

**Section 91(24) Powers, the Inherent Right of Self-Government,
and Canada's Fiduciary Obligations**

Kent McNeil

August, 2002

A research paper prepared for the Office of the B.C. Regional
Vice-Chief of the Assembly of First Nations

Table of Contents

Executive Summary		
1.	Introduction	1
2.	Canadian Law on the Crown's Fiduciary Obligations to the Aboriginal Peoples	1
3.	Parliament's Section 91(24) Powers and the Crown's Fiduciary Obligations	
(a)	Infringements of the Inherent Right of Self-Government by the <i>Indian Act</i> Prior to the <i>First Nations Governance Act</i>	6
(b)	Infringement of the Inherent Right of Self-Government by the <i>First Nations Governance Act</i>	
(i)	Would the Act Infringe the Inherent Right?	19
(ii)	Could the Infringement Be Justified?	28
4.	Concluding Remarks: The Dilemma of Aboriginal Governance and Strategic Options	32

Section 91(24) Powers, the Inherent Right of Self-Government, and Canada's Fiduciary Obligations

Executive Summary

Minister of Indian Affairs Robert Nault introduced the *First Nations Governance Act* in Parliament on June 14, 2002. This Act would make significant changes to Indian band governance in relation to leadership selection and other matters. This paper addresses the questions of whether these changes would amount to an infringement of the inherent right of self-government and, if so, whether the infringement could be justified.

Case law has established that First Nations do have an inherent right to select their leaders by custom. An examination of the leadership selection provisions of the *First Nations Governance Act* reveals that the Act would probably infringe this right. For the infringement to be justified, the federal government would have to prove a valid legislative objective and respect for the Crown's fiduciary obligations.

Even if the federal government could get over the hurdle of a valid legislative objective, proof of respect for the Crown's fiduciary obligations would be problematic. Two requirements that the government would have to meet are proof of minimal impairment of the inherent right and consultation with the holders of the right. The government does not appear to have met either of these requirements.

A challenge to the constitutionality of the leadership selection provisions of the *First Nations Governance Act* might be brought on behalf of those First Nations who object to the imposition of those provisions upon them. The federal government might avoid such a challenge by rewriting the Act to make its application to each First Nation contingent on the Nation's consent. Such an approach would also be consistent with Canada's democratic values, and would be a significant indication of the federal government's willingness to reject colonialism and genuinely acknowledge the inherent right of self-government.

Kent McNeil

August, 2002

1. Introduction

This research paper examines Canada's fiduciary obligations to the Aboriginal Peoples in the context of the proposed legislative changes to the *Indian Act's*¹ band governance provisions. It complements the paper I wrote on "The Implications of Parliament's Exercise of Section 91(24) Powers for the Inherent Right of Self-Government" (August, 2002).

The main issue to be analyzed in the current paper is the extent to which Parliament's exercise of s.91(24) powers in relation to governance is constrained by Canada's fiduciary obligations. The conclusions flowing from this analysis will then be applied to the leadership selection provisions in the proposed *First Nations Governance Act*, introduced in Parliament on June 14, 2002, by Robert Nault, Minister of Indian Affairs. I will start with a brief overview of Canadian law on the Crown's fiduciary obligations to the Aboriginal Peoples generally.

2. Canadian Law on the Crown's Fiduciary Obligations to the Aboriginal Peoples²

Although there were suggestions in earlier case law that the Crown owes trust-like obligations

¹ R.S.C. 1985, c.I-5.

² For more detailed discussion, see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996); Kent McNeil, "The Lands and Trust Services Initiative: Its Potential Impact on the Federal Government's Fiduciary Obligations", Part I (August, 1998), Part II (December, 1999), a research report prepared for the Assembly of First Nations; Kent McNeil, "Fiduciary Obligations and Aboriginal Peoples", in Mark R. Gillen and Faye Woodman, eds., *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery Publications, 2000), 807-65; "Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples" [hereinafter "Federal Responsibility"], in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) [hereinafter *Emerging Justice?*], 309-55.

to the Aboriginal Peoples of Canada,³ it was not clear until the Supreme Court of Canada's 1984 decision in *Guerin v. The Queen*⁴ that these are legally enforceable fiduciary obligations. Since *Guerin*, the courts have dealt with numerous allegations of breach of these fiduciary obligations, and have often found that breaches did occur and that the Aboriginal plaintiffs were entitled to compensation and other appropriate remedies.⁵

So far, the case law can be divided into two broad categories. The first category involves cases like *Guerin* where the Crown in its *executive* capacity has fiduciary obligations that arise out of the discretionary power it wields over the rights and interests of the Aboriginal Peoples in certain contexts. For example, due to the inalienability of Aboriginal title,⁶ the Royal Proclamation of 1763,⁷ and the surrender provisions in the *Indian Act*,⁸ the Crown in right of Canada has fiduciary obligations in relation to surrender of Aboriginal title and reserve lands. Dickson J. (as he then was) put it this way in *Guerin*:

... where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and *that obligation carries with it a discretionary power*, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.⁹

☐☐☐ See Rotman, *supra* note 2 at 73-87.

☐☐☐ [1984] 2 S.C.R. 335 [hereinafter *Guerin*].

☐☐☐ For discussion of some of the case law, see works cited *supra* in note 2.

☐☐☐ For detailed discussion linking the inalienability of Aboriginal title to the inherent right of self-government, see Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 *McGill L.J.* (forthcoming).

☐☐☐ Reprinted in R.S.C. 1985, App. II, No. 1.

☐☐☐ R.S.C. 1985, c.I-5, ss. 37-41.

☐☐☐ *Guerin*, *supra* note 4 at 384 [emphasis added].

Applying this principle to reserve lands, Dickson J. said that the Crown's fiduciary obligations arise from the fact that First Nations have an interest in their lands that is inalienable other than by surrender to the Crown.¹⁰ As a result, the Crown has a discretionary power in relation to those lands which is the source of its fiduciary obligations in this context.¹¹

As a general rule, therefore, in any situation where the Crown has discretionary power over the rights or interests of the Aboriginal Peoples, the exercise of this power is subject to fiduciary obligations. The nature and extent of these obligations will depend on the circumstances. The fiduciary obligations which arise from this power are not, however, contingent on the constitutional recognition and affirmation of Aboriginal and treaty rights by s.35(1) of the *Constitution Act, 1982*.¹² Although *Guerin* was decided by the Supreme Court in 1984, the breach of fiduciary obligation in that case actually took place in the 1950s, long before s.35(1) was enacted. Nonetheless, constitutional entrenchment of Aboriginal and treaty rights has extended the reach of the Crown's fiduciary obligations because it has forced Parliament to take account of them when it enacts legislation that might infringe those rights. This is the context for the second category of cases dealing with the fiduciary obligations owed to the Aboriginal Peoples.

In its first decision on the meaning and effect of s.35(1), the Supreme Court in *R. v. Sparrow*¹³ held that the constitutional protection accorded to Aboriginal rights by s.35(1) is not absolute. Those rights can still be infringed by Parliament, if the federal government can justify the infringement by

¹⁰ *Ibid.* at 376.

¹¹ *Ibid.* at 383-84. See also *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 [hereinafter *Blueberry River*]. Note that this discretionary power and the resulting fiduciary obligations relate not only to *surrender*, but also to *use*, of reserve lands. This is apparent from the reliance both Wilson and Dickson JJ. placed on s.18(1) of the *Indian Act* as one source of the Crown's power: see *Guerin*, *supra* note 4 at 348-52, 383-86.

¹² Schedule B to the *Canada Act 1982*, (U.K.) 1982, c.11.

¹³ [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

proving a valid legislative objective that is substantial and compelling, such as conservation of a fishery, and showing that the Crown's fiduciary obligations have been respected. Depending on the circumstances, respect for these obligations can include addressing questions along these lines:

... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.¹⁴

Moreover, the requirements for justification apply to legislation enacted before as well as after s.35(1) came into force in 1982.¹⁵

The obligation of Parliament to take the Crown's fiduciary obligations into account in enacting legislation that may have a detrimental effect on Aboriginal or treaty rights was revealed further in the Supreme Court's decision in *R. v. Adams*, where Chief Justice Lamer said this:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.¹⁶

¶ *Ibid.* at 1119 (Dickson C.J. and La Forest J.).

