

2003

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## Recommended Citation

McNeil, Kent. "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government." *Windsor Yearbook of Access to Justice* 22 (2003): 329-361.

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## CHALLENGING LEGISLATIVE INFRINGEMENTS OF THE INHERENT ABORIGINAL RIGHT OF SELF-GOVERNMENT

Kent McNeil\*

*The Parliament of Canada exercised its s.91(24) legislative authority over "Indians, and Lands reserved for the Indians" when it enacted the Indian Act in 1876. Through this Act and its precursors, the Canadian government imposed the band governance system on First Nations. Although traditional forms of Aboriginal government were not abolished by the imposition of this system, there can be no doubt that the capacity of Aboriginal governments was impaired and the inherent right of self-government of at least some First Nations was infringed. After the enactment of section 35 of the Constitution Act, 1982, this infringement of the inherent right of self-government would have to be justified by the federal government in order to be valid. Moreover, any post-section 35(1) amendments to the band governance provisions would have to be justified to the extent that they amounted to further infringements of the inherent right. This would include, for example, the changes that were proposed in the now defunct First Nations Governance Act. Any First Nation that is subject to the Indian Act's band governance provisions could challenge the application of those provisions to it as an infringement of that First Nation's inherent right. The initial burden would be on the First Nation to prove its right of self-government and to show a prima facie infringement of that right by the Indian Act. Extinguishment aside, the burden would then be on the Crown to prove justification by establishing a valid legislative objective and respect for the Crown's fiduciary obligations. If the Crown failed to do so, then the provisions of the Act that infringe that First Nation's inherent right of self-government would be inapplicable to it.*

*Le Parlement du Canada a exercé l'autorité législative sur «Les Indiens et les terres réservées pour les Indiens» que lui confère l'article 91(24) lorsqu'il a adopté la Loi sur les Indiens en 1876. Par le biais de cette loi et de ses précurseurs, le gouvernement canadien a imposé aux Premières Nations le système de gouvernance de bandes. Quoique les formes traditionnelles de*

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\* Professor, Osgoode Hall Law School, Toronto. Brent Arnold's research assistance with this article is very gratefully acknowledged. I would also like to thank Frank Cassidy, Herb (Satsan) George, and the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations for their generous support. Responsibility for the contents of this article is, however, entirely my own.

*gouvernement autochtone n'aient pas été abolies par l'imposition de ce système, il n'y a aucun doute qu'il a affaibli la capacité des gouvernements autochtones et qu'il a porté atteinte au droit inhérent à l'autonomie gouvernementale d'au moins quelques-unes des Premières Nations. Suite à l'adoption de l'article 35 de la Loi constitutionnelle de 1982, il faudrait que le gouvernement fédéral justifie cette atteinte au droit inhérent à l'autonomie gouvernementale pour qu'elle soit valable. De plus, il faudrait que toute modification post-article 35(1) des dispositions concernant la gouvernance de bandes soit justifiée en autant qu'elle constituerait une nouvelle atteinte au droit inhérent. Cela inclurait, par exemple, les modifications proposées dans la Loi sur la gouvernance des Premières Nations maintenant défunte. Toute Première Nation qui est assujettie aux dispositions de gouvernance de bandes de la Loi sur les Indiens pourrait contester l'application chez elle de ces dispositions comme atteintes au droit inhérent de cette Première Nation. La Première Nation aurait le fardeau initial d'établir son droit à l'autonomie gouvernementale et de démontrer que la Loi sur les Indiens comporte une atteinte de prime abord à ce droit. Puis, extinction à part, la Couronne aurait alors le fardeau d'établir la justification en indiquant un objectif législatif valable ainsi que le respect de ses responsabilités fiduciaires, faute de quoi les dispositions de la Loi qui portent atteinte au droit inhérent d'autonomie gouvernementale de cette Première Nation n'y serait pas applicable.*

## I. INTRODUCTION

On June 14, 2002, the *First Nations Governance Act* (then Bill C-61) was introduced in the House of Commons by then Minister of Indian Affairs, Robert Nault. After dying on the order paper when the first session of the 37<sup>th</sup> Parliament was prorogued, it was reintroduced as Bill C-7 in October, 2002. If enacted, this legislation would, among other things, have replaced the band governance provisions in the *Indian Act*.<sup>1</sup> Strong opposition to the proposed legislation was voiced by many First Nation leaders, including Matthew Coon Come, the National Chief of the Assembly of First Nations at the time it was introduced, and Roberta Jamieson, Chief of the Six Nations.<sup>2</sup> Among other things, it was alleged that the new legislation would infringe the First Nations' inherent right of self-government that is thought to be constitutionally protected as an Aboriginal and/or treaty right by section 35(1) of the *Constitution*

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

2 E.g., see B. Laghi "Natives Vow to Battle Bill" *Globe and Mail* (15 June 2002) A7; A. J. Hall "Making Sense of the New Indian Act" *Winnipeg Free Press* (15 August 2002) A13.

*Act, 1982*.<sup>3</sup> This allegation raises a fundamental issue: if First Nations have a constitutionally protected right of self-government, does federal legislation that imposes a certain form of government on First Nations infringe that right? More specifically, if the *First Nations Governance Act* would have infringed that right, what about the band governance provisions that are in the current *Indian Act*? Are they any less subject to constitutional challenge? This article will seek to answer these questions by examining the historical development of the *Indian Act*'s band governance provisions and assessing the impact of section 35(1) on their constitutional validity. It will then offer some general thoughts on how legislative changes like those that were proposed in the *First Nations Governance Act* might be challenged.

The inherent right of self-government can be defined as the right of the Aboriginal peoples to govern their own territories and peoples within Canada.<sup>4</sup> It is inherent in the sense that it is derived not from the Canadian Constitution or Canadian law, but from the existence of Aboriginal nations as independent cultural, social, and political entities with their own laws and systems of government prior to European colonization of North America.

The inherent right of self-government has been recognized politically in Canada. In the negotiations leading to the Charlottetown Accord that was submitted to the Canadian electorate in 1992, the Prime Minister, provincial premiers, territorial leaders, and Aboriginal representatives all agreed that such a right exists and should be explicitly acknowledged in the Constitution. While the Accord was rejected by the electorate (for reasons that probably had very little to do with Aboriginal self-government), acceptance of the inherence of the right by Canada's political leaders was a significant endorsement of the position that Aboriginal peoples have generally taken all along.<sup>5</sup> Despite the rejection of the Charlottetown Accord, the Canadian government reaffirmed its acceptance of the inherent right in 1995 in a policy guide entitled *Aboriginal Self-Government*.<sup>6</sup>

The question of whether the inherent right of self-government is an Aborigi-

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3 Schedule B to the Canada Act 1982 (U.K.), 1982, c.11. Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

4 The "within Canada" limitation arises from my conviction that, assuming the right of self-government is a s.35(1) right, it is very unlikely the Supreme Court of Canada will ever accept that it includes a right to secede from Canada and form independent nation-states. In *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, the Court held that the population of Quebec does not have a right of self-determination that would entitle Quebec to secede from Canada unilaterally. I think it improbable that the Court would come to a different conclusion where the Aboriginal peoples are concerned. In *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, for example, Binnie J. (Major J. concurring) expressed the opinion that the rights that are recognized and affirmed by s.35(1) have to be compatible with Canadian sovereignty.

