AN ANALYSIS OF THE ABORIGINAL GOVERNMENT
PROVISIONS OF THE 1992 CHARLOTTETOWN ACCORD:
SELF-GOVERNMENT IN THE "POST-CHARLOTTETOWN" ERA

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ABSTRACT

The 1992 Charlottetown Accord attempted to constitutionalize the inherent Aboriginal right of self-government. The Accord was the result of a long series of public consultations and intense political negotiations which resulted in a document that was rejected by a majority of Canadians. The Aboriginal government provisions of the 1992 Charlottetown Accord do not represent the majority of essential elements for Aboriginal peoples to recognize and implement the inherent right of self-government. However, the Accord represents a major change in thinking for the federal and provincial governments in Canada in that the inherent right was recognized. As well, many of the principles contained in the Accord provide a bench mark for future constitutional discussions regarding self-government. Aboriginal governments must be given a substantive legislative and fiscal base if self-government is to be realized. The Accord failed to meet these fundamental needs.
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CHAPTER 1

The Context to Examine the Aboriginal Government Provisions of the Charlottetown Accord

A. Introduction

This Chapter introduces the topic and scope of this thesis. First, the Chapter examines the concept of self-government, including the inherent right of Aboriginal self-government and the distinction between the source of this right and its contemporary implementation. Second, the Chapter introduces a case study and submits that the Siksika Nation provides perhaps, one of the best opportunities to examine the "effects" of the Aboriginal government clauses of the 1992 Charlottetown Accord on an Aboriginal treaty nation. Third, the analytical parameters of the thesis are briefly set out. Finally, this Chapter examines the link between economic stability and development to self-government. One of the primary benefits of Aboriginal governments possessing significant legislative and jurisdictional authority on a level at least equal to the provinces is that it allows for economic stability, which is a central facet of implementing
the inherent right of self-government.

B. Overview of Thesis

Since the constitutional talks of the early 1980s, Aboriginal self-government has been a dominant theme on the Canadian constitutional and political scene. The "inherent right of self-government" expresses best the demands and aspirations of Aboriginal peoples in Canada. The concept's legal definition is riddled with difficulties. Politically, it was not until the 1992 round of constitutional negotiations and proposals that the inherent right of self-government took a central place in the constitutional process. Indeed, it embodies a central component of the Charlottetown Accord.

The definition of self-government presents legal and political difficulties. On the one hand, federal and provincial governments fear or believe its meaning is too broad while, on the other hand, Aboriginal peoples fear a restrictive interpretation. Nevertheless, both parties agree that the term 'self-government' expresses the desire of Aboriginal peoples to control their destiny. It expresses their desire for self-reliance and for the accountability of their leadership to their own people and not to the federal Parliament or provincial or territorial legislatures. It reclaims their history as the First Peoples of the North American continent. The concept represents respectability, responsibility and dignity.⁴
Although some Aboriginal leaders argue for total sovereignty, outside of the Canadian state, most Aboriginal leaders and their peoples want to stay within the existing federal structure of Canada. Thus, the aspiration is primarily not external or nation-state sovereignty, which the federal Parliament exercises, but rather, sovereignty internal to the Canadian state, such as that exercised by the provincial legislatures and the federal Parliament.

The 1992 Charlottetown Accord proposed the constitutional entrenchment of the inherent Aboriginal right of self-government and the recognition that Aboriginal governments comprise a distinct and separate order of government, alongside the federal and provincial governments, within Canada. This thesis argues that the provisions of the Charlottetown Accord, while appearing to recognize Aboriginal governments as comprising one of three orders of government, did not realize this purported recognition of Aboriginal governments comprising one of three orders of government. In this way, the Accord did not satisfy the desire of Aboriginal peoples to exercise the inherent right of self-government in a meaningful manner. Most Aboriginal peoples believe that the entrenchment of the inherent right of Aboriginal self-government is a necessity and must include the powers needed to operate on a level either equal or similar to that of the provinces within Canada, in addition to some concurrent authority with the federal Parliament. If Aboriginal
governments comprising one of three orders of government within Canada are recognized and secured in the Constitution, the concerns of self-reliance, responsibility and dignity for Aboriginal peoples will follow in due course.

This thesis tests the hypothesis that the entrenchment of Aboriginal governments as one of three orders of government within Canada satisfies the demands of Aboriginal peoples for adequate control over their lives by providing sufficient jurisdictional and legislative powers within Canada. Sufficient jurisdictional and legislative bases have the best chance of resulting in viable and vibrant Aboriginal economies which will, in turn, satisfy the demands of Aboriginal peoples to control their destiny. This thesis will show, however, that the Charlottetown Accord failed to meet the necessary prerequisites for Aboriginal governments to assume a meaningful role in the Canadian polity to the degree they now demand. What the Charlottetown Accord gave with one hand, it took with the other.

First, this thesis outlines the parameters of its investigation and provides some preliminary information upon which the thesis is based. This discussion includes a brief examination of the source of the inherent right of self-government as opposed to the implementation of the right. This thesis is concerned with the latter. As well, the thesis discusses the importance of economic stability and its link to self-government. The existing orders of government (federal
and provincial) are very much dependent upon fiscal security, both through their own economies and through transfer payments, to operate their governments. Aboriginal governments are no different in their need for fiscal security. Finally, the Siksika Nation is introduced as the case study for the thesis.

In the second Chapter, the thesis examines the existing situation under the federal Indian Act. The problems inherent in the Indian Act system illustrate its paternalistic and assimilationist characteristics. The Indian Act does not provide a strong legislative base for autonomous self-government, self-reliance and economic development for Aboriginal governments and this stands out as a fundamental weakness in the Act. Regardless of jurisdictions possessed by a government, the inability to fund the implementation of programs in the areas of jurisdiction impairs severely a government’s ability to operate effectively and responsibly. A number of examples of Aboriginal self-government operating within the existing constitutional framework are discussed, including the Sechelt Indian Band Self-Government Act and the Cree-Naskapi (of Quebec) Act. These forms of self-government are not based on any inherent right and do not represent one of three orders of government per se. Their weaknesses are discussed briefly in this light.

Chapter Three discusses the existing constitutional provisions relating to Aboriginal peoples. Section 35 of the
Constitution Act, 1982, as interpreted in a number of important judgements, provides the basis for this discussion. This examination provides first, a backdrop for the recognition and implementation of the inherent Aboriginal right of self-government and second, a means of ascertaining the effectiveness of the Charlottetown Accord's "one of three orders of government" clause in meeting the self-government demands of Aboriginal peoples.

The fourth Chapter examines the Charlottetown Accord and its provisions concerning Aboriginal peoples, particularly the recognition of the inherent right of self-government and the recognition of Aboriginal governments as one of three orders of government. The Accord provides a basis for future amendments to the Constitution even though the majority of Aboriginal peoples and the Canadian public rejected it. An examination of the Charlottetown Accord will also answer the question as to whether Aboriginal governments should push for similar provisions or demand different amendments in future constitutional discussions.

Finally, the thesis applies the principles of the Charlottetown Accord recognising the inherent Aboriginal right of self-government and attempting to establish three orders of government, to the subject of the case study, the Siksika Nation in Alberta. The purpose is to study the possible effect of the Accord's Aboriginal provisions on an Indian treaty nation. By doing so, a better and more lucid
understanding can develop regarding the constitutionalization of the inherent right of self-government and how the recognition of Aboriginal governments as one of three orders of government, particularly Indian treaty nations, fails to satisfy fully their demand for responsibility, self-reliance and dignity as peoples.

C. The Concept of Self-Government

This thesis deals with the constitutional aspects of implementing Aboriginal self-government in a meaningful way within Canada. Although the concept of self-government is not easily defined and the right of self-government is a topic of considerable debate, there exists widespread agreement that the right of self-government consists of two distinguishing features. They are (1) the source of the right of self-government and (2) the implementation of the right of self-government.

The on-going debate about the source of the right of self-government centres around two questions: where does the right of self-government originate and has it been extinguished? The Supreme Court of Canada appears to support the view that Aboriginal governments historically were self-governing. In R. v. Sioui\(^5\) the Supreme Court cites with approval the following passage from the United States Supreme Court decision of Worcester v. Georgia.\(^6\)

Such was the policy of Great Britain towards the Indian nations inhabiting the territory
from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged. (emphasis by Lamer J.)

This passage affirms the view that Aboriginal governments were historically seen as, at the least, semi-sovereign entities capable of governing their internal affairs.

Indeed, Bruce Clark argues that an inherent right of self-government exists at common law and has been constitutionalized in section 35(1). However, at the other end of the spectrum are those who maintain that the inherent right of self-government, strictly defined, has been extinguished, although it existed at one time. Notwithstanding the issue of the origins of the right of self-government, the Supreme Court of Canada seems clear on its views of Aboriginal self-government and Canadian sovereignty.

In R. v. Sparrow the Supreme Court of Canada states

...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

Thus, self-government, at least within the existing constitutional framework, means something other than possession of the underlying title of Aboriginal lands in Canada and means something other than the sovereignty now exercised by the federal Parliament.

The question over the source of the Aboriginal right of
self-government is an important debate because it ignores any sort of political compromise and goes to the heart of the Canadian legal system. On the one hand, if the right of self-government is inherent, a constitutional deal, such as the Charlottetown Accord, may be unnecessary, to the extent that the right of self-government is already recognized and, more importantly, not contingent upon federal or provincial recognition. On the other hand, if the right of self-government is contingent, that is, it depends upon some sort of recognition by the federal and provincial governments or the courts for its existence, then the right is not based upon the historical use and occupation of Aboriginal peoples over the lands now known as Canada. The distinction between the two approaches signifies a fundamental element in the debate over self-government.

The point in raising questions about the source of the right of Aboriginal self-government is to distinguish them from questions about the implementation of the right. Thus, this thesis is not particularly concerned with the source of the right, except to the extent that the Accord recognizes its 'inherency'. Rather, this thesis examines the implementation of self-government, assuming that it is based upon the inherent right, as recognized by the Accord.

This thesis uses implementation not to signify necessarily the nuts and bolts of a day to day operating Aboriginal government exercising its right of self-government.
Rather, implementation denotes the constitutional and jurisdictional parameters within which Aboriginal governments operate, particularly as one of three orders of government within Canada.

D. The Case Study: Siksika Nation

This thesis uses throughout, and primarily in the last Chapter, the Siksika Nation of Alberta to illustrate the effects of the Aboriginal provisions of the Accord. In particular, the thesis examines the degree that the Accord satisfies the demands of Aboriginal governments to be seen as equal players in the Canadian polity as envisioned by the "one of three orders of government" clause in the Accord.

The Siksika Nation, formerly the Blackfoot Indian Reserve, No.143, is situated approximately 80 kilometres west of Calgary, Alberta and straddles the Bow River. The total area of the Siksika Nation exceeds 175,000 acres, making it the second largest Indian reserve (for physical size) in Canada. It has an "on-reserve" population of approximately 2,400 people. Its "off-reserve" population exceeds 1,300, with these people residing primarily in the Calgary area. The Siksika Nation signed Treaty 7 in 1877 and is a leading member of the Treaty 7 Tribal Council which has its headquarters in Calgary.

The Siksika Nation has one elected chief and twelve elected councillors and follows the election guidelines
provided for in the Indian Act. The Siksika Nation is actively involved in a number of self-government and economic initiatives. The Community-Based Self-Government initiative, announced by the federal government in April 1986 dominates the Nation's self-government strategy. The Siksika Nation entered into a negotiating agreement for self-government with the federal government in 1991. In February 1993, the Siksika Nation presented its negotiating position to the federal negotiators. As well, the Nation has engaged in an internal administrative revitalization which it hopes will make the Siksika Nation government more streamlined and more cost-efficient.

The Siksika Nation has a number of different departments or "service areas", as they are called. These include health, social services, education (including Old Sun Community College), police services, recreation, communications, finance and administration, lands and resources, agriculture, the Siksika Economic Development Corporation (SEDCo) and Indian Government. The administrative apparatus is under the direct authority of the office of the Tribal Management Coordinator (TMC) who is the senior civil servant and justice official for the Nation. Each service area has a service area manager who is responsible for the day to day operation of the area concerned and for budget preparation. Connected to each service area is an advisory board which advises the service area manager on policy and administrative matters.
In addition, the Siksika Nation has a Priorities and Planning Committee which oversees fundamental and broad policy objectives of the Nation and makes recommendations in this regard to Chief and Council. The Siksika Nation plans to establish a treasury board to oversee the expenditure of Siksika Nation monies. The total staff of the Siksika Nation exceeds 300 people.  

The Siksika Nation is involved in a number of Alternative Funding Arrangements (AFA’s), including health and social services. The AFA initiative was approved by the federal Treasury Board in June 1986 and is designed to transfer funds and responsibility to Indian communities and allows these communities to set their own priorities for the delivery of services.  

The Siksika Nation incorporated SEDCo in 1987 as a non-profit corporation that acts as an agent for Chief and Council to foster economic development and growth for the Nation. In August 1990, SEDCo completed construction and opened the Siksika Nation Commercial Complex. It houses the Siksika Nation administration, a supermarket, video store, Siksika Fashions, a restaurant, and other businesses. As well, SEDCo operates a service station and convenience store. The Siksika Nation’s Hidden Valley Resort is leased to private investors and includes a 9-hole golf course, lake, tennis courts, 300 cottage lots and a restaurant. There is also the Tribal Ranch and a 114 acre industrial park in the final stages of
development. The Siksika Nation has a vibrant agricultural economy and is in the middle of a major irrigation project.

E. Nature of Thesis Study

This thesis limits its focus to "registered" Indians under the Indian Act and, as a result of the Siksika Nation being the case study, treaty Indian nations. The focus of this thesis does not suggest that the issues of non-registered (or non-status) or non-treaty Indians, the Metis, or the Inuit are not important. Rather, in order to make this study workable, a limitation was set upon its focus. In simple terms, the Siksika Nation, as a relatively well-established treaty Indian nation with strong potential for economic growth, provides a good example for analysing the affects of the Accord's provisions on Aboriginal governments in general. If the Accord provides little assistance to the Siksika Nation, then the chances of it assisting or complimenting other Aboriginal governments and Aboriginal peoples in Canada (especially those in remote areas and those with small populations) are lessened.

F. Economic Stability and Self-Government

The existing Indian Act regime makes economic development very difficult for registered Indians and their governments. One tenet of the Indian Act is preservation of the reserve land base. For example, section 21 of the Act provides for a
registry system in terms of a certificate of possession to record a financial interest in the land for Indians. Section 55 deals with non-Indians and allows for a surrender or designation of reserve land to the Crown which in turn leases (among other things) the land to the third party. Designation allows a non-Indian to use the land for a certain period of time, after which the land reverts back to full reserve status. A surrender gives to the federal government the right to manage the lands as it sees fit.\textsuperscript{17}

The primary problems with these systems of land registry is that they do not have any means of creating a priority for the registration of interests, and no assurance fund pays those who have suffered losses as a consequence of relying on the system, unlike provincial land title systems.\textsuperscript{18} Thus, non-Indian investors must assume more investment risk with Indian sponsored investment projects, thereby making Indian investments less appealing. Robert Reiter states that the \textbf{Indian Act} regime

\begin{quote}
...provides a nineteenth-century infrastructure which is inadequate for meeting the challenge of bringing Indian economies into the mainstream of the Canadian economy.\textsuperscript{19}
\end{quote}

As a result of the archaic registry system, Indians have a difficult time raising capital because they are unable to supply adequate security to outside investors. The lack of access to capital is perhaps the single largest impediment to substantive economic development on most Indian reserves. If community development (which goes hand in hand with self-
government) depends upon an adequate economic base (in the form of transfer payments and economic development), and that base is weak to begin with, the chances for successful development are lessened considerably.

Most reserve economies are undeveloped or underdeveloped. One does not have to go to a third-world country to see all the incidence of economic breakdown and the social and spiritual problems which follow therefrom. ...These problems are partially caused by the fact that the major capital base of reserve economies is provided for by transfer funds.

Clearly, undeveloped or underdeveloped communities are not conducive for fully functioning self-government regimes.