¶ This follows from the decision in *Sparrow* that the rights that were constitutionally entrenched by s.35(1) are not to be defined by legislation that restricted them before that section's enactment: see *ibid.* at 1091-93. Otherwise, the Court recognized, the "crazy patchwork of regulations" that was in place prior to 1982 would be incorporated into the constitutional definition of Aboriginal rights: *ibid.* at 1091.

¶ [1996] 3 S.C.R. 101 [hereinafter *Adams*], at para. 54. See also *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 533 [hereinafter *Marshall [No. 2]*], at para. 33, where the Court quoted this passage and applied it to treaty rights.

The courts also assume that Parliament intends to respect the Crown's fiduciary obligations when enacting legislation. For this reason statutes, as well as treaties and constitutional documents, are to be interpreted generously in favour of Aboriginal Peoples. Chief Justice Lamer put it this way in *R. v. Van der Peet*:

The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s.35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples must be given a generous and liberal interpretation.... The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s.35(1), such doubt or ambiguity must be resolved in favor of aboriginal peoples.¹⁷

Case law therefore reveals that the Supreme Court, while retaining the discretionary power basis for the Crown's fiduciary obligations articulated by Dickson J. in *Guerin*,¹⁸ has begun to acknowledge a more broadly-based fiduciary relationship. Starting with *Sparrow*, the Court recognized that the "relationship between the Government and aboriginals is trust-like, rather than adversarial", and began to find further justification for the fiduciary nature of the relationship in "the honour of the Crown".¹⁹ The enactment of s.35(1) in 1982 provided the Court with the grounds for requiring the legislative branch of government to take account of the fiduciary obligations of the Crown as well in situations where Aboriginal and treaty rights are concerned.²⁰ Interpretive principles have

¹⁷ [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*], at paras. 24-25.

¹⁸ See *Blueberry River*, *supra* note 11.

¹⁹ *Sparrow*, *supra* note 13 at 1107-1108. See also *R. v. Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*], at para. 41 (Cory J.); *R. v. Marshall [No. 1]*, [1999] 3 S.C.R. 456 [hereinafter *Marshall [No. 1]*], at paras. 49-52 (Binnie J.), para. 78 (McLachlin J., dissenting on other grounds).

²⁰ Note, however, that the Court has refused to extend the Crown's fiduciary obligations to judicial and quasi-judicial bodies: see *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994]

also been grounded in the honour of the Crown and the resulting fiduciary obligations. The Supreme Court has thus been developing fiduciary principles that will permit the courts to supervise the unique relationship between the Crown and the Aboriginal Peoples and hold the federal government to what Dickson J. referred to in *Guerin* as "the fiduciary's strict standard of conduct."²¹

3. Parliament's Section 91(24) Powers and the Crown's Fiduciary Obligations

(a) Infringements of the Inherent Right of Self-Government by the *Indian Act* Prior to the *First Nations Governance Act*

There can be little doubt that, from the perspective of Canadian law, the authority over "Indians, and Lands reserved for the Indians", that was conferred on the Canadian Parliament by s.91(24) of the *Constitution Act, 1867*,²² included the power to enact the *Indian Act*.²³ Moreover, the federal government did not have to justify any infringements of Aboriginal or treaty rights by Parliament prior to the enactment of s.35(1) of the *Constitution Act, 1982*.²⁴ So to the extent that the *Indian Act* infringed or authorized the infringement of the inherent right of self-government,²⁵ the infringement

1 S.C.R. 159.

☐☐☐ *Guerin, supra* note 4 at 384 (see text accompanying note 9, *supra*, for the context of this quotation).

☐☐☐ 30 & 31 Vict. (U.K.), c.3.

☐☐☐ See *Attorney-General of Canada v. Lavell; Isaac v. Bedard*, [1974] S.C.R. 1349; *Attorney-General of Canada v. Canard*, [1976] 1 S.C.R. 170. However, specific provisions of the Act have been held to be invalid because they violate the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms*: see *R. v. Drybones*, [1970] S.C.R. 282; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 3 C.N.L.R. 19 (S.C.C.) [hereinafter *Corbiere*].

☐☐☐ See *R. v. Sikyea*, [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267; *Daniels v. The Queen*, [1968] S.C.R. 517; *R. v. Derricksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

☐☐☐ See Kent McNeil, "The Implications of Parliament's Exercise of Section 91(24) Powers for the Inherent Right of Self-Government", a research paper prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations, August, 2002 [hereinafter "Parliament's Exercise of Property of the Office of the BC Regional Vice Chief–Assembly of First Nations

did not have to be justified prior to 1982. However, we have seen that the fiduciary obligations of the Crown pre-dated the enactment of s.35(1).²⁶ It might, therefore, be argued that imposition of the *Indian Act's* band governance provisions on specific Aboriginal Peoples without their consent²⁷ would have been a violation of the Crown's fiduciary obligations.²⁸ While the finding of such a violation might not invalidate the imposition of those provisions, it might provide an opportunity to seek equitable remedies.²⁹

Since the enactment of s.35(1) in 1982, however, infringements of Aboriginal and treaty rights do have to be justified in accordance with the *Sparrow* test in order to be valid.³⁰ Moreover, we have seen that even infringements that occurred prior to the enactment of s.35(1) have to be justified.³¹ Aboriginal Peoples can therefore challenge the imposition of the *Indian Act's* band governance

Section 91(24) Powers"], where it is argued that the *Indian Act's* band governance provisions violated the inherent right of self-government of at least some of the Aboriginal Peoples to whom they have been applied.

¶¶¶ See text accompanying note 12, *supra*.

¶¶¶ The *Indian Act*, S.C. 1876, c.18, s.62, authorized the Governor in Council to impose the Act's electoral provisions on Indian bands. The current *Indian Act*, R.S.C. 1985, c.I-5, s.74(1), authorizes the Minister of Indian Affairs to do this. In *Badger v. Canada*, [1991] 2 C.N.L.R. 17 (F.C.T.D.), at 21, it was held that the consent of a band, though desirable, is not required for the Minister to exercise this authority. However, the impact of s.35(1) of the *Constitution Act, 1982*, was not considered in that case: see *infra* note 83.

¶¶¶ See generally "Federal Responsibility", *supra* note 2, where it is pointed out as well (at 339) that this might amount to a violation of the *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 9, in relation to the Aboriginal Peoples to whom the Order applies.

¶¶¶ On the availability of equitable remedies for breach of the Crown's fiduciary obligations, see Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich Publishing Ltd., 2001), 106-9.

¶¶¶ See *supra* notes 13-14 and accompanying text.

¶¶¶ See *supra* note 15 and accompanying text.

provisions on the basis that those provisions infringe their inherent right of self-government.³² According to Supreme Court jurisprudence, the burden would be on the Aboriginal People mounting such a challenge to prove its right of self-government in this regard and to establish a *prima facie* infringement of it.³³ Extinguishment apart, the burden would then be on the federal government to prove that the infringement was justified.³⁴ If the federal government failed to do so, the imposition of the band governance provisions on that Aboriginal People would be unconstitutional and therefore invalid.

We have seen that the justificatory test laid down in *Sparrow* requires proof of respect for the Crown's fiduciary obligations as well as proof of a valid legislative objective.³⁵ In the case of a continuing infringement, the time for meeting this test appears to be the time when the infringement of the Aboriginal right is challenged, rather than the time the right was first infringed or the date when constitutional protection was accorded to it by s.35(1).³⁶ This would seem to be particularly so for

¶¶¶ See *Corbiere*, *supra* note 23, where McLachlin and Bastarache JJ. (at para. 22) and L'Heureux-Dubé J. (at para. 112) pointed out that, if an Indian band could prove an Aboriginal or treaty right in relation to choice of their own leaders, in the absence of proof of justification that right would have precedence over the electoral provisions in the *Indian Act*: see "Parliament's Exercise of Section 91(24) Powers", *supra* note 25, text accompanying notes 125-26.