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

6 Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995). See also Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997) [*Gathering Strength*] at 13.

nal right that has been recognized and affirmed by section 35(1) of the *Constitution Act, 1982* has not yet been addressed directly by the Supreme Court of Canada. In *R. v. Pamajewon*,<sup>7</sup> the Court assumed, without deciding, that an Aboriginal right of self-government is included in section 35(1).<sup>8</sup> In *Delgamuukw v. British Columbia*,<sup>9</sup> the Court declined to decide or even provide guidance on the issue of self-government.<sup>10</sup> However, in that case Chief Justice Lamer defined Aboriginal title in a way that appears to make self-government a necessary element of it:

A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.<sup>11</sup>

The significance of this passage was perceived by Justice Williamson in *Campbell v. British Columbia (Attorney General)*,<sup>12</sup> a case involving a challenge to the constitutionality of the governance provisions in the Nisga'a Treaty that was finalized on August 4, 1998. In upholding the validity of these provisions, Williamson J. found that the

... passages from *Delgamuukw* suggesting the right for the community to decide to what uses the land encompassed by their Aboriginal title can be put are determinative of the question. The right to Aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35.<sup>13</sup>

The same reasoning would seem to extend the scope of the right of self-government to Aboriginal and treaty rights generally, which the Supreme Court in other cases has held are likewise communal and subject to the decision-making authority of the Aboriginal community that holds them.<sup>14</sup>

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

7 [1996] 2 S.C.R. 821.

8 *Ibid.* at para. 24.

9 [1997] 3 S.C.R. 1010 [*Delgamuukw*].

10 *Ibid.* at para. 170, Lamer C.J. said: "The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation."

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

12 [2000] 4 C.N.L.R. 1 (B.C.S.C.) [*Campbell*].

13 *Ibid.* at para. 137.

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

First, as the Supreme Court of Canada has been encouraging parties to resolve issues of Aboriginal rights through negotiation rather than litigation,<sup>15</sup> the Court is unlikely to undermine the negotiation process by ruling that negotiated self-government agreements are unconstitutional. To the extent that the constitutionality of these agreements is dependent on the inherent right of self-government, at least, the Court is likely to uphold the right. Secondly, the Royal Commission on Aboriginal Peoples was convinced that this right is already constitutionally entrenched in section 35(1),<sup>16</sup> and this position has been accepted by the Canadian government and is supported by most academic commentary.<sup>17</sup> Thirdly, in his concurring judgment in the recent Supreme Court decision in *Mitchell v. M.N.R.*,<sup>18</sup> Justice Binnie went to lengths to explain that, even though an Aboriginal right to bring goods into Canada duty free would be inconsistent with Canadian sovereignty, this does not mean that Aboriginal peoples do not have an internal right of self-government. While Chief Justice McLachlin did not address this issue in her judgment, which was concurred in by four of her colleagues, I think Binnie J.'s opinion provides an indication of the direction the Court may take in the event that a properly-framed self-government case comes before it.

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

## II. INFRINGEMENT OF THE INHERENT RIGHT OF SELF-GOVERNMENT BY THE *INDIAN ACT*

### A. Band Governance under the *Indian Act* and Its Predecessors

Section 91(24) of the *Constitution Act, 1867*,<sup>19</sup> gave the Parliament of Can-

15 E.g., see *Delgamuukw*, *supra* note 9 at para. 186 (Lamer C.J.).

16 See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) [hereinafter *Partners in Confederation*]; *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [*RCAP Report*], Vol. 2, *Restructuring the Relationship*, Pt. 1, 202–13.

17 *Gathering Strength*, *supra* note 6 at 13. For commentary, see M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), and "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 *Alta. L. Rev.* 465; B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 *Osgoode Hall L.J.* 681, and "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can. Bar Rev.* 196; J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 *U.B.C. L. Rev.* 1, and "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537; P. Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999); D. Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000); P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). I have reached the same conclusion in my own work: see especially "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" and "Envisaging Constitutional Space for Aboriginal Governments", in *Emerging Justice?*, *supra* note 5 at 58 and 184.

18 *Supra* note 4.

19 30 & 31 *Vict. (U.K.)*, c.3.

ada exclusive jurisdiction over “Indians, and Lands reserved for the Indians.” Pursuant to this authority, Parliament enacted a precursor to the *Indian Act* in 1869, entitled *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*.<sup>20</sup> This was the first Canadian statute to make provision for Indian band governance by elected chiefs.<sup>21</sup> Section 10 provided:

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

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

12. The Chief or Chiefs of any Tribe in Council may frame, subject to confirmation by the Governor in Council, rules and regulations for the following subjects:
  1. The care of the public health.
  2. The observance of order and decorum at assemblies of the people in General Council, or on other occasions.
  3. The repression of intemperance or profligacy.
  4. The prevention of trespass by cattle.
  5. The maintenance of roads, bridges, ditches and fences.
  6. The construction of and maintaining in repair of school houses, council houses and other Indian public buildings.
  7. The establishment of pounds and the appointment of pound-keepers.

These provisions were continued in 1876 in the first consolidated *Indian Act*,<sup>22</sup> with some additions and minor variations. The duty to maintain roads was made enforceable by obligatory labour imposed by the Superintendent-

20 S.C. 1869 (32 & 33 Vict.), c.6.

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

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

General of Indian Affairs on Indians residing on reserves who were engaged in agriculture, on penalty of imprisonment in the event of non-performance.<sup>23</sup> The provision for the election of chiefs remained substantially the same, with the significant addition of “incompetency” to the list of causes for which chiefs could be removed by the Governor.<sup>24</sup> To the seven legislative powers of chiefs was added an eighth, the authority to make rules and regulations for “[t]he locating of the land in their reserves, and the establishment of a register of such locations”.<sup>25</sup> This power related to the authority given to bands to allocate lots, with the approval of the Superintendent-General, to band members.<sup>26</sup> Administrative decisions of this sort could be made on behalf of the band by a majority of the chiefs, “at a council summoned according to their rules, and held in the presence of the Superintendent-General or his agent.”<sup>27</sup> While this provision reveals that chiefs also had the authority to make rules regarding their meetings, control of those meetings by the Superintendent-General was nonetheless maintained by the obligatory presence of the Indian agent. However, authority to surrender reserve lands to the Crown was not delegated to the chiefs, as a majority of the adult male members resident on or near the reserve had to assent to any such surrender “at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General”.<sup>28</sup> So in the case of surrenders of reserve lands, the rules for the meetings were those of the adult male members who must, therefore, have had the authority to make such rules.<sup>29</sup>

In 1880, the *Indian Act* was amended.<sup>30</sup> For the most part, the band gover-

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23 *Ibid.*, s.23.

24 *Ibid.*, s.62.

25 *Ibid.*, s.63.

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

27 *Ibid.*, s.61.

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

29 Section 26 replaced s.8 of *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*, S.C. 1868 (31 Vict.), c.42, which had provided for surrender of reserve lands by assent of the chief or a majority of the chiefs “at a meeting or council of the tribe, band or body [of Indians] summoned for that purpose according to their rules and entitled under this Act to vote thereat, and held in the presence of the Secretary of State or of an officer duly authorized to attend such council by the Governor in Council or by the Secretary of State; provided that no Chief or Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near the lands in question”. It is notable that the implicit acknowledgment in 1868 of the authority of the tribes or bands to choose their own leaders in their own ways had disappeared by 1876, having been replaced by the provisions for election of chiefs and for surrenders of reserve lands by a majority vote of adult males. Nonetheless, of necessity those bands that had not been brought under the Act’s electoral provisions must have continued to choose their leaders in accordance with their own customs, a fact that was explicitly acknowledged in 1951 when the *Indian Act* was revised: see text following note 43, *infra*.

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

nance provisions remained the same, though the discretionary nature of the Canadian government's power to impose the elective system on any band was fortified with the words that this could be done "[w]hensoever the Governor in Council deems it advisable for the good government of a band" and the tenure of life chiefs was made subject to the introduction of the elective system.<sup>31</sup> The legislative powers of chiefs were expanded to include designation of the religious denomination required of teachers on reserves, protection of sheep, horses, mules, and cattle, construction and maintenance of water-courses, and repression of noxious weeds.<sup>32</sup> More significantly, chiefs were given the authority to create penalties of fines (up to \$30), imprisonment (up to 30 days), or both for infraction of band rules and regulations. Imposition of these penalties, however, was by proceedings "in the usual summary way before a Justice of the Peace, following the procedure on summary trials before a justice out of sessions."<sup>33</sup> So, while the *Indian Act* conferred legislative and executive functions on chiefs, the jurisdiction to enforce band rules and regulations was expressly given to Canadian courts.