An essential component of a successful self-government strategy is authority and control over fiscal resources. In all cases, fiscal resources will mean transfer payments from the other two orders of government (in varying degrees). In other cases, Aboriginal governments will derive fiscal resources from economic development strategies including the attraction of investment, diversification, limiting economic leakage off of the reserve base, and natural resources exploitation. The way in which an Aboriginal government funds itself, either with transfer payments alone or with economic development and transfer payments, depends on a number of key factors that include the land and population size of the community, its location and its infrastructure in reality and potentially. As this author has noted previously:

Regardless of the formal structures in place - that is the basis of authority and the degree
of rights secured - First Nations must have an adequate economic base in order to finance their governments.  

The following comment on the American Indian movement and economic development illustrates the relationship between sovereignty/self-government and economic development:

Economic development in Indian country has been a by-product of an Indian movement toward sovereignty, and sovereignty has meant being able to do what the Indian government decides to do...

This supports the view that there exists a strong link between economic stability and development and the drive towards Aboriginal self-government.

Natural resource development provides an example of the importance of economic development and self-government. Natural resources offers many Aboriginal Nations the capital so desperately needed to finance economic developments and infrastructure which, in turn, attracts economic investment. The existing Indian Act regime makes it difficult, if not impossible, for Indian Nations to raise significant amounts of capital on their own. In addition, those funds to which they are entitled and which result from resource development are not immediately available to Indian Nations. Rather, the money is held in trust and distributed by the Minister to the Indian band. This slows economic development and hampers significantly the ability of Indian Nations to create a sound economic base.

Natural resources, renewable and non-renewable, can
provide the necessary capital, through royalties and taxation, to make strong and vibrant Indian economies. In addition, control over the exploitation of resources also gives Indians more control of the employment of their own people in development projects and also keeps economic leakage from the reserve base to a minimum. As it stands now, Indian natural resources are under the direct control of the Department of Indian and Northern Affairs.

Of course, the larger and more resource-rich the land base, the more opportunities for an Aboriginal Nation to exploit its natural resources for its own benefit. The Siksika Nation depends on its oil and gas revenue to assist in maintaining the operation of its government. With a staff of more than 300 persons, the revenue from oil and gas (in 1991 it was 1.35 million dollars) represents approximately 5% of total band revenue. While the amounts may sound small initially, for the Siksika Nation every dollar is important.

However, the Siksika Nation offers a good example of an Aboriginal Nation with the potential to be relatively self-reliant but for the current Indian Act limitations on its government. In a comparative study between the government of Alberta and the Siksika Nation the conservative estimate (in 1990) of the total tax generated from oil and gas from the Siksika Nation was $25.9 million. This would cover almost all of the Siksika Nation’s current expenditures. In addition, the Siksika Nation has no control over its oil and
gas and indeed, as told to this author, the Siksika Nation is dependent upon Indian Affairs for information and infrastructure support concerning its own oil and gas revenues. With full control over its oil and gas, for example, the Siksika Nation could raise a significant amount of capital which would assist in its economic development strategy which includes a full-serviced industrial park. This example illustrates the potential for resource development in raising capital for Aboriginal Nations and the losses which they experience under the present system. Self-government that gives control and authority over natural resources would ameliorate this situation.

Economic development and economic stability affects the social and cultural and the political and philosophical underpinnings of Aboriginal government:

Economic development is not only economic. Regardless of the extent to which decision makers take non-economic issues into account, their decisions have non-economic consequences. Tribes ... are political sovereigns making substantive decisions regarding the future configuration of their societies. ... Economic development, then, is inherently strategic. By being strategic, economic development becomes political and therefore an essential component to any self-government strategy.

The purpose of government, in addition to other matters, is to provide services to its citizens. A primary means of providing services and increasing the standard of living is through community development. Thus, community development,
especially for smaller communities like Indian reserves, and self-government are closely interdependent. Community development provides an infrastructure and network that provides to the community its essential services and an adequate level of quality for living. Everything from education to public works, from economic development to social support services, are crucial to the productive functioning of a community, large or small. Because of the lack of infrastructure currently available in many Aboriginal communities and because of their great need, more so than in non-Indian societies, for active and vibrant social, economic and political development, community development is key to a successful future for Indians. Without community development, self-government is a hollow concept. Likewise, without self-government, community development lacks a strong base.28

Self-government in practice can be measured by the extent that authority and jurisdiction can be enforced and implemented. Without the ability to implement laws and programs, Aboriginal governments lack the fundamental tools to assert authority and to implement the wishes of their constituents. The Cree-Naskapi Commission (an independent tribunal that oversees the implementation of the Cree-Naskapi Act) reported the following in its 1988 report to Parliament:

However, political autonomy is not enough; there must be economic strength as well. If self-government is to achieve long-term success, native communities must have sound economic bases. ...Chief Joe Guanish of the Naskapi Band
stated the point this way: "Self-Government is also meaningless without an economic base, for the personal and collective growth that self-government is intended to permit and inspire can never be achieved among persons dispirited by poverty and unemployment."

The above statement affirms the important and vital role which community development in general, and economic development in particular, have in the maintenance and fostering of Aboriginal governments. If Aboriginal governments are to provide services to their people, then they must have adequate resources to enable them to conduct their tasks. In the past decade federal funds have shrunk with the passing of each fiscal year. As a result, the traditional program funding upon which Aboriginal governments are dependent has been decreasing. Hence, the ability to implement successfully community/economic development strategies weakens correspondingly. The result is that the communities in Canada which need the most development, social economic and political, remain the least likely to obtain adequate funding and infrastructure support.

Presently, all Aboriginal Nations are heavily dependent upon federal and provincial legislation and cooperation for their fiscal stability. Some are much more dependent than others. Self-government which represents autonomous and independent government within Canada is crucial to Aboriginal peoples, because their Aboriginal governments need control over fiscal resources for proper infrastructure development.
and planning.

The relationship between economic development and community development is reinforced by the following statement by Cam Mackie commenting on community economic development:

> The concept of community development places much emphasis on the participation and involvement of community members in identifying and resolving community problems. The concept of economic development emphasizes entrepreneurship, return on investment, and financially self-supporting activity. Combining the two makes a very powerful tool for community change. ... Without a process of preparation, participation, identification of economic opportunities, and the commitment of substantial numbers of people in the community, many Indian economic development activities will not succeed. ... If any level of economic self-sufficiency is to be reached by many aboriginal communities, [this is essential for self-government] the skills and knowledge gained through ... community development practice in Canada must now be applied in concert with the application of business skills and the attempt to create economic opportunities.³⁰

Thus, combining community development with economic development envelops some of the primary aims of self-government: self-sufficiency and meeting the needs of the people.

A good example of the practical consequences of insufficient funding, and economic stability and its relationship to self-government is found in the following statement by the Naskapi Band to the Cree-Naskapi Commission at its hearings on the implementation of the Cree-Naskapi (of Quebec) Act³¹ that the Band was
...reluctant to adopt certain by-laws in the knowledge that the Band has no funds budgeted for the costs of prosecuting offenders under these by-laws. Up to this time, Quebec has refused to fund the Band for this purpose because its policy is that municipalities in Quebec must pay the fees of city attorneys to prosecute offenders under municipal by-laws.\textsuperscript{32}

Thus, the relationship between acting like a government, making and enforcing laws, is directly linked to the ability to fund such activities of a government.

G. Conclusion

This Chapter has outlined the analytical parameters of the thesis and in doing so has examined the context for the discussion of the Aboriginal government provisions of the \textbf{Charlottetown Accord}. It is clear that the concept of self-government is expansive and limitations on its analysis are not only useful but necessary. The next step is to examine the existing situation under the federal \textbf{Indian Act} regime to understand what the Accord attempted to displace and replace.
CHAPTER 1

ENDNOTES

1. This thesis uses the term "aboriginal" within the context of section 35(2) of the Constitution Act, 1982. It provides: "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada." This thesis also uses the term "Indian". In doing so, I refer specifically to Indians registered under the federal Indian Act. I recognize that these terms are inherently derogatory and offensive to many. These terms are used only out of legal necessity. See P. Chartrand, "'Terms of Division': Problems of 'Outside-Naming' for Aboriginal People in Canada", (1991) 2:2 Journal of Indigenous Studies 1; Patricia Monture, "Reflecting on Flint Woman", in R. Devlin, ed. Canadian Perspectives on Legal Theory. (Toronto: Emond Montgomery, 1991); Patricia Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Ninh-Yah-Gah ["Flint Woman"]", (1986) 2 Canadian Journal of Women and the Law 159; and Thomas Isaac, "The Power of Constitutional Language: The Case Against 'Aboriginal Peoples'", (1993) 19:1 Queen's Law Journal.

2. "Aboriginal" and "Indian" nation connote "...a collective of people". (p.21); "...[T]hey are the First Nations, the founding people, because their ancestors were living here ...with their own laws and institutions.... They had municipal government, international agreements, sophisticated community structures, and an established justice system....(p.1), Assembly of First Nations, To The Source: Commissioners' Report Assembly of First Nations, (Ottawa: APN, April 1992). See also, D. Engelstad and J. Bird eds., Nation to Nation: Aboriginal Sovereignty and the Future of Canada, (Concord, Ont.: House of Anansi Press Ltd., 1992).

3. "Aboriginal governments" denotes the broadest meaning that can be attributed to the term. In one case it may mean autonomous government similar to that held by a province whereas in another case it may mean a very limited form of government that simply delivers services (possibly in the urban setting). In some cases it may have a regional context whereas in others it may mean a single community, or a mix thereof. For example, an Aboriginal government may be autonomous but part of a larger regional or treaty governmental framework.


11. Ibid., 404.

12. Indian Act, R.S.C. c.I-5, ss.74-80, see also Indian Band Election Regulations, C.R.C. 1978, c.952.


14. This figure includes all services provided to Siksika Nation members on the reserve including health, education and social services. It also includes seasonal and contract employees.

15. Canada, Indian and Northern Affairs, "Information Sheet No.7; Alternative Funding Arrangements", (Ottawa: DIAND, April 1989).

16. In addition, I am cognizant and appreciate fully the rich diversity which exists among Canada’s Aboriginal peoples. In no way do I suggest that the case study is representative of any other group of Aboriginal peoples in Canada. Nevertheless, the case study provides a particularly valuable opportunity to examine the effects of a new order of government that will certainly have an impact on all Aboriginal governments.

17. Indian Act, ss.37-41 and 53-60.


23. With expenditures around $27 million (1991), the Siksika Nation has a large per capita distribution. However, this figure includes almost all services provided and offered to the Siksika Nation's members by the federal and provincial governments and therefore represents an all-inclusive figure.

24. Ladressay, Siksika Nation Taxation Potential Estimates, (c.1991); on file with author.


26. To date, the Siksika Nation has been unable to develop the industrial park to the extent that it would like in order to attract investors.


CHAPTER 2

The Indian Act Regime and Examples of Aboriginal-Government

A. Introduction

For more than a decade, self-government has been the key concept used by Aboriginal and non-Aboriginal peoples alike to convey the demands of Aboriginal peoples. The concept is not easy to define because of the varying degrees of autonomy and independence demanded by Aboriginal peoples across Canada. However, each definition has a common characteristic in that self-government means increased control over an Aboriginal nation’s affairs and future. Increased control means different things to different communities. Three manifestations of increased control through self-government are (1) local government regimes, such as the Sechelt Band in British Columbia; (2) comprehensive claims, such as the Cree and Naskapi Bands in northern Quebec; and (3) the constitutional recognition of Aboriginal governments based on the inherent right of self-government and recognizing that Aboriginal governments are equal to the other orders of government in Canada, as proposed by the 1992 Charlottetown
Accord. This thesis deals with the last expression of self-government. The inherent right of Aboriginal self-government and its manifestation by Aboriginal governments as one of three orders of government provides a solid jurisdictional and legislative base for the right of self-government whereas the other two options can not necessarily do so. The issue at the heart of this thesis is the degree to which the Accord meets the demands of Aboriginal peoples in terms of the inherent right and the place of Aboriginal governments in the Canadian polity.

This Chapter examines briefly the present Indian Act system and demonstrates the constraints placed upon local band councils and governments under the Act. The Chapter also discusses two self-government initiatives in Canada; the Cree-Naskapi (of Quebec) Act and the Sechelt Indian Band Self-Government Act. Both pieces of legislation represent significant progress for these Aboriginal nations. However, these legislative structures do not make either form of government one of three orders of government per se because of their inherent weaknesses which are outlined in this Chapter and certainly do not reflect an exercise of an inherent right of self-government.

B. Indian Act Regime

i. General

Section 91(24) of the Constitution Act, 1867 grants
legislative jurisdiction over "...Indians, and lands reserved for Indians" to the federal Parliament. The federal Parliament has exercised this authority through the Indian Act beginning in 1868. In addition, the federal Parliament has passed legislation dealing specifically with oil and gas on Indian lands in the Indian Oil and Gas Act.

From the beginning, the Indian Act's goal was to assimilate "Indians" into mainstream Canadian society and to paternalize the Indian's relationship with the federal Crown. A number of examples illustrate this point. The 1886 Indian Act stated that "Every Indian or person who engages in or assists in celebrating the Indian festival known as "Potlatch" is guilty of a misdemeanor". A revised version of this section was repealed by the 1951 Indian Act. This ritualistic and ceremonial feasting has special significance for a number of Aboriginal peoples along the Pacific coast of Canada. The 1869 Indian Act (not its official name at the time) introduced the concept of enfranchisement. It permitted an Indian to relinquish Indian status under the Indian Act. Section 17 of this Act read that enfranchised Indians "shall no longer be deemed Indians within the meaning of the laws relating to Indians...". Section 86(1) of the same Act states:

Any Indian who may be admitted to the degree of Doctor of Medicine, or to any other degree by any University of Learning, or who may be admitted in any Province of the Dominion to practice law ...or who may enter Holy Orders ...shall ipso facto become and
be enfranchised under this Act.\textsuperscript{10} This provision, and others like it, had the effect of preventing Indians from educating themselves and, at the same time, retaining their Indian status. Indians were seen as "uncivilized" and to be "civilized" they had to renounce their "Indianness" and therefore assimilate into mainstream society.

Indians have also been confined to their reserve in order to receive their entitlements as registered Indians under the \textbf{Indian Act}.\textsuperscript{11} The \textbf{Indian Act} defines "reserve" as

\begin{quote}
...a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band...\textsuperscript{12}
\end{quote}

Reserve lands are for the "use and benefit" of Indians and are not owned by Indians.\textsuperscript{13} A band’s interest in the land has been described as a personal usufructuary right and not one which entails ownership.\textsuperscript{14} Although the \textbf{Act} does not grant the creation of a reserve, that authority rests, in part, on the royal prerogative which is not subject to any statutory limitation.\textsuperscript{15}

\section*{ii. Band Councils}

Indian band councils, which are the legal delegated governing bodies constituted under the \textbf{Indian Act}, carry out four basic functions as acknowledged in \textit{Whitebear Indian Council v. Carpenter’s Provincial Council of Saskatchewan}\textsuperscript{16}. They are (1) municipal government, (2) acting as an agent of the Minister of Indian Affairs, (3) acting as an instrument of
communication between the band members and other governments, and (4) acting in an advisory capacity to the Minister.\textsuperscript{17} Sections 81, 83 and 85.1 of the \textit{Indian Act} comprise the by-law making authority of Indian band councils. Section 81 states that a band council may make by-laws for a variety of purposes so long as the by-laws are not inconsistent with the \textit{Indian Act}, or any regulation made by the Minister or Governor in Council. The areas of jurisdiction under section 81 include\textsuperscript{18} health for reserve residents, regulation of traffic, observance of law and order, construction of roads, ditches, fences and other local works, zoning of the reserve, regulation of construction, surveying of reserve lands, destruction of noxious weeds, regulation of public wells, preservation and protection of fur-bearing animals, fish and other game, residence of band members, and ancillary matters arising out of the exercise of these powers.

iii. By-Law Authority

The courts have interpreted section 81 to mean that band by-laws have no effect outside of the reserve,\textsuperscript{19} just as municipal by-laws do not have effect outside of a municipality. In many ways, the powers conferred under section 81 resemble those of a municipality. In \textit{Re Stacey and Montour}\textsuperscript{20} the Quebec Court of Appeal stated that section 81 powers are

\[
\text{...powers to regulate, and to regulate only 'administrative statutes'. In other words,}
\]
a band council has, in this area, the same sort of legislative powers as those possessed by the council of a municipal corporation.\textsuperscript{21}

Section 82(2) allows the Minister to disallow any by-law made pursuant to section 81. The Minister is not required to give reasons for the disallowance and is not required to give notice to the band that a by-law is disallowed.\textsuperscript{22} Harry Slade notes the following about section 81:

On the face of it, Section 81 provides some useful tools for band councils in regulating land use within the reserve and to undertake local works beneficial to the community. No one would suggest, however, the powers conferred under Section 81 are sufficiently broad to enable a band council to regulate anything like the range of matters that can be regulated by a municipal council under the \textit{Municipal Act}.\textsuperscript{23}

Thus, band councils, sometimes compared to municipal councils, do not possess the same scope and degree of authority as municipal councils.

