning wills and estates to settlement lands.

²⁹⁴ *MSA*, ss. 222, 224.

These policies are subject to a veto by the provincial Minister responsible for the settlements. In addition, subject to provincial approval, the General Council may establish policies on hunting, fishing, trapping, and wild plant harvesting on settlement lands.²⁹⁵

The settlement councils may adopt bylaws applicable within the settlement concerning local matters such as planning, land use and development, as well as its internal management. However, settlement bylaws cannot be inconsistent with policies adopted by the General Council.²⁹⁶

The federal government announced in its 1995 self-government policy that “with the participation of the Government of Alberta, it is also prepared to negotiate self-government arrangements with Métis people residing on Alberta Métis Settlements, which reflect their unique circumstances.”²⁹⁷ However no such agreement has yet been reached.

iv. Taxation and funding

Metis settlement councils have the power to tax land and interests in settlement lands, but only in accordance with the General Council policy; this power can extend to taxing provincial government interests in settlement lands.²⁹⁸ Settlement councils also have the power to set a levy “to help pay for the cost of providing settlement or other services or facilities to a development or subdivision,” but subject to maximum rates set by the provincial government.

²⁹⁹

The provincial Minister responsible for Metis settlements retains the power to regulate their budgets, accounting, and audits; he or she may also investigate a settlement or the General

²⁹⁵ *MSA*, s. 226. Resident settlement members have the right to fish for sustenance in the settlement area or any adjoining body of water: *MSA*, ss. 131, 132.

²⁹⁶ *MSA*, s. 227, Schedule 1.

²⁹⁷ INAC, *Federal Policy Guide: Aboriginal Self-Government*, *supra* note 5.

²⁹⁸ *MSA*, s. 166.

²⁹⁹ *MSA*, ss. 168, 169.

Council.³⁰⁰ Further, the Minister has the power to dismiss settlement councillors for improper management and to appoint a comptroller to administer the settlement in their place.³⁰¹

Until the end of the 2006-2007 fiscal year, the province was required by law to provide \$10 million annually to the Metis Settlements General Council as transition funding. Also until 2007, the province was required to make matching payments to settlements for the money they raised through taxes and levies.³⁰²

The province's official position is that it "will work with the Métis Settlements General Council to examine potential approaches to further enhance governance and self-reliance," suggesting that it foresees an end to provincial funding. However \$9 million was again provided for transition funding in 2007-2008.³⁰³

C. Other agreements with the Metis

i. Harvesting

In 2003, the Supreme Court of Canada affirmed in the *Powley* decision that the term "Metis" under section 35 of the *Constitution Act, 1982* "refers to distinct peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears."³⁰⁴ The court therefore concluded that members of the Metis community in and around Sault Ste. Marie had a constitutionally protected Aboriginal right to hunt for food.

In response to the *Powley* decision, some provinces have entered into harvesting agreements with Metis organizations. Alberta signed an interim harvesting agreement with the Metis Nation of Alberta and with the Metis Settlements General Council in 2004. The agreement

³⁰⁰ *MSA*, ss. 170-175.

³⁰¹ *MSA*, ss. 176-178.

³⁰² *Metis Settlements Accord Implementation Act*, R.S.A. 2000, c. M-15, ss. 6, 7, 8, Schedule 1.

³⁰³ Alberta Department of Aboriginal Affairs and Northern Development, *Business Plan 2006-09*, p. 2; Alberta, *2007-08 Estimates: International, Intergovernmental and Aboriginal Relations*, p. 235.

³⁰⁴ *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at para. 10.

“was meant to provide an exemption from the application of the wildlife regulatory regime to eligible Métis who were harvesting pursuant to the terms and conditions of the accommodation.” However, the Court of Queen’s Bench recently held that that the agreement is not authorized under the *Wildlife Act*.³⁰⁵ An interim harvesting agreement was signed by Ontario with the Metis Nation of Ontario in 2004, but it expired in 2006.³⁰⁶

ii. Canada-Metis Nation Framework Agreement

In 1995, the federal government announced that for Metis groups “living off a land base” it was prepared to enter into negotiations involving the provinces and that would involve “devolution of programs and services” as well as “arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base.”³⁰⁷ No agreements have yet been reached.

In response to the *Powley* judgment, the Government of Canada and the Metis National Council negotiated the Canada-Métis Nation Framework Agreement in 2005.³⁰⁸ Among the issues to be discussed are the implementation of the *Powley* decision with respect to harvesting, governance, and programs and services. The “manageable negotiation and discussion processes...will address any Aboriginal and Treaty rights of the Métis, including the inherent right of self-government” and seek “to identify options to resolve long outstanding issues between the Métis Nation and Canada outside of litigation.”

³⁰⁵ *R. v. Kelley*, 2007 ABQB 41, [2007] 2 C.N.L.R. 332 at para. 69.

³⁰⁶ *R. v. Laurin et al.*, 2007 ONCJ 265, [2007] 3 C.N.L.R. 316.

³⁰⁷ INAC, *Federal Policy Guide: Aboriginal Self-Government*, *supra* note 5.

³⁰⁸ <http://www.ainc-inac.gc.ca/nr/prs/m-a2005/02665mnc_e.html>