¶¶¶ See *Sparrow*, *supra* note 13; *Van der Peet*, *supra* note 17; *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

¶¶¶ See *Sparrow*, *supra* note 13; *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*]; *Adams*, *supra* note 16; *R. v. Côté*, [1996] 3 S.C.R. 139 [hereinafter *Côté*].

¶¶¶ See *supra* notes 13-14 and accompanying text.

¶¶¶ This appears to be at least implicit in *Sparrow*, *Adams*, *Marshall [No. 2]*, *Gladstone*, *Côté*, *supra* notes 13, 16 and 34, respectively, and other Supreme Court decisions involving justification like *R. v. Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.), at paras. 109-17 (Cory J.), and *Badger*, *supra* note 19, at paras. 96-98 (Cory J.). Those cases all involved infringement of Aboriginal or treaty rights to hunt or fish, a valid legislative objective for which is conservation. Obviously, the time for assessing whether an infringement is necessary for conservation purposes is the time the infringement is challenged, not the time when it was first imposed, as conservation needs may well have changed in the meantime. However, in the case of a one-time infringement, such as clear-cutting Aboriginal title land, the time for

Property of the Office of the BC Regional Vice Chief–Assembly of First Nations

infringements that occurred before s.35(1) was enacted, as it would be unreasonable to expect the federal government to prove that it had met the justificatory test at a time when no justification of legislative infringements of Aboriginal rights was required. If this is correct, justification for imposition of the *Indian Act's* band governance provisions on an Aboriginal People would have to be shown at the time the Aboriginal People challenged the imposition as an infringement of their inherent right of self-government, not at the time those provisions were originally imposed on them.

Assuming the federal government could show a valid legislative objective for such an infringement,³⁷ it would still have to prove that the Crown's fiduciary obligations have been respected. We have seen that Dickson C.J. and La Forest J. posed some questions in *Sparrow* that are relevant to this and are worth repeating:

... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.³⁸

The first question, which is equivalent to the minimal impairment requirement laid down in *R. v. Oakes*³⁹ for justification of infringement of *Charter* rights,⁴⁰ cannot be answered without first identifying the legislative objective. Let us assume, as one possibility, that the federal government proved that the legislative objective for the *Indian Act's* band governance provisions is the democratic justification would have to be the time when the infringement occurred.

☐☐☐☐ This is a major assumption, as the reasons for violating the right of self-government have to be substantial and compelling: see "Parliament's Exercise of Section 91(24) Powers", *supra* note 25, text accompanying notes 84-87.

☐☐☐☐ *Sparrow*, *supra* note 13 at 1119.

☐☐☐☐ [1986] 1 S.C.R. 103.

☐☐☐☐ See "Parliament's Exercise of Section 91(24) Powers", *supra* note 25, text accompanying notes 116-21.

governance of Indian bands, and that a court accepted the validity of that objective in accordance with the *Sparrow* test. A question that might then need to be addressed is whether the band governance provisions meet that objective more effectively with respect to that particular Aboriginal People than their own inherent-right form of government. This question would raise very complex cultural and political issues that courts are probably ill-equipped to assess. For example, a court would no doubt have to determine what is meant by "democratic governance". This is not something that can be answered in the abstract - it would have to take account of the culture and traditions of the particular Aboriginal People concerned. The representative form of government familiar to most Canadians certainly is not the only form of democratic government, and may in fact be inconsistent with the democratic traditions of at least some Aboriginal Peoples.⁴¹

While monetary compensation may not be directly relevant to justification of infringement of the inherent right of self-government,⁴² the third question posed by Dickson C.J. and La Forest J. in *Sparrow*, namely whether the Aboriginal group in question had been consulted with respect to the measures taken to meet Parliament's legislative objective, is fundamental in this context. In *Sparrow*, consultation related to conservation measures that would infringe an Aboriginal fishing right. In *Delgamuukw v. British Columbia*, the Supreme Court found consultation to be necessary where infringements of Aboriginal title are contemplated as well. Chief Justice Lamer said this:

¶ See generally Menno Boldt and J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" (1984) 17 *Can. J. of Political Science* 537; Russel Lawrence Barsh, "The Nature and Spirit of North American Political Systems" (1986) 10 *Am. Indian Q.* 191. More specifically, see Tom Porter, "Traditions of the Constitution of the Six Nations", in Leroy Little Bear, Menno Boldt and J. Anthony Long, eds., *Pathways to Self-Determination* (Toronto: University of Toronto Press, 1984), 14-21; Darlene Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 *U. of T. Fac. of L. Rev.* 1.

¶ The right of self-government probably lacks the economic aspect that Lamer C.J. linked to compensation in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*], at para. 169: see "Parliament's Exercise of Section 91(24) Powers", *supra* note 25, text accompanying notes 88-91.

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.⁴³

The nature and scope of the duty of consultation therefore seems to depend on a number of factors, including the nature of the Aboriginal right being infringed, the severity of the infringement, the urgency of the situation, and the importance of the infringement to Canadian society generally.⁴⁴

Infringements of Aboriginal and treaty rights to fish appear to be more easily justified when the rights in question have a commercial dimension.⁴⁵ The reason for this is that the economic interests of other users of the resource are involved to a greater extent where commercial rights are concerned.⁴⁶ Similarly, the economic aspect of Aboriginal title seems to have caused the Supreme Court to regard infringements of that title as justifiable in appropriate circumstances in order to achieve the objective of

⁴³ *Delgamuukw*, *supra* note 42 at para. 168.

⁴⁴ See also *ibid.* at para. 162; *Nikal*, *supra* note at para. 110; *Marshall [No. 2]*, *supra* note at para. 43.

⁴⁵ Compare *Gladstone*, *supra* note 34, and *Marshall [No. 2]*, *supra* note 16, with *Sparrow*, *supra* note 13. For critical commentary, see Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?", in *Emerging Justice*, *supra* note 2 at 281-91.

⁴⁶ See *Gladstone*, *supra* note 34, especially paras. 57-75.

... *reconciliation* of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community".⁴⁷

Where the inherent right of self-government is concerned, the impact of the exercise of that right on the economic interests of other Canadians would seem to be relatively low. On the other hand, the importance of that right to the Aboriginal Peoples is very high, as their ability to maintain their cultural, social and political distinctiveness depends on the extent to which they can govern their own communities in accordance with their own traditions. Accordingly, the degree of consultation necessary to meet the Crown's fiduciary obligations in this context should be very high as well, approaching if not requiring the full consent that Chief Justice Lamer envisaged for some infringements of Aboriginal rights.

We have seen that the appropriate time for justifying a continuing infringement of the inherent right of self-government is probably the time when the infringement is challenged rather than when it was first imposed.⁴⁸ If so, when would the consultation have to take place? As there was no legal duty to consult prior to the enactment of s.35(1) for a legislative infringement of the right of self-government to be valid,⁴⁹ as a legal matter the federal government could not be expected to have consulted about this prior to 1982. But does this mean that a duty arose in 1982 when s.35(1) was enacted to consult with the Aboriginal Peoples upon whom the band governance provisions had been

¶¶¶¶ *Delgamuukw*, *supra* note 42 at para. 165 (Lamer C.J.) [emphasis in original], quoting from *Gladstone*, *supra* note 34 at para. 73. For critical commentary on the connection between justification and reconciliation, see Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin", a paper presented at "A Just and Lasting Reconciliation: First Nations Government", a conference sponsored by the University of Victoria and Assembly of First Nations (B.C.), Vancouver, 19-22 March 2002.

¶¶¶¶ See *supra* notes 35-36 and accompanying text.