More significant changes to band governance were made in the *Indian Advancement Act, 1884*,<sup>34</sup> which was to be applied to any bands that the Governor in Council "considered fit to have this Act applied to them."<sup>35</sup> The Act provided for band governance by band councils to be elected yearly by the adult male members resident on the reserve.<sup>36</sup> The elected councillors were authorized to choose a "chief councillor" from among their number at their first meeting.<sup>37</sup> Band councils were empowered to make by-laws, rules, and regulations, subject to approval and confirmation by the Superintendent-General, in relation to the same subjects that the chiefs had legislative authority over by virtue of the *Indian Act, 1880*. In addition, they could appoint constables and erect "lock-ups" to enforce the observance of order, but, as provided in the 1880 Act, enforcement of band by-laws by fine or imprisonment was through proceedings before a Justice of the Peace.<sup>38</sup> Other powers included the making of by-laws for the removal and punishment of trespassers on the reserve and for the raising of money "by assessment and taxation on the lands of Indians enfranchised, or in possession of lands by location ticket in the reserve".<sup>39</sup> Band councils were also empowered to make provision for "appropriation and payment to the local Agent as Treasurer by the Superintendent General of so much of the moneys of the band as may be required for defraying expenses necessary for carrying out the by-laws made by the council".<sup>40</sup> So the Indian agent not only pre-

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31 *Ibid.*, s.72.

32 *Ibid.*, s.74.

33 *Ibid.*

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

35 *Ibid.*, s.3.

36 *Ibid.*, ss. 5, 7.

37 *Ibid.*, s.6.

38 *Ibid.*, s.10 (3) and (13).

39 *Ibid.*, s.10 (10) and (11).

40 *Ibid.*, s.10 (12).

sided at and controlled council meetings,<sup>41</sup> but also acted as treasurer for the band council.

The dual system of band governance by elected chiefs under the *Indian Act, 1880* and by elected band councils under the *Indian Advancement Act, 1884* was continued, with minor amendments, until 1951, when the *Indian Act* was revised.<sup>42</sup> Several significant changes in relation to band governance were made at that time. The dual electoral system in place since 1884 was replaced by one system of band government by a single chief and one councillor for every 100 band members (from a minimum of 2 to a maximum of 12 councillors) to be elected by the adult members (including, for the first time since 1869, women) who were “ordinarily resident” on the reserve.<sup>43</sup> Nevertheless, a new definition of “council of the band” was added that explicitly envisaged the selection of band councils by the “custom of the band”:

2. (1)(a) “council of the band” means
  - (i) in the case of a band to which section seventy-three [the election provision, now s.74] applies, the council established pursuant to that section,
  - (ii) in the case of a band to which section seventy-three does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief chosen according to the custom of the band.

By expressly bringing band councils chosen by custom within the definition of “council of the band,” the 1951 Act effectively brought bands that are not subject to its electoral provisions within the scope of the Act’s other band council provisions. But was this already the case under the earlier *Indian Acts* that contained no definition of “council of the band” and no reference to selection of leaders in accordance with band custom?

41 *Ibid.*, s.9. The agent’s role in this regard was set out in detail, unlike the simple requirement in the earlier *Indian Acts* that the Superintendent General or his agent be present at council meetings (see text accompanying note 27, *supra*). Section 9 of the 1884 Act specified that the agent was to call the meetings, preside over them, record the proceedings, and “have full power to control and regulate all matters of procedure and form, and to adjourn the meeting to a time named or *sine die*, and to report and certify all by-laws and other acts and proceedings of the council to the Superintendent General”. Moreover, the section provided that “he shall address the council and explain and advise them upon their powers and duties, and any matter requiring their consideration, but shall have no vote on any question to be decided by the council”. Equivalent provisions respecting the role of Indian agents at council meetings of chiefs under the old system were incorporated into the *Indian Act* by *An Act to amend the Indian Act*, S.C. 1936, c.20, s.5.

42 S.C. 1951, c.29. In 1906, the *Indian Act* and the *Indian Advancement Act* were amalgamated as the *Indian Act*, R.S.C. 1906, c.81, Parts I and II respectively. The *Indian Act*, R.S.C. 1927, c.98, continued this amalgamation.

43 S.C. 1951, c.29, ss. 73–78. Note that the residency requirement was rendered unconstitutional by s.15 of the *Canadian Charter of Rights and Freedoms*, Pt. 1 of the *Constitution Act, 1982*, *supra* note 3: see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*], discussed *infra* in text accompanying notes 124–40.

I think the answer to this question is probably yes. The 1876 *Indian Act* provided that it applied "to all the Provinces, and to the North West Territories, including the Territory of Keewatin."<sup>44</sup> It also provided in section 97:

97. The Governor in Council may, by proclamation from time to time, exempt from the operation of this Act, or from the operation of any one or more of the sections of this Act, Indians or non-treaty Indians, or any of them, or any band or irregular band of them, or the reserves or special reserves, or Indian lands or any portions of them, in any province, in the North-West Territories, or in the territory of Keewatin, or in either of them, and may again, by proclamation from time to time, remove such exemption.<sup>45</sup>

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

The by-law making authority of band councils was expanded somewhat in the 1951 Act to include such on-reserve matters as the regulation of traffic, prevention of disorderly conduct and nuisances, conservation and management of fish and game, and zoning of lands.<sup>46</sup> By-laws made pursuant to this authority were (and continue to be) subject to disallowance by the Minister.<sup>47</sup> However, the provisions respecting Indian agents' presence at and control over band council meetings were removed. The new Act nonetheless retained the distinction between ordinary and more "advanced" bands that had first appeared in the *Indian Advancement Act, 1884*. Section 82 provided that "where the Governor in Council declares that a band has reached an advanced stage of development,"<sup>48</sup> the band council could, with the approval of the Minister, make by-laws in relation to the taxation of reserve lands, licensing of businesses, expenditure of band moneys, hiring of staff, payment of salaries, and so on. However, as in earlier versions of the *Indian Act*,<sup>49</sup> authority to surrender reserve lands was

44 S.C. 1876 (39 Vict.), c.18, s.1. This was before the Yukon Territory was carved out of the North-West Territories in 1898.

45 Versions of this provision have been retained up to the present. The current *Indian Act*, R.S.C. 1985, c.1-5, provides in s.4(2):

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

46 S.C. 1951, c.29, s.80.

47 *Ibid.*, s. 81(2), currently R.S.C. 1985, c.1-5, s.82(2).

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

49 See *supra* note 28 and accompanying text.

not given to the band council, but was now vested in the adult band members generally rather than just the adult males.<sup>50</sup>

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

### B. Pre-Section 35(1) Infringement of the Inherent Right of Self-Government

Two initial points must be made. First, in Canadian constitutional law the Parliament of Canada has had general authority to infringe Aboriginal and treaty rights ever since Confederation.<sup>51</sup> Prior to the enactment of section 35(1) in 1982, these infringements did not have to be justified.<sup>52</sup> After Aboriginal and treaty rights received constitutional protection in 1982, infringements of these rights by Parliament have required justification.<sup>53</sup> We will come back to this matter of justification later.

The second point is that the enactment of the band governance provisions in the *Indian Act* and its predecessors would not necessarily have infringed the inherent right of self-government of any particular First Nation. As we have seen, for the election provisions that were first enacted in 1869 to apply to any particular band, the Canadian government must declare them to apply to that band.<sup>54</sup> Other provisions, however, such as the statutory powers of chiefs and band councils, appear to apply of their own force to all bands not subject to an exemption.<sup>55</sup> So even if a band continued to select its leaders according to its own laws and customs, in the absence of an exemption those leaders would apparently be subject to the other governance provisions of the *Indian Act*.<sup>56</sup>

50 S.C. 1951, c.29, s.39. Note, however, that the provision that the surrender meeting be summoned "according to their rules" (*Indian Act*, S.C. 1876, c.18, s.26(1)) or "according to the rules of the band" (*Indian Act*, R.S.C. 1886, c.43, s.39(a), and subsequent Acts) was removed.