Section 83 confers, subject to the approval of the Minister, the power to make by-laws relating to taxation for local purposes, licensing of businesses, appointment of officials to conduct business, remunerating Chief and Council, in such amounts that are approved by the Minister, enforcement of payment of amounts duly raised, raising of money from band members to support band projects and any ancillary matter arising out of this section.

Section 85.1 permits band councils to make by-laws relating to the prohibition of the sale, barter, supply or manufacturing of intoxicants on the reserve.
Regardless of the limited authority that the Act confers on band councils, the legislation is still essentially paternalistic in that the Minister of Indian Affairs can disallow any by-law and the fundamental purpose of the Act remains the control of Indians. Only recently has Indian Affairs begun to relinquish its full control, and even these

...delegated federal powers under the Indian Act are not a path to full Indian government as much as they are a path leading towards bands and tribal councils increasing their capacity to implement INAC programs, which are designed and funded in a centralized fashion and are based on principles that deny the essential spirit of Indian government.

For most Aboriginal governments, control over service delivery is not enough to meet their aspirations for self-government. In addition, they want the authority to determine the substance of the programs they deliver to their people. They want autonomous legislative and jurisdictional authority.

Possession and allocation of reserve lands involve a large degree of Ministerial authority. The band council must seek ministerial approval in order to allocate land and the Minister has the final authority to secure possession of reserve land. Moreover, the band council’s power to manage reserves and surrendered or designated lands under sections 53-60 are delegated by the Minister to the band council. The same is true for the authority by band councils to manage Indian moneys.
iv. Regulatory Powers and Provincial Application

In addition to the ministerial powers, the Indian Act also provides for a wide range of regulatory powers held by the Governor in Council. Section 73 of the Act contains a lengthy list of regulations which can be enacted by the Governor in Council. Note that these regulations supersede a band by-law passed by a band council pursuant to section 81.²⁷

The Indian Act also provides that provincial laws of general application apply to Indians. Section 88 of the Act states

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application ...in force in any province are applicable to ...Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder...

Although Indians are subject to provincial laws of general application, the Supreme Court of Canada has held that the laws to which Indians are subject must be "general" in nature and cannot relate exclusively or directly to Indians thereby maintaining the federal authority under section 91(24) of the Constitution Act, 1867. In R. v. Kruger²⁸, Dickson J. stated that there are

...two indicia by which to discern whether or not a provincial enactment is a law of general application. ...If the Act does not extend uniformly throughout the territory, the inquiry is at an end... If the law does extend uniformly throughout the jurisdiction, the intention and effects of the enactment
need to be considered. The law must not be in relation to one class of citizens in object and purpose. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect impairs the status or capacity of a particular group.29

Provincial legislation can impair the status and capacity of an Indian without necessarily singling out an Indian. This was the decision of R. v. Dick.30 The Supreme Court of Canada held that although the British Columbia Wildlife Act31 prevented year round hunting and therefore affected the accused Indian who wished to hunt based on its cultural significance, the Act, nevertheless, did not single out Indians specifically and therefore, was intra vires the province.

Thus, the historical and present Indian Act regime severely restricts and retards the ability of Indians to manage their own affairs and to determine their destiny. The Act paternalizes and assimilates Aboriginal peoples and remains the single largest impediment to Aboriginal sovereignty and Aboriginal social and economic development within Canada.

C. Cree-Naskapi (of Quebec) Act

The Cree-Naskapi Act32 resulted from the 1975 James Bay and Northern Quebec Agreement33, (JBNQA) which permitted the Quebec government to proceed with the James Bay hydro electric project. In return for ceding most of their land, the Cree,
Inuit and subsequently the Naskapi received certain environmental, land use and government rights. For the purposes of this thesis, the most notable provision of the JBNQA is outlined in section 9.0.1 of the JBNQA. It imposed an obligation on the federal Parliament to enact legislation providing for local government for the Cree, and subsequently the Naskapi. In 1984, the federal Parliament enacted the Cree-Naskapi Act pursuant to its obligation under the JBNQA. The Act provides the Cree and Naskapi bands with by-law making authority similar to that held by most municipalities. These powers, outlined in section 45 of the Act, include, in addition to the matters outlined in the Indian Act, the authority to make by-laws relating to the administration of band affairs and internal management, public order, taxation for local purposes and local services including fire protection.

A major weakness of the Act is that it does not confer independent legislative authority on the Cree and Naskapi bands. While the Minister does not have a general disallowance power for by-laws made under the Act, the Minister may disallow or create by-laws relating to local taxation, hunting and trapping, elections, special band meetings, land registry system, long-term borrowing, band expropriation and fines and penalties for breaking band by-laws. Cree and Naskapi bands are subservient to the federal Parliament and to the Quebec National Assembly, as the case
The Cree and Naskapi do not retain their traditional rights and title to the land. The JBNQA states that the Cree "...cede, release, surrender and convey all their Native claims, rights, title and interest" in the land. All of the bands are separate corporate entities under their umbrella regional organization the Cree Regional Authority. The Act outlines permissable forms of government. Each community must have a band council which follows a prescribed set of rules and orders. Band by-laws and resolutions must be enacted according to the procedures set out in the Act and the elections must be carried out in the prescribed manner (with election by-laws being subject to Ministerial approval).

In terms of economic development, the Cree have made considerable progress. They own and operate Air Creebec and have a holding company, CREECO, which operates trucking and construction businesses. All of the individual Cree and Naskapi bands operate various businesses including outfitting companies, shopping malls, restaurants and general stores.

However, the Cree and Naskapi have been subject to fiscal shortfalls with respect to funding by the federal and provincial governments. The 1986 Cree-Naskapi Report cites the following from Chief Isaac Masty:

We are ...concerned that the continuing viability of our local government is jeopardized by the failure of the Government of Canada to provide us with adequate funding as negotiated in the funding formula and the repeated vacuum created in our budgetary
planning process resulting from Indian Affairs' failure to provide us with the available budgetary amounts in advance of our fiscal year.\textsuperscript{41}

Thus, strategic long term planning, which is crucial to successful economic and community planning, is hampered by the bureaucratic malaise which Aboriginal governments must face when dealing with the Department of Indian Affairs.

In addition, with respect to funding and self-government, this author concluded that the \textbf{Cree-Naskapi Act}

...is adequate only to the extent that funds are available. Although the Cree and Naskapi received cash settlements, they are still entitled to regular program funding by the federal government. The problem has been that the federal government has interpreted parts of the JBNQA as being independent of regular program funding. Of all the disagreements that has arisen over the act, none is sharper than that concerning fiscal relations between the federal and Quebec governments and the Cree and Naskapi. ... Without adequate program funding, the ability of the Cree and Naskapi to operate and conduct their affairs in an efficient and effective manner is severely curtailed.\textsuperscript{42}

The above statement provides an example of the importance of funding to the maintenance and operation of Aboriginal self-government as discussed in Chapter 1.

D. \textbf{Sechelt Indian Band Self-Government Act}

The \textbf{Sechelt Indian Band Self-Government Act}\textsuperscript{43} came into force in October 1986 and provides a form of Aboriginal government for the Sechelt Band of British Columbia. The Act
establishes a municipal form of government and grants delegated legislative authority to the band council in areas similar to those provided to the Cree and Naskapi bands. While the band is no longer under the auspices of the Indian Act, except where a void in legislation has not yet been filled by the Sechelt band council, it still possesses only delegated authority. The Act can be amended or repealed by Parliament since it remains federal legislation. With this, the Sechelt legislation is the weakest form of "self-government" established outside of the Indian Act.

In terms of natural resources, the band does not own the natural resources on its land and it is still subject to the Indian Oil and Gas Act which provides for very little band involvement. As well, the British Columbia Indian Reserves Mineral Resources Act and the Indian Reserves Minerals Resources Act, both provincial legislation, apply to the band. These examples are particularly important considering the dependence of many governments on natural resource exploitation. Ownership and control of natural resources are significant for many Indian nations that have either vast mineral deposits, timber reserves or oil and gas reserves.

The Sechelt legislation replaces, for the most part, the Indian Act, as it applies to Sechelt lands and members. The purpose of the Act is to

...enable the Sechelt Indian Band to exercise and maintain self-government on Sechelt lands and to obtain control over and the administration of the resources and services
available to its members.\textsuperscript{47}

For the purposes of this thesis, section 6 of the Act is noteworthy in that it provides for the capacity and rights of the Sechelt Band. It denotes the legal character of the band and states:

The Band is a legal entity and has, subject to this Act, the capacity, rights, powers and privileges of a natural person and, without restricting the generality of the foregoing, may (a) enter into contracts or agreements; (b) acquire and hold property or any interest therein, and sell or otherwise dispose of that property or interest; (c) expend or invest moneys; (d) borrow money; (e) sue and be sued; and (f) do such other things as are conducive to the exercise of its rights, powers and privileges.

The notion that the Band is a natural person is important. The Cree-Naskapi Act also provides that its respective bands be constituted as corporations.\textsuperscript{48} Section 6 basically equates the band to a corporation. However, a government that is non-delegated like a nation-state or other sovereign entity, like a province, is a natural person with additional authority and powers. These non-delegated governments are not restricted to the definition provided by the Sechelt Act. Professor Hogg states the relationship between the natural person and sovereignty in the following manner:

...the state, although a legal person, is not subject to exactly the same laws as other legal persons, namely corporations and private individuals. The state enjoys extensive powers that are not available to subjects: to collect taxes, to maintain
an army, a police force and courts, and to exercise powers necessary to administer the myriad laws which regulate and provide state services in a modern society. In addition, the state enjoys certain privileges or exemptions from the general law of the land. …for example, the immunity of the state from certain kinds of legal proceedings.49

Thus, while the governments of Canada and the provinces are recognized as natural persons, they are not necessarily restricted by the definition provided for in section 6 of the Sechelt act. The difference in the nature of authority possessed, namely a natural person or a sovereign entity, is a critical distinction between the Cree, Naskapi and Sechelt Bands and the other two orders of government. While they are all legal natural persons, the federal and provincial governments possess the inherent concept of sovereignty and are, therefore, deemed capable of exercising sovereign powers which necessarily exceed those of a natural person. The case law on the status and capacity of Indian Act bands is mixed. However, it is clear that in addition to not being corporations or natural persons per se, they also are not sovereign beings in the same manner as the federal and provincial governments.50

In addition to the natural/legal person debate, the Sechelt act also raises questions about the nature of land tenure and a government. The act provides that Sechelt lands shall be held in fee simple.51 This is a remarkable departure from precedent. Usually the Crown holds the lands
in trust for the use and benefit of Indians. The issue of fee simple title is noteworthy in that it signifies what title does not vest in the Band; namely radical or sovereign title. Ultimate title still resides in the federal/provincial Crown. Nevertheless, fee simple title enables the Sechelt Band to engage in a much broader economic development strategy by offering security for investors.

The Cree and Naskapi and the Sechelt Band are not autonomous governments which exercise jurisdiction and authority at the same level as the federal and provincial governments. They are improvements over the Indian Act system but they do not necessarily confer or represent autonomous orders of government in Canada that are not subject to the ultimate legislative authority of either one of the other two orders of government. For the Cree, Naskapi and Sechelt Bands, the federal and their respective provincial governments continue to play a major role in the allocation and level of funding, the establishment of spending priorities and the ability of the governments to operate in a day to day manner.

E. Conclusion

This Chapter has examined the existing Indian Act system and two examples of self-government arrangements currently operating in Canada; the Cree and Naskapi Bands of northern Quebec and the Sechelt Band of British Columbia. Clearly, the Indian Act system provides little to support the aspirations
of Aboriginal peoples towards self-government. The Cree-Naskapi Act and the Sechelt act, although to some degree meeting the needs of these peoples, neither recognize nor support an autonomous non-delegated order of government in Canada.

Both the Cree-Naskapi Act and the Sechelt legislation exist without the constitutional recognition of a new order of government within Canada. Indeed, they can exist entirely outside of the realm of the constitutional recognition of Aboriginal peoples. The next Chapter examines the difference that sections 25 and 35 of the Constitution Act, 1982 make to this situation.


4. **An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands**, S.C. 1868, c.42.


   "(1) "civilizing" the Indians - that is, assimilating them (and their lands) into Eurocanadian citizenry; (2) while accomplishing this, the ever more efficient, "better management" of Indians and their lands was always a goal to be pursued and, following on this, an important element in better management was controlling expenditure and resources; (3) to accomplish this efficiency it became important to define who was an Indian and who was not".

7. **Indian Act**, S.C. 1886, c.43, s.114.

9. An Act for the gradual enfranchisement of Indians, the better management of Indians affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c.6.

10. This section eventually became section 111 of the Indian Act, R.S.C. 1906, c.81. Section 111 was repealed by S.C. 1919-1920, c.50, s.3.

11. See Richard Bartlett, Indian Reserves and Aboriginal Lands in Canada, (Saskatoon, Sask: Native Law Centre, 1990).

12. Indian Act, s.2(1).


18. This list is not exhaustive. For a full list, see section 81 of the Indian Act.


21. Ibid., 68.


24. *Indian Act*, section 82(2).

25. Indian Affairs Minister Thomas Siddon announced that his Department would be transferring more than 80% of the administrative work currently being done by I.N.A.C. to Indian reserve governments. Rudy Platiel, "Powers shift to aboriginals, government says", *The Globe and Mail*, (November 20, 1992), A7.


27. Section 81(1) of the *Indian Act* provides: "The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister,...". [Emphasis added].


34. Section 9.0.1 of the JBNQA provides: "Subject to all other provisions of the Agreement, there shall be recommended to Parliament special legislation concerning local government for the James Bay Crees on Category IA lands allocated to them." The corresponding text and section for the Naskapi band is Section 7.1 of the Northeastern Quebec Agreement, (Ottawa: DIAND, 1984).

35. The Quebec National Assembly was a party to the JBNQA primarily because of its jurisdiction and "ownership" of the lands in question, transferred to it by the federal Crown in the 1912 Quebec Boundaries Extension Act, S.C. 1912, c.45. The JBNQA resulted from the Quebec government’s plans to proceed with the James Bay hydro-electric project which threatened to flood a large portion of traditional Cree and Inuit territory in northern Quebec. See generally, Robert Bourassa, Power from the North, (Scarborough, Ont.: Prentice-Hall Canada, Inc., 1985) and Harvey Feit, "Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement", (1980) 1:1 Canadian Journal of Anthropology.

36. This conclusion is not absolute. For example, in Chisasibi Band v. Barbara Chewanish, (Que.Prov.Ct., No:640-27-000099-842), 27; Ouellet J. held the following: "...it would seem to me that the Band Council constitutes an autonomous level of government when it exercises the powers conferred upon it by the Cree-Naskapi (of Quebec) Act. As long as it remains within the powers so conferred, the Band Council represents a level of government independent from the Canadian Parliament and the Quebec legislature." In Eastmain Band v. Gilpin, [1987] 3 C.N.L.R. 54, at 67; Lavergne P.C.J. of the Quebec Provincial Court noted that the Cree-Naskapi Act, by way of section 35(3) of the Constitution Act, 1982 maintains the "...proposition that the Crees hold some sort of residual sovereignty as regards their local governments."
This support’s the argument made by Isaac, supra, note 32. However, it is submitted that more judicial comment, especially from higher courts, is needed to solidify the above comments.

