

The Implications of Parliament's Exercise of Section 91(24)

Powers for the Inherent Right of Self-Government

Kent McNeil

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Table of Contents

Executive Summary		
1.	Introduction	1
2.	Infringement of the Inherent Right of Self-Government by the <i>Indian Act</i>	
	(a) Band Governance under the <i>Indian Act</i> and Its Predecessors	5
	(b) Pre-S.35(1) Infringement of the Inherent Right of Self-Government	13
	(c) Post-S.35(1) Infringement of the Inherent Right of Self-Government	20
	(d) Post-S.35(1) Amendments to the <i>Indian Act</i>	26
	(e) The <i>Indian Act</i> and the <i>Canadian Charter of Rights and Freedoms</i>	30
3.	Challenging the Application of the Proposed Legislation to First Nations	35

The Implications of Parliament's Exercise of Section 91(24) Powers for the Inherent Right of Self-Government

Executive Summary

The Parliament of Canada exercised its s.91(24) legislative authority over "Indians, and Lands reserved for the Indians", when it enacted the *Indian Act* in 1876. Through this Act and its precursors, the Canadian Government imposed the band council governance system on First Nations. Although traditional forms of Aboriginal government were not abolished by the imposition of this system, there can be no doubt that the capacity of Aboriginal governments was impaired and the inherent right of self-government of at least some First Nations was infringed.

After the enactment of s.35 of the *Constitution Act, 1982*, this infringement of the inherent right of self-government would have to be justified by the federal government in order to be valid. Moreover, any post-s.35(1) amendments to the band governance provisions would have to be justified to the extent that they amounted to further infringements of the inherent right. This would include the amendments that are proposed in the *First Nations Governance Act* that was introduced in Parliament on June 14, 2002.

Any First Nation that would be subject to the provisions of this proposed legislation could challenge the Act's application to it as an infringement of that First Nation's inherent right. The initial burden would be on the First Nation to prove its right of self-government and to show a *prima facie* infringement of that right by the *First Nations Governance Act*. Extinguishment aside, the burden would then be on the Crown to prove justification by establishing a valid legislative objective and respect for the Crown's fiduciary obligations. If the Crown failed to do so, then the provisions of the Act that infringe that First Nation's inherent right of self-government would be inapplicable to it.

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1. Introduction

On June 14, 2002, Minister of Indian Affairs Robert Nault introduced a bill in Parliament, entitled the *First Nations Governance Act*, that would replace the band council governance provisions that are currently in the *Indian Act*.¹ This is the first of two research papers on the potential impact of this legislation on the inherent right of self-government. This paper will focus mainly on the question of whether the *Indian Act* has infringed the inherent right. The second paper, entitled "Section 91(24) Powers, the Inherent Right of Self-Government, and Canada's Fiduciary Obligations", will discuss infringement of the inherent right by the *First Nations Governance Act* and Canada's fiduciary obligations in that context.

The inherent right of self-government can be defined as the right of the Aboriginal peoples of Canada to govern their own territories and peoples. It is inherent in the sense that it is derived, not from the Canadian Constitution or Canadian law, but from the existence of Aboriginal nations as independent cultural, social and political entities with their own laws and systems of government prior to European colonization of North America.

The inherent right of self-government has been recognized politically in Canada. In the negotiations leading to the Charlottetown Accord that was submitted to the Canadian electorate in 1992, the Prime Minister, provincial premiers, territorial leaders, and Aboriginal representatives all agreed that such a right exists and should be explicitly acknowledged in the Constitution. While the Accord never became law because it was rejected by the electorate (for reasons that probably had very little to do with

 R.S.C. 1985, c.I-5.

Aboriginal self-government), acceptance of the inherence of the right by Canada's political leaders was a significant endorsement of the position that Aboriginal peoples have generally taken all along.² Moreover, despite the rejection of the Charlottetown Accord, the Canadian Government reaffirmed its acceptance of the inherent right in 1995 in a policy guide, entitled *Aboriginal Self-Government*.³

The question of whether the inherent right of self-government is an Aboriginal right that has been recognized and affirmed by s.35(1) of the *Constitution Act, 1982*⁴ has not yet been addressed directly by the Supreme Court of Canada. In *R. v. Pamajewon*,⁵ the Court assumed, without deciding, that an Aboriginal right of self-government is included in s.35(1). In *Delgamuukw v. British Columbia*,⁶ the Court declined to decide or even provide guidance on the issue of self-government.

Chief Justice Lamer said this:

The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation.⁷

However, in *Delgamuukw* the Chief Justice did define Aboriginal title in a way that appears to

☐☐☐ See "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments", in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) [hereinafter *Emerging Justice?*], 161-83.

☐☐☐ Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995).

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

☐☐☐ [1996] 2 S.C.R. 821.

☐☐☐ [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

☐☐☐ *Ibid.* at para. 170.

make self-government a necessary element of that title:

A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.⁸

The significance of this passage was perceived by Justice Williamson in *Campbell v. British Columbia (Attorney-General)*,⁹ a case involving a challenge to the constitutionality of the governance provisions in the Nisga'a Treaty, initialled on August 4, 1998. In his judgment upholding the validity of these provisions, Williamson J. found that the

... passages from *Delgamuukw* suggesting the right for the community to decide to what uses the land encompassed by their Aboriginal title can be put are determinative of the question. The right to Aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions is, I conclude, constitutionally guaranteed by Section 35.¹⁰

The same reasoning would seem to extend the scope of the right of self-government to Aboriginal and treaty rights generally, which the Supreme Court in other cases has held are likewise communal and subject to the decision-making authority of the Aboriginal community that holds them.¹¹

While *Campbell* was only a decision of the British Columbia Supreme Court, it was not appealed and so remains the law of British Columbia so long as it is not overruled by a higher court. I doubt whether that will happen, for several reasons. First, as the Supreme Court of Canada has been

⁸ *Ibid.* at para. 115 [emphasis in original].

⁹ [2000] 4 C.N.L.R. 1 (B.C.S.C.) [hereinafter *Campbell*].

¹⁰ *Ibid.* at para. 137.

¹¹ See *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 35-36; *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 533, at paras. 17, 38.

encouraging parties to resolve issues of Aboriginal rights through negotiation rather than litigation,¹² the Court is unlikely to undermine the negotiation process by ruling that negotiated self-government agreements are unconstitutional. To the extent that the constitutionality of those agreements is dependent on the inherent right of self-government, at least, the Court is likely to uphold the right. Secondly, the Royal Commission on Aboriginal Peoples was convinced that this right is already constitutionally entrenched in s.35(1),¹³ and this position is supported by most academic commentators who have discussed the issue.¹⁴ Thirdly, in the recent Supreme Court decision in *Mitchell v. M.N.R.*,¹⁵ Justice Binnie (Major J. concurring) went to lengths to explain that, even though an Aboriginal right that would permit goods to be brought into Canada duty free would be inconsistent

¶ E.g. see *Delgamuukw*, *supra* note 6 at para. 186 (Lamer C.J.).

¶ See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) [hereinafter *Partners in Confederation*]; *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [hereinafter *RCAP Report*], Vol. 2, *Restructuring the Relationship*, 2202-13.

¶ E.g. see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), and "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 *Alta. L. Rev.* 465; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 *Osgoode Hall L.J.* 681, and "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can. Bar Rev.* 196; John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 *U.B.C. L. Rev.* 1, and "Sovereignty's Alchemy; An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999); Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: University of British Columbia Press, 2000); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). I have reached the same conclusion in my own work: see especially "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" and "Envisaging Constitutional Space for Aboriginal Governments", in *Emerging Justice?*, *supra* note 2, 58-101, 184-214.

¶ [2001] 1 S.C.R. 911.

with Canadian sovereignty, this does not mean that Aboriginal peoples do not have an internal right of self-government. While Chief Justice McLachlin did not address this issue in her judgment, which was concurred in by four of her colleagues, I think Binnie J.'s judgment provides an indication of the direction in which the Court may move in the event that a properly-framed self-government case comes before it.