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

52 See *R. v. Sikyee*, [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267; *Daniels v. White*, [1968] S.C.R. 517; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

53 E.g., see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw*, *supra* note 9; *R. v. Marshall [No. 2]*, *supra* note 14.

54 See *supra* notes 21, 31, and accompanying text. This is still the case today: see the *Indian Act*, R.S.C. 1985, c.I-5, s.74(1). See also text accompanying note 140, *infra*.

55 On the Governor in Council's authority to exempt bands from provisions of the *Indian Act*, see *supra* note 45 and accompanying text.

56 See *Bigstone v. Big Eagle*, [1993] 1 C.N.L.R. 25 (F.C.T.D.) at 33; *Canatonquin v. Gabriel*, [1981] 4 C.N.L.R. 61 (F.C.A.), affirming [1978] 1 F.C. 124 (F.C.T.D.); *Jenniss c. Jenniss*, [2000] 1 C.N.L.R. 134 (Que. S.C.).

For discussion purposes, let us start by looking at First Nations that were subjected to the election provisions of the *Indian Act*. In 1924, the Governor in Council imposed these provisions on the Six Nations in southern Ontario by an order in council made under the authority of the Act.<sup>57</sup> This order was replaced by an equivalent order in council in 1951 made under the new Act.<sup>58</sup> In *Davey v. Isaac*,<sup>59</sup> members of the Six Nations representing the “Hereditary Chiefs” challenged the validity of this imposition of the electoral system on the basis that the *Indian Act* did not apply to the Six Nations, as they did not constitute a “band” within the meaning of that term as defined in the Act. The Supreme Court held the Six Nations to be a “band” at the relevant time because they fit at least one of the definitions of that term in the 1951 Act, namely “a body of Indians ... for whose use and benefit in common, moneys are held by His Majesty”.<sup>60</sup> The Court therefore found the 1951 order in council to be valid. Exercise of the statutory authority accorded to the elected band council by the *Indian Act* was therefore legal.

Imposition of the electoral system is clearly regarded by many members of the Six Nations as an infringement of their inherent right of self-government, exercised traditionally by the Hereditary Chiefs. At trial in *Davey v. Isaac*, Justice Osler of the Ontario High Court observed:

A large proportion of the inhabitants of the Six Nations lands have resisted [the electoral] system from its beginning and take the position that the only persons entitled to govern the Six Nations people have been and continue to be those who become members of the council of traditional chiefs....<sup>61</sup>

The legal action was initiated because the defendants, who supported the Hereditary Chiefs, had padlocked the doors of the council house where the elected band council met, in an apparent effort to prevent the council from dealing with lands on the Six Nations Reserve.<sup>62</sup> The elected band councillors asked for and got a permanent injunction that restrained the defendants from obstructing the plaintiffs in their lawful use of the council house.<sup>63</sup>

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

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

59 [1977] 2 S.C.R. 897. While the term “Hereditary Chiefs” is used in this court case, it probably is not an accurate description of the traditional leadership of the Six Nations: see T. Porter, “Traditions of the Constitution of the Six Nations”, in L. Little Bear, M. Boldt and J. A. Long, eds., *Pathways to Self-Determination* (Toronto: University of Toronto Press, 1984) at 14.

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

61 *Isaac v. Davey* (1973), 38 D.L.R. (3d) 23 (Ont. H.C.), at 26, rev’d (1974), 5 O.R. (2d) 610, [1977] 2 S.C.R. 897.

62 See *ibid.*, 38 D.L.R. (3d) at 25.

63 *Davey v. Isaac*, *supra* note 59, upholding the decision of the Ontario Court of Appeal: *Isaac v. Davey* (1974), 5 O.R. (2d) 610, which had reversed the decision of the trial judge.

It might be argued that imposition of the electoral system on the Six Nations did not infringe their inherent right of self-government because it did not make the traditional government of the Hereditary Chiefs illegal or prevent it from functioning. While this may be arguable as a strict matter of law, it is unrealistic. As a practical matter, the authority conferred on the elected council by the *Indian Act* has had a direct impact on the ability of the Hereditary Chiefs to exercise their traditional functions. The conflict between the two forms of government is apparent from the facts in *Davey v. Isaac*, referred to above. It is also revealed by the earlier case of *Logan v. Styres*,<sup>64</sup> which involved an application by a member of the Six Nations for a declaration that the orders in council imposing the electoral system on the Six Nations in 1924 and 1951 were *ultra vires* and for an injunction to restrain the elected band council from “taking any steps to facilitate the surrender of 3.05 acres” of the Six Nations Reserve.<sup>65</sup> While authority to assent to surrenders of reserve lands had been vested in the adult band members by the 1951 *Indian Act*,<sup>66</sup> King J. pointed out that “[i]t is the elected Councillors who negotiate the terms of surrender.”<sup>67</sup> He said as well that “[i]t would appear that many of the Six Nations Indians, a great majority in fact, do not recognize the authority of the Parliament of Canada to provide for elected Councillors or to provide for the surrender of Reserve lands by means of a vote.”<sup>68</sup> He also acknowledged that the “Orders in Council to which objection is taken set up a system whereby elected Councillors would supplant the hereditary Chiefs among other matters in dealing with the surrender of Reserve lands.”<sup>69</sup> To the extent that statutory powers were conferred on the elected band council by the *Indian Act*, King J. thought that the elected council had replaced the traditional government of the Hereditary Chiefs. So in the case of the Six Nations, imposition of the electoral system evidently did infringe their inherent right of self-government.<sup>70</sup>

Let us now consider the hypothetical case of a First Nation that did not have the electoral system imposed upon it, but that continued to choose its leaders in accordance with its own customs, as envisaged by the 1951 *Indian Act*.<sup>71</sup> In this situation, we concluded above that, in the absence of an exemption, the other band governance provisions of the *Indian Act* probably would have applied to the chief and/or council chosen by custom.<sup>72</sup> Those leaders would therefore

64 (1959), 20 D.L.R. (2d) 416 (Ont. H.C.).

65 *Ibid.* at 417.

66 See *supra* note 50 and accompanying text.

67 *Supra* note 64 at 418.

68 *Ibid.*

69 *Ibid.* at 417–18.

70 A *prima facie* infringement apparently occurs if there is “any meaningful diminution of the appellants’ rights”: *R. v. Gladstone*, *supra* note 53 at para. 43 (Lamer C.J.). Factors to be considered in this context are whether the limitation is “unreasonable”, whether it imposes “undue hardship,” and whether it denies “to the holders of the right their preferred means of exercising that right”: *R. v. Sparrow*, *supra* note 53 at 1112 (Dickson C.J. and La Forest J.). In *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 75, Lamer C.J. stated that “[t]he guiding inquiry at the infringement stage remains whether the regulations at issue represent a *prima facie* interference with the appellant’s aboriginal or treaty rights.” See also *R. v. Nikal*, [1996] 1 S.C.R. 1013, at paras. 86–108 (Cory J.); *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 86–95 (Cory J.).

71 See text following note 43, *supra*.

72 See *supra* notes 45, 54–56, and accompanying text.

have the authority to exercise the statutory powers conferred on band councils by the Act. So would the conferral of those statutory powers have amounted to an infringement of that First Nation's inherent right of self-government? The answer to this question is not as clear as in a case like that of the Six Nations, where the electoral system was imposed against the wishes of a majority of the people. The answer really depends on whether the statutory powers merely *complemented*, or *curtailed and replaced*, the authority of the leaders under the First Nation's traditional form of government. If the former, then arguably there would be no infringement of the inherent right. If the latter, then application of the *Indian Act* to that First Nation would no doubt have amounted to an infringement.