¶¶¶¶ See *supra* note 25 and accompanying text. See also *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.); *Davey v. Isaac*, [1977] 2 S.C.R. 897.

imposed about the continuation of any infringement of their right of self-government? Possibly. However, in the interests of administrative and economic efficiency (if for no other reason) it might be up to the affected Aboriginal Peoples to raise the matter of the infringement of their right of self-government post-s.35(1) with the Department of Indian Affairs in order to trigger the obligation to consult. If the Department failed to consult with them after the matter had been raised, the federal government would probably have difficulty justifying the infringement of their right of self-government from then on.⁵⁰

As consultation must involve people, with whom is the federal government obliged to consult regarding infringements of the inherent right of self-government? This question raises complex issues. I think one has to start by identifying the Aboriginal group that has the right of self-government. The Royal Commission on Aboriginal Peoples was of the view that this right is vested in Aboriginal nations, which they thought to number between 60 and 80 in Canada.⁵¹ They said this:

In our view, the inherent right of self-government is vested in the entire people making up an Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not vest in local communities as such, considered apart from the nations of which they are part.⁵²

While this approach may be appropriate for Aboriginal nations that were or are presently united by a

¶¶¶ In this respect, the recent decisions of the British Columbia Court of Appeal in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2002] 2 C.N.L.R. 312, and *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121, are relevant. In those cases, it was held that an Aboriginal right does not actually have to be proven in court for the duty to consult to arise. While those decisions related to Aboriginal title and resource use, the same principle would seem to apply to an Aboriginal right of self-government.

¶¶¶ *Report of the Royal Commission on Aboriginal Peoples* (Minister of Supply and Services Canada, 1996), Vol. 2, *Restructuring the Relationship*, Part I [hereinafter *RCAP Report*, Vol. 2, Pt. I], 177-84, 234-36.

¶¶¶ *Ibid.* at 234.

common social and political organization, it might be difficult to apply to geographically-extended nations like the Cree who share a culture and language but lack a unifying political structure.⁵³

Moreover, the Royal Commission acknowledged that the *Indian Act's* regime of Indian bands and band councils has fragmented some Aboriginal nations by creating local political entities:

We recognize that there are obstacles to implementing this approach to self-government. In the case of First Nations, for example, one of the effects of the band orientation of the *Indian Act* has been to foster loyalties at the level of the local community, at the expense of broader national affinities arising from a common language, culture, spirituality and historical experience.⁵⁴

While I would not presume to suggest how Aboriginal Peoples should resolve this matter, it may be that the Commission's approach, while appropriate for some Aboriginal nations, cannot be applied universally. An approach that takes account of both the historical and current differences among the various Aboriginal nations of Canada might be more suitable. Moreover, there is a terminological problem here that needs to be acknowledged if we are to avoid begging the vital question of the identify of the holders of the inherent right. As I do not think the term "Aboriginal nation" can be applied universally to the holders of the right, I will use the broader, less familiar term "Aboriginal polity".⁵⁵

My use of this term is intended to encompass all the collectivities that hold the inherent right, including Aboriginal nations.

¶¶¶ The Cree were in fact parties to several of the numbered treaties entered into in the prairie region in the 1870s: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880); Arthur J. Ray, Jim Miller and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2000). If the Cree were an Aboriginal nation in whom an inherent right of self-government was vested at the time, one has to question whether separate Cree groups could have signed different treaties that may have had an impact on that right. Compare, however, the *dicta* of the Supreme Court in *Marshall [No. 2]*, *supra* note 16, referred to *infra* in note 56.

¶¶¶ *RCAP Report*, Vol. 2, Pt. I, *supra* note 52 at 235.

¶¶¶ The term "polity" is defined by *The Concise Oxford Dictionary* (Oxford: Clarendon Press, 1964) as: "Condition of civil order; form, process, of civil government; organized society, state."

I do, however, agree with the Commission that the Aboriginal polity in whom the inherent right of self-government is vested also has the authority to deal with the Canadian government in regard to that right.⁵⁶ While the Commission expressed this view in relation to negotiations leading to treaties for implementing the right,⁵⁷ the same logic applies in the context of consultation over infringements of the right: the people who must be consulted are the people who hold the right. Moreover, as the right of self-government, like other Aboriginal rights, is a communal right that is vested in the Aboriginal polity as a whole rather than in individual members,⁵⁸ consultation has to be with the polity as a community. This is not to say that an Aboriginal polity cannot delegate authority to individuals to consult with the federal government on their behalf. However, this would have to be done in accordance with their own traditions of self-government.⁵⁹

¶¶¶ Note, however, that in *Marshall [No. 2]*, *supra* note 16 at para. 17, the Supreme Court said that, because the Mi'kmaq treaties of 1760-61 consisted of a series of local agreements with individual Mi'kmaq communities rather than a single treaty with the Mi'kmaq Nation, "the exercise of the treaty rights [to hunt and fish] will be limited to the area traditionally used by the local community"; moreover, those rights, because they are communal, are "exercised by authority of the local community to which the accused belongs". This seems to imply that the right of self-government in relation to Mi'kmaq hunting and fishing is vested in local communities rather than in the Mi'kmaq Nation. However, this aspect of *Marshall [No. 2]* has been criticized, as it is inconsistent with the Court's acquittal of Mr. Marshall in *Marshall [No. 1]*, *supra* note 20, because he had not in fact been fishing in the traditional fishing grounds of his local community when he caught the eels he was charged with selling: see Bruce H. Wildsmith, "Vindicating Mi'kmaq Rights: The Struggle Before, During and After *Marshall*", 1999/2000 Access to Justice Lecture, University of Windsor Faculty of Law, March 2000 (copy on file with the author), 24-29; Stephen Patterson, "The *Marshall* Decision as Seen by an 'Expert Witness'" (2000) 8:1-3 *Canada Watch* 53 at 59.

¶¶¶ *RCAP Report*, Vol. 2, Pt. I, *supra* note 51 at 235.

¶¶¶ See *Delgamuukw*, *supra* note 42 at para. 170; *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), at para. 137. It has been held as well that the right to vote in band council elections is a communal right: see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1992] 2 C.N.L.R. 31 (F.C.T.D.), at 33, relying on *Twinn v. The Queen*, [1987] 2 F.C. 450 (F.C.T.D.), at 462-63, where it was held that an Aboriginal right to control band membership would be a communal right.

¶¶¶ The historic treaties provide examples of Aboriginal polities negotiating with representatives of the Crown through leaders chosen by them in accordance with their own traditions.

To sum up, Aboriginal polities affected by the *Indian Act's* band governance provisions can challenge the application of those provisions to them on the basis that the provisions infringe their inherent right of self-government.⁶⁰ The onus would be on the Aboriginal polity mounting the challenge to prove its right of self-government in relation to the matters coming within those provisions, and to show a *prima facie* infringement. Extinguishment of the right aside, the burden would then be on the federal government to justify the infringement by proving a valid legislative objective and respect for the Crown's fiduciary obligations.

If the imposition of the Act's band governance provisions on the Aboriginal polity in question occurred *before* the enactment of s.35(1) in 1982, I think the federal government would have to show a legislative objective that was valid at the time the challenge was brought. The government would probably have to prove as well that application of those provisions to the particular Aboriginal polity was still necessary to meet the objective at the time of the challenge. While the government would not have had a constitutional obligation to consult prior to the enactment of s.35(1), it would be obliged to do so after the section came into force, at least if the Aboriginal polity whose inherent right had been infringed raised the matter. Failure on the part of the federal government to consult after being asked to do so might well lead a court to conclude that the infringement of the right of self-government could not be justified.

If the imposition of the Act's band governance provisions on the Aboriginal polity occurred *after* the enactment of s.35(1), there would have been a duty to consult prior to the imposition.⁶¹ Once again, failure to do so could lead to a decision that the Crown's fiduciary obligations had not been respected and so the infringement could not be justified.

¶¶¶ Aboriginal Peoples who have treaty rights might base such a challenge on violation of those rights as well. The viability of a treaty right challenge would obviously depend on the terms, both oral and written, of the particular treaty.