For the purposes of this paper, I am therefore going to assume that the inherent right of self-government is an Aboriginal right that has already been recognized and affirmed by s.35(1). I will now turn to the question of whether the provisions respecting band council governments in the *Indian Act* infringe the inherent right of self-government.

2. Infringement of the Inherent Right of Self-Government by the *Indian Act*

(a) Band Governance under the *Indian Act* and Its Predecessors

Section 91(24) of the *Constitution Act, 1867*,¹⁶ gave the Parliament of Canada exclusive jurisdiction over "Indians, and Lands reserved for the Indians". Pursuant to this authority, Parliament in 1869 enacted a precursor to the *Indian Act* entitled *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*.¹⁷ This was the first Canadian statute to make provision for Indian band governance by

¹⁶ 30 & 31 Vict., c.3 (U.K.).

¹⁷ S.C. 1869 (32 & 33 Vict), c.6.

elected chiefs.¹⁸ Section 10 provided:


10. The Governor may order that the Chiefs of any tribe, band or body of Indians shall be elected by the male members of each Indian Settlement of the full age of twenty-one years at such time and place, and in such manner, as the Superintendent General of Indian Affairs may direct, and they shall in such case be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, or immorality, and they shall be in the proportion of one Chief and two Second Chiefs for every two hundred people; but any such band composed of thirty people may have one Chief; Provided always that all life Chiefs now living shall continue as such until death or resignation, or until their removal by the Governor for dishonesty, intemperance or immorality.


Section 11 of the Act imposed a duty on chiefs to maintain or pay for the maintenance of the roads, bridges, ditches and fences on their reserves. Section 12 went on to list the legislative powers of chiefs:

12. The Chief or Chiefs of any Tribe in Council may frame, subject to confirmation by the Governor in Council, rules and regulations for the following subjects, viz:

1. The care of the public health.
2. The observance of order and decorum at assemblies of the people in General Council, or on other occasions.
3. The repression of intemperance or profligacy.
4. The prevention of trespass by cattle.
5. The maintenance of roads, bridges, ditches and fences.
6. The construction of and maintaining in repair of school houses, council houses and other Indian public buildings.
7. The establishment of pounds and the appointment of pound-keepers.

These provisions were continued in 1876 in the first consolidated *Indian Act*,¹⁹ with some additions and minor variations. The duty to maintain roads was made enforceable by obligatory labour imposed by the Superintendent-General of Indian Affairs on Indians residing on reserves who were

 See Richard H. Bartlett, *The Indian Act of Canada*, 2nd ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988), 17-18.

 S.C. 1876 (39 Vict.), c.18.

engaged in agriculture, on penalty of imprisonment in the event of non-performance.²⁰ The provision for the election of chiefs remained substantially the same, with the significant addition of "incompetency" to the list of causes for which chiefs could be removed by the Governor.²¹ To the seven legislative powers of chiefs was added an eighth, the authority to make rules and regulations for "[t]he locating of the land in their reserves, and the establishment of a register of such locations".²² This power related to the authority given to bands to allocate lots, with the approval of the Superintendent-General, to band members.²³ Administrative decisions of this sort could be made on behalf of the band by a majority of the chiefs, "at a council summoned according to their rules, and held in the presence of the Superintendent-General or his agent."²⁴ This provision reveals that chiefs also had the authority to make rules regarding their meetings; however, control of those meetings by the Superintendent-General was maintained by the obligatory presence of the Indian agent. However, authority to surrender reserve lands to the Crown was not delegated to the chiefs, as a majority of the adult male members resident on or near the reserve had to assent to any such surrender, again "at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the

ᑭᑭᑭ *Ibid.*, s.23.

ᑭᑭᑭ *Ibid.*, s.62.

ᑭᑭᑭ *Ibid.*, s.63.

ᑭᑭᑭ *Ibid.*, s.6. Upon approval, the Superintendent-General was required by s.7 to issue location tickets, which are now known as certificates of possession.

ᑭᑭᑭ *Ibid.*, s.61.

Governor in Council or by the Superintendent-General".²⁵ So in the case of surrenders of reserve lands, the rules for the meetings were those of the adult male members who must, therefore, have had the authority to make such rules.²⁶

In 1880, the *Indian Act* was amended.²⁷ For the most part the band governance provisions remained the same, though the discretionary nature of the Canadian Government's power to impose the elective system on any band was fortified with the words that this could be done "[w]henver the Governor in Council deems it advisable for the good government of a band", and the tenure of life chiefs was made subject to the introduction of the elective system.²⁸ The legislative powers of chiefs

¶¶¶ *Ibid.*, s.26. This provision can be compared with the surrender provisions in the *Royal Proclamation of 1763*, reprinted in R.S.C. 1985, App. I, No. 1, at 6, providing for the purchase of Indian lands by the Crown "at some public Meeting or Assembly of the said Indians, to be held for that Purpose".

¶¶¶ Section 26 replaced s.8 of *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*, S.C. 1868 (31 Vict.), c.42, which had provided for surrender of reserve lands by assent of the chief or a majority of the chiefs "at a meeting or council of the tribe, band or body [of Indians] summoned for that purpose according to their rules and entitled under this Act to vote thereat, and held in the presence of the Secretary of State or of an officer duly authorized to attend such council by the Governor in Council or by the Secretary of State; provided that no Chief or Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near the lands in question". The gender discrimination in relation to surrenders of reserve lands in the 1876 *Indian Act* was therefore not in the 1868 Act (use of the pronoun "he" was probably just a matter of usage that was not intended to exclude the participation of female members, at least where the rules of the tribe or band, which expressly governed the summoning of the council, provided for their participation). Moreover, it is notable that the implicit acknowledgment in 1868 of the authority of the tribes or bands to choose their own leaders in their own ways had disappeared by 1876, having been replaced by the provisions for election of chiefs and for surrenders of reserve lands by a majority vote of adult males. Nonetheless, of necessity those bands that had not been brought under the Act's electoral provisions must have continued to choose their leaders in accordance with their own customs, a fact that was explicitly acknowledged in 1951 when the *Indian Act* was revised: see text following note 40, *infra*.

¶¶¶ By *The Indian Act, 1880*, S.C. 1880 (43 Vict.), c.28.


¶¶¶ *Ibid.*, s.72.

were expanded to include designation of the religious denomination required of teachers on reserves, protection of sheep, horses, mules and cattle, construction and maintenance of water-courses, and repression of noxious weeds.²⁹ More significantly, chiefs were given the authority to create penalties of fines (up to \$30) or imprisonment (up to 30 days), or both, for infraction of band rules and regulations. Imposition of these penalties, however, was by proceedings "in the usual summary way before a Justice of the Peace, following the procedure on summary trials before a justice out of sessions."³⁰ And so, while the *Indian Act* conferred legislative and executive functions on chiefs, the jurisdiction to enforce band rules and regulations was expressly given to Canadian courts.


More significant changes to band government were provided for in the *Indian Advancement Act, 1884*,³¹ which was to be applied to any bands that the Governor in Council "considered fit to have this Act applied to them".³² The Act provided for band governance by band councils, to be elected yearly by the adult male members resident on the reserve.³³ The elected councillors were authorized to choose a "chief councillor" from among their number at their first meeting.³⁴ Band councils were empowered to make by-laws, rules and regulations, subject to approval and confirmation by the Superintendent-General, in relation to the same subjects that the chiefs had legislative authority over by virtue of the *Indian Act, 1880*. In addition, they could appoint constables and erect "lock-ups" to

 *Ibid.*, s.74.

 *Ibid.*

 S.C. 1884 (47 Vict), c.28.

 *Ibid.*, s.3.

 *Ibid.*, ss. 5, 7.