37. JBNQA, supra, note 33, s.21.


39. Ibid., ss.49-57, 63-78.


44. Indian Oil and Gas Act, R.S.C. 1985, c.I-7.


46. Indian Reserves Minerals Resources Act, R.S.B.C. 1979, c.192.

47. Sechelt Act, supra, note 43, s.4.


51. Sechelt Act, supra, note 43, s.23(1) reads: "The title to all lands that were, ...reserves, ...of the Indian Act Sechelt band is hereby transferred in fee simple to the Band,...".

52. Professor Sinclair puts it simply when he writes: "The Crown at the top owns the land. At the base is O who owns a fee simple (a "bundle" of rights) in relation to that land. He then may easily dispose of some of these rights. This leaves totally undisturbed the ownership of the land; that’s up above." A.M. Sinclair, Introduction to Real Property Law, 3d ed. (Toronto: Butterworths, 1987), 9.
CHAPTER 3

Existing Constitutional Provisions and Aboriginal Peoples

A. Introduction

Before the discussion of the Charlottetown Accord the, existing constitutional situation as it relates to Aboriginal peoples must be understood. Section 91(24) of the Constitution Act, 1867, section 25 of the Canadian Charter of Rights and Freedoms and section 35 of the Constitution Act, 1982 are the most relevant constitutional provisions.¹

B. Section 91(24), Constitution Act, 1867

Section 91(24) of the Constitution Act, 1867² assigns exclusive legislative authority³ to the federal Parliament over "Indians, and Lands reserved for the Indians". Beginning in 1868⁴ and culminating with the present Indian Act,⁵ Parliament has exercised exclusive legislative jurisdiction by enacting legislation dealing specifically with Indians and lands reserved for them. In addition, Parliament has enacted the Indian Oil and Gas Act,⁶ the Indian Mining Regulations,⁷ the Indian Oil and Gas Regulations,⁸ and the Indian Timber
For the purposes of this thesis, section 91(24) is not a central component of the discussion. It is a significant section in that it purports to assign jurisdiction to one government (the federal Parliament) over many governments (Indian Bands). The Charlottetown Accord sought to diminish this legislative jurisdiction and replace it with Aboriginal jurisdiction.

C. Section 25, Canadian Charter of Rights and Freedoms

Section 25 of the Canadian Charter of Rights and Freedoms reads as follows:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Bruce Wildsmith describes section 25 in the following manner:

Section 25 is not a mere canon of interpretation whose force is spent once it is determined that the rights and freedoms in the Charter cannot "be construed so as [not] to abrogate or derogate" from the rights referred to in section 25. Neither does section 25 create substantive rights or in any way enhance or entrench the position of aboriginal peoples. Its purpose and effect are to maintain the special position of Canada's aboriginal peoples unimpaired by the Charter.
There has been relatively little substantive case law on section 25. Of the few cases dealing with section 25, two decisions are substantive in their analysis of section 25. First, in *Steinhauer v. R.* the Alberta Court of Queen’s Bench held that section 25 acts as "...a shield and does not add to aboriginal rights". Second, the New Brunswick Court of Appeal in *Augustine and Augustine v. R.; Barlow v. R.* cited with approval from Professor Hogg’s second edition of his *Constitutional Law of Canada*. Professor Hogg states that section 25

...does not create any new rights, or even fortify existing rights. It is simply a saving provision, included to make clear that the Charter is not to be construed as derogating from "any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada". In the absence of s.25, it would perhaps have been arguable that rights attaching to groups defined by race were invalidated by s.15 (the equality clause) of the Charter.

Hogg’s understanding of section 25 appears to be generally accepted.

Section 25 assists in understanding the scope of Aboriginal rights by limiting the extent that Aboriginal rights may be infringed upon by the Charter. The protection afforded to Aboriginal rights by section 25 may be particularly important to traditional forms of Aboriginal government which do not necessarily fall into the current western understanding of "democratic". Some traditional forms of Aboriginal government rely on hereditary chiefs or
government based upon consensus, not necessarily relying upon
democratic elections for legitimacy.

D. Section 35, Constitution Act, 1982

i. General

Section 35 of the Constitution Act, 1982 reads:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

At present, section 35(1) is the only provision in the Canadian Constitution that recognizes and affirms Aboriginal and treaty rights. It provides constitutional protection for "existing aboriginal and treaty rights". By virtue of section 52 of the Constitution Act, 1982, section 35 is part of the supreme law of Canada thereby superseding federal and provincial legislation inconsistent with its provisions.

Aboriginal rights are not created by section 35(1). As Brian Slattery points out, these rights are held by Aboriginal peoples

...by reason of the fact that aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada.
Understanding the scope of Aboriginal rights and Aboriginal title necessitates a brief discussion of some important judicial decisions in the area.

ii. Calder v. A.G.B.C.

In Calder v. A.G.B.C. the Supreme Court of Canada dealt with the request of the Nishga Indians of the Naas Valley in British Columbia for a declaration that the Aboriginal title to their traditional lands was not extinguished. The Nishga had been unsuccessful in the lower courts. The Supreme Court of Canada held four to three that the Nishga’s Aboriginal rights with respect to their traditional lands were extinguished. Pigeon J. (among the four) decided against the Nishga claim on procedural reasons. Thus, the court was split 3/3 on the substantive issue.

The majority judgement of Pigeon, Judson, Martland and Ritchie JJ. and the minority judgement of Hall, Spence and Laskin JJ. elaborated on the origins, recognition and nature of Aboriginal rights to land in British Columbia. Both judgements held that Aboriginal title did not originate with the Royal Proclamation of 1763. The majority decision, given by Judson J., held that the Royal Proclamation was not applicable to British Columbia whereas the minority decision, given by Hall J., held that it was. Judson J. defined Aboriginal title as follows:

...it is clear that Indian title in British Columbia cannot owe its origin to the
Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.  

Hall J. described the nature of the Nishga's Aboriginal title as follows:

The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation. ...This is not a claim to a title in fee but it is in the nature of an equitable title or interest. ...a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title. ...Possession is of itself at common law proof of ownership. ...Unchallenged possession is admitted here.  

Calder stated that Aboriginal rights in respect of land are not dependent on the Royal Proclamation of 1763 or any other instrument for its existence. Aboriginal title and ownership of the lands is a common law right. Judson J. defined Aboriginal title in terms of the Nishga's use and occupancy of the lands at issue for centuries and as a component in the communal structure of the Nishga peoples. Hall J. defined Aboriginal title as being a usufructuary right which was based in the common law.

iii. Re Paulette

Morrow J. of the Northwest Territories Supreme Court held in Re Paulette that Aboriginal rights constitute an interest in land and the Royal Proclamation of 1763 did not
create Aboriginal rights but rather confirmed their existence.\textsuperscript{28} As well, Morrow J. doubted whether Treaties 8 and 11 extinguished Aboriginal title to the land in question. He writes:

\begin{quote}
Unless therefore the negotiation of Treaty 8 and Treaty 11 legally terminated or extinguished the Indian land rights or aboriginal rights; it would appear that there was a clear constitutional obligation to protect the legal rights of the indigenous people in the area covered by the proposed caveat, and a clear recognition of such rights.\textsuperscript{29}
\end{quote}

\textbf{iv. R. v. Guerin}

The most recent Supreme Court of Canada decision concerning the nature of Aboriginal rights with respect to land is \textbf{R. v. Guerin}.\textsuperscript{30} The facts of \textbf{Guerin} are straightforward. In October 1957, the Musqueam Indian Band of British Columbia surrendered 162 acres of reserve land situated in the City of Vancouver to the federal Crown pursuant to sections 37 to 41 of the \textbf{Indian Act}.\textsuperscript{31} The surrender enabled the band to secure a lease with a golf club. The terms and conditions of the lease were not part of the surrender but rather, were discussed between federal officials and the band at band meetings. The Crown executed the lease on terms less favourable than the terms originally agreed upon orally. The Crown did not receive the band’s permission to change the terms of the lease nor did it provide a copy of the lease to the band until 1970. The band instituted a suit
against the Crown for breach of trust.

The Supreme Court of Canada's judgement consists of three separate opinions of the eight justices taking part. Seven of the eight judges held that the Crown has a fiduciary duty respecting Indians lands. Dickson J. writes:

...the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.32

Dickson J. held that Indian title comes from two sources: Indians' historical occupation and possession of their lands and the Royal Proclamation of October 7, 1763.33 Aboriginal title is sui generis, that is, unique to First Nations peoples. The nature of this right is described by Dickson J. in Guerin as follows:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. ...The nature of the
The Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

The above statement indicates the wide scope of definition attributed to Aboriginal rights with respect to land. Note that the federal fiduciary responsibility is referred to in terms of "surrendered lands". It leaves the nature of the Aboriginal interest in reserve land open for consideration.

v. R. v. Sparrow

With section 35 being added to the Constitution in 1982, the nature of Aboriginal rights in Canadian law took a new and expanded focus. There has been much academic commentary on section 35(1), particularly before the landmark 1990 Supreme Court of Canada decision of R. v. Sparrow. The following will be a brief discussion of Sparrow to assist in shedding some light on the meaning of this important subsection.

The facts of Sparrow are as follows. Ronald Sparrow, a member of the Musqueam Indian Band of British Columbia, was charged and convicted at trial under section 61(1) of the Fisheries Act for fishing with a drift-net that was longer than that permitted under the band's food fishing licence. Sparrow admitted that the facts constituted an offence but
defended his action on the basis that he was exercising an existing Aboriginal right to fish and that the drift-net length restriction was inconsistent with section 35(1) of the Constitution Act, 1982 and therefore, invalid.

The Supreme Court discussed section 35(1) in a segmented manner. It held that "existing" means the rights which were in existence when the Constitution Act, 1982 came into effect. The court stated that existing means unextinguished and that "existing aboriginal rights" require an interpretation that is flexible so as "...to permit their [aboriginal rights] evolution over time". The court adopted the language of Professor Slattery in noting that "existing" means that rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour".

The court's discussion of "recognized and affirmed" is the most substantive portion of the decision. On the issue of Crown sovereignty and legislative power and Aboriginal title, the court writes

...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

The court notes that the interpretation of "recognized and affirmed" is derived from "...general principles of constitutional interpretation" and that section 35 shall be interpreted in a "purposive way". That is, it shall be given a "generous, liberal interpretation". The court then cites its earlier decision of R. v. Nowegijick wherein it stated:
...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.\textsuperscript{45} 

The decision continues by outlining a justificatory analysis that would allow federal or provincial legislation to override an existing Aboriginal or treaty right. This analysis does not need to be discussed since the topic of this thesis concerns the general application of the right of self-government and not necessarily the degree to which the federal and provincial governments can override Aboriginal rights under section 35.

\textbf{Sparrow} contains several important principles in understanding Aboriginal rights and therefore assists in understanding the relationship between Aboriginal rights and an inherent right of self-government. For example, the court speaks of a "flexible interpretation" of Aboriginal rights so as to permit their "evolution". Certainly, because of recent judicial and political events, the possibility exists that a right of self-government might result from a flexible interpretation of the Constitution. This is further supported by the purposive approach adopted by the court which calls for a liberal and generous interpretation of Aboriginal rights. The affirmation of the principles in \textbf{Nowegijick} that treaties and statutes relating to Indians be construed in favour of Indians also supports the position that Aboriginal peoples possess some degree of sovereignty within what is now known as Canada. Specifically, the treaties did not extinguish their
internal sovereignty but rather strengthened their claim of independence.

The court notes, however, that sovereignty and underlying title to the land vests in the Crown.\textsuperscript{46} However, the issue of underlying title may not necessarily rule out a favourable interpretation on Aboriginal sovereignty within the confines of the Canadian state from the Supreme Court. The court has offered more favourable comments. In \textit{R. v. Sioui}\textsuperscript{47} the Supreme Court stated:

The British Crown recognized that the Indians had certain ownership rights over their land ... It also allowed them autonomy in their internal affairs, intervening as little as possible.\textsuperscript{48}

Although the \textit{Sparrow} decision is the only Supreme Court decision to date which deals directly with section 35(1), it provides little by way of substance for determining the existence of a right of self-government. The decision speaks only to the regulation of rights, specifically the right to fish. It does not deal with the issue of self-government and autonomy. In particular, the decision does not deal with the extent and degree of relationships between Aboriginal governments and the federal and provincial governments, outside of the application of the regulatory regimes of these two orders of government.

vi. Conclusion

While a number of the decisions discussed earlier concern
Aboriginal rights or Aboriginal title, they do not speak of self-government. Those, like Sioui, that discuss sovereignty do not discuss the practical realities and implications of sovereignty for Aboriginal governments, in whatever form it takes. The terminology of section 35 does little to help the situation both in terms of the possible source of an Aboriginal right of self-government and its implementation. "Recognized and affirmed" does not provide a source for the rights. It simply offers recognition and affirmation. However, this "recognition and affirmation" has the benefit of implying that the source of Aboriginal rights lies outside of the Constitution and thereby strengthens the inherent nature of the rights.

The possible exception to the above argument is subsection 35(3) which provides that land claims agreements are to be considered "treaty rights" within subsection 35(1). Therefore, if self-government relations are defined in land claims agreements, then these forms of self-government become constitutionalized, i.e. recognized and affirmed, within the meaning of subsection 35(1).49

A question remains in the self-government debate. Even if the right of self-government were implicitly included in section 35 or explicitly recognized in an amendment to the Constitution, what would it mean with respect to Canadian federalism and the existing division of powers between the federal and provincial governments?50 Clearly, the examples
of Aboriginal government which exist in Canada today do not represent a relationship of governments dealing with each other as equals. The discussion of the Sechelt and Cree-Naskapi legislation in Chapter 2 illustrated this. Regardless, a right of self-government in section 35 would have to mean something.

The inclusion of sections 25 and 35 in the Constitution resulted from the 1981 constitutional discussions and conferences. Subsequently, other constitutional conferences in the 1980s picked up where the Constitution Act, 1982 (and its amendment in 1983) left off. Therefore, the next section appropriately briefly examines the constitutional events leading up to the 1992 Charlottetown Accord.

E. Pre-Charlottetown Accord Constitutional Events

The constitutional discussions of the early 1980s resulted in the Constitution Act, 1982. Section 37 of the Constitution Act, 1982 required the Prime Minister to convene a constitutional conference on matters affecting Aboriginal peoples within a year of the passing of the Constitution Act, 1982.51 On March 15-16, 1983, a constitutional conference produced the 1983 Constitutional Accord on Aboriginal Rights, ultimately proclaimed as the Constitution Amendment Proclamation, 1983.52 The amendment was agreed upon by the federal government, nine provincial governments (excepting Quebec), the two territorial governments and four national
Aboriginal organizations. The amendment provided for three future constitutional conferences within four years on Aboriginal matters and made amendments to section 25 of the Charter and section 35 of the Constitution Act, 1982.

The 1984, 1985 and 1987 Aboriginal constitutional conferences did not result in any constitutional amendments. The negotiations at the 1987 conference broke down when British Columbia, Alberta, Saskatchewan and Newfoundland rejected Prime Minister Mulroney's proposal to entrench into the Constitution an Aboriginal right of self-government. The four national Aboriginal organizations also had problems with the Prime Minister's proposal since it was based on a contingent right of self-government as opposed to one based on the inherent right.