¶¶¶ See the cases cited *supra* in note 50.

Given the central importance of the inherent right of self-government to Aboriginal Peoples and the minimal impact of its exercise on at least the economic interests of other Canadians, I think the degree of consultation that would be necessary is very high, coming close to if not requiring actual consent. Identification of the Aboriginal polity with whom consultation must take place might, however, be problematic. I argued above that consultation must take place with the polity that holds the right of self-government, which in most cases is an Aboriginal nation rather than an *Indian Act* band. However, as the Act's band governance provisions apply to bands rather than to Aboriginal nations,⁶² there is a lack of fit here that complicates the analysis, both legally and practically.

Finally, given that the inherent right of self-government is a collective right that is held by all the members of the Aboriginal polity *as a community rather than as individuals*, consultation has to be with the group as a collectivity, not with individuals. The community's own political organization and procedures, which are themselves expressions of the polity's inherent right of self-government, would have to be respected for the consultation process to be valid. This could be of considerable importance in relation to the proposed *First Nations Governance Act*. We shall now consider whether that legislation, if enacted by Parliament and imposed on Aboriginal polities without their consent, would be an infringement of the inherent right of self-government, and if so whether the infringement could be justified.

(b) Infringement of the Inherent Right of Self-Government by the *First Nations Governance Act*

(i) Would the Act Infringe the Inherent Right?

For the purposes of this paper, I do not think it is necessary to undertake a detailed analysis of

¶¶¶ In some instances these are the same, but in many instances they are not. To complicate matters even further, in the case of confederacies like the Haudenosaunee (the Six Nations Confederacy) the inherent right of self-government may be shared between the confederacy and the nations that are members of it.

the specific provisions of the *First Nations Governance Act* [hereinafter the *FNGA*]. As is now well known, the Act deals mainly with the selection and authority of band councils, band administration and financial management, accountability, and the application of human rights legislation.

Regarding the inherent right of self-government, the Preamble to the Act contains the following significant statements:

Whereas the Government of Canada has adopted a policy recognizing the inherent right of self-government as an aboriginal right and providing for the negotiation of self-government;

Whereas neither the *Indian Act* nor this Act is intended to define the nature and scope of any right of self-government or to prejudice the outcome of any self-government negotiation[.]

These statements fall short of asserting that the Act does not or is not intended to *infringe* the inherent right. But regardless of the intention, whether the Act infringes the right or not is a constitutional question that can only be answered legally by a court. Moreover, this question cannot be answered in a general way - it can only be answered in the context of the self-government rights of a specific Aboriginal polity.⁶³

In my paper on "The Implications of Parliament's Exercise of Section 91(24) Powers for the Inherent Right of Self-Government", I concluded that imposition of the *Indian Act's* band governance provisions probably infringed the inherent right of self-government of at least some Aboriginal polities.⁶⁴ Some of the 1985 amendments to the *Indian Act* probably did that as well.⁶⁵ Generally, then, to the extent that the *FNGA* impacts on the legal capacity or the practical ability of Aboriginal

¶¶¶ See "Parliament's Exercise of Section 91(24) Powers", *supra* note 25, at notes 73, 126-27, and accompanying text

¶¶¶ *Ibid.*, text accompanying notes 54-73.

¶¶¶ *Ibid.*, text accompanying notes 97-109.

polities to exercise their inherent right of self-government, it probably infringes the right. A specific instance of this can be found in the provisions of the Act that relate to band councils chosen by custom.

The selection of band councils by custom was expressly envisaged by s.2(1)(c) the 1951 *Indian Act*,⁶⁶ which defined "council of the band" as

- (i) in the case of a band to which section seventy-three applies, the council established pursuant to that section,
- (ii) in the case of a band to which section seventy-three does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band[.]

An identical definition appears in the current Act.⁶⁷ Section 73 (now s.74) provides for selection of band councils by elections. It applies only to those bands that have been subjected to the electoral system by an order of the Governor in Council (the 1951 Act) or the Minister (the current Act). The default position is therefore selection of band councils by the custom of the band.⁶⁸

The *Indian Act* only *envisages* the selection of band councils by custom - it does not *provide* for customary selection. In *Bone v. Sioux Valley Indian Band No. 290 Council*, Heald D.J. said:

It seems clear that this [the s.2(1) definition of "council of the band"] is a 'definition' provision rather than an 'empowering' provision.... It does not confer a power upon a

⁶⁶ S.C. 1951, c. 29.

⁶⁷ *Indian Act*, R.S.C. 1985, c.I-5, s.2(1).

⁶⁸ This is apparent from Federal Court decisions holding that, when a s.74 order imposing the electoral system is revoked, selection by band custom is automatically restored: see *Jock v. Canada (Minister of Indian and Northern Affairs)*, [1992] 1 C.N.L.R. 103 (F.C.T.D.) [hereinafter *Jock*], at 110-11 (F.C.T.D.); *Sparvier v. Cowessess Indian Band # 73*, [1994] 1 C.N.L.R. 182 (F.C.T.D.) [hereinafter *Sparvier*], at 185. See also *Badger v. Canada*, [1991] 2 C.N.L.R. 17 (F.C.T.D.), affirmed (1992), 146 N.R. 79 (F.C.A.); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1994] 1 F.C. 394 (F.C.T.D.), at 405; *Jenniss c. Jenniss*, [2000] 1 C.N.L.R. 134 (Que. S.C.).

Band to develop a custom for selecting its council.⁶⁹

Since the Act does not empower bands to select their councils by custom, authority for this must be found elsewhere. As it is not found in any statute, it must come from the inherent right of self-government, which in this context, it seems, is exercisable by Indian bands as defined by the *Indian Act*.⁷⁰ This was acknowledged by Heald D.J. in *Bone* when he observed that s.2(1)

... recognizes that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors. The definition of "council of a band" acknowledges that prior to the enactment of the *Indian Act* in 1951, Indian Bands had their own methods for selecting the Band Council. The power or ability to continue choosing the Band Council in the customary manner is left intact by the *Indian Act*, except in those cases where the power is removed from the Band by a ministerial order under s-s.74(1) of the Act.

Accordingly, I do not think that the power of the Band to choose its council in a customary manner is a "power conferred on the Band" as is contemplated by s-s.2(3)(a) of the *Indian Act*. Rather, *it is an inherent power of the Band; it is a power the Band has always had*, which the *Indian Act* only interferes with in limited circumstances, as provided for under s.74 of the Act. Thus, in my view the Band may exercise this inherent power unrestrained by s-s.2(3)(a) of the *Indian Act*.⁷¹

¶ [1996] 3 C.N.L.R. 54 (F.C.T.D.) [hereinafter *Bone*], at 65. Heald D.J.'s opinion is consistent with principles of statutory interpretation. See Jim Evans, *Statutory Interpretation: Problems of Communication* (Auckland: Oxford University Press, 1988), at 52, where it is written that the definition sections in statutes

... normally do not have any immediate legal effect at all. Instead the terms they define wait to be employed in other provisions that have a substantive legal effect.

See also S.G.G. Edgar, *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971), at 213.

¶⁷⁰ Section 2(1) of the Act defines "band" as "a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act".

¶⁷¹ *Bone, supra* note 69 at 65 [emphasis added]. S-s.2(3)(a) of the *Indian Act* provides: "Unless the context otherwise requires or this Act otherwise provides, (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band".