 *Ibid.*, s.6.

enforce the observance of order but, as provided in the 1880 Act, enforcement of band by-laws by fine or imprisonment was through proceedings before a Justice of the Peace.³⁵ Other additional authority included the making of by-laws for the removal and punishment of trespassers on the reserve, and for the raising of money "by assessment and taxation on the lands of Indians enfranchised, or in possession of lands by location ticket in the reserve".³⁶ Band Councils were also empowered to make provision for "appropriation and payment to the local Agent as Treasurer by the Superintendent General of so much of the moneys of the band as may be required for defraying expenses necessary for carrying out the by-laws made by the council".³⁷ So not only did the Agent preside at and control council meetings³⁸ - he also acted as treasurer for the band council.

The dual system of band governance by elected chiefs under the *Indian Act, 1880*, and by elected band councils under the *Indian Advancement Act, 1884*, was continued, with minor amendments, until 1951, when the *Indian Act* was revised.³⁹ Several significant changes in relation to

¶¶¶ Ibid., s.10.

¶¶¶ Ibid.

¶¶¶ Ibid.

¶¶¶ Ibid., s.9. The agent's role in this regard was set out in detail, unlike the simple requirement in the earlier *Indian Acts* that the Superintendent General or his agent be present at council meetings (see *supra* note 24 and accompanying text). Section 9 of the 1884 Act specified that the agent was to call the meetings, preside over them, record the proceedings, and "have full power to control and regulate all matters of procedure and form, and to adjourn the meeting to a time named or *sine die*, and to report and certify all by-laws and other acts and proceedings of the council to the Superintendent General". Moreover, the section provided that "he shall address the council and explain and advise them upon their powers and duties, and any matter requiring their consideration, but shall have no vote on any question to be decided by the council". Equivalent provisions respecting the role of Indian agents at council meetings of chiefs under the old system were incorporated into the *Indian Act* by *An Act to amend the Indian Act*, S.C. 1936, c.20, s.5.

¶¶¶ S.C. 1951, c.29. In 1906, the *Indian Act* and the *Indian Advancement Act* were amalgamated

band governance were made at that time. The dual electoral system in place since 1884 was replaced by one system of band government by a single chief and one councillor for every 100 band members (from a minimum of 2 to a maximum of 12 councillors), elected by the adult members (including, for the first time since 1869, women) who were ordinarily resident on the reserve.⁴⁰ Nevertheless, a new definition of "council of the band" was added that explicitly envisaged the selection of band councils by the "custom of the band":

2.(1)(a) "council of the band" means

- (i) in the case of a band to which section seventy-three [the election provision] 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 chosen according to the custom of the band.

This definition makes clear that even those Indian bands that are not subject to the electoral provisions are nonetheless subject to the Act's other band governance provisions. But was this so under the earlier *Indian Acts* that contained no definition of "council of the band" and no reference to selection of leaders in accordance with band custom?

I think the answer to this question must be yes. The 1876 *Indian Act* provided that it applied "to all the Provinces, and to the North West Territories, including the Territory of Keewatin."⁴¹ It also provided in section 97:

as the *Indian Act*, R.S.C. 1906, c.81, Parts I and II respectively. The *Indian Act*, R.S.C. 1927, c.98, continued this amalgamation.

¶⁴⁰ *Ibid.*, ss. 73-78. Note that the residency requirement was rendered unconstitutional by s.15 of the *Canadian Charter of Rights and Freedoms*: see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 3 C.N.L.R. 19 (S.C.C.) [hereinafter *Corbiere*], discussed *infra* in text accompanying notes 110-27.

¶ S.C. 1876 (39 Vict.), c.18, s.1. This was before the Yukon Territory was carved out of the

97. The Governor in Council may, by proclamation from time to time, exempt from the operation of this Act, or from the operation of any one or more of the sections of this Act, Indians or non-treaty Indians, or any of them, or any band or irregular band of them, or the reserves or special reserves, or Indian lands or any portions of them, in any province, in the North-West Territories, or in the territory of Keewatin, or in either of them, and may again, by proclamation from time to time, remove such exemption.⁴²

It is therefore apparent that the Act was intended to apply to Indian bands generally, except to the extent that the Governor in Council had either exempted its application pursuant to s.97 or had not exercised the authority required to make a specific provision of the Act (e.g. the provision for election of chiefs) apply to a particular band.

The by-law making authority of band councils was expanded somewhat in the 1951 Act to include such on-reserve matters as the regulation of traffic, prevention of disorderly conduct and nuisances, conservation and management of fish and game, and zoning of lands.⁴³ By-laws made pursuant to this authority were (and continue to be) subject to disallowance by the Minister.⁴⁴ However, the provisions respecting Indian agents' presence at and control over band council meetings were removed. The new Act nonetheless retained the distinction between ordinary and more "advanced" bands that had first appeared in the *Indian Advancement Act, 1884*. Section 82 provided

Northwest Territories in 1898.

▣▣▣▣ Versions of this provision have been retained in the Act right up to the present. The current *Indian Act*, R.S.C. 1985, c.I-5, provides in s.4(2):

4.(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 [regarding definition and registration of Indians] or sections 37 to 41 [regarding surrender of reserve lands], shall not apply to

- (a) any Indians or any group or band of Indians, or
- (b) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

▣▣▣▣ S.C. 1951, c.29, s.80.

▣▣▣▣ *Ibid.*, s. 81(2), currently R.S.C. 1985, c.I-5, s.82(2).

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that, "where the Governor in Council declares that a band has reached an advanced stage of development",⁴⁵ the band council could, with the approval of the Minister, make by-laws in relation to the taxation of reserve lands, licencing of businesses, expenditure of band moneys, hiring of staff, payment of salaries, and so on. But as with the earlier *Indian Acts*,⁴⁶ authority to surrender reserve lands was not given to the band council - it remained vested in the adult band members, including (for the first time since 1876) women.⁴⁷

After 1951, no significant amendments were made to the band governance provisions of the *Indian Act* until 1985. As those amendments came after the recognition and affirmation of Aboriginal and treaty rights by s.35(1) of the *Constitution Act, 1982*, examination of them will be postponed until we consider the impact of s.35(1). But first we need to determine whether the provisions relating to band governance in the pre-1982 *Indian Acts* and their predecessors amounted to infringements of the inherent right of self-government.

(b) Pre-S.35(1) Infringement of the Inherent Right of Self-Government

Two initial points need to be made. First, in Canadian constitutional law the Parliament of Canada has had the general authority to infringe Aboriginal and treaty rights ever since

⁴⁵ S.C. 1951, c.29, s.84, empowered the Governor in Council to revoke such a declaration.

⁴⁶ See *supra* note 25 and accompanying text.

⁴⁷ S.C. 1951, c.29, s.39. Note, however, that the provision that the surrender meeting be summoned "according to their rules" (*Indian Act*, S.C. 1876, c.18, s.26) or "according to the rules of the band" (*Indian Act*, R.S.C. 1886, c.43, and subsequent Acts) was removed.

Confederation.⁴⁸ Prior to the enactment of s.35(1) in 1982, these infringements did not have to be justified.⁴⁹ Since Aboriginal and treaty rights became constitutionally protected by s.35(1), infringements of these rights by Parliament do have to be justified.⁵⁰ We will come back to this matter of justification later.

The second point is that the enactment in and of itself of the band governance provisions in the *Indian Act* and its predecessors would not necessarily have infringed the inherent right of self-government of any particular First Nation. As we have seen, for the election provisions that were first enacted in 1869 to apply to any particular band, the Canadian Government has to declare them to apply to that band.⁵¹ Other provisions, however, such as the statutory powers of chiefs and band councils, appear to have applied of their own force to all bands not subject to an exemption.⁵² So even if a band continued to select its leaders according to its own laws and customs, in the absence of an exemption those leaders apparently would be subject to the other governance provisions of the *Indian Act*.⁵³

⁴⁸ There may, however, be some restrictions on this authority in constitutional instruments applicable in specific regions, such as the *Rupert's Land and North-Western Territory Order* of June 23, 1870, reprinted in R.S.C. 1985, App. II, No. 9: see Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

⁴⁹ See *R. v. Sikyua*, [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.).