On April 30, 1987 the Prime Minister and the ten Premiers reached agreement on a constitutional package known as the Meech Lake Accord. The Meech Lake Accord provided no explicit provisions for Aboriginal peoples since it was primarily concerned with bringing Quebec into the constitutional framework of Canada. With the failure of the Meech Lake Accord on June 22, 1990 the stage was set for a new round of constitutional discussions culminating with the 1992 Charlottetown Accord. The Charlottetown Accord deals substantively with Aboriginal matters and, as such, is the concern of the next Chapter.
CHAPTER 3

ENDNOTES

1. Sections 25 and 35 and section 91(24) deal exclusively with Aboriginal peoples and Indians, respectively. While the entire Constitution affects Aboriginal peoples and their rights, these sections are those most directly connected to the self-government debate.


4. An Act providing for the organization of the department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, S.C. 1868, c.42.


Proclamation, 1983, R.S.C. 1985, App.II, No.46 [am.s.s. 25(b) and add. 35(3), 35(4), 35.1 and 37.1 and 54.1].


13. Ibid., 191; This author has written previously that section 25 may, in fact, have the effect of being more than simply an interpretive clause or a clause which maintains existing rights. See Thomas Isaac, "The Constitution Act, 1982 and the Constitutionalization of Aboriginal Self-Government in Canada: Cree-Naskapi (of Quebec) Act", [1991] 1 C.N.L.R. 1 at 6.


18. Constitution Act, 1982, supra, note 17, section 52: "(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Peter Hogg describes the effect of section 52 in the following manner: "By virtue of s.52(1), the
Constitution of Canada is superior to all other laws in force in Canada, whatever their origin; federal statutes, provincial statutes, pre-confederation statutes, received statutes, imperial statutes and common law; all of these laws must yield to inconsistent provisions of the Constitution of Canada. Section 52(1) provides an explicit basis for judicial review of legislation in Canada, for, whenever a court finds that a law is inconsistent with the Constitution of Canada, the court must hold that law to be invalid ("of no force or effect"). Peter Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992), 3.4 (p.52).


23. Ibid., 323.

24. Ibid., 395.

25. Ibid., 328.

26. Ibid., 352 and 368.


28. Ibid., 27.
29. Ibid., 30.


32. Guerin, supra, note 30 at 376.

33. Ibid., 377.

34. Ibid., 382.


38. Sparrow, supra, note 36 at 396 and 397.

39. Ibid., 397.


41. Sparrow, supra, note 36 at 404.

42. Ibid., 407.

43. Ibid.


45. Ibid., 198.

46. Sparrow, supra, note 36.


48. Ibid., 450.


51. Section 37, Constitution Act, 1982 reads in part: "(1) A constitutional conference composed of the Prime Minister ...and the first ministers of the provinces shall be convened by the Prime Minister ...within one year after this Part comes into force. (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada ...the Prime Minister ...shall invite representatives of those peoples to participate in the discussions on that item."


53. The four national Aboriginal organizations were the Assembly of First Nations, the Metis National Council, the Inuit Committee on National Issues and the Native Council of Canada.

54. Section 37.1, Constitution Act, 1982 reads in part: "(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister ...and the first ministers of the provinces shall be convened by the Prime Minister ..., the first within three years after April 17, 1982 and the second within five years after that date. (2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister ...shall invite representatives of these peoples to participate in the discussions on these matters."

55. The amendment to section 25 of the Charter dealt primarily with terminology. Section 35, Constitution Act, 1982, was expanded to include subsections (3) (dealing with land claims agreements as treaty rights) and (4) (equality guarantee to Aboriginal men and women). For discussion see, Canada, I.N.A.C. "A Record of Aboriginal Constitutional Reform", Information, (Ottawa: I.N.A.C., 1983); R.E. Gaffney, G.P. Gould, and A.J. Semple, Broken Promises: The Aboriginal Constitutional Conferences, (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984); Bryan Schwartz, First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984, (Kingston, Ont.: Institute for Intergovernmental Relations, Queen’s University, 1986); and David Hawkes, Aboriginal Peoples and Constitutional Reform: What Have We Learned?, (Kingston, Ont.:


58. Manitoba M.L.A. Elijah Harper, using procedural tactics, blocked the Manitoba Legislature from ratifying the Meech Lake Accord before the June 23, 1990 deadline because the Accord did not deal with Aboriginal concerns.

CHAPTER 4

The 1992 Charlottetown Accord and Aboriginal Governments

A. Introduction

The 1992 Charlottetown Accord represents the most significant political progress to date regarding the recognition of the inherent Aboriginal right of self-government. This Chapter focuses on those elements of the Accord that deal directly with Aboriginal peoples and particularly on those provisions outlining a new order of government in Canada comprising Aboriginal governments. The Chapter illustrates that although the Charlottetown Accord was not perfect and had a number of substantive weaknesses, it nevertheless represented a major move forward on the part of the federal and provincial governments in recognizing and affirming the demands of Canada’s Aboriginal peoples. While the Accord attempted to meet the needs of Aboriginal peoples as they regain their suppressed sovereignty, it fell short of providing the necessary framework within which Aboriginal governments could operate as independent governments within
Canada to the extent required by Aboriginal peoples.

The **Charlottetown Accord** represented the culmination of numerous constitutional debates in Canada and attempted to deal with almost all of them. The cornerstone of the Accord was the "Canada Clause". As an interpretive clause, it recognized, among other things, the federal and democratic nature of Canada, the right of Aboriginal peoples, being the first peoples of Canada, to promote their cultures and traditions and to ensure the integrity of their governments, the commitment of Canada to racial and ethnic equality and individual and collective human rights, gender equality, and that Quebec constitutes a distinct society within Canada.

The Accord also committed federal, provincial and territorial governments to the principle of preserving and developing the Canadian social and economic union. Included in the social and economic union are universal health care, adequate social services, high quality education, protecting the environment, free movement of goods, persons, services and capital, the goal of full employment and sustainable and equitable development.

The Accord provided for a commitment by the federal Parliament to provide equalization payments to the provinces with the goal of maintaining reasonably comparable levels of public services at reasonably comparable levels of taxation to all Canadian citizens.

Senate amendments in the Accord included the election of
senators, an equal number of senators from each province and guaranteed representation of Aboriginal peoples. The Accord made the Supreme Court of Canada the general court of appeal and constitutionalized the Supreme Court Act. First Ministers conferences and the House of Commons were also addressed in the Accord.

Exclusive provincial jurisdiction was recognized over culture, forestry, mining, tourism, housing, recreation, and municipal and urban affairs. The areas of exclusive provincial jurisdiction would be subject to a general declaratory power possessed by the federal Parliament to allow it to declare an activity to be in the general interest of Canada and thereby bring the activity within the authority of the federal Parliament.

The Accord proposed amendments to the Constitution that would dramatically affect the nature of relations between Aboriginal governments and the other governments of Canada. The Accord recognized the inherent right of self-government and proposed that the inherent right be interpreted in a manner consistent with the recognition of Aboriginal governments comprising one of three orders of government. The Accord placed special emphasis on the need for self-government negotiations, notwithstanding the existence of the inherent right. Treaty rights were guaranteed an interpretation that is "just, broad and liberal" and one that considers the "spirit and intent and the context" of the negotiations.
relating to the treaty in question.

The following discussion will examine in detail some of the more pertinent sections of the Accord as they relate directly to Aboriginal peoples and self-government.

B. The Aboriginal Provisions of the Charlottetown Accord
i. Inherent Right of Aboriginal Self-Government

The 1992 Charlottetown Accord proposed amending section 35.1 of the Constitution Act, 1982 to include the following:

The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

This subsection constitutionalizes the inherent right of self-government. By itself, it represents an historic step forward in that it constitutionalizes the inherent right of Aboriginal self-government. The real issue, however, concerning the inherent right is: what does it mean regarding the creation of three orders of government including Aboriginal governments and what is the effect of the inherent right in terms of Aboriginal governments and the existing Canadian state? This discussion is important because it appears likely that any future constitutional amendments affecting Aboriginal peoples will have to deal with the inherent right of self-government.

The phrase "within Canada" most likely denotes two things. First, the inherent right exists within the geographical confines of the Canadian state as it is presently recognized. Second, regardless of its geographical nature,
the inherent right is a component of the existing Canadian constitutional framework.

"Within Canada" may also limit the scope of the inherent right with respect to its international application and the international claim, by some Aboriginal nations, that they possess an international right of self-determination. However, it is unlikely that "within Canada" would have this effect since the Canadian constitution cannot alter the international law of states as it applies to other states.\textsuperscript{5}

\textbf{ii. The Contextual Statement}

The \textbf{Charlottetown Accord} contains a contextual statement in section 35.1(3) that defined, to some degree, the scope of the inherent right. The contextual statement reads:

The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

The language of the contextual statement is not typical constitutional language thereby making its meaning uncertain and problematic. For example, the terms "safeguard and
develop" and "develop, maintain and strengthen" may represent growth in constitutional language and politics, but these terms do not have any substantive precedents in constitutional jurisprudence. Therefore, it is difficult to know what they mean. This is especially true with regard to their effect, or lack thereof, on the language used in sections 91 and 92 of the Constitution Act, 1867 where "exclusive legislative authority" is utilized to express the scope of power held by the federal and provincial governments. The uncertainty of the language applies to the entire Accord in that it deals with old constitutional issues in, at times, a novel manner. New constitutional language could prove to be beneficial for Aboriginal peoples. The problem is that whether it is good or bad is not certain.

More troublesome is the extent of legislative authority recognized in clause (b) of the contextual statement. At first glance, "lands, waters and environment" appears to include natural resources. However, upon examination, "natural resources" are most likely not included. Two reasons stand out for this conclusion.

First, section 109 of the Constitution Act, 1867 and section 1 of the Constitution Act, 1930 use the terminology "lands, mines, minerals and royalties". The implication is that "lands" alone does not comprise the minerals, mines and royalties thereto.

Second, earlier drafts of the legal text included the
terms "seas" and "resources" under clause (b). The obvious implication of this is that resources were not meant to be included in the term "lands". Also, the clause which details the negotiating framework for self-government agreements under the Accord states that issues such as "lands and resources" shall be part of the negotiations.

The uncertainty of the status of "natural resources" in the contextual statement represents a serious shortcoming in the Accord considering the immense role that resource development and exploitation play for the other governments of Canada in financing the activities of the state. This is especially true for Aboriginal governments since, for many Aboriginal peoples, their way of life, their beliefs and traditions are based strongly on the land. Therefore, control over the land, including natural resources, represents an essential feature of autonomy for Aboriginal peoples.

A number of other phrases in the contextual clause are of particular importance. "Duly constituted legislative bodies" most likely means that the legislative bodies of Aboriginal peoples shall be constituted by proper procedures and mechanisms determined by the Aboriginal peoples concerned. This interpretation would be consistent with the notion that the right of self-government is "inherent" and not contingent upon the approval or acceptance of the other governments of Canada (federal and provincial).

"Each within its own jurisdiction" is significant because
it signifies the individual and distinct nature of the many Aboriginal governments and communities in Canada. While some Aboriginal governments may opt for a wide array of authority and powers, others may seek more limited forms of government. Whatever the case, the contextual statement guaranteed a non-contingent interpretation by virtue of section 35.2(7) of the Accord. It reads:

Nothing in this section abrogates or derogates from the rights referred to in section 35 or 35.1, or from the enforceability thereof, and nothing in subsection 35.1(3) or in this section makes those rights contingent on the commitment to negotiate under this section.

Although the contextual statement is simply an interpretive clause, it places the inherent right of self-government within a certain set of parameters regarding interpretation. By affecting the substance of the inherent right, the contextual statement may be as important as the recognition of the inherent right.

Finally, the term "relationship" in clause (b) of the contextual statement infers a non-proprietary interest in the lands. "Relationship" connotes a different degree of authority than does "title" or "ownership". Thus, the nature of the "relationship" remains unclear.

iii. One of Three Orders of Government

Section 35.1(2) could have been the most important clause in the Accord in that it purports to provide for the
recognition of Aboriginal governments comprising one of three orders of government. It states that the inherent right shall be interpreted:

...in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

This section deals directly with the jurisdictional relationship between the federal and provincial governments and Aboriginal governments. This clause could be interpreted to suggest the creation of what might be referred to as a twelfth Crown in Canada (comprising all the Aboriginal governments). However, this interpretation seems unlikely due to the fact that the creation of a third Crown is not stated specifically and that the clause is an interpretive clause. It does not actually create a third order of government for Aboriginal governments. Rather, it states that section 35.1(1), the inherent right, should be "interpreted" in a manner consistent with Aboriginal governments comprising one of three orders of government within Canada.

Thus, the one of three orders of government clause that would be held by Aboriginal governments would be limited in its application to subsections (1) and (3). Subsection (3), the contextual statement, raises problems for Aboriginal governments in that its meaning is ambiguous, especially in light of the nature of the "orders" of government occupied by the federal and provincial governments. For example, sections 91 and 92 of the Constitution Act 1867 outline federal and
provincial areas of exclusive legislative authority. While judicial interpretation has provided additional meaning to the original terminology, the intent of sections 91 and 92 remains relatively clear. The full intent of the contextual statement remains unclear and thereby presents a problem for constitutional interpretation and understanding.

Also missing from the one of three orders of government clause is any reference to fiscal responsibility, fiscal rights and transfer agreements. These issues are dealt with by the draft political accord (which is not legally binding) on Aboriginal peoples released in October 1992. The "one of three orders of government clause" and the entire Accord do not deal with the fiscal relationship between Aboriginal governments and the other governments of Canada. This omission represents a major weakness in the Accord.

Nevertheless, the one of three orders of government clause can be interpreted to imply the sovereignty of Aboriginal governments within Canada. The nature of the other two orders of government, and the inclusion of Aboriginal governments as a third order, supports the recognition of Aboriginal governments exercising sovereignty within Canada. The federal and provincial governments are sovereign governments exercising exclusive and shared jurisdiction over all areas of government within Canada and internationally in the operation of the state (albeit to a limited degree). Therefore, by implication, Aboriginal governments would also
take part in the sharing of legislative and jurisdictional authority in an exclusive and shared capacity.

"One of three orders" implies much more than simply sovereignty. It denotes, to some degree, the "type" of sovereignty to be exercised. That is, "one of three orders of government" connotes some sort of equality in that the governments are all "orders" of government. This would support the claim that Aboriginal governments cannot be, and are reluctant to be seen as, municipal governments. However, just as "one of three orders" supports a broader degree of authority for Aboriginal governments, it also weakens considerably the notion of rights existing at international law regarding self-determination.

The language used also supports the claim that Aboriginal governments, under the Accord, are governments equal in status to the federal and provincial governments. Specifically, "one of three orders of government" is used particularly to distinguish it from a "third order of government", which signifies an hierarchical order of governments in Canada.\textsuperscript{12}

A number of proposals examine the creation of an Aboriginal province or First Nations province.\textsuperscript{13} The problem with a First Nations "province" is that it places all Aboriginal peoples under one conceptual framework and regards them as a single conceptual entity. "One of three orders of government" implies individual status upon each and every Aboriginal nation in Canada, thereby ensuring their
distinctiveness and cultural and sovereign identity. Aboriginal nations may decide eventually to group themselves together in a variety of political networks, which will most likely occur considering the fiscal and cost/benefit reality imposed on all governments. The choice of political organization remains with the Aboriginal governments and is not predetermined by so-called "provincial status". This does not mean that the provincial model is not worthy of examination. Rather, "one of three orders of government" denotes a clearer conceptual framework.

The constitutional position of provincial governments, especially from the perspective of the Crown, is clear in Canada. For example, in the 1892 Privy Council decision of Liquidators of the Maritime Bank v. Receiver General of New Brunswick the issue was whether the Government of New Brunswick could use the Crown prerogative as a basis for claiming priority over other creditors trying to recover funds from the liquidators of the Maritime Bank. The federal government proposed that the government of New Brunswick could not use the Crown prerogative as a basis for its claim because confederation resulted in the direct ties between the Crown and New Brunswick being curtailed, thereby making the federal Crown superior to the provincial Crowns. The Privy Council held that the Constitution Act, 1867 had as its object neither the welding of

...the provinces into one, nor to subordinate provincial governments to
a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. ...the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it by the appellants. It derives no authority from the Government of Canada ... within the limits assigned by sect. 92 ...these powers are exclusive and supreme.\textsuperscript{15}

The \textit{Liquidators} decision is critical in understanding Canadian federalism. Without this decision, it would be more difficult for a provincial legislature to delegate powers to subordinate bodies. Section 92 powers are original and not merely derivative in nature. Thus, the issue for Aboriginal governments is the relationship they possess with the other two orders of governments. The type of authority that Aboriginal governments possess must be original in nature, and not merely derivative from the other two orders, as the \textit{Liquidators} decision held on behalf of the provinces.