Section 74 of the *Indian Act* would be repealed by the *FNGA*. Selection of band councils would then take place in one of two ways: (1) in accordance with band designed and adopted leadership selection codes; (2) in the absence of a code, by election in accordance with regulations made by the Governor in Council. The definition of "council of the band" in the *Indian Act* would be replaced with a new definition of "council" to reflect this change:

"council", in relation to a band, means the council selected by election or custom in accordance with a leadership selection code or, in the absence of such a code, by election in accordance with the regulations.⁷²

Section 5 of the Act deals with leadership selection codes. If a band was subject to the *Indian Act's* election provisions immediately before s.5 of the *FNGA* came into force, the code adopted by the band would have to include certain rules that are set out in s.5(1), including rules regarding the council's size and composition, qualifications of electors and candidates, and the term of office for councillors. For the purposes of this paper, the most important rule is in s.5(1)(b): "establishing the mode of selection of the members of the council, *as long as a majority of them at least are elected*" [emphasis added]. These changes would give bands more authority over the procedures for selecting their leaders than the current *Indian Act's* election provisions that they would replace. They may, therefore, be viewed as less intrusive infringements of the inherent right of self-government than the current provisions. However, the *FNGA's* leadership selection provisions are nonetheless a statutory regime setting out the rules that bands must follow in creating their own membership codes. Like the current provisions, they would interfere with the legal capacity and practical ability of Aboriginal polities to exercise their inherent right of self-government. For this reason, they probably infringe the inherent right in the same kind of way, if not to the same extent, as the current *Indian Act*.⁷³

⁷² *FNGA*, s.2(1).

⁷³ See "Parliament's Exercise of Section 91(24) Powers", *supra* note 25.

The provisions in the *FNGA* for the selection of leaders by custom do, however, amount to a more serious infringement of the inherent right of self-government than the current *Indian Act*. Under the current Act, bands that are not subject to a s.74(1) ministerial order imposing the Act's electoral provisions on them can select their leaders in accordance with their own customs, which can be based either on traditional practices or modern adaption designed to meet their own needs.⁷⁴ In *Bigstone v. Big Eagle*, Strayer J. said this:

Unless otherwise defined in respect of a particular band, "custom" must I think include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus. With a newly re-established band whose circumstances are vastly different (e.g. the majority not being resident on the reserve) from those of the band dissolved some 90 years earlier, it is not surprising that innovative measures would have to be taken to establish a contemporary "custom". The real question as to the validity of the new constitution then seems to be one of political, not legal, legitimacy: is the constitution based on a majority consensus of those who, on the existing evidence, appear to be members of the band? This is a question which a court should not seek to answer in the absence of some discernable legal criteria which it can apply.⁷⁵

In *McLeod Lake Indian Band v. Chingee*, Reed J. referred to *Bigstone* and observed:

Also, custom by its nature is not frozen in time. It can and does change in response to changed circumstances. A band may choose to depart from oral tradition and set down its custom in written form. It may move from a hereditary to an electoral system. It may choose to adopt as its customary practices, practices and procedures that resemble the election procedures used to elect municipal or provincial governments. I cannot interpret the reference to "custom of the band" in subsection 2(1) as preventing a band from changing the custom according to which it governs itself from time to time in response to changing circumstances.⁷⁶

¶ Several Federal Court decisions have acknowledged the validity of a variety of band customs for the selection of leaders: e.g. see *Jock and Sparvier*, *supra* note 68; *Crow v. Blood Indian Band Council*, [1997] 3 C.N.L.R. 76 (F.C.T.D.).

¶ [1993] 1 C.N.L.R. 25 (F.C.T.D.) [hereinafter *Bigstone*], at 34. Strayer J.'s views on this matter were approved and applied by Heald D.J. in *Bone*, *supra* note 69 at 63-64. See also *Lac des Mille Lacs First Nation v. Chapman*, [1998] 4 C.N.L.R. 57 (F.C.T.D.), at 65-66.

¶ [1999] 1 C.N.L.R. 106 (F.C.T.D.), at 108.

As we have seen, the current *Indian Act* does not place restrictions on, or even make any provision for, selection of band councils by custom.⁷⁷ The Federal Court has repeatedly concluded that this leaves bands with considerable scope for the exercise of inherent rights in the selection of their leaders.

The *FNGA* would change this by placing statutory restrictions on this use of custom. The relevant provisions are in s.5 (2) to (4), which need to be reproduced in full with their headings [put in bold]:

Custom bands

- (2) Where a band was not subject to an order under section 74 of the *Indian Act* immediately before the coming into force of this section, a leadership selection code adopted by the band must
 - (a) include the rules required under subsection (1); or
 - (b) consist of the custom rules for the council's selection, by election or otherwise, as they existed on the coming into force of this section, together with a process for appealing the selection and a procedure for amending the code.

Time limit for adoption of custom rules


- (3) A code consisting of custom rules may be adopted only during the period of two years beginning on the coming into force of this section.

Newly created bands

- (4) Where a band is established after the repeal of section 74 of the *Indian Act*, a leadership selection code adopted by the band must include the rules required under subsection (1).

These provisions have to be read in conjunction with s.4 (1)(a) and (2):

Proposal for adoption by band

 See *supra* notes 69-71 and accompanying text.

- 4.(1) The council of a band may, in accordance with the regulations, propose any of the following codes for adoption by the eligible voters of the band:
- (a) a leadership selection code:

.....

Conditions for adoption

- (2) A proposed code is adopted if it is in writing and is approved, in a vote conducted by the council in accordance with the regulations, by a majority of the eligible voters of the band who participate in the vote, and if those who vote to approve it constitute more than twenty-five per cent of all eligible voters.

These provisions would evidently restrict the exercise by bands of the inherent right to select their leaders by custom. Examples of these restrictions include: (1) bands currently under custom would have to put their customs in writing and have them approved by eligible voters in accordance with regulations to be made under s.31 of the *FNGA* (s.4(2));⁷⁸ (2) those customs would have to either include the rules in s.5(1) of the Act or consist of the band's custom rules as they existed when s.5 came into force, and in the latter case they would have to include a process for appealing the selection and a procedure for amending the code (s.5(2)); (3) a two-year limitation period for the adoption of a leadership selection code would be placed on bands that decide to retain their customary selection procedures (s.5(3)); (4) bands not under custom at the time s.5 came into force would have no choice - they would have to include the rules in s.5(1) (s.5(1)); (5) bands created after the repeal of s.74 of the *Indian Act* would not have the option provided in s.5(2) either - they too would have to include the rules in s.5(1) in their leadership selection codes (s.5(4)).⁷⁹

At the infringement stage of the analysis, the issue is not whether the legislative measures are beneficial or desirable. The matter to be determined is simply whether or not the measures amount to a

¶¶¶ Section 31 provides: "The Governor in Council may make regulations respecting the adoption of a code by a band under section 4, including procedures for the holding of votes."

¶¶¶ Contrast this with the current situation, where new bands to which s.74 does not apply are free to design their own customs without statutory restrictions: see *Bigstone*, *supra* note 75.

prima facie infringement of an Aboriginal or treaty right. Given that the provisions relating to leadership selection codes in the *FNGA* do place restrictions on the current inherent authority of bands to select their leaders by custom, and assuming that that authority is derived from an inherent right of self-government,⁸⁰ it seems that imposition of those measures on the bands would amount to an infringement of that right. This is not to say that other provisions in the *FNGA* do not infringe the inherent right of self-government as well. The analysis in this paper is, however, limited to the leadership selection provisions in the Act.


If my conclusion that the leadership selection provisions in the *FNGA* would infringe the inherent right of self-government is correct, the next matter to be considered is whether the infringement could be justified.

(ii) Could the Infringement Be Justified?

We have seen that the *Sparrow* test requires proof by the Canadian government of a valid legislative objective as a first step in justifying an infringement of an Aboriginal right.⁸¹ The legislative objectives of the *FNGA* are explicitly stated in s.3:

3. The purposes of this Act are

- (a) To provide bands with more effective tools of governance on an interim basis pending the negotiation and implementation of the inherent right of self-government;
- (b) to enable bands to respond more effectively to their particular needs and aspirations, including the ability to collaborate for certain purposes; and
- (c) to enable bands to design and implement their own regimes in respect of leadership selection, administration of government and financial management and

 This is at least implicit in Federal Court decisions dealing with band councils selected by custom: see cases cited *supra* in note 68, and text accompanying notes 69-71.