⁵⁰ E.g. see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw*, *supra* note 6; *R. v. Marshall [No. 2]*, *supra* note 11.

⁵¹ See *supra* notes 19, 28, and accompanying text. This is still the case today: see the *Indian Act*, R.S.C. 1985, c.I-5, s.74(1). See text accompanying note 126, *infra*.

⁵² On the Governor in Council's authority to exempt bands from provisions of the *Indian Act*, see *supra* note 42 and accompanying text.

⁵³ See *Bigstone v. Big Eagle*, [1993] 1 C.N.L.R. 25 (F.C.T.D.) at 33; *Canatonquin v. Gabriel*, Property of the Office of the BC Regional Vice Chief – Assembly of First Nations

For discussion purposes, let us look at First Nations that were subjected to the election provisions of the *Indian Act*. In 1924 the Governor in Council imposed these provisions on the Six Nations in southern Ontario, by an order in council made under the authority of the Act.⁵⁴ This order was replaced by an equivalent order in council in 1951, made under the new Act.⁵⁵ In *Davey v. Isaac*,⁵⁶ members of the Six Nations representing the "Hereditary Chiefs" challenged the validity of this imposition of the electoral system on the basis that the *Indian Act* did not apply to the Six Nations, as they did not constitute a "band" within the meaning of that term as defined in the Act. The Supreme Court held the Six Nations to be "band" at the relevant time because they fit at least one of the definitions of that term in the 1951 Act, namely "a body of Indians ... for whose use and benefit in common, moneys are held by His Majesty".⁵⁷ The Court therefore found the 1951 order in council to be valid. Exercise of the statutory authority accorded to the elected band council by the *Indian Act* was therefore legal.

Imposition of the electoral system is clearly regarded by many members of the Six Nations as

[1981] 4 C.N.L.R. 61 (F.C.A.), affirming [1978 1 F.C. 124 (F.C.T.D.); *Jenniss c. Jenniss*, [2000] 1 C.N.L.R. 134 (Que. S.C.).

¶ At the time, the *Indian Act*, R.S.C. 1906, c.81, s.93. For background and discussion, see Darlene Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 *U. of T. Fac. of L. Rev.* 1.

¶ *Indian Act*, S.C. 1951, c.29, s.73.

¶ [1977] 2 S.C.R. 897.


¶ The full definition in the *Indian Act*, S.C. 1951, c.29, s.2(1)(a), provided that "'band' means a body of Indians (i) for whose use and benefit in common, lands, the legal title to which is vested in His Majesty, have been set apart before or after the coming into force of this Act, (ii) for whose use and benefit in common, moneys are held by His Majesty, or (iii) declared by the Governor in Council to be a band for the purposes of this Act".

an infringement of their inherent right of self-government, exercised traditionally by the Hereditary Chiefs. At trial in *Davey v. Isaac*, Justice Osler of the Ontario High Court observed:


A large proportion of the inhabitants of the Six Nations lands have resisted [the electoral] system from its beginning and take the position that the only persons entitled to govern the Six Nations people have been and continue to be those who become members of the council of traditional chiefs....⁵⁸

The legal action was initiated because the defendants, who supported the Hereditary Chiefs, had padlocked the doors of the council house where the elected band council met, in an apparent effort to prevent the council from dealing with lands on the Six Nations Reserve.⁵⁹ The elected band councillors asked for and got a permanent injunction that restrained the defendants from obstructing the plaintiffs in their lawful use of the council house.⁶⁰

It might be argued that imposition of the electoral system on the Six Nations did not infringe their inherent right of self-government because it did not make the traditional government of the Hereditary Chiefs illegal or prevent it from functioning. While this may be arguable as a strict matter of law, it is unrealistic. As a practical matter, the authority conferred on the elected council by the *Indian Act* has had a direct impact on the ability of the Hereditary Chiefs to exercise their traditional functions. The conflict between the two forms of government is apparent from the facts in *Davey v. Isaac*, referred to above. It is also revealed by the earlier court case of *Logan v. Styres*,⁶¹ which involved an application by a member of the Six Nations for a declaration that the orders in council

 *Isaac v. Davey* (1973), 38 D.L.R. (3d) 23, at 26.

 See *ibid.*

 *Davey v. Isaac*, *supra* note 56, upholding the decision of the Ontario C.A., *Isaac v. Davey* (1974), 51 D.L.R. (3d) 170, which had reversed the decision of the trial judge.

 (1959), 20 D.L.R. (2d) 416 (Ont. H.C.).

imposing the electoral system on the Six Nations in 1924 and 1951 were *ultra vires* and for an injunction to restrain the elected band council from "taking any steps to facilitate the surrender of 3.05 acres" of the Six Nations Reserve.⁶² While authority to assent to surrenders of reserve lands was vested in the adult band members by the 1951 *Indian Act*,⁶³ Justice King pointed out that "[i]t is the elected Councillors who negotiate the terms of surrender".⁶⁴ He said as well that "[i]t would appear that many of the Six Nations Indians, a great majority in fact, do not recognize the authority of the Parliament of Canada to provide for elected Councillors or to provide for the surrender of Reserve lands by means of a vote."⁶⁵ He also acknowledged that the "Orders in Council to which objection is taken set up a system whereby elected Councillors would supplant the hereditary Chiefs among other matters in dealing with the surrender of Reserve lands."⁶⁶ To the extent that statutory powers were conferred on the elected band council by the *Indian Act*, King J. therefore thought that the elected council had replaced the traditional government of the Hereditary Chiefs. So in the case of the Six Nations, imposition of the electoral system evidently did infringe their inherent right of self-government.⁶⁷

¶¶¶ *Ibid.* at 417.

¶¶¶ See *supra* note 47 and accompanying text.

¶¶¶ *Logan v. Styres*, *supra* note 61 at 418.

¶¶¶ *Ibid.*

¶¶¶ *Ibid.* at 417-18.

¶¶¶ A *prima facie* infringement apparently occurs if there is "any meaningful diminution of the appellants' rights": *R. v. Gladstone*, *supra* note 50 at para. 43 (Lamer C.J.). Factors to be considered in this context are whether the limitation is "unreasonable", whether it imposes "undue hardship", and whether it denies "to the holders of the right their preferred means of exercising that right": *R. v. Sparrow*, *supra* note 50 at 1112 (Dickson C.J. and La Forest J.). In *R. v. Côté*, [1996] 3 S.C.R. 139, Property of the Office of the BC Regional Vice Chief – Assembly of First Nations

Let us now consider the hypothetical case of a First Nation that did not have the electoral system imposed upon it, but that continued to choose its leaders in accordance with its own customs, as envisaged by the 1951 *Indian Act*.⁶⁸ In this situation, we concluded above that, in the absence of an exemption, the other band governance provisions of the *Indian Act* would nonetheless apply to the chief and/or council chosen by custom.⁶⁹ Those leaders would therefore have the authority to exercise the statutory powers conferred on band councils by the Act. So would the conferral of those statutory powers amount to an infringement of that First Nation's inherent right of self-government? The answer to this question is not as clear as in a case like that of the Six Nations where the electoral system was imposed against the wishes of a majority of the people. The answer really depends on whether the statutory powers merely *complemented*, or *curtailed and replaced*, the authority of the leaders under the First Nation's traditional form of government. If the former, then arguably there would be no infringement of the inherent right. If the latter, then application of the *Indian Act* to that First Nation would no doubt have amounted to an infringement.

To my knowledge, the question of whether the band governance provisions of the *Indian Act* constitute an infringement of the inherent right of self-government of First Nations who choose their leaders by custom has not been determined by a Canadian court. It has been generally assumed that

at para. 75, Lamer C.J. stated that "[t]he guiding inquiry at the infringement stage remains whether the regulations at issue represent a *prima facie* interference with the appellant's aboriginal or treaty rights."