The proposal of Aboriginal governments comprising one of three orders of government is interpretive in nature and is weakened substantively by other clauses in the Accord.

\textbf{iv. Preservation of Peace, Order and Good Government}

Section 35.4(2) provides that federal and provincial laws (not territorial laws) may supersede Aboriginal laws where the Aboriginal laws are inconsistent with the preservation of peace, order and good government. This subsection is limited
by section 35.4(3) which states that nothing in section 35.4 extends the legislative authority of the federal or provincial governments.

35.4(2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.

35.4(3) For greater certainty, nothing in this section extends the legislative authority of the Parliament of Canada or the legislatures of the provinces or territories.

Section 91 of the Constitution Act, 1867 confers upon the federal Parliament exclusive areas of jurisdiction. In addition, it places all powers not held by the provincial legislatures with the federal Parliament. Section 91 contains a "peace, order and good government" which states that the federal Parliament has the power:

...to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces;...

There are a number of branches of the p.o.g.g. power under section 91. The result is that the section 91 p.o.g.g. power has been given a very broad interpretation to include a wide variety of situations. Thus, although it is not the Charlottetown p.o.g.g. clause, the section 91 p.o.g.g. signifies the importance of such authority as vested in the clause.

Beyond the particulars of the Charlottetown p.o.g.g.
clause is a matter of principle that relates directly to the issue of Aboriginal governments constituting one of three orders of government within Canada. If Aboriginal governments constitute one of three orders of government, as opposed to a "third" order of government, and if Aboriginal governments are to be treated as equals to the other two levels of government, why then does the p.o.g.g. clause only grant authority to the federal and provincial governments and not to Aboriginal governments?

This query questions the reality underlying the "one of three orders of government" clause. Clearly, the p.o.g.g. clause places the federal and provincial governments into a different "order" of government than that held by Aboriginal governments.

v. Legislative Authority of Aboriginal Governments

As mentioned earlier, the Charlottetown Accord does not describe the precise meaning of the "one of three orders of government" clause. However, section 35.4(1) serves as an indicator of the degree to which the one of three orders of government clause was intended to have effect. Section 35.4(1) reads:

Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to
their authority.

In general, this clause ensures that a legal vacuum does not exist in Aboriginal communities during the transition period. It is a transitional clause from federal and provincial areas of jurisdiction to Aboriginal jurisdiction (depending on the scope of the inherent right).

At first glance, this provision appears to grant Aboriginal governments exclusive legislative authority in that Aboriginal governments' legislation can supersede non-Aboriginal government legislation. However, two phrases in this clause are unclear in their potential impact.

First, "[E]xcept as otherwise provided by the Constitution of Canada" is an assurance that the rights now existing in the Constitution (for example section 35 Aboriginal and treaty rights that have had the effect of superseding federal or provincial legislation) shall not be adversely affected by this section. However, this clause could also mean that Aboriginal laws can displace federal and provincial laws only to the extent that this is provided for by the Constitution of Canada. This interpretation is restrictive and constitutes a problem in the clause's meaning.

The second clause is more troublesome and supports the negative connotation of the "[E]xcept as otherwise provided..." clause discussed in the preceding paragraph. The phrase "...according to their authority" represents a serious短coming in this section in that it de facto limits the
application of the inherent right to "their authority", which would most likely refer, to some degree, to the contextual statement. The contextual statement, which assists in defining the inherent right, is particularly vague with respect to the traditional division of powers in Canada. Therefore, "...according to their authority" does not have a lucid base upon which it can be understood. Thus, the fundamental meaning of "one of three orders of government" is undermined significantly. If Aboriginal governments have exclusive legislative authority over certain areas of jurisdiction, then these areas must be understood by all. If not, the meaning of phrases like "...according to their authority", when "their" authority is not clear from the beginning can be particularly confusing and potentially represent a major threat to the exercise of the inherent right.

If the inherent right of self-government was left undefined it would enhance its inherent nature. Yet, it was not left undefined. The Accord provides numerous examples of where the inherent right is defined or limited. Two examples are the contextual statement and the "peace, order and good government" clause. Nevertheless, a major reconstruction of existing constitutional jurisprudence is necessary to appreciate fully the impact and consequences of recognizing a "new" order of government in Canada without using the language which has been used for more than 130 years to define the
powers and authority of the orders of government in Canada.

Moreover, this clause signifies the diversity of Aboriginal governments that would be created pursuant to the inherent right. For example, it is generally accepted that not all Aboriginal governments would want the same "type" of government. Thus, not all Aboriginal governments would want control over all services provided to their people or have the same structure of government. The reasons for diversity include the geographical location of an Aboriginal government, its population size, its ability to access larger economic markets, the existing level of infrastructure, the unique and particular traditions, customs and beliefs of each Aboriginal nation, and conclusions based upon cost/benefit analyses.

The diversity envisioned by the Accord, and indeed by Aboriginal peoples, is supported by section 35.2 of the Accord which allows for agreements to implement the right of self-government, including issues of jurisdiction, lands and resources, and fiscal and economic arrangements. Subsection 35.2(5) underscores the issue of diversity amongst Canada’s Aboriginal peoples. It states:

The parties to negotiations referred to in subsection (1) shall have regard to the different circumstances of the various Aboriginal peoples of Canada. [emphasis added]

Thus, the Siksika Nation, with its large land base, proximity to a large economic market and relatively large population, may opt for a large number of jurisdictional areas which would involve essentially exclusive legislative
authority. Smaller Aboriginal nations or especially urban Aboriginal communities will most likely tend towards more innovative ways of expressing their place as an "order" of government which is primarily the result of necessity, as opposed to choice.

vi. Gender Equality and the Application of the Charter

The Accord proposed to delete the existing section 35(4) and replace it with a general clause that would cover the existing constitutional provisions relating to Aboriginal peoples and the proposals made in the Accord. Section 35.7 reads:

Notwithstanding any other provision of this Act, the rights of the Aboriginal peoples of Canada referred to in this Part are guaranteed equally to male and female persons.

In addition, while section 25 of the Canadian Charter of Rights and Freedoms ensures that Charter rights cannot abrogate or derogate from Aboriginal or treaty rights, section 28 of the Charter ensures that Aboriginal and treaty rights cannot interfere with the equality of male and female persons. Finally, section 35.5(2) of the Accord stated:

For greater certainty, nothing in this section abrogates or derogates from section 15, 25 or 28 of the Canadian Charter of Rights and Freedoms or from subsection 35(7) of this Part.

Clearly, Aboriginal governments are subject to the full weight of equality provisions provided for by law in Canada and their status as one of three orders of government does not
exempt them from such application. Further, the Accord provided for the application of the Charter to Aboriginal governments with an amendment to section 32 (application section) of the Charter. The Charter would apply to

[s.32(1)(c)] all legislative bodies and governments of the Aboriginal peoples of Canada in respect of all matters within the authority of their respective legislative bodies.

vii. Fiscal Arrangements for Aboriginal Governments

Nothing in the Accord deals directly with the financing of Aboriginal governments. Indeed, the proposed amendments concerning equalization payments make no mention of Aboriginal governments. This further supports the argument that the Accord did not, in fact, create three orders of government but rather maintained the status quo for Canadian federalism with an increased role for Aboriginal governments. The only mention of fiscal arrangements, in a substantive sense, and Aboriginal governments is section 3.1 of the Best Efforts Draft: Political Accord Relating to Aboriginal Constitutional Matters. Section 3.1(b) reads, in part:

...Parliament and the government of Canada, and the legislature and the governments of the provinces are committed to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist these governments: (i) to govern their own affairs, ...taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of an Aboriginal government to raise revenue from its own sources.

Since the Political Accord has no constitutional
authority, its relevance to the Accord is minimal, except to the extent that it composes part of the entire package. Moreover, the issue of Aboriginal governments comprising one of three orders of government in Canada is again questioned with the exclusion of Aboriginal governments from the equalization scheme. The fiscal arrangements provided by the Accord support the premise that the federal and provincial governments comprise one order of government (in their relationships with each other) and Aboriginal governments comprise another, albeit lesser, order of government within Canada. This is further represented by the Accord's p.o.g.g. clause discussed earlier.

viii. Negotiation Process

Section 35.2 of the Accord committed the provincial, territorial and federal governments to negotiate in good faith the implementation of the right of self-government with Aboriginal peoples. Subsection (5) recognizes the diverse nature of Aboriginal peoples in Canada in that the self-government negotiations "...shall have regard to the different circumstances of the various Aboriginal peoples of Canada".

The negotiation process cannot abrogate or derogate from section 35 or section 35.1. In order to give the negotiating process an opportunity to produce results, subsection 35.3(1) provides that section 35.1 (the inherent right) shall not be made the subject of judicial notice, interpretation or
enforcement for five years after section 35.1 comes into force.

Finally, subsection 35.2(6) provides that rights of Aboriginal peoples that pertain to self-government will be treaty rights under section 35(1) if they are set out in a treaty or a land claims agreement, or in an amendment to a treaty or a land claims agreement or if a self-government agreement contains a declaration that the rights contained therein are treaty rights. By inference, if such a declaration does not exist, or is not a treaty or land claims agreement (or amendment thereto), then the rights contained in self-government agreements shall not be considered treaty rights.

This section would cause the federal government to change substantially its policy on self-government, specific claims and comprehensive claims. Self-government would have to be an integral component of such agreements to meet the "good faith" obligation imposed by the Accord. In particular, the Community-Based Self-Government strategy would have been altered drastically in order to incorporate constitutional status for Aboriginal governments (by way of treaty rights) concluding agreements under that process.

One problem with the negotiated settlements clause of the Accord is that it negates the essence of the inherent right. If the inherent right is indeed inherent, there ought not to be any need for a negotiating process. The effect of a
negotiated settlement on the inherent right of self-government would be to make it, to some degree, contingent.\textsuperscript{26}

ix. Treaty Rights

The \textbf{Accord} made provision for securing a "just, broad and liberal" interpretation for treaty rights under the proposed section 35.6(1). As well, treaty rights were ensured an interpretation that would consider the spirit, intent and context of the negotiations relating to the negotiations of a treaty. A commitment was also made in the \textbf{Accord} to establish "treaty processes" to clarify, implement or rectify the terms of the treaties (s.35.6(2)). All treaty peoples are guaranteed equal access to the process (s.35.6(5)).

Clearly, these provisions meet the demands of many treaty peoples by ensuring that their particular rights are maintained and protected. Indeed, the Supreme Court of Canada in \textbf{R. v. Nowegijick}\textsuperscript{27} held that Indian treaties "...should be liberally construed and doubtful expressions resolved in favour of the Indians".

C. Conclusion

The 1992 \textbf{Charlottetown Accord} made significant progress in terms of recognizing Aboriginal rights and the inherent right of self-government. Notwithstanding this progress, the \textbf{Accord} did not secure for Aboriginal governments a right to the resources on the lands under their control and to which
many Aboriginal governments claim ownership. As well, it did not explicitly create a new order of government for Aboriginal governments nor a new Aboriginal Crown in the constitutional sense. If it had, the argument could be made that Aboriginal governments, through the existence of their own Crown, are entitled to have legislative and prerogative authority in the exercise of their inherent right of self-government similar to the authority now enjoyed by the other Crowns of Canada.

The Accord failed to meet a number of essential Aboriginal demands, at least in the broad sense. Although it recognized the inherent right of Aboriginal self-government, it failed to secure those governments into the constitutional framework in a meaningful manner. The Accord stated that Aboriginal governments comprised one of the three orders of government within Canada, but failed to create the new order by weakening its affect substantively by use of the p.o.g.g. clause and failing to entrench any fiscal policies towards Aboriginal governments.

Guaranteeing the inherent right of self-government, securing a broad and liberal interpretation for treaty rights, establishing Aboriginal governments as one of three orders of governments and establishing a negotiating framework for self-government are the essential principles addressed by the Accord. These principles will form the basis of the discussion to follow in the next Chapter.

The final stage in this analysis is to subject the Accord
and the proposal that Aboriginal governments comprise one of three orders of government within Canada to a particular Aboriginal nation; the Siksika Nation in Alberta.
CHAPTER 4
ENDNOTES


3. Charlottetown Accord; Draft Legal Text, (October 9, 1992); section 35.1(1).

4. The Cree of northern Quebec have made significant inroads in establishing a strong international presence in their reliance upon international legal arguments supporting their claim of sovereignty. The Grand Council of the Crees (of Quebec) has non-governmental organization status at the United Nations. ["Cree council is granted status at UN", The Globe and Mail, March 13, 1987, A16] In February 1992, the Grand Council of the Crees (of Quebec) submitted a detailed report on the status and rights of the Crees respecting the international right of self-determination. [Status and Rights of the James Bay Crees in the Context of Quebec’s Secession from Canada, Submitted to the United Nations’ Commission on Human Rights, Forty-Eighth Session, January 27 - March 6, 1992 (February 1992)]

5. The fact that one state cannot change international law is a fundamental premise upon which international law exists. For example, J.L. Brierly defines international law as "...the body of rules and principles of action which are binding upon civilized states in their relations with one another." J.L. Brierly, The Law of Nations, 6th ed. by Sir Humphrey Waldock, (London: Oxford University Press, 1986), 1. W.E. Hall describes international law as consisting "...in certain rules of conduct which modern civilized states regard as being
binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the law of his country, and which they also regard as being enforceable by appropriate means in case of infringement." W.E. Hall, A Treatise on International Law, 8th ed., ed. A. Pearce Higgins, (New York: Oxford University Press, 1924), 1. Both of these definitions assume reciprocal acceptance of international law by other states.


8. At common law, fee simple title does not include ownership in precious metals. [Woolley v. A.G. of Victoria (1877), 2 A.C. 163] However, fee simple title at common law includes most other subsurface properties. [A.M. Sinclair, Introduction to Real Property Law, 3d ed., Toronto: Butterworths, 1987 at p.53] Provincial legislation has generally stripped the fee simple interest of including ownership of mines and minerals.


10. Accord, supra, note 3, section 35.2(1)(b) at p.39.


12. Working Group 3, dealing with Aboriginal matters during the negotiations leading to the Accord, recognized the difference between "third order of government" and "one of three orders of government" and specifically used the latter. Interview with Donna Greschner, (Saskatoon, Sask, April 1993).


15. Ibid. (1892) A.C. 437; 441-443.


17. For example, Peter Hogg, supra, note 16, states that there are three branches of the section 91 p.o.g.g. power. They are (1) the "gap" branch (to fill a vacuum in legislative authority), (2) the "national concern" branch (dealing with matters of a national concern like marine pollution in R v. Crown Zellerbach, [1988] 1 S.C.R. 401) and (3) the "emergency" branch (held to include matters such as inflation, Re Anti Inflation Act, [1976] 2 S.C.R. 373).

18. In Re Anti-Inflation Act, [1976] 2 S.C.R. 373, the Supreme Court of Canada held seven to two that the 1975 Anti-Inflation Act (wage and price controls) was within federal jurisdiction because "...this situation could be characterized by the government as an emergency." Hogg, supra, note 16, p.459.

19. Section 35(4) of the Constitution Act, 1982 reads: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

21. Section 25 of the Charter reads: The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

22. Section 28 of the Charter reads: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." [emphasis added]

23. This does not suggest that the Accord was acceptable to all Aboriginal women. The Native Women’s Association of Canada (NWAC) launched an action in the Federal Court of Canada seeking an injunction to the October 26, 1992 referendum on the Accord arguing that they were left out of the process. Although the Federal Court of Appeal agreed that the NWAC was wrongfully excluded from the constitutional talks, the Federal Court (Trial Division) would not issue an injunction, partly because the court was reluctant to use law to affect a political process. "Unity accord 'dead matter,' native women’s group told", The Globe and Mail, (November 14, 1992), A4. Note that the problem with the Accord appeared to be based on primarily a rejection of the "process" as opposed to the actual legal text. "Support for deal growing among native women", The Globe and Mail, (October 9, 1992), n.p..