 See *supra*, text accompanying notes 13-14.

accountability, while providing rules for those bands that do not choose to do so.

The onus would therefore be on the Canadian government to prove that these objectives are so compelling and substantial that they justify the infringement of the constitutional right of Indian bands to design and utilize their own customs to choose their leaders without being subject to restrictions imposed by federal legislation.

The objective stated in s.3(c), namely "to enable bands to design and implement their own regimes in respect of leadership selection, ... while providing rules for those bands that choose not to do so", is evidently the one that is most relevant to infringement of the inherent right to rely on custom for the selection of leaders. However, our analysis of the leadership selection provisions in the Act has revealed that, instead of *enabling* bands to design and implement their own regimes of leadership selection, the Act in fact *restricts* the authority bands currently have to select their leaders by custom.⁸²

The leadership selection provisions therefore do not appear to be consistent with the stated purposes of the Act. This inconsistency might make it difficult for the government to convince a court that those provisions fulfil a valid legislative objective.

¶¶¶ I recognize that s.74 of the current *Indian Act* gives the Minister the discretion to impose the Act's electoral system on bands, thereby taking away their authority to select their leaders by custom. It could therefore be argued that the inherent right to select leaders by custom is subject to ministerial discretion that will be removed by the *FNGA*, so the new legislation would in fact confer more authority on band councils. The problem with this argument is that it fails to take account of the fact that s.74 is also subject to s.35(1) of the *Constitution Act, 1982*. Since the enactment of s.35(1), any imposition of the *Indian Act's* electoral system on a band could be challenged as an infringement of that band's inherent right to choose its leaders by custom (this right would not have been extinguished by a s.74(1) order made prior to the enactment of s.35(1), as revocation of the order restores the authority of the band to rely on custom: see cases cited *supra* in note 68). In *Corbiere*, *supra* note 23 at para. 22 (McLachlin and Bastarache JJ.) and para. 112 (L'Heureux-Dubé J.), the Supreme Court of Canada suggested that, if a band could establish an Aboriginal right with respect to selection of leaders, in the absence of adequate proof of justification that right would take precedence over the *Indian Act's* election provisions: see "Parliament's Exercise of Section 91(24) Powers", *supra* note 25, text accompanying notes 125-26. *Ergo*, absent justification an inherent right to select leaders by custom would take precedence over a s.74(1) order.

Assuming, however, that the Canadian government could establish a valid legislative objective for the *FNGA*'s leadership selection provisions that could serve to justify infringement of the inherent right to select leaders by custom, the government would still have to prove respect for Canada's fiduciary obligations. As we have seen, two of the aspects of this branch of the justificatory test are minimal impairment of the right and consultation with the Aboriginal Peoples concerned.⁸³ Regarding minimal impairment, if the legislative objective is really "to enable bands to design and implement their own regimes in respect of leadership selection",⁸⁴ do the Act's leadership selection provisions meet the objective by minimally impairing the right of bands to select their leaders by custom? Once again, the lack of fit between the stated purposes of the Act and the leadership selection provisions is apparent: the right being infringed appears to be more consistent with the stated purposes than the provisions themselves. To justify the infringement, it seems to me that the government would have to prove that reliance on custom somehow interferes with the ability of bands "to design and implement their own regimes in respect of leadership selection". As this sounds counterintuitive, I think the burden on the government would be heavy. Moreover, I do not think the burden could be met by evidence of a general nature. As justification of infringement must relate to the specific rights of the Aboriginal group that holds those rights,⁸⁵ the government would have to present factual evidence on a case-by-case basis justifying the application of the Act's leadership selection provisions to each band that challenged their application by proving an infringement of their inherent right to select their leaders by custom. In other words, the government would probably have to prove that selection of leaders by custom *by that band* was so contrary to the interests of the members of that band (or possibly to the interests of Canadian society as a whole) that infringement of that band's constitutional right to select leaders by custom was justifiable.

☐☐☐ See *supra* notes 37-44.

☐☐☐ *FNGA*, s.3(c).

☐☐☐ See the cases cited *supra* in note 36.

Assuming the Canadian government could get over these difficulties, it would still have to show that Canada's fiduciary obligations had been met by consultation. As we have seen, the communal nature of Aboriginal rights dictates that consultation has to be with the right-holding people *as a community, not as individuals*.⁸⁶ The Canadian government claims that it consulted extensively with First Nations people before drafting the *FNGA*. The "Backgrounder" accompanying the Act on the government's website contains the following statement:

The proposed First Nations Governance Act is the result of one of the most extensive consultations with First Nations people ever undertaken in Canada. Throughout the spring, summer and fall of 2001, First Nations people across Canada participated in community meetings, information sessions and discussion groups, and provided their opinions and ideas through correspondence, the First Nations Governance Web site and a toll-free call centre. More than 10,000 individuals and leaders expressed their views.⁸⁷

Apart from the fact that the "Backgrounder" gives no indication of what views were expressed by the First Nations people who participated in the consultations, the fact remains that, for infringement of an Aboriginal right to be justified, the consultation must take place with the actual holders of the right. Consultation with First Nations people generally cannot justify infringement of an Aboriginal right of any particular Aboriginal People.

I remarked earlier that identification of the Aboriginal polities that hold the inherent right of self-government can be problematic. However, in the context of the inherent right to select leaders by custom, the case law to date suggests that this right is now vested in Indian bands, as defined by the *Indian Act*. I am conscious of the paradox arising from this conclusion that statutorily-defined Aboriginal groups can hold inherent rights. The difficulty arises from the colonial reality that

⁸⁶ See *supra* notes 57-60 and accompanying text.

⁸⁷ "Backgrounder: First Nations Governance Act", on-line: http://www.fng-gpn.gc.ca/FNGA_bkgrd_e.asp.

Aboriginal nations have had definitions of who they are imposed on them by Canadian legislation in the form of the *Indian Act* for over 100 years.⁸⁸ As a consequence, many Aboriginal polities today find themselves in a situation where some aspects of their inherent right of self-government may in fact be exercised by *Indian Act* bands. This would appear to be the case where selection of band councils by custom is concerned. While band councils themselves may not be an expression of the inherent right of self-government of many Aboriginal polities, colonialism has resulted in a situation whereby the selection of band councils by custom has become an expression of the right of self-government in that context. Aboriginal Peoples should not be prejudiced by this paradox, especially because it was not of their making - it was, in fact, created by Parliament, possibly in violation of Canada's fiduciary obligations.⁸⁹

4. Concluding Remarks: The Dilemma of Aboriginal Governance and Strategic Options

The controversy over the *First Nations Governance Act* is reflective of the central dilemma facing the Aboriginal Peoples who have been subjected to the *Indian Act's* band governance provisions. On the one hand, imposition of those provisions was a colonial act that infringed their inherent right of self-government because it imposed a form of government that interfered with the functioning of their traditional forms of government. On the other hand, by the time their inherent right received constitutional protection in 1982, the Act's band council form of government had been operating on most Indian reserves for several generations, and had become established. Even when leaders are chosen by custom rather than by election, the authority they exercise in relation to the *Indian Act* is

¶¶¶ In many cases, this has occurred despite their objections: e.g. see *Davey v. Isaac*, [1977] 2 S.C.R. 897, where the application of the *Indian Act* to the Six Nations was challenged (unsuccessfully) on the ground that the Six Nations are not a "band" within the meaning of that term in the Act. For background and discussion, see Johnston, *supra* note 41.

¶¶¶ See text accompanying notes 26-29, *supra*.

derived from the statute, not from the inherent right of self-government. So as long as an imposed legislative regime is in place, whether it is in the form of the *Indian Act* regime or the modified regime provided by the *FNGA*, there will always be tension between that regime and the inherent right. They cannot occupy the same space because they are fundamentally inconsistent with one another.