See also *R. v. Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.), at paras. 86-108 (Cory J.); *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 86-95 (Cory J.).

☞ See text following note 40, *supra*.

☞ See *supra* notes 40-42, 52-53, and accompanying text.

the authority of band councils is derived solely from the *Indian Act*,⁷⁰ but that assumption appears to have been made without considering the circumstances of First Nations that choose their leaders by custom. Given that the *Indian Act* does not purport to codify the authority of leaders chosen by custom or take away any powers they might have as traditional leaders exercising inherent rights of self-government, arguably the statutory powers of those leaders are *in addition to*, rather than *in derogation of*, their inherent powers.⁷¹ If so, it would seem to follow that the governance provisions of the *Indian Act* have not infringed the inherent right of those First Nations.

It is probably unwise to attempt to arrive at any general conclusions regarding this question because the circumstances of First Nations vary. Some First Nations who currently choose their leaders by custom have reverted to that method after operating for years under the electoral system.⁷² Others may never have had the electoral system imposed on them. Also, the extent to which the band governance provisions of the *Indian Act* have impacted on the inherent right of self-government of any particular First Nation depends very much on the nature of that Nation's traditional form of government. It would therefore be necessary to examine the circumstances of each First Nation in

¶¶¶ E.g. see *Paul Band v. R.*, [1984] 1 C.N.L.R. 87 (Alta. C.A.), at 92-94; *St. Mary's Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1996] 2 C.N.L.R. 214 (F.C.T.D.), affirmed [1997] 1 C.N.L.R. 206 (F.C.A.), leave to appeal to the S.C.C. refused 20 February 1997. Compare *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indians Reserve No. 135*, [1994] 1 C.N.L.R. 206 (Alta. Q.B.).

¶¶¶ For discussion and further supporting arguments, see Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*", in *Emerging Justice?*, *supra* note 2, 215-48 at 232-38.

¶¶¶ E.g. the Akwesasne, Blood, Cowessess and Sioux Valley First Nations: see *Jock v. Canada (Minister of Indian and Northern Affairs)*, [1992] 1 C.N.L.R. 103 (F.C.T.D.); *Crow v. Blood Indian Band Council*, [1997] 3 C.N.L.R. 76 (F.C.T.D.); *Sparvier v. Cowessess Indian Band #73*, [1994] 1 C.N.L.R. 182 (F.C.T.D.); *Bone v. Sioux Valley Indian Band No. 290 Council*, [1996] 3 C.N.L.R. 54

order to determine the extent to which the *Indian Act's* band governance provisions have amounted to an infringement of that Nation's inherent right.⁷³ It can, however, be safely concluded that those provisions have infringed the inherent rights of at least some First Nations, as the example of the Six Nations demonstrates.

(c) Post-S.35(1) Infringement of the Inherent Right of Self-Government

We have seen that prior to the enactment of s.35(1) of the *Constitution Act, 1982*, infringements of the inherent right of self-government by the Parliament of Canada did not have to be justified.⁷⁴ That changed when s.35(1) came into force on April 17, 1982. Moreover, it seems that the infringements that have had to be justified since that time are not just those imposed *after* s.35(1) came into force. Any infringement of an Aboriginal or treaty right that originated *before* that time has to be justified as well if the right still existed on April 17, 1982, and the infringement of it continued thereafter.⁷⁵

(F.C.T.D.).

¶¶¶ This approach is in keeping with the Supreme Court decisions cited *supra* in note 67, which have dealt with the infringement issue in the context of the circumstances of the First Nation concerned and the particular statute or regulations that allegedly infringed their Aboriginal or treaty rights. See also *Delgamuukw*, *supra* note 6 at para. 165, where Lamer C.J. said that whether an infringement is justifiable "is ultimately a question of fact that will have to be examined on a case-by-case basis."

¶¶¶ See *supra* note 49 and accompanying text.

¶¶¶ This follows from the decision in *R. v. Sparrow*, *supra* note 50, 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 April 17, 1982, would be incorporated into the constitutional definition of Aboriginal rights: *ibid.* at 1091.

It follows from this that any pre-s.35(1) infringements of the inherent right of self-government of particular First Nations by the *Indian Act's* band governance provisions that continued after April 17, 1982, would have to be justified.⁷⁶ For example, imposition of the electoral system on the Six Nations, if it continued after the enactment of s.35(1), would be a infringement of their unextinguished inherent right of self-government that would have to be justified.⁷⁷ The justification test, as formulated by the Supreme Court of Canada in *R. v. Sparrow*,⁷⁸ involves proof by the Crown of a valid legislative objective and of respect for its fiduciary obligations to the Aboriginal peoples.

Virtually all of the Supreme Court of Canada decisions on justification, including *Sparrow*, have been in relation to Aboriginal or treaty rights to hunt or fish.⁷⁹ Valid legislative objectives in those cases involved such things as conservation, safety, and allocation of the resource among various users, matters which obviously are not very relevant to justification of infringements of the inherent right of self-government. In the *Delgamuukw* case, the Supreme Court discussed the issue of justification in relation to infringements of Aboriginal title to land, and added economic development by a variety of means to the list of potentially valid legislative objectives.⁸⁰ Once again, this is not very relevant to justification of infringements of the inherent right of self-government.⁸¹

⁷⁶ The Act in force at that time was the *Indian Act*, R.S.C. 1970, c.I-6, as amended.

⁷⁷ I am assuming that assertion of Crown sovereignty, Confederation, and the enactment of the *Indian Act* did not *extinguish* the inherent right of self-government. For support for this view, see *Campbell*, *supra* note 9; *Partners in Confederation*, *supra* note 13 at 31-36.

⁷⁸ *Supra* note 50.

⁷⁹ E.g. see the cases listed in note 67, *supra*.

⁸⁰ *Delgamuukw*, *supra* note 6 at para. 165 (Lamer C.J.).

⁸¹ While economic development is obviously an important element of First Nation governance, Property of the Office of the BC Regional Vice Chief – Assembly of First Nations

One can, nonetheless, extract some general principles from the case law on justification. For a legislative objective to meet the first branch of the *Sparrow* justification test, it must be compelling and substantial. In general terms, what this seems to mean is that the objective is more important to Canadian society as a whole - including the Aboriginal peoples who are part of that society - than is protection of the Aboriginal or treaty right, and so infringement of the right can be justified. Another way the Supreme Court has expressed this is that, given the underlying purpose of s.35(1) is the reconciliation of the Aboriginal peoples' prior presence in Canada with Crown sovereignty,⁸² the constitutional rights of the Aboriginal peoples have to give way in appropriate circumstances to substantial and compelling Parliamentary objectives.⁸³

It must be kept in mind that the onus of proving a valid legislative objective is on the Crown.⁸⁴ In the context of infringement of the inherent right of self-government by the *Indian Act*, one therefore has to ask what kind of objectives the Crown could present that would justify replacing traditional forms of government with band council governments. At the time the *Indian Act* was first enacted in 1876, the main objective of Parliament appears to have been the eventual assimilation of the First

the economic development the Supreme Court had in mind in *Delgamuukw* was of the province of British Columbia, not of First Nations. For critical commentary on the Court's view that economic development can take precedence over the protection of Aboriginal title, see Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right", in *Emerging Justice?*, *supra* note 2, 292-308.

▣▣▣ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, especially at para. 31 (Lamer C.J.).

▣▣▣ See *R. v. Gladstone*, *supra* note 50, especially at paras. 72-75 (Lamer C.J.); *Delgamuukw*, *supra* note 6 at paras. 161, 165 (Lamer C.J.). 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.

▣▣▣ *R. v. Sparrow*, *supra* note 50 at 1110.