25. Section 36(2) of the Accord reads: "Parliament and the government of Canada are committed to making equalization payments so that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

CHAPTER 5

Post-Charlottetown Aspects of Aboriginal Governments
As "One of Three Orders of Government":
A Case Study; Siksika Nation

A. Introduction

This Chapter examines the principles of the Charlottetown Accord outlined in the preceding Chapter in light of the self-government aspirations of Aboriginal peoples, particularly from the perspective of the Siksika Nation and from the analysis offered in Chapter 2 on the Indian Act, the Cree-Naskapi (of Quebec) Act and the Sechelt Indian Band Self-Government Act. The discussion concerning the Siksika Nation focuses on three concepts, in addition to a general analysis of the Accord and self-government. The three concepts are: (1) rights, (2) legislative authority, and (3) fiscal stability. The author notes that since the Siksika Nation is presently negotiating a self-government package, no conclusive documentation is available. Nevertheless, because of the Siksika Nation's unique position as an Aboriginal government, it provides a good case study for the purposes of this thesis.
B. Analytical Framework

i. General

Chapters 1, 2 and 3 of this Thesis outlined the existing legal reality facing Aboriginal peoples in Canada in their quest for self-government. From this discussion, three primary issues arise that deal with the concerns of Aboriginal peoples and self-government. They are (1) the issue of rights, (2) the issue of legislative and government authority and (3) the issue of fiscal stability. It is submitted that these three issues comprise the essential components necessary to discuss self-government. In addition, although the issue of legislative authority is linked directly to the concept of three orders of government, all three issues broadly relate to this topic and to the usefulness of the Charlottetown Accord. In this way, all three issues are part of the thesis put forward, that the explicit creation of a third order of government (which includes the rights, legislative authority and fiscal stability issues) answers, to a large extent, many of the questions posed in the self-government debate by Aboriginal peoples. The remaining issue is the extent to which the concept of Aboriginal governments comprising one of three orders of government accommodates the needs and demands of Aboriginal peoples.

The Siksika Nation’s leadership actively supported the Charlottetown Accord. The Siksika Nation explicitly distanced
itself from other Treaty 7 and Treaty 6 nations (many of these nations were campaigning against the Accord) during the events leading up to the October 26, 1992 vote on the Accord.²

ii. Rights

The rights issue deals with the recognition and constitutional protection of the rights of the Aboriginal peoples of Canada in a manner satisfactory to them. The entire ambit of Aboriginal rights is at issue here. However, for treaty Aboriginal nations, like the Siksika Nation, treaty rights and their impact, or lack thereof, on self-government is critical to a full understanding of the issues at stake in the debate. The rights issue also deals with the application of the "other" rights in Canada, including the Canadian Charter of Rights and Freedoms.³

iii. Legislative Authority

Legislative authority concerns the extent and scope of legislative authority and power held by Aboriginal governments. The "type" of legislative authority held by a government is central to this issue. Is the government municipal in nature, provincial in nature, a hybrid of the two or something entirely new? This issue strikes at the heart of the three orders of government discussion in that "one of three orders" is a "type" of legislative authority. The issue then becomes not only the degree and extent of legislative
authority, but more importantly, the meaning attributed to the legislative authority by means of a critical analysis. For the Siksika Nation, the issue is whether the Aboriginal provisions of the Charlottetown Accord meet its aspirations in so far as legislative authority is concerned.

iv. Fiscal Stability

The issue of fiscal stability underscores both the rights and legislative authority issues in that without economic stability, the other two issues are limited in their impact. Likewise, economic stability without an adequate rights and legislative base may be meaningless, in so far as self-government aspirations are concerned. Fiscal stability must be examined from both a transfer payment and economic development perspective. This is a reality of the modern Canadian state and a reality for Aboriginal governments. It is doubtful that either transfer payments or economic development exclusively can meet the needs of any one Aboriginal nation. Both must be linked in an effective and strategic manner.

C. Discussion
i. Rights

The primary document outlining most of the self-government goals of the Siksika Nation is the Agreement between the Siksika Nation and the federal government under...
the Community Based Self-Government initiative (CBSG), discussed in Chapter 1. The Agreement provides an agenda and process for negotiating an agreement-in-principle on Aboriginal government arrangements for the Siksika Nation. The details of the Agreement, which itself is brief, are fleshed out in an attached Discussion Paper. The Discussion Paper elucidates three basic concerns of the Siksika Nation with regard to rights. They are:

...the protection, retention, and growth of the distinct Siksika culture and language; ...the protection and enhancement of Siksika aboriginal and treaty rights ...[and] the enhancement of community social vitality, common unity, and well being including but not limited to the flourishing of the principles of accountability, freedom to dissent, and such other individual and collective rights and freedoms as are enshrined in the Charter of Rights and Freedoms.

The Siksika Nation’s position on "rights" includes both the generally acknowledged position of most of Canada’s Aboriginal peoples and positions not generally held by the majority of them. On the one hand, the "protection and enhancement" of aboriginal and treaty rights is generally accepted by all of Canada’s Aboriginal peoples. On the other hand, the Siksika Nation’s overall acceptance of the Canadian Charter of Rights and Freedoms may be seen as an acceptance of the status quo by the Siksika Nation.

Some have argued that the Charter is repugnant to the goals and objectives of Canada’s Aboriginal peoples in
Nevertheless, Siksika’s position on the Charter may rely on the status of section 25, discussed in Chapter 3, and on an acceptance that Aboriginal rights contain both individual and collective notions of rights (although not seen as such in the traditional Aboriginal sense).

The "enhancement of community social vitality, common unity and well being" is important in light of the Chapter 1 discussion on the link between economic development and community development. This illustrates the complexity and holistic nature of the concept of self-government in that the Siksika Nation does not distinguish between community based goals, economic development and the enhancement of rights generally and the constitutionalization of the government.

The federal response, in the Discussion Paper, was to affirm that the negotiations would be conducted without prejudice to treaty and Aboriginal rights and that the negotiations would not affect any future constitutional developments. As well, the federal government insisted on the application of the Charter to Siksika government, political and financial accountability of the Siksika government, and the maintenance of the special relationship between the federal government and the Siksika Nation (presumably the fiduciary relationship, although this is unclear).

Both the federal and Siksika governments agreed that the Nation’s political institutions would be representative in nature and that sections 25 and 35 of the Constitution Act,
1982 would be considered in the negotiations.\textsuperscript{11}

From the rights perspective, the \textit{Charlottetown Accord} meets the needs of the Siksika Nation, based on the preceding discussion in Chapter 4. Aboriginal and treaty rights are affirmed, the protection of Siksika culture and language is secured, and the application of the \textit{Charter} established, with the inclusion of section 25.

Finally, the \textit{Accord} ensures adequate protection for a broad and liberal interpretation of treaty rights, which are especially important for the Siksika Nation, a Treaty 7 signatory. Section 35.6 provides, in part:

\begin{quote}
(1) The Treaty rights referred to in sub-section 35(1) shall be interpreted in a just, broad and liberal manner taking into account their spirit and intent and the context of the specific treaty negotiations relating thereto. . . .
\end{quote}

In April 1993 the Siksika Nation and the federal government signed the \textbf{Siksika Nation Self-Government Comprehensive Agreement in Principle}.\textsuperscript{12} The title is misleading since this document is not the actual agreement in principle but rather establishes the parameters for negotiating the agreement in principle. The reasoning used to sign this agreement in principle is confusing since all of its provisions resemble the provisions of the federal government's July 1988 CBSG Guidelines. There appears to be no advantage gained by the Siksika Nation in signing this Agreement in Principle.

Section 4.2.1 of the Agreement in Principle provides that
the jurisdiction exercised by the Siksika Nation government shall conform to the Canadian Charter of Rights and Freedoms. The Agreement in Principle also states that the process (ie. CBSG) is not intended to define, redefine or renegotiate Aboriginal or treaty rights.

ii. Legislative Authority

At the heart of legislative authority and the Charlottetown Accord was an attempt to shift power from the status quo under the Indian Act\textsuperscript{13} to the creation of a new system of government that would recognize Aboriginal governments as equals to the federal and provincial governments (recognizing that not all governments are equal in their legislative spheres, but rather equality in the sense that they deal with one another on a level playing field). This did not occur in the Accord primarily due to the lack of substance regarding the "one of three orders of government" clause and the implications of the p.o.g.g. clause. Outside of the Accord, the Siksika Nation has made it clear, along with many other Aboriginal nations,\textsuperscript{14} that their demands for self-government mean simply more than increased control over the delivery of services. Rather, their self-government strategies fall in line with the Accord in that they call for a radical change in the way in which the existing system of government in Canada functions. The federal government, outside the context of the Accord, supports self-government
options in terms of increased control over program delivery and delegated authority, as opposed to a type of sovereignty similar to that exercised by the federal and provincial governments. This federal position, articulated clearly by the Department of Indian Affairs, contradicts the substantive self-government provisions outlined in the Charlottetown Accord.\textsuperscript{15}

In the Discussion Paper, the Siksika Nation outlines its position on legislative authority broadly. The Siksika Nation calls for:

...greater self-determination and social justice, so the Siksika Nation will have greater protection of and control over its own destiny ...[the] protection of Siksika lands ...[and the] protection of the distinct Siksika culture and language.\textsuperscript{16}

"[G]reater self-determination" represents a wide array of power and authority sought by the Siksika Nation. The Agreement provides the following list of the areas of jurisdiction included within this broad phrase. They include the legal status and capacity of Siksika government, the structures and procedures of government, membership, election procedures, land title and management, financial powers, accountability and arrangements, renewable and non-renewable resources, the environment, public works and community infrastructure, language, culture and heritage, education, justice, health, water, transportation, social and welfare issues, local trade and commerce and intertribal transfers.\textsuperscript{17} Needless to say, this wide array of powers covers all, or
nearly all, of the conceivable areas of jurisdiction with which the Siksika Nation is concerned. Indeed, the connotation of "self-determination" raises the issue of sovereignty for the Siksika Nation to its highest level.\textsuperscript{18}

However, regardless of the great range of powers sought and placed on the negotiating table, the real issue is the extent to which the federal and provincial governments are willing to assign control to the Siksika Nation. In this sense, and in light of the \textit{Charlottetown Accord}, the most important issue is that of "legal status and capacity" because it goes to the heart of Siksika government. What type of government will the Siksika government be? With this in mind, the federal response in the Agreement, the Discussion Paper and its own Guidelines on the CBSG process are discouraging and do not reflect the spirit of the \textit{Accord}.

The Discussion Paper outlines the federal position in the following manner:

\begin{quote}
...Indian government negotiations will not alter the division of powers between the federal and provincial governments but will, through practical measures, attempt to accommodate Indian government within the existing constitutional framework. ...the negotiation of new Indian government arrangements in areas which extend beyond the present reserve base, ...will require the cooperation and involvement of the provincial government concerned. ... federal [...] laws of general application will continue to apply under new community Indian government arrangements except to the extent that these laws are inconsistent with the provisions of any legislation giving effect to the Indian government arrangements.\textsuperscript{19}
\end{quote}

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The above position is reiterated in the official guidelines used by Indian Affairs in the CBSG process. The fact that the CBSG process will not "alter the division of powers" and shall deal with self-government only within the "existing constitutional framework" provides further evidence that the principles of government outlined in the Charlottetown Accord are very different than those utilized by Indian Affairs. This position is supported by statements made by a senior official of Indian Affairs, after the failure of the Charlottetown Accord. One senior official is quoted as saying "sovereignty is a relative term", meaning that self-government negotiations after Charlottetown are dependent upon federal recognition. Gordon Shanks, Director-General of Government Relations for Indian Affairs, gave the following response to the national chief of the Assembly of First Nations, Ovide Mercredi's statement that with the Charlottetown failure, Aboriginal governments may simply take over authority themselves outside of the Constitution:

That could prove to be a fruitless gesture.
...You can only be as sovereign as others are willing to recognize. Legitimacy depends on your ability to govern - and that is an expensive process.

While the above statement may sound all well and good, the critical element for the Siksika Nation, and all Aboriginal governments, is the degree and extent that it (or they) actually exercises power according to its demands. Thus, while the federal government has acknowledged a
willingness to negotiate on a wide range of jurisdictional areas, this may be fruitless considering the fundamental statements about the nature of government that it is willing to recognize (i.e., one that does not alter the existing federal provincial division of powers and one that is within the existing constitutional framework, which presumably includes the existing sections 91 and 92 of the Constitution Act, 1867).

In January 1993, the Siksika Nation submitted its Principles of Mutual Understanding (PMU’s) to the federal government for a response. The PMU’s provide details about each of the broad areas of jurisdiction mentioned above. For the purposes of this thesis, the most important is that of legal status and capacity.

The legal status and capacity PMU states that the Siksika Nation seeks a "new" relationship with the other governments of Canada within the Canadian constitutional framework. Siksika proposes that it occupy areas of jurisdiction now held by the federal and provincial governments. The Siksika Nation would have the status and capacity similar to that of a province. The latter point illustrates a clear separation from the traditional modus of Aboriginal governments in Canada being recognized as "natural persons". Equation with provincial status ensures that the Siksika Nation shall possess all of the powers held by natural persons plus those held by the state (or in Canada’s case, the Crown).
Therefore, this position presupposes the creation of a new order of government occupied by the Siksika Nation, as envisioned by the Charlottetown Accord.

The Accord is weak on control and ownership of natural resources. For the Siksika Nation, this omission represents a major shortcoming because of the Nation's large land base and oil reserves, notwithstanding that the Siksika Nation’s political leadership supported the Accord.

The 1993 Agreement in Principle represents a substantive change in policy for the Siksika Nation. It provides that the Siksika Nation government has the legal status and capacity of a natural person. As discussed earlier, a government limited to corporate status is not on an equal playing field with the federal and provincial governments. By defining the Siksika Nation government in this way, the Agreement in Principle de facto excludes the participation of the Siksika Nation in a three orders of government framework, in any meaningful way.

Section 4.1.1 of the Agreement in Principle states that the Siksika Nation Government Act will be paramount to other federal laws to the extent that "specific" provision is made therein. As a federal statute, the Act can be modified or amended without the approval of the Siksika Nation. As well, because it is not constitutionalized, the Act signifies a delegated form of government akin to the Indian Act bands, the Sechelt Band and the Cree-Naskapi Bands. Section 4.1.4 of
the Agreement in Principle states that Alberta may be required to pass enabling legislation thereby creating another level of delegation to the Siksika Nation.

It is unclear how "specific" the Siksika Nation Self-Government Act must be in order for the Siksika Nation to supersede existing federal laws, assuming that this power is not challenged by the federal government. The term "specific" means precise and therefore, it is submitted that the Act must cover a wide array of legislative 'angles' in order to circumvent federal legislative authority. This is in addition to the fact that the Siksika Nation government would only be delegated as opposed to original, like the provinces.26 Considering the nature of legislative drafting and the existing federal policies regarding self-government, it is unlikely that the Siksika Nation Self-Government Act will be "specific" to the extent to supersede federal legislative authority. This is supported by section 4.1.2 of the Agreement in Principle which states that all other federal laws, that is laws not "specifically" superseded by the Siksika Nation Self-Government Act, shall continue to apply.

Finally, a memo27 on the federal government's response to the Siksika Nation's Principles of Mutual Understanding (negotiating instruments for self-government) indicates the following position adopted by the federal negotiators, and clearly in keeping with established federal policy for a number of years. In the negotiations leading to a self-
government act for the Siksika Nation, the Siksika Nation

cannot make references to the Constitution.
cannot make references to treaties or
fiduciary duty [or to] concern as to economy
of scale. concern as to taking jurisdiction
from other federal department (sic) and the
province...