The question of whether the band governance provisions of the *Indian Act* constitute an infringement of the inherent right of self-government of First Nations who choose their leaders by custom has not yet been determined by a Canadian court. It has been generally assumed that the authority of band councils is derived solely from the *Indian Act*,<sup>73</sup> but that assumption appears to have been made without considering the circumstances of First Nations that choose their leaders by custom. Given that the *Indian Act* does not purport to codify the authority of leaders chosen by custom or to take away any powers they might have as traditional leaders exercising inherent rights of self-government, arguably the statutory powers of those leaders function *in addition to*, rather than *in derogation of*, their inherent powers.<sup>74</sup> If so, it would seem to follow that the governance provisions of the *Indian Act* have not infringed the inherent right of those First Nations.

It is probably unwise to attempt to arrive at any general conclusions regarding this question because the circumstances of First Nations vary. Some First Nations who currently choose their leaders by custom have reverted to that method after operating for years under the electoral system.<sup>75</sup> Others may never have had the electoral system imposed on them. Also, the extent to which the band governance provisions of the *Indian Act* have impacted on the inherent right of self-government of any particular First Nation depends very much on the nature of that Nation's traditional form of government. It would therefore be necessary to examine the circumstances of each First Nation to determine whether the *Indian Act's* band governance provisions have amounted to an

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

74 For discussion and further supporting arguments, see Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*", in *Emerging Justice?*, *supra* note 5, 215 at 232-38.

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

infringement of its inherent right.<sup>76</sup> It can, however, be safely concluded that those provisions have infringed the inherent rights of at least some First Nations, as the example of the Six Nations demonstrates.<sup>77</sup>

### C. Post-Section 35(1) Infringement of the Inherent Right of Self-Government

We have seen that, prior to the enactment of section 35(1) of the *Constitution Act, 1982*, infringements of the inherent right of self-government by the Parliament of Canada did not have to be justified.<sup>78</sup> That changed when section 35(1) came into force on April 17, 1982. Moreover, it seems that the infringements that have had to be justified since that time are not just those imposed *after* section 35(1) came into force. Any infringement of an Aboriginal or treaty right that originated *before* that time has to be justified as well if the right was

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76 This approach is in keeping with the Supreme Court decisions cited *supra* in note 70, which have dealt with the infringement issue in the context of the circumstances of the First Nation concerned and the particular statute or regulations that allegedly infringed its Aboriginal or treaty rights. See also *Delgamuukw*, *supra* note 9 at para. 165, where Lamer C.J. said that whether an infringement is justifiable "is ultimately a question of fact that will have to be examined on a case-by-case basis."

77 A further complicating factor is the identification of the Aboriginal group in which the right of self-government is vested. In some instances, a contemporary First Nation corresponds to an Aboriginal nation or other group that governed itself at the time of European colonization. In other instances, however, Aboriginal nations have been fragmented into separate First Nations or Indian bands as a result of colonization, the creation of reserves, and the imposition of the *Indian Act's* band governance system. The Royal Commission on Aboriginal Peoples took the position that the inherent right of self-government is vested in Aboriginal nations, numbering between 60 and 80, rather than in local communities: see *RCAP Report*, *supra* note 16, Vol. 2, *Restructuring the Relationship*, Pt. 1, 177–84, 234–36. See also *Gathering Strength*, *supra* note 6 at 13, where the federal government supported this position. In *R. v. Pamajewon*, *supra* note 7, however, the Supreme Court seems to have assumed that contemporary Ojibwa First Nations can have rights of self-government derived from the pre-colonization Ojibwa people. Moreover, the Federal Court, in relation to the selection of band councils by the "custom of the band," has accepted that *Indian Act* bands have "always had" an "inherent power" to select their leaders by customs that have "developed over decades if not centuries": *Bone*, *supra* note 75 at 65 (see also the other cases cited in the same note). I am nonetheless conscious of the paradox arising from this conclusion that statutorily-defined Aboriginal groups (Indian bands) can hold inherent rights. The difficulty arises from the colonial reality that Aboriginal nations have had definitions of who they are imposed on them by the *Indian Act* for over 100 years. As a consequence, many Aboriginal nations today find themselves in a situation where some aspects of their inherent right of self-government may in fact be exercised by *Indian Act* bands. This would appear to be the case where selection of band councils by custom is concerned. While band councils themselves may not be an expression of the inherent right of self-government of many Aboriginal nations, colonialism has resulted in a situation whereby the selection of band councils by custom has become an expression of the right of self-government in that context. Aboriginal nations should not be prejudiced by this paradox, especially because it was not of their making and was possibly in violation of Canada's fiduciary obligations. For further discussion, see K. McNeil, "Section 91(24) Powers, the Inherent Right of Self-Government, and Canada's Fiduciary Obligations", a research report prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations, August, 2002, reproduced in *Canadian Aboriginal Law 2002*, Conference Materials, Ottawa, 5–6 December 2002 (Vancouver: Pacific Business & Law Institute, 2002), especially at 11–12, 15–19, 23–24.

78 See *supra* note 52 and accompanying text.

unextinguished and so still existed on April 17, 1982, and the infringement of it continued thereafter.<sup>79</sup>

This means that any pre-section 35(1) infringements of the inherent right of self-government of particular First Nations by the *Indian Act's* band governance provisions that continued after April 17, 1982 would have to be justified.<sup>80</sup> For example, imposition of the electoral system on the Six Nations, if it continued after the enactment of section 35(1), would be an infringement of their unextinguished inherent right of self-government that would have to be justified.<sup>81</sup> The justification test, as formulated by the Supreme Court of Canada in *Sparrow*,<sup>82</sup> involves proof by the Crown of a valid legislative objective and of respect for the fiduciary obligations it owes to the Aboriginal peoples.

Virtually all Supreme Court decisions on justification, including *Sparrow*, have been in relation to Aboriginal or treaty rights to hunt or fish.<sup>83</sup> Valid legislative objectives in those cases involved such things as conservation, safety, and allocation of the resource among various users – matters that are obviously not very relevant to justification of infringements of the inherent right of self-government. In the *Delgamuukw* case, the Supreme Court discussed the issue of justification in relation to infringements of Aboriginal title to land and added economic development by a variety of means to the list of potentially valid legislative objectives.<sup>84</sup> Once again, this is not very relevant to justification of infringements of the inherent right of self-government.<sup>85</sup>

One can, nonetheless, extract some general principles from the case law on justification. For a legislative objective to meet the first branch of the *Sparrow* justification test, it must be compelling and substantial. In general terms, what this seems to mean is that the objective is more important to Canadian society as a whole – including the Aboriginal peoples who are part of that society – than is protection of the Aboriginal or treaty right; thus, infringement of the right can be justified. Another way the Supreme Court has expressed this is that, given the underlying purpose of section 35(1) is the reconciliation of the Aboriginal peoples' prior presence in Canada with Crown sovereignty,<sup>86</sup> the

79 This follows from the decision in *R. v. Sparrow*, *supra* note 53, which held that the rights that were constitutionally entrenched by s.35(1) are not to be defined by legislation that restricted them before that section's enactment: see *ibid.* at 1091–93. Otherwise, the Court recognized, the “crazy patchwork of regulations” that was in place prior to April 17, 1982, would be incorporated into the constitutional definition of Aboriginal rights: *ibid.* at 1091.

80 The Act in force at that time was the *Indian Act*, R.S.C. 1970, c.1-6, as amended.

81 I am assuming that assertion of Crown sovereignty, Confederation, and the enactment of the *Indian Act* did not *extinguish* the inherent right of self-government. For support for this view, see *Campbell*, *supra* note 12; *Partners in Confederation*, *supra* note 16 at 31–36.

82 *Supra* note 53.

83 E.g., see the cases cited in note 70, *supra*.

84 *Delgamuukw*, *supra* note 9 at para. 165 (Lamer C.J.).