This means that, since the enactment of s.35(1) of the *Constitution Act, 1982*, imposition of the legislative regime should be challengeable by the holders of the inherent right. However, given that the Indian bands who now self-identify as First Nations are to some extent the products of the legislation that is being challenged, they might have difficulty convincing a court that *their* inherent right of self-government has been infringed. This is another facet of the dilemma: the inherent right must be vested in the Aboriginal nations or other Aboriginal groups who had band governance imposed upon them, not in the political entities that emerged as a result of that imposition. If this is correct, any challenge to the constitutionality of the legislation's band governance provisions might pose a threat to the political stability of some reserves, as it would undermine the legitimacy of chiefs and councillors who are exercising statutory authority. If such a challenge were to be brought, I think it would be essential for an inherent right government to be in place to fill the power vacuum. Otherwise, a court might conclude that infringement of the inherent right of self-government by the imposition of the band council government could be justified at the present time because there is no current alternative.

Apart from negotiated self-government agreements that discard the imposed legislative regime and acknowledge and implement the inherent right, are there any other solutions to this dilemma, at least in the short-term? A litigation strategy could involve a challenge to the *FNGA*'s leadership selection provisions, but not to the *Indian Act*'s band governance provisions.⁹⁰ A challenge of this sort would avoid the potentially destabilizing effects of a challenge to the constitutionality of band

FOOTNOTES In constitutional cases, as a rule courts only consider the specific legislative provisions being challenged: e.g. see *Corbiere*, *supra* note 23, where the Supreme Court only ruled on the constitutionality of s.77(1) of the *Indian Act*, even though other provisions of the Act (e.g. s.77(2)) probably suffer from the same defect.

governance itself. If successful, such a challenge would preserve the *status quo* until self-government agreements could be negotiated. However, the case law up to now on Aboriginal rights generally and the right of self-government in particular seems to suggest that each band claiming an inherent right to use custom to select its council would have to bring its own action. This is because Aboriginal rights are specific and have to be proven on a case-by-case basis.⁹¹ If the courts took this position, a general challenge to the constitutionality of the *FNGA's* leadership selection provisions would be unlikely to succeed.⁹²

There is, however, a good reason for distinguishing such a challenge from the cases on Aboriginal rights. Numerous decisions on the selection of band councils by custom have already revealed that *every Indian band* has a right to use custom for this purpose that can be exercised in the absence of a s.74(1) order imposing the *Indian Act's* electoral provisions on that band.⁹³ In none of the decisions that I have examined have the courts *required proof* of this right, no doubt because it is statutorily acknowledged by the Act's definition of "council of the band".⁹⁴ Moreover, as the inherence of this right has been expressly recognized by the Federal Court,⁹⁵ it must be an expression of the

¶¶¶ See the cases cited *supra* in notes 17, 34, and 42.

¶¶¶ In *Corbiere*, *supra* note 23, the Court did find the on-reserve residency requirement for electors of chiefs and councillors to be unconstitutional rather than simply inapplicable to the Batchewana First Nation, but that decision is of little assistance in this regard because the challenge was based on s.15(1) of the *Charter*, not on an Aboriginal or treaty right.

¶¶¶ See the cases cited in notes 68, 69, 74 and 75, *supra*. Recall as well that the right is not extinguished by a s.74(1) order: see *supra* note 82.

¶¶¶ See text accompanying notes 66-67, *supra*, for this definition.

¶¶¶ In *Bone*, *supra* note 69: see text accompanying notes 69-71, *supra*. In that case, Heald D.J. referred to it as "an inherent power" which "the Band has always had": *ibid.* at 65. I do not think anything turns on his use of the term "power" instead of "right", as they are probably equivalent in this context. In general usage, a right to exercise governmental authority is usually expressed as a power, perhaps to acknowledge its public nature and distinguish it from private rights (e.g., ss. 91 and 92 of the *Constitution Act, 1982* are described as the main "division of powers" provisions in the Canadian Constitution).

Aboriginal right of self-government. Given that it seems to be unnecessary for each band to establish its right to choose its leaders by custom, a general challenge to the constitutionality of the *FNGA*'s leadership selection provisions might succeed. Such an action would be based on an allegation that those provisions infringe the Aboriginal right of Indian bands generally to select their leaders by custom. This would be revealed by showing how the *FNGA* diminishes the authority that bands currently have to select their leaders in this way.⁹⁶ If the court accepted that an Aboriginal right had been infringed, the onus would then be on the Canadian government to try to justify the infringement.⁹⁷

We have seen that consultation is a key ingredient of justification.⁹⁸ Given the importance of the right of self-government to the Aboriginal Peoples, the level of consultation should be very high, possibly requiring actual consent for the right to be impaired.⁹⁹ Moreover, we have seen that the consultation must take place with the Aboriginal collectivity that holds the right, not with individuals or Aboriginal Peoples generally.¹⁰⁰ Since the right to use custom to choose band councillors appears to be vested in Indian bands,¹⁰¹ consultation regarding the infringement of that right would have to take place with each band. There is no provision for this in the *FNGA*. On the contrary, with the exception of the bands and nations exempted from the Act's application by s.35,¹⁰² it appears to apply to Indian

⁹⁶ See text accompanying notes 74-80, *supra*.

⁹⁷ See text accompanying notes 81-88, *supra*.

⁹⁸ See text accompanying notes 42-59, *supra*.

⁹⁹ See text accompanying notes 42-48, *supra*.

¹⁰⁰ See text accompanying notes 56-59, *supra*.

¹⁰¹ See text accompanying notes 66-71, 74-77, 88, *supra*.

¹⁰² Section 35 provides: "For greater certainty, this Act does not apply to (a) a band, as defined in subsection 2(1) of the *Cree-Naskapi (of Quebec) Act*, except as provided in that Act; (b) the Nisga'a Nation, within the meaning of the *Nisga'a Final Agreement Act*; (c) the Band, as defined in subsection 2(1) of the *Sechelt Indian Band Self-Government Act*; or (d) a first nation, as defined in section 2 of Property of the Office of the BC Regional Vice Chief–Assembly of First Nations

bands generally.¹⁰³ Parliament could correct this shortcoming by including a provision that would require the consent of each band to the application of the Act,¹⁰⁴ or at least of its leadership selection provisions.¹⁰⁵ Such a provision would make a constitutional challenge to the leadership selection provisions unnecessary, and would be in keeping with the Act's stated purpose "to enable bands to design and implement their own regimes in respect of leadership selection".¹⁰⁶ Even more importantly, it would be an important step in the decolonization of Canada because it would acknowledge that the democratic principles that are at the heart of Canadian society¹⁰⁷ apply to Canada's relationship with the Aboriginal Peoples as well. Instead of continuing the colonial legacy of the *Indian Act*, a consensual *FNGA* would signal a rejection of the imposition of governance structures on the Aboriginal Peoples and demonstrate that Canada really does respect their inherent right of self-government.

the *Yukon First Nations Self-Government Act*."

¶¶¶¹⁰³ This is subject to s.34, which provides: "The Governor in Council may, by order made during the period of two years beginning on the coming into force of section 4, exempt any band from the application of this Act or any of its provisions for a period specified in the order to facilitate the negotiation or ratification of a final agreement on self-government."

¶¶¶¹⁰⁴ This provision would need to replace s.34: see *supra* note 103.

¶¶¶¹⁰⁵ In *Bigstone*, *supra* note 75, Strayer J. suggested that, "[u]nless otherwise defined in respect of a particular band", the practices for selection of band councils by custom must include practices "which are generally acceptable to members of the band, upon which there is a broad consensus": see text accompanying note 75, *supra*, and the cases cited in that note which have adopted this approach. In my opinion, the consent that should be required for the application of the *FNGA*'s leadership selection provisions to any particular band should be similarly based either on the practices of that band for giving its consent to important measures that impact on its rights, or on the kind of broad consensus that Strayer J. had in mind.

¶¶¶¹⁰⁶ *FNGA*, s.3(c): see text following note 81, *supra*.

¶¶¶¹⁰⁷ See *Reference Re Succession of Quebec*, [1998] 2 S.C.R. 217.