Needless to say, in terms of occupying one of three
orders of government in Canada, the federal position, and the
Siksika Nation’s acceptance of this position as evidenced by
the Agreement in Principle, deadens any such opportunity for
the Siksika Nation.

iii. Fiscal Stability

The Siksika Nation’s position on fiscal stability is
twofold:

the promotion of economic development and
a fair distribution of income and prosperity
to foster the greater participation of the
Siksika people in the economic life of
Canada [and] the federal government will
honour all of its historic and current
responsibilities to the Siksika...

The Siksika Nation’s current stand towards economic
development is accurately summed up by its current Chief,
Strater Crowfoot:

People are always sitting and criticizing.
My philosophy is just do it. If there is a
problem, take it on, do it and get on
with something else.

This progressive attitude has carried over to economic
development for the Siksika Nation as developed in Chapter 1,
Part D.
The federal response, in the Discussion Paper, limits the fiscal stability of the Siksika Nation to the existing programs, such as the Alternative Funding Arrangements, and does not deal with the issue of transfer payments, which would be akin to treatment similar to a province by the federal government. Indeed, the federal response states that the Department shall remain the key instrument of the government in dealing with the issue of fiscal relationships with Aboriginal governments.  

As discussed in Chapter 4, the financial commitments in the Charlottetown Accord are weak at best, if not altogether missing, other than the non-constitutionally binding Political Accord. Thus, fiscal stability remains elusive and not subject to a serious critique and involvement by the federal government and, to some extent, by Aboriginal governments. Indeed, the relationship between fiscal stability and self-imposed taxation regimes for Aboriginal governments causes political sensitivity for many Aboriginal political leaders, to say the least.

D. Analysis

The Charlottetown Accord surpasses the existing Indian Act regime, the Cree-Naskapi (of Quebec) Act and the Sechelt Indian Band Self-Government Act in its scope and substance of self-governing provisions and constitutional framework. The Accord provides the most expansive, wide
ranging and most acceptable principles to Aboriginal peoples for the recognition and implementation of self-government within Canada to date.

However, notwithstanding the progress that the Accord made, it contained serious shortcomings as noted in the previous Chapter. These shortcomings were so severe that they prevented the Accord from achieving one of its primary objectives; the establishment of three orders of government.

The "natural person" concern dealt with in preceding Chapters is addressed by the Accord in assuring that Aboriginal governments, exercising the inherent right of self-government, comprise one of three orders of government in Canada. Thus, the legal status and capacity of Aboriginal governments is solved, clearly in favour of Aboriginal governments. They become natural persons-plus, like the federal and provincial Crowns.

The Accord addresses the issue of municipal style government, long advocated by the federal Department of Indian Affairs and enshrined in the Cree-Naskapi Act and Sechelt legislation. One of three orders of government implies status that exceeds that held by municipalities and is akin to federal or provincial status. While some Aboriginal governments might adopt a municipal form, the essential point is that the choice is the Aboriginal peoples concerned, and not an external government.

Aboriginal government being one of three orders of
government would change the nature of federalism in Canada and shift emphasis from one of duality to one of multiplicity. Federalism could not longer be, and some would argue is no longer now, a relationship between two orders of government that are relatively easy to define. Rather, federalism would become a dynamic relationship between possibly hundreds of governments interacting and relating to one another each in a unique and distinct manner. This is especially true in light of the negotiating provisions of the Accord.

Section 35.4(1) of the Accord recognized the ability of Aboriginal laws to "displace" federal and provincial laws "according to their [Aboriginal] authority". This could be interpreted as a substantive step forward for all Aboriginal governments in Canada in that it supersedes the existing disallowance power held, in varying degrees, by the Minister of Indian Affairs (et al.) under the Indian Act, the Cree-Naskapi Act and the Sechelt legislation. Aboriginal governments would be in a position that they have never been within the Canadian constitutional framework. A problem with the provision is that it is unclear what "Aboriginal authority" means.

The Charlottetown Accord constitutionalizes Aboriginal governments thereby making them "equal" participants in the federation. Unlike the band councils under the Indian Act, the Cree-Naskapi Act and the Sechelt legislation, Aboriginal governments, under the Accord, would exercise jurisdiction
based upon the inherent right of self-government, recognized and guaranteed by the Constitution. The legitimacy and existence of Aboriginal governments would no longer be dependent upon federal legislation that can be amended or repealed by Parliament.

For Indians, the Accord represents a shift in authority from section 91(24), Constitution Act, 1867 to their inherent right of self-government. Thus, the Accord affects the federal government’s authority over Indians. An issue for further discussion is the extent to which the Crown’s fiduciary relationship would survive the Accord in the case of an Aboriginal peoples exercising its rights contained therein to their full degree.

The Accord, while clearly acknowledging more control to Aboriginal governments over lands and resources, remains weak on the precise nature of the relationship between Aboriginal governments and lands and resources. Program implementation and program control are two distinct issues. Both are necessary for Aboriginal governments to be truly autonomous. The Accord does little to solve the issue of who owns the land and natural resources held by Aboriginal peoples. If one of three orders of government means a new type of ‘crown’ for Aboriginal peoples within the Canadian federation, then ownership would clearly be with the new crown; Aboriginal governments. However, this point remains ambiguous and represents a significant weakness of the Accord.
As stated earlier, the **Accord** is also weak on economic development powers and authority for Aboriginal governments and is weak on the issue of transfer payments and the funding of Aboriginal governments in general. This, along with the question of the ownership of lands and resources, represent the two significant shortcomings of the **Accord** for Aboriginal peoples. However, interpreted broadly, the **Accord** provides more than the existing situation. For example, if one of three orders of government means what it says, then Aboriginal governments are public governments like the federal and provincial governments, Aboriginal governments should then be able to participate and implement public debt financing schemes similar to the other two orders of government. The present system makes the raising of capital a very difficult if not impossible task for Aboriginal governments.

The most substantive weakness in the **Accord** is that it fails to fulfil its promise of creating three orders of government in Canada by giving with one hand (the inherent right and the one of three orders of government clause) and taking with the other (the p.o.g.g. clause, lack of fiscal security and the unclear nature of Aboriginal legislative authority).

The **Accord** secures Aboriginal and treaty rights to the greatest extent yet in Canadian law. The **Indian Act** does not mention of Aboriginal or treaty rights. The Cree and Naskapi had to cede their rights in the **James Bay and Northern Quebec**
Agreement. The Sechelt legislation ensures that it cannot abrogate or derogate from the Aboriginal and treaty rights set out in section 35 of the Constitution Act, 1982. As well, the Accord has a broad application covering all Aboriginal peoples including the Inuit, Metis and Indian peoples of Canada. Indeed, Aboriginal women secured a number of clauses ensuring gender equality in the exercise of the inherent Aboriginal right.

Finally, the Accord represents a major shift in the way in which the federal and provincial governments look upon Aboriginal peoples (at least at the political level). The assimilationist and paternalistic underpinnings of the Indian Act, while still present, are certainly not as dangerous as they are under the present Indian Act system and in the current dealings of the Department of Indian Affairs (as evidenced by the CBSG process).

8. Richard Simeon writes: "...it is clear that the assertion that there is a fundamental dichotomy between individual and group rights is false. In fact, it is by virtue of our membership in a larger community, and through the protection of its institutions, that we have rights at all. Community is implicit in rights. Conversely, the only justification for community is that its strength and vitality is essential to the well-being, indeed the rights, of each of its members. in "Sharing Power: How Can First Nations Government Work", F. Cassidy, ed., Aboriginal Self-Determination, (Lantzville, B.C.: Oolichan Books, 1991), 99 at 103; see also T. Isaac, "Individual versus Collective Rights: Aboriginal People and the Significance of Thomas v. Norris", (1992) 21:3 Man.L.J. 618.

9. See endnote 27, Chapter 1.


11. Ibid., 7.


14. For example, Ronald Wright cites a Mohawk Warrior by the name of Ateronhiatakon who sums up the position of many Iroquois (in Canada) on the issue of self-government and thus, represents an extreme position in this debate: "This [Akwesasne] is a sovereign nation that has existed since time immemorial and we will not tolerate any outside interference, ...Only the people of Akwesasne can decide their laws and their future." in Ronald Wright, Stolen Continents: The "New World" Through Indian Eyes, (Toronto: Penguin Books, 1993), 331.
15. The limited role of the CBSG process is reaffirmed in a letter dated May 15, 1992 from Thomas Siddon, Minister of Indian Affairs and Northern Development to Chief Robert Louie of the Westbank Indian Council. Making reference to the CBSG process, Minister Siddon writes: "I do recognize that this [CBSG] limits the full achievement of the self-government aspirations of First Nations. However, the community self-government process was never intended as a replacement for constitutional discussions". (p.3)


17. Agreement, supra, note 4, p.4-5.

18. The United Nations' International Covenant on Civil and Political Rights (Article 1) guarantees that all peoples have the right to self-determination. This Covenant was acceded to by Canada on May 19, 1976 and entered into force in Canada on August 19, 1976. See for example, D. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination", (1986) Univ.Tor.Fac.L.Rev. 1.


22. A full set of the PMU's are on file with the author.

23. See endnotes 49 & 50, Chapter 2. The Siksika Nation is not alone in the federal government pushing a corporate status and capacity limited to the natural person. The North Shore First Nations Government Sub Agreement In Principle (February 29, 1992) with the federal government under the CBSG process states the following regarding the legal status and capacity of the North Shore First Nations: "The North Shore First Nations are hereby recognized as legal entities ...are recognized as having the legal capacity, rights, powers and privileges of a natural person at law." (p.2)

25. The Cree-Naskapi Bands may be constitutionalized by the 1975 James Bay and Northern Quebec Agreement and section 35(3) of the Constitution Act, 1982. See Chapter 2, Endnote 32.

26. See the Liquidators decision in Chapter 4, Endnote 14.


34. James Bay and Northern Quebec Agreement, (Quebec: Edituer official du Quebec, 1976), see also Chapter 2, Endnote 35.

35. Sechelt, supra, note 32 at s.3.
CHAPTER 5
ENDNOTES


2. Siksika Nation, "Press Release", (September 25, 1992), [on file with author].


6. Ibid., pp.5-6.

7. For example, Menno Boldt and J. Anthony Long write: "...the western-liberal tradition embodied in the Canadian Charter Rights and Freedoms, which conceives of human rights in terms of the individual, poses yet another serious threat to the cultural identity of native Indians in Canada." in "Tribal Philosophies and the Canadian Charter of Rights and Freedoms", M. Boldt and J.A. Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, (Toronto: University of Toronto Press, 1985), 165. Mary Ellen Turpel questions the legitimacy of the Charter by stating that "... despite protestations to the contrary, cultural differences, at least First Nations' cultural differences, have not been
CHAPTER 6

Conclusion

This thesis has examined the Aboriginal government provisions of the 1992 Charlottetown Accord in light of the Accord's purported guarantee that Aboriginal governments comprise one of three orders of government within Canada. The existing governmental and constitutional framework in place for Aboriginal governments under the federal Indian Act\(^1\), the Sechelt Indian Band Self-Government Act\(^2\) and the Cree-Naskapi (of Quebec) Act\(^3\) does not represent autonomous and non-delegated forms of government and hence, does not meet a fundamental demand of most Aboriginal peoples. Although the Sechelt and Cree-Naskapi legislation may meet the needs of the Aboriginal peoples concerned, they do not offer a broad legislative and jurisdictional base that most Aboriginal governments and peoples have demanded to be recognized and affirmed.

The analysis of the Charlottetown Accord in Chapter 4 illustrated that although the Accord held promise to secure constitutionally many of the legislative and jurisdictional demands of Aboriginal peoples regarding self-government, it failed to do so in a substantive manner. This is not to say
that the Accord was completely flawed. However, it contained a number of major weaknesses: the lack of definition regarding the precise nature and implementation of Aboriginal governments as one of three orders of government; a full understanding of the fiscal relationship between Aboriginal governments and the other two orders of government; and most significantly, the lack of actually creating three orders of government, as the Accord intended to accomplish.

Nevertheless, the Accord represents a significant step forward in thinking about Aboriginal governments by recognizing the inherent right of Aboriginal self-government, by recognizing the place of Aboriginal governments as one of three orders of government and generally by recognizing the need for Aboriginal peoples to have direct control over their collective destiny as a peoples.

The thesis used the Siksika Nation of Alberta as a case study. It revealed that the Siksika Nation's statements regarding self-government reflected the general desire for an autonomous order of government in Canada for the Siksika Nation and a solidification of the treaty process. However, the Siksika Nation's participation in the Community Based Self-Government (CBSG) process undermines the broader self-government perspective significantly. Indeed, the CBSG process does not promote the macroscopic goals of self-government, namely a recognition of the inherent right, a recognition that Aboriginal governments are governments like
the federal and provincial governments and a stable fiscal base.

On its face, the Charlottetown Accord appears to offer the Siksika Nation most of its goals and desires concerning self-government. This thesis revealed major flaws in achieving all of the Accord's objectives, particularly creating three orders of government. Even so, the federal government refuses to discuss "Charlottetown" type principles in the CBSG process. This is in keeping with its CBSG policies and guidelines. Thus, the drive towards progress and autonomy for Aboriginal governments, in this case the Siksika Nation, has virtually ceased, from a federal perspective. On the federal side, the political will seems lacking. Most of the provinces appear willing to discuss the issue. On the side of the Siksika Nation, a critical analysis and understanding of the CBSG process and its intended results based on the Siksika Nations's publicly stated goals and objectives, are lacking.

Still, the Charlottetown Accord signifies a substantial point in Canada's constitutional history towards Aboriginal peoples. It represents a novel and responsible approach to Aboriginal concerns, albeit with some major weaknesses. The issue now confronting the concept of self-government is the extent to which the federal and provincial governments are willing to go to recognize the self-government principles outlined in the Accord. In this light, the future does not
look promising. The federal government has made it clear that it intends to follow the original CBSG policy guidelines and refuses to permit constitutional issues on Aboriginal self-government to be discussed in CBSG negotiations. Perhaps the greatest impediment to discussing the constitutional aspects of Aboriginal governments is the fiscal reality facing all Canadian governments. Self-government costs money and there is little money to go around. In an era of fiscal cutbacks, the possibility of funding Aboriginal governments, through transfer payments, seems remote.  

With the weaknesses of the Accord discussed and analyzed, any future constitutional proposals for Aboriginal self-government should be able to meet the demands of Aboriginal peoples in a meaningful way. In particular, the creation of three orders of government should be the primary focus of future constitutional negotiations since this concept embodies many of the central issues in the self-government debate.  

The Charlottetown Accord principles should continue to play a role in Canadian constitutional discourse on Aboriginal peoples and their inherent right of self-government. Although not perfect, the Accord represents a major change by the federal and provincial governments in how they think about Aboriginal governments in Canada. This change in thinking, as exemplified by the Accord, does not meet the most fundamental needs of Aboriginal peoples regarding their inherent right of self-government. The issue that remains to be addressed is
the degree to which Aboriginal governments are willing to exercise fiscal policies conducive to governing (establishing a tax base, fiscal restraint, etc.) and the extent to which the federal and provincial governments are willing to share power and recognize another order of government. The answer is not clear and the issue of Aboriginal self-government will not go away. Canadians, Aboriginal and non-Aboriginal alike, must work to create a constitutional and political framework that recognizes and affirms the proper and just place for Aboriginal governments in the Canadian polity.
1. Indian Act, R.S.C. 1985, c.1-5.


4. In addition to the comments in Chapter 5 made about the CBSG process in particular, see also "Ground lost since death of accord, Mercredi says", The Globe and Mail, (March 31, 1993), n.p.; and "Native leaders look beyond Oct.26", The Globe and Mail, (October 9, 1992). In a letter dated March 19, 1993, Janice Cochrane, Assistant Deputy Minister (I.N.A.C.) to all CBSG Chiefs, stated: "Ministers have indicated that they are not prepared to implement the Charlottetown Accord through non-constitutional means. This means that the existing CBSG policy continues to guide government policy in relation to self-government. With Cabinet mandate to amend the current CBSG policy, there appears little likelihood of policy change within the remaining mandate of the current government."


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