85 While economic development is obviously an important element of First Nation governance, the economic development the Supreme Court had in mind in *Delgamuukw* was of the province of British Columbia, not of First Nations. For critical commentary on the Court's view that economic development can take precedence over the protection of Aboriginal title, see K. McNeil, “Aboriginal Title as a Constitutionally Protected Property Right”, in *Emerging Justice?*, *supra* note 5 at 292.

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

constitutional rights of the Aboriginal peoples must give way in appropriate circumstances to substantial and compelling Parliamentary objectives.<sup>87</sup>

It must be kept in mind that the onus of proving a valid legislative objective is on the Crown.<sup>88</sup> In the context of infringement of the inherent right of self-government by the *Indian Act*, one therefore must ask what kind of objectives the Crown could present that would justify replacing inherent-right forms of government with band council governments. When the *Indian Act* was first enacted in 1876, the main objective of Parliament appears to have been the eventual assimilation of Indian people into Canadian society.<sup>89</sup> Nonetheless, it seems that in the case of an infringement that originated before the enactment of section 35(1), the time for which justification must be proven is the post-section 35(1) time of actual conflict between the right and the infringing legislation that caused the matter to come before the court.<sup>90</sup> If this is correct, then, in the event a First Nation were to challenge the current application of the *Indian Act* band governance provisions to it and prove that they infringe its inherent right of self-government, the Crown would have to show a valid present-day legislative objective for the infringement. This might be difficult, as the kinds of valid legislative objectives the Supreme Court has accepted until now all relate to the compelling and substantial interests of Canadian society as a whole. What compelling and substantial interest of Canadian society would justify the imposition of a form of government on a First Nation against its wishes? In that situation, one would expect that the democratic values of Canada<sup>91</sup> (not to mention the international principle of self-determination<sup>92</sup>) would generally support the right of self-government against the infringing legislation.

87 See *R. v. Gladstone*, *supra* note 53, especially at paras. 72–75 (Lamer C.J.); *Delgamuukw*, *supra* note 9 at paras. 161, 165 (Lamer C.J.). For critical commentary on the connection between justification and reconciliation, see K. McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2 *Indigenous L.J.* 1.

88 *R. v. Sparrow*, *supra* note 53 at 1110.

89 See Bartlett, *supra* note 21 at 16–19; J. L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy”, in I. A. L. Getty and A. S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) at 39; J. S. Milloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change”, *ibid.* at 56.

90 This is at least implicit in the cases on justification cited *supra* in note 70. Those cases all involved infringement of Aboriginal or treaty rights to hunt or fish, a valid legislative objective for which is conservation. Obviously, the time for assessing whether an infringement is necessary for conservation purposes is the time the infringement is challenged, not the time when it was first imposed, as conservation needs may well have changed in the meantime. However, in the case of a one-time infringement, such as clear-cutting Aboriginal title land, the time for justification would have to be the time when the infringement occurred.

91 See *Reference Re Secession of Quebec*, *supra* note 4.

92 This principle, as expressed, for example, in the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, G.A. Res. 2200(XXI), art. 1(1), 993 U.N.T.S. 3 (in force as of 3 January 1976), the International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res. 2200(XXI), art. 1(1), 999 U.N.T.S. 171 (in force as of 23 March 1976), and the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add. 1, art. 3, provides that all peoples have the right to “freely determine their political status and freely pursue their economic, social and cultural development.” For discussion of this right in relation to Indigenous peoples, see E.-I. Daes, “The Right of Indigenous

Let us assume, as one possibility, that the federal government alleged that the current legislative objective for the *Indian Act's* band council provisions is the democratic governance of Indian bands.. While a court might accept the validity of that objective in principle, it is doubtful whether that would be sufficient for it to decide that the legislative objective is valid in the sense of providing justification for the continuing imposition of the Act's band council form of government on a particular First Nation. Instead, the court would likely have to go further and find that the replacement of that First Nation's inherent-right form of government with band council government actually furthered the objective of democratic governance in the present day. This would involve very complex cultural and political issues that might be difficult for the court to assess. For example, the court would probably have to start by determining what is meant by "democratic governance." This is not something that could be answered in the abstract – it would have to take account of the culture, traditions, and contemporary circumstances of the First Nation in question. The representative form of government familiar to most Canadians is certainly not the only form of democratic government and may, in fact, be inconsistent with the democratic traditions of at least some Aboriginal peoples.<sup>93</sup> In this situation, I think it would be incumbent on the Crown to prove not only that the Act's band council regime is more democratic than the First Nation's inherent-right form of government, but also that it is sufficiently so to justify favouring the former over the latter despite the impact such an outcome might have on the culture of the community. Keeping in mind that the constitutional rights of the First Nation would be at stake in this context, the burden on the Crown to prove that the legislative objective is indeed valid should be onerous in these circumstances.

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

... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.<sup>94</sup>

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Peoples to 'Self-Determination' in the Contemporary World Order", in D. Clark and R. G. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) at 47; S. J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 75–125; R. T. Coulter, "Indigenous Peoples and the Law of Self-Determination: A Possible Consensus", Indian Law Resource Center, Helena, Montana, 18 October 2002 (copy on file with author).

93 See generally M. Boldt and J. A. Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" (1984) 17 *Can. J. of Political Science* 537; R. L. Barsh, "The Nature and Spirit of North American Political Systems" (1986) 10 *Am. Indian Q.* 181. More specifically, see Johnston, *supra* note 57; Porter, *supra* note 59.

94 *R. v. Sparrow*, *supra* note 53 at 1119.

The relevance of these questions – in particular those regarding compensation and consultation – to infringements of Aboriginal title to land was accepted by Lamer C.J. in *Delgamuukw*.<sup>95</sup> However, he pointed out that “the choice between them will in large part be a function of the nature of the aboriginal right at issue.”<sup>96</sup> So while Aboriginal title, for example, has an economic aspect that will make compensation relevant to justification of its infringement,<sup>97</sup> that may not be the case where infringements of the inherent right of self-government are concerned. Minimal impact and consultation, however, would both seem to be relevant to justification of infringements of this right. Whether the Crown could meet the burden of proving these in situations where the band governance provisions of the *Indian Act* have been imposed on a particular First Nation is a good question, the answer to which would depend on the factual context.

It is nonetheless worth remarking in this context that infringements of Aboriginal and treaty rights to fish appear to be more easily justified when the rights in question have a commercial dimension.<sup>98</sup> The reason for this is that the economic interests of other users of the resource are involved to a greater extent where commercial rights are concerned.<sup>99</sup> Similarly, the economic aspect of Aboriginal title seems to have caused the Supreme Court to regard infringements of that title as justifiable in appropriate circumstances in order to achieve the objective of “reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that ‘distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community.’”<sup>100</sup> Where the inherent right of self-government is concerned, the impact of the exercise of that right on the economic interests of other Canadians would probably be relatively low – indeed, to the extent that self-government facilitates the economic development of First Nations, other Canadians might actually benefit! On the other hand, the importance of that right to First Nations is very high, as their ability to maintain their cultural, social, and political distinctiveness depends on the extent to which they can govern their own communities in accordance with their own traditions. For these reasons, it should be difficult for the Crown to justify infringements of the right of self-government.

The Crown’s duty to consult with Aboriginal peoples in relation to infringements of their rights presents difficulties in situations where the infringement originated prior to the enactment of section 35(1) in 1982. While this duty

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95 *Supra* note 9 at paras. 162–69.

96 *Ibid.* at para. 162.

97 *Ibid.* at para. 169.

98 Compare *R. v. Gladstone*, *supra* note 53, and *R. v. Marshall [No. 2]*, *supra* note 14, with *R. v. Sparrow*, *supra* note 53. For critical commentary, see K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?”, in *Emerging Justice?*, *supra* note 5 at 281.