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Nations into Canadian society.⁸⁵ It nonetheless seems that, in the case of an infringement that originated before the enactment of s.35(1), the time for proving justification is the post-s.35(1) time of actual conflict between the right and the infringing legislation that caused the matter to come before the court.⁸⁶ If this is correct, it means that in the event a First Nation were to challenge the current application of the *Indian Act* band governance provisions to it and prove that they infringe its inherent right of self-government, the Crown would have to show a valid present-day legislative objective for the infringement. This might be difficult, as the kinds of valid legislative objectives the Supreme Court has accepted up to now all relate to the compelling and substantial interests of Canadian society as a whole. What compelling and substantial interest of Canadian society would justify the imposition of a form of government on an Aboriginal community against the wishes of that community? In that situation, surely the democratic values of Canada⁸⁷ (not to speak of the international principle of self-determination) would support the right of self-government against the infringing legislation.

Assuming, however, that the Crown *was* able to show a valid legislative objective for infringing the inherent right of self-government today, it would still have to meet the second branch of the *Sparrow* justification test by proving respect for the fiduciary obligations it owes to First Nations. In *Sparrow*, the Supreme Court indicated some of the questions, depending on the circumstances, that need to be addressed in this context:

☐☐☐ See Bartlett, *supra* note 18 at 16-19; John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy", in Ian A.L. Getty and Antoine S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983), 39; John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change", *ibid.*, 56.

☐☐☐ This is at least implicit in the cases on justification cited *supra* in note 67.

... 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.⁸⁸

The relevance of these questions, in particular those regarding compensation and consultation, to infringements of Aboriginal title to land was accepted by Lamer C.J. in *Delgamuukw*.⁸⁹ However, he pointed out that "the choice between them will in large part be a function of the nature of the aboriginal right at issue."⁹⁰ So while Aboriginal title, for example, has an economic aspect that will make compensation relevant to justification of its infringement,⁹¹ that may not be the case where infringements of the inherent right of self-government are concerned. Minimal impact and consultation, however, would both seem to be relevant to justification of infringements of this right. Whether the Crown could meet the burden of proving these in situations where the band government provisions of the *Indian Act* have been imposed on a particular First Nation is a good question.

Failure by the Crown to prove either a valid legislative objective or respect for its fiduciary obligations in this context does not mean that the band governance provisions of the *Indian Act* would be held to be *ultra vires* and struck down by a court. It would simply mean that those provisions would not apply to the First Nation that proved they infringed its inherent right of self-government. The band governance provisions would continue to be otherwise valid and would still apply to other

⁸⁷ See *Reference Re Succession of Quebec*, [1998] 2 S.C.R. 217.

⁸⁸ *R. v. Sparrow*, *supra* note 50 at 1119.

⁸⁹ *Supra* note 6 at paras. 162-69.

⁹⁰ *Ibid.* at para. 162.

⁹¹ *Ibid.* at para. 169.


First Nations that did not prove such an infringement. Some First Nations might be content to operate under those provisions for the time being without alleging any infringement of their inherent right of self-government. They would be free to do so, without forfeiting their right to challenge the application of those provisions to them at some future time.⁹²


In 1985 and 1988, the Parliament of Canada enacted amendments to the *Indian Act*⁹³ that have had an impact on First Nation governance. As those amendments came after the enactment of s.35(1), their application to any First Nation could be challenged from the time they came into force as a violation of that Nation's inherent right of self-government. These amendments are therefore worth examining.

(d) Post-S.35(1) Amendments to the *Indian Act*

The most important amendments made to the *Indian Act* in 1985 involve entitlement to be registered as an Indian under the Act, First Nation control over band membership, and the legislative authority of band councils.

The amendments respecting entitlement to be registered as an Indian were primarily designed to address the gender discrimination in the Act. In particular, the provision that caused Indian women to lose their status if they married non-Indian men was removed. Women who had lost their status as a


 However, acceptance of the application of the band governance provisions by a particular First Nation might make it more difficult to establish an infringement later on, or might make it easier for the Crown to meet the justification test if an infringement could be shown.


 R.S.C. 1985, c.32 (1st Supp.), c.17 (4th Supp.), c.43 (4th Supp.).

result of this provision once again became entitled to be registered, as did their children.⁹⁴ At the same time, First Nations were given the option of taking control over their own membership by establishing membership rules by majority vote of their electors.⁹⁵ Membership rules cannot, however, deny membership to persons, including women who had their status restored, who were entitled to be members of that First nation prior to the time the membership rules came into force.⁹⁶

The membership provisions in the 1985 amendments, in particular the provision limiting the authority of First Nations to exclude current members, were challenged by three First Nations in Alberta in *Sawridge Band v. Canada*,⁹⁷ on the grounds that those provisions violated their Aboriginal and treaty rights to determine their own membership. Muldoon J. decided that no Aboriginal or treaty right to control membership had been established by the plaintiffs, but even if the alleged Aboriginal right had existed it would have been extinguished by the 1876 *Indian Act* before the relevant treaties were negotiated. This decision was overturned by the Federal Court of Appeal on the ground that the record disclosed a sufficient basis for finding a reasonable apprehension of bias on the part of the trial judge.⁹⁸ The case was therefore sent back to trial without any decision on the merits.

A First Nation's authority to determine its own membership is usually considered to be an

 *Indian Act*, R.S.C. 1985, c.I-5, s.6, as amended by R.S.C. 1985, c.32 (1st Supp.), s.4, c.43 (4th Supp.), s.1. See Bartlett, *supra* note 18 at 13-14.

 *Indian Act*, R.S.C. 1985, c.I-5, s.10, as amended by R.S.C. 1985, c.32 (1st Supp.), s.4.

 *Ibid.*, s.10 (4) and (5). See Bartlett, *supra* note 18 at 15.

 [1995] 4 C.N.L.R. 121 (F.C.T.D.).

 [1997] 3 F.C. 583, leave to appeal refused without reasons, [1997] S.C.C.A. No. 430.

important aspect of the inherent right of self-government.⁹⁹ Despite its inconclusive outcome, the *Sawridge* case nonetheless raised the question of whether this aspect of self-government had already been extinguished by the *Indian Act* prior to the enactment of s.35(1) in 1982. This question relates to the broader issue of whether specific aspects the inherent right of self-government could have been extinguished piecemeal, without extinguishing other aspects of the right. No attempt will be made to resolve this issue here. However, it is worth pointing out that the Supreme Court of Canada in *R. v. Pamajewon*¹⁰⁰ treated the inherent right of self-government (assuming it exists) as being composed of a bundle of rights over specific areas of jurisdiction, each of which has to be established separately. It might follow from this that a specific self-government right, such as the right to determine membership, could have been extinguished without other self-government rights being affected. On the other hand, one could regard the taking away of a First Nation's right to determine its own membership (if that in fact happened¹⁰¹) as an *infringement* of its broader right of self-government rather than an *extinguishment* of the narrower right to determine membership.¹⁰² This issue, while currently unresolved as a matter of Canadian law, is obviously very important because any self-government

⁹⁹ E.g. see Bartlett, *supra* note 18 at 16; *RCAP Report, supra* note 13, Vol. 2, *Restructuring the Relationship*, 237-39.

¹⁰⁰ *Supra* note 5.

¹⁰¹ The burden of proving extinguishment is on the Crown, and requires "clear and plain" legislative intent: see *R. v. Sparrow, supra* note 50 at 1099; *R. v. Gladstone, supra* note 50 at para. 31-38; *Delgamuukw, supra* note 6 at 180. See generally Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2002) 33 *Ottawa L. Rev.* (forthcoming).