99 See *R. v. Gladstone*, *supra* note 53 at paras. 57–75.

100 *Delgamuukw*, *supra* note 9 at para. 165 (Lamer C.J.) [emphasis in original], quoting from *Gladstone*, *supra* note 53 at para. 73. For critical commentary on the connection between justification and reconciliation, see McNeil, *supra* note 87.

existed as a fiduciary obligation in appropriate circumstances prior to 1982,<sup>101</sup> it was not a constitutional duty and so was not binding on Parliament. As a result, legislative infringements of Aboriginal rights that took place before 1982 did not have to be justified by showing adequate consultation with the Aboriginal people concerned.<sup>102</sup> Given this lack of a constitutional duty to consult prior to 1982, it may be difficult for the Crown to prove that it did in fact consult with any particular First Nation before imposing the *Indian Act's* band governance provisions upon it. Moreover, we have seen that, in the case of an infringement of an Aboriginal right that originated pre-section 35(1) and continued thereafter, the time for meeting the justification test is probably when the infringement is challenged, rather than when it began.<sup>103</sup> So when would the duty to consult have arisen? The duty must have arisen as a matter of constitutional law when section 35(1) came into force in 1982, as that is when infringements of the inherent right of self-government by imposition of the *Indian Act's* band governance provisions would have become unconstitutional unless justified. As a practical matter, however, the federal government cannot be expected to have immediately initiated consultations in 1982 with the more than 600 Indian bands in Canada that are subject to the *Indian Act*. Instead, it may be up to First Nations who object to the imposition of the Act's band governance provisions on them to initiate these discussions. If the federal government fails to participate in meaningful consultation after the matter has been raised, it may have difficulty justifying any infringement of the right of self-government from then on.<sup>104</sup>

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

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101 See *Guerin v. The Queen*, [1984] 2 S.C.R. 335, where the Supreme Court held that the Crown breached the fiduciary duty it owed to the Musqueam Nation because it did not consult them regarding the terms of a lease for a portion of their reserve lands. In *Delgamuukw*, *supra* note 9 at para. 168, Lamer C.J. referred to this as a breach of the Crown's "fiduciary duty at common law".

102 See the cases cited *supra* in note 52. The decision of the Supreme Court in *Davey v. Isaac*, *supra* note 59, reveals the lack of a legally-enforceable duty to consult before imposition of the *Indian Act's* band governance provisions on First Nations.

103 See *supra* note 90 and accompanying text.

104 In relation to this, see the recent decisions of the British Columbia Court of Appeal in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2002] 2 C.N.L.R. 312, and *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121, additional reasons [2002] 4 C.N.L.R. 117, leave to appeal granted by the S.C.C., 20 March 2003, [2003] 2 C.N.L.R. iv. In those cases, it was held that an Aboriginal right does not actually have to be proven in court for the duty to consult to arise. While those decisions related to Aboriginal title and resource use, the same principle would seem to apply to an Aboriginal right of self-government. For further discussion of when the duty to consult arises, see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 *Can. Bar Rev.* 252.

and still apply to other First Nations that did not prove such an infringement. Some First Nations might be content to operate under those provisions for the time being without alleging any infringement of their inherent right of self-government. They would be able to do so without forfeiting their right to challenge the application of those provisions to them at some future time.<sup>105</sup>

In 1985 and 1988, the Parliament of Canada enacted amendments to the *Indian Act*<sup>106</sup> that have had an impact on First Nation governance. As those amendments came after the enactment of section 35(1), their application to any particular First Nation could be challenged from the time they came into force as a violation of its inherent right of self-government. These amendments are therefore worth examining.

#### D. Post-Section 35(1) Amendments to the *Indian Act*

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

The amendments respecting entitlement to be registered as an Indian were primarily designed to address gender discrimination in the Act. In particular, the provision that caused Indian women to lose their status if they married non-Indian men was removed. Women who had lost their status as a result of this provision once again became entitled to be registered, as did their children.<sup>107</sup> At the same time, First Nations were given the option of taking control over their own membership by establishing membership rules by majority vote of their electors.<sup>108</sup> Membership rules cannot, however, deny membership to persons (including women who had their status restored) who were entitled to be members of that First Nation prior to the time the membership rules came into force.<sup>109</sup>

The membership provisions in the 1985 amendments, in particular the provision limiting the authority of First Nations to exclude current members, were challenged by three First Nations in Alberta in *Sawridge Band v. Canada*<sup>110</sup> on the ground that those provisions violated their Aboriginal and treaty rights to determine their own membership. Muldoon J. decided that no Aboriginal or treaty right to control membership had been established by the plaintiffs, but even if the alleged Aboriginal right had existed it would have been extinguished by the 1876 *Indian Act* before the relevant treaties were negotiated. This decision was overturned by the Federal Court of Appeal on the ground that the

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

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

107 *Indian Act*, R.S.C. 1985, c.1-5, s.6, as amended by R.S.C. 1985, c.32 (1st Supp.), s.4, c.43 (4th Supp.), s.1. See Bartlett, *supra* note 21 at 13-14; A. Skarsgard, *Indian Status and Band Membership: Update 1986*, Legal Information Service Report No. 23 (Saskatoon: University of Saskatchewan Native Law Centre, 1986); D. Opekokew, "Self-Identification and Cultural Preservation: A Comment on Recent Indian Act Amendments" [1986] 2 C.N.L.R. 1.

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

109 *Ibid.*, s.10 (4) and (5). See Bartlett, *supra* note 21 at 15.

110 [1995] 4 C.N.L.R. 121 (F.C.T.D.), rev'd [1997] 3 F.C. 580 (F.C.A.).

record disclosed a sufficient basis for finding a reasonable apprehension of bias on the part of the trial judge.<sup>111</sup> The case was therefore sent back to trial without any decision on the merits.

A First Nation's authority to determine its own membership is usually considered an important aspect of the inherent right of self-government.<sup>112</sup> Despite its inconclusive outcome, the *Sawridge* case nonetheless raised the question of whether this aspect of self-government had already been extinguished by the *Indian Act* prior to the enactment of section 35(1) in 1982. This question relates to the broader issue of whether specific aspects of the inherent right of self-government could have been extinguished piecemeal, without extinguishing other aspects of the right, an issue that will not be resolved here. However, it is worth pointing out that the Supreme Court of Canada in *R. v. Pamajewon*<sup>113</sup> treated the inherent right of self-government (assuming it exists) as a bundle of rights over specific areas of jurisdiction, each of which has to be established separately. It might follow from this that a specific self-government right, such as the right to determine membership, could have been extinguished without other self-government rights being affected. On the other hand, one could regard the taking away of a First Nation's right to determine its own membership (if that in fact happened<sup>114</sup>) as an *infringement* of its broader right of self-government rather than an *extinguishment* of the narrower right to determine membership.<sup>115</sup> This issue, while currently unresolved in Canadian law, is obviously very important because any self-government rights that were extinguished prior to the enactment of section 35(1) would not have been recognized and affirmed by that subsection, whereas rights that were merely infringed would have been recognized and affirmed and so the infringement would have to be justified in order to be effective post-section 35(1).<sup>116</sup>

The 1985 and 1988 amendments to the *Indian Act* also extended the legislative authority of band councils to include, among other things, the power to make by-laws respecting "the residence of band members and other persons on the reserve" and providing "for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band."<sup>117</sup>

111 [1997] 3 F.C. 580, leave to appeal refused without reasons, [1997] S.C.C.A. No. 430.

112 E.g., see Bartlett, *supra* note 21 at 16; *RCAP Report, supra* note 16, Vol. 2, *Restructuring the Relationship*, Pt. 1, 237–39. See also *McArthur v. Canada (Department of Indian Affairs and Northern Development)*, [1992] 4 C.N.L.R. 33 (Sask. Q.B.), especially at 40.

113 *Supra* note 7.