¹⁰² This seems to be the position of the Royal Commission on Aboriginal Peoples: see *RCAP Report, supra* note 13, Vol. 2, *Restructuring the Relationship*, 202-12 (apparently written, however, before the S.C.C. decision in *R. v. Pamajewon, supra* note 5).

rights that were extinguished prior to the enactment of s.35(1) would not have been recognized and affirmed by that subsection, whereas rights that were merely infringed would have been recognized and affirmed and so the infringement would have to be justified in order to be effective post-s.35(1).¹⁰³

The 1985 and 1988 amendments to the *Indian Act* also extended the legislative authority of band councils to include, among other things, the power to make by-laws respecting "the residence of band members and other persons on the reserve" and providing "for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band".¹⁰⁴ Band councils were also given the authority to restrain contraventions of band by-laws by court action.¹⁰⁵ The patronizing requirement in s.83 for a declaration by the Governor in Council that a band had "reached an advanced stage of development" before the band council could make money by-laws¹⁰⁶ was removed so that all band councils were accorded this authority, subject still to the approval of the Minister.¹⁰⁷ Finally, band councils were given the authority, with the assent of a majority of the electors who attended a special meeting called for that purpose, to make by-laws prohibiting the sale, manufacture and possession of intoxicants, and prohibiting persons from being intoxicated, on the reserve.¹⁰⁸

¹⁰³ See *R. v. Sparrow*, *supra* note 50.

¹⁰⁴ *Indian Act*, R.S.C. 1985, c.I-5, s.81(1) (p.1) and (p.2), added by R.S.C. 1985, c.32 (1st Supp.), s.15.

¹⁰⁵ *Ibid.*, s.81(3), added by R.S.C. 1985, c.32 (1st Supp.), s.15.

¹⁰⁶ S.82 of the 1951 Act: see *supra* note 45 and accompanying text.

¹⁰⁷ *Indian Act*, R.S.C. 1985, c.I-5, s.83, as amended by R.S.C 1985, c.17 (4th Supp.), s.10.

¹⁰⁸ *Ibid.*, s.85.1, added by R.S.C. 1985, c.32 (1st Supp.), s.16.

As these amendments generally *expanded* the powers of band councils, from one perspective it might be argued that they would not have *infringed* the inherent right of self-government. However, as band council government is statutory and was imposed on some First Nations without their consent, from another perspective it seems that any changes to the authority of band councils would amount to further infringements of that right. For the Six Nations, for example, expansion of the powers of the band council might infringe further on the exercise of authority by their traditional government. One cannot, however, answer the question of whether the 1985 amendments infringed the inherent right of self-government of First Nations generally, as the answer depends on the specific circumstances of each First Nation. If an infringement were found, the issue of whether the infringement could be justified would also depend on the circumstances of the First Nation in question.

(e) The *Indian Act* and the *Canadian Charter of Rights and Freedoms*

The impact of the *Canadian Charter of Rights and Freedoms*¹⁰⁹ on the *Indian Act* is not directly relevant to the issue of whether that Act infringed the inherent right of self-government. However, the decision of the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*¹¹⁰ might provide some insight into how the Court would deal with an allegation that the *Indian Act* infringes that right.

In *Corbiere*, the plaintiffs, who are members of the Batchewana First Nation in Ontario, challenged the constitutional validity of the part of s.77(1) of the *Indian Act* that limited the right to vote

¹⁰⁹ *Constitution Act, 1982* (Schedule B to the *Canada Act 1982*, (U.K.) 1982, c.11), Pt. 1.

¹¹⁰ *Supra* note 40.

in band council elections to band members who were "ordinarily resident on the reserve".¹¹¹ They contended that excluding non-resident band members from elections violated their s.15(1) equality rights under the *Charter*. The Supreme Court agreed, and unanimously held that the words "and is ordinarily resident on the reserve" had to be struck from s.77(1), after an 18-month period to give Parliament an opportunity to deal with the consequences of the decision.¹¹²

The first thing to note is that the Supreme Court rejected the option of simply declaring the offending words in s.77(1) to be inapplicable to the Batchewana First Nation. Instead, the Court held that the voting restriction affected most if not all First Nations, and was unconstitutional because it violated the equality rights of off-reserve members generally. As discussed above, the Court would be unlikely to adopt this approach where an allegation was made that the band governance provisions of the *Indian Act* offend the inherent right of self-government of a particular First Nation, as Aboriginal rights (unlike the *Charter* right to equality) are specific and can vary from one First Nation to another.¹¹³ So establishing that those provisions violate the inherent right of self-government of one First Nation would not necessarily mean that they violate the right of self-government of other First Nations.¹¹⁴

¶¶¶¹ *Indian Act*, R.S.C. 1985, c.I-5, s.77(1).

¶¶¶² There were two judgments, one authored by McLachlin and Bastarache JJ. (Lamer C.J., Cory and Major JJ. concurring), the other by L'Heureux-Dubé J. (Gonthier, Iacobucci and Binnie JJ. concurring). As they came to the same conclusions for very similar reasons with respect to the issues discussed in this paper, I will refer simply to the decision of the Court, rather than to the separate judgments, except when quoting.

¶¶¶³ See *supra* notes 72-73 and accompanying text. Compare Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can. Bar Rev.* 196, at 213-15, where it is argued that the right of self-government is a generic rather than a specific right.

¶¶¶⁴ Also, as L'Heureux-Dubé J. pointed out in *Corbiere*, *supra* note 40 at para. 112, it would be

Similarly, the Court's reasons for concluding that the voting restriction in s.77(1) violated s.15(1) of the *Charter* are not very relevant to the question of whether the band governance provisions of the *Indian Act* violate the inherent right of self-government of particular First Nations. Equality rights pertain to everyone in Canada, whereas the Aboriginal right of self-government is held only by the Aboriginal peoples, and its expression can vary in form and content from one First Nation to another.¹¹⁵ However, after finding a violation of s.15(1), the Court went on to consider whether the violation could be justified under s.1 of the *Charter*. The Court's s.1 analysis does bear some resemblance to its approach to justification for violation of s.35(1) Aboriginal rights, and so is worth examining.¹¹⁶

The Court in *Corbiere* followed the approach to s.1 that had been laid down by Dickson C.J. in *R. v. Oakes*¹¹⁷ and refined in *Egan v. Canada*.¹¹⁸ In the latter case, Iacobucci J. summarized the

the s.74(1) order in council that brought a First Nation within the electoral provisions of the *Indian Act*, rather than the provisions themselves, that would be challengeable: see text accompanying note 126, *infra*.

¶¶¶⁵ In *R. v. Van der Peet*, *supra* note 82 at paras. 18-19, Lamer C.J. distinguished *Charter* rights, which are "general and universal", from Aboriginal rights, which are "held only by aboriginal members of Canadian society". At para. 69 he said that Aboriginal rights also vary from one Aboriginal group to another because they "depend entirely on the traditions, customs and practices of the *particular aboriginal community claiming the right*" [emphasis in original]. See also *R. v. Pamajewon*, *supra* note 5.

¶¶¶⁶ For general discussion, see Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 *Sask. L. Rev.* 543. Note, however, that in *R. v. Adams*, *supra* note 67 at paras. 53-54, Lamer C.J. took a stricter approach to statutes that confer administrative discretion that might be exercised so as to infringe Aboriginal rights than to statutes that confer equivalent discretion that might be used to infringe *Charter* rights.

¶¶¶⁷ [1986] 1 S.C.R. 103.

¶¶¶⁸ [1995] 2 S.C.R. 513.

Court's s.1 approach in this way:

A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.¹¹⁹

The requirement of a pressing and substantial legislative objective is obviously very similar, if not identical, to the requirement of a compelling and substantial legislative objective to justify infringements of Aboriginal rights. However, as the second branch of the *Oakes/Egan* test is based on what can be demonstrably justified in a free and democratic society, it differs from the second branch of the *Sparrow* test, which is based on respect for the Crown's fiduciary obligations to the Aboriginal peoples.¹²⁰ The requirement of minimal impairment is nonetheless equivalent to the *Sparrow* requirement that there be "as little infringement as possible in order to effect the desired result".¹²¹

In *Corbiere*, the Court found that the objective in restricting voting to reserve residents was to ensure that band members who had the closest connection with the reserve elected the council that would make decisions affecting life on the reserve. This objective was held to be sufficiently pressing and substantial to meet the first branch of the s.1 test.¹²² However, the Court decided that the second

¹¹⁹ *Ibid.* at para. 182.

¹²⁰ See *supra* notes 88-91 and accompanying text.

¹²¹ *R. v. Sparrow*, *supra* note 50 at 1119.

¹²² *Corbiere*, *supra* note 40 at para. 21 (McLachlin and Bastarache JJ.), paras. 99-100 (L'Heureux-Dubé J.).

branch of the test had not been met because the Crown had failed to demonstrate that complete exclusion of non-resident members from band council elections was necessary to meet the legislative objective. Specifically, the Court held that the Crown had not met the requirement of showing minimal impairment of the s.15(1) rights of off-reserve members.¹²³

As suggested above, the Crown would probably have a difficult time today establishing a compelling and substantial legislative objective for infringement of the inherent right of self-government by the band governance provisions in the *Indian Act*.¹²⁴ But even if the Crown could surmount that hurdle, the *Corbiere* decision suggests that the Crown might also have difficulty proving that the objective (whatever it might be) has been met with as little infringement of the inherent right as possible.

Even more to the point, however, the Court in *Corbiere* suggested that Aboriginal governance rights might take precedence over the band governance provisions in the *Indian Act*. McLachlin and Bastarache JJ. observed that, if a "band could establish an Aboriginal right to restrict voting, as suggested by the Court of Appeal, that right would simply have precedence over the terms of the *Indian Act*".¹²⁵ L'Heureux-Dubé J. commented as follows:

If certain bands can demonstrate an Aboriginal or treaty right to restrict non-residents from voting, this in no way affects the constitutionality of the impugned section of the *Indian Act*. It is the order in council made pursuant to s.74(1), bringing the band within the application of the *Indian Act's* electoral rules, which would have to be challenged under such a claim. In analysing such a case, it would have to be

¹²³ *Ibid.* at para. 21 (McLachlin and Bastarache JJ.), paras. 103-5 (L'Heureux-Dubé J.).

¹²⁴ See *supra* notes 84-87 and accompanying text.

¹²⁵ *Corbiere*, *supra* note 40 at para. 22. See also the Federal Court of Appeal decision, *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs)*, [1997] 3 C.N.L.R. 21, especially at 26-31, 58-59.

determined whether an Aboriginal right had been proven, whether the legislation as it then stands infringes that right, and whether that infringement is justified....¹²⁶

These comments confirm that proof of an Aboriginal right relating to governance (such as the right to participate in choice of political leaders) could result in a declaration that some or all of the band council governance provisions in the *Indian Act* are constitutionally inapplicable to First Nations that are able to establish such a right. The *Corbiere* decision therefore reveals that the Supreme Court would be open to the arguments presented in this paper for challenging the application of specific provisions of that Act to particular First Nations.

2. Challenging the Application of the Proposed Legislation to First Nations

We concluded earlier that application of the *Indian Act* band council governance provisions probably infringed the inherent right of self-government of at least some First Nations.¹²⁷ Furthermore, amendments to those provisions since the enactment of s.35(1) of the *Constitution Act, 1982* could also violate the inherent right of self-government of particular First Nations.¹²⁸ The same can be said of the changes to band council governance contained in the proposed *First Nations Governance Act*.

The approach the Supreme Court would probably take to a challenge to the constitutionality of the proposed changes was outlined briefly by L'Heureux-Dubé J. in the passage from *Corbiere*

¹²⁶ *Corbiere*, *supra* note 40 at para. 112, relying upon *R. v. Sparrow*, *supra* note 50, and *R. v. Van der Peet*, *supra* note 82.

¹²⁷ See text accompanying notes 54-73, *supra*.

¹²⁸ See text accompanying notes 94-109, *supra*.

quoted above.¹²⁹ First of all, it would be up to particular First Nations to challenge the application to them of specific provisions in the new legislation. The onus would be on a First Nation mounting such a challenge to prove its inherent right of self-government as a s.35(1) right, and to show a *prima facie* infringement of that right. In the absence of proof that the right had been extinguished pre-s.35(1), the burden would then be on the federal Crown to show justification in accordance with the *Sparrow* test. This would require proof of a compelling and substantial legislative objective, and of respect for the Crown's fiduciary obligations to that First Nation.¹³⁰

The Crown's fiduciary obligations in this context will be discussed in detail in my second research paper, "Section 91(24) Powers, the Inherent Right of Self-Government, and Canada's Fiduciary Obligations". Briefly, however, I think the main issues to be addressed in relation to this are the Crown's obligation to show, first, that it has infringed the inherent right of self-government as little as possible in furtherance of its legislative objective, and second, that it has consulted with the Aboriginal people concerned about the infringement of their right. Regarding the obligation to consult, I do not think consultation with First Nations generally or with individual members of a particular First Nation would be adequate to justify infringement of any Aboriginal people's right of self-government.

¹²⁹ See text accompanying note 126, *supra*.

¹³⁰ In light of 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, it may be enough for a First Nation to have a claim to an Aboriginal right of self-government that has some chance of success for the fiduciary obligations of the Crown to arise. As every Aboriginal group that has Aboriginal rights probably has governance rights in relation to those rights (see *supra* notes 8-11 and accompanying text), proof of any Aboriginal right may be a sufficient indication of a right of self-government to trigger at least the Crown's obligation to consult before taking action that might infringe the self-government right.

Aboriginal rights are specific and can vary from one Aboriginal group to another.¹³¹ They are also communal, and decisions respecting them have to be made by the Aboriginal community that holds them.¹³² It would seem to follow that any infringement of those rights would have to be justified by proof of adequate consultation with the particular Aboriginal group *as a community*, not with First Nations generally or with individual members of that group.

In the *Delgamuukw* case, Chief Justice Lamer commented on the duty to consult in relation to infringement of Aboriginal title:

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.¹³³

The burden is on the Crown to show that it has fulfilled the duty to consult in a way that is appropriate in the circumstances.

The inherent right of self-government is fundamental to every Aboriginal society. It relates to and affects all Aboriginal rights because, given the communal nature of those rights, decisions respecting them are made through the political structures of each Aboriginal nation.¹³⁴ So if any

¹³¹ See *supra* note 115.

¹³² See *supra* notes 8-11 and accompanying text.

¹³³ *Delgamuukw*, *supra* note 6 at para. 168.

¹³⁴ See *Campbell*, *supra* note 9 at para. 137, quoted *supra* in text accompanying note 10.

Aboriginal practice, custom or tradition "truly *made the society what it was*",¹³⁵ it would be that of self-government. The vital importance of governance to Aboriginal societies was clearly recognized by the Supreme Court in the *Corbiere* case. The Canadian constitutional values of democracy and respect for minorities¹³⁶ also provide general support for the primal importance of Aboriginal self-government. So the nature and scope of the requisite consultation for infringement of the right of self-government to be justified should be stringent, and might require the actual consent of individual Aboriginal nations.

It can therefore be concluded that the proposed legislative changes to band council governance might not apply to First Nations who are able to establish an inherent right of self-government. If those changes infringe a particular First Nation's inherent right, the federal Crown will have to prove a compelling and substantial legislative objective. If the Crown can meet that requirement, it will still have to prove that it has respected its fiduciary obligations, in particular by showing minimal impairment of the right and adequate consultation. In this context, the duty to consult might require the actual consent of the First Nation before the changes can apply to it.

¶¶¶⁵ These are the words Lamer C.J. used In *R. v. Van der Peet*, *supra* note 82 at para. 55 [emphasis in original], to describe the practices, customs and traditions that give rise to Aboriginal rights.

¶¶¶⁶ See *Reference Re Succession of Quebec*, *supra* note 87. This is not to suggest that Aboriginal peoples are simply minorities, but acknowledges that they are a minority of the Canadian population demographically, and so are vulnerable to the will of the majority expressed through Parliament. In fact, their Aboriginal and treaty rights were accorded constitutional recognition and affirmation in 1982 to provide them with some protection against majority rule: see *R. v. Sparrow*, *supra* note 50 at 1103-10.