114 The burden of proving extinguishment is on the Crown, and requires "clear and plain" legislative intent: *R. v. Sparrow, supra* note 53 at 1099; *R. v. Gladstone, supra* note 53 at paras. 31–38; *Delgamuukw, supra* note 9 at para. 180. See generally K. McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001–2002) 33 *Ottawa L. Rev.* 301.

115 This seems to be the position of the Royal Commission on Aboriginal Peoples: see *RCAP Report, supra* note 16, Vol. 2, *Restructuring the Relationship*, Pt. 1, 202–12 (apparently written, however, before the S.C.C. decision in *R. v. Pamajewon, supra* note 7).

116 See *R. v. Sparrow, supra* note 53.

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

Band councils were also given the authority to restrain contraventions of band by-laws by court action.<sup>118</sup> The patronizing requirement in section 83 for a declaration by the Governor in Council that a band had "reached an advanced stage of development" before the band council could make money by-laws<sup>119</sup> was removed so that all band councils were accorded this authority, though still subject to the approval of the Minister.<sup>120</sup> Finally, band councils were given the authority, with the assent of a majority of the electors who attended a special meeting called for that purpose, to make by-laws prohibiting the sale, manufacture, and possession of intoxicants, and prohibiting persons from being intoxicated, on the reserve.<sup>121</sup>

As these amendments generally *expanded* the powers of band councils, from one perspective it might be argued that they could not have *infringed* the inherent right of self-government. However, as band council government is statutory and was imposed on at least some First Nations without their consent, from another perspective it seems that any changes to the authority of band councils would amount to further infringements of that right. For the Six Nations, for example, expansion of the powers of the band council might infringe further on the exercise of authority by their traditional government. One cannot, however, answer the question of whether the amendments infringed the inherent right of self-government of First Nations generally, as the answer depends on the specific circumstances of each First Nation. If an infringement were found, the issue of whether it could be justified would also depend on the circumstances of the First Nation in question. However, because the infringement would have occurred after section 35(1) came into force, the federal government would have been under an obligation to consult with affected First Nations *before* imposing the changes to band governance upon them. Failure to consult should make it difficult for the Crown to justify any infringements caused by the amendments.<sup>122</sup>

#### E. The *Indian Act* and the *Canadian Charter of Rights and Freedoms*

The impact of the *Canadian Charter of Rights and Freedoms*<sup>123</sup> on the *Indian Act* is not directly relevant to the issue of whether that Act has infringed the inherent right of self-government. However, the decision of the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*<sup>124</sup> might provide some insight into how the Court would deal with an allegation that the *Indian Act* infringes that right.

In *Corbiere*, the plaintiffs, members of the Batchewana First Nation in Ontario, challenged the constitutional validity of the part of section 77(1) of

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

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

120 *Indian Act*, R.S.C. 1985, c.1-5, s.83, as amended by R.S.C. 1985, c.17 (4th Supp.), s.10.

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

122 In *Delgamuukw*, *supra* note 9 at para.168, Lamer C.J. said, albeit in relation to infringement of Aboriginal title, that "[t]here is always a duty of consultation."

123 *Supra* note 43.

124 *Supra* note 43.

the *Indian Act* that limited the right to vote in band council elections to band members who were “ordinarily resident on the reserve.”<sup>125</sup> They contended that excluding non-resident band members from elections violated their section 15(1) equality rights under the *Charter*. The Supreme Court agreed and unanimously held that the words “and is ordinarily resident on the reserve” be struck from section 77(1), after an 18-month period to give Parliament an opportunity to deal with the consequences of the decision.<sup>126</sup>

The first thing to notice is that the Supreme Court rejected the option of simply declaring the offending words in section 77(1) to be inapplicable to the Barchewana First Nation. Instead, the Court held that the voting restriction affected most, if not all, First Nations and was unconstitutional because it violated the equality rights of off-reserve members generally. As discussed above, the Court would be unlikely to adopt this approach where an allegation was made that the band governance provisions of the *Indian Act* offended the inherent right of self-government of a particular First Nation, as Aboriginal rights (unlike the *Charter* right to equality) are specific and can vary from one First Nation to another.<sup>127</sup> So establishing that those provisions violate the inherent right of self-government of one First Nation would not necessarily mean that they violate that of other First Nations.<sup>128</sup>

Similarly, the Court’s reasons for concluding that the voting restriction in section 77(1) violated section 15(1) of the *Charter* are not very relevant to the question of whether the band governance provisions of the *Indian Act* violate the inherent right of self-government of particular First Nations. Equality rights pertain to everyone in Canada, whereas the Aboriginal right of self-government is held only by the Aboriginal peoples and its expression can vary in form and content from one First Nation to another.<sup>129</sup> However, after finding a violation of section 15(1), the Court considered whether the violation could be justified under section 1 of the *Charter*. The Court’s section 1 analysis does bear some

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

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

127 See text accompanying notes 76–77, 105, *supra*. Compare Slattery (2000), *supra* note 17 at 213–15, where it is argued that the right of self-government is a generic rather than a specific right.

128 Also, as L’Heureux-Dubé J. pointed out in *Corbiere*, *supra* note 43 at para. 112, it would be the s.74(1) order in council bringing a First Nation within the electoral provisions of the *Indian Act* that would be challengeable, rather than the provisions themselves: see text accompanying note 140, *infra*.

129 In *R. v. Van der Peet*, *supra* note 86 at paras. 18–19, Lamer C.J. distinguished *Charter* rights, which are “general and universal,” from Aboriginal rights, which are “held only by aboriginal members of Canadian society”. At para. 69, he said that Aboriginal rights also vary from one Aboriginal group to another because they “depend entirely on the traditions, customs and practices of the particular aboriginal community claiming the right” [emphasis in original]. See also *R. v. Pamajewon*, *supra* note 7. Compare Slattery (2000), *supra* note 17.

resemblance to its approach to justification for violation of section 35(1) Aboriginal rights and is worth examining in this context.<sup>130</sup>

The Court in *Corbiere* followed the approach to section 1 that had been laid down by Dickson C.J. in *R. v. Oakes*<sup>131</sup> and refined in *Egan v. Canada*.<sup>132</sup> In the latter case, Iacobucci J. summarized the Court's section 1 approach in this way:

A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.<sup>133</sup>

The requirement of a pressing and substantial legislative objective is obviously very similar, if not identical, to the requirement of a compelling and substantial legislative objective to justify infringements of Aboriginal rights. However, as the second branch of the *Oakes/Egan* test is based on what can be demonstrably justified in a free and democratic society, it differs from the second branch of the *Sparrow* test, which is based on respect for the Crown's fiduciary obligations to the Aboriginal peoples.<sup>134</sup> The requirement of minimal impairment is nonetheless equivalent to the *Sparrow* requirement that there be "as little infringement as possible in order to effect the desired result."<sup>135</sup>

In *Corbiere*, the Court found that the objective in restricting voting to reserve residents was to ensure that band members who had the closest connection with the reserve elected the council that would make decisions affecting life on the reserve. This objective was held to be sufficiently pressing and substantial to meet the first branch of the section 1 test.<sup>136</sup> However, the Court decided that the second branch of the test had not been met because the Crown had failed to demonstrate that complete exclusion of non-resident members from band council elections was necessary to meet the legislative objective. Specifi-

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130 For general discussion, see D. Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 Sask. L. Rev. 543. Note, however, that in *R. v. Adams*, [1996] 3 S.C.R. 101, at paras. 53–54, Lamer C.J. took a stricter approach to statutes that confer administrative discretion that might be exercised so as to infringe Aboriginal rights than to statutes that confer equivalent discretion that might be used to infringe *Charter* rights.

131 [1986] 1 S.C.R. 103.

132 [1995] 2 S.C.R. 513.

133 *Ibid.* at para. 182.

134 See *supra* notes 94–97 and accompanying text.

135 *R. v. Sparrow*, *supra* note 53 at 1119.

136 *Corbiere*, *supra* note 43 at para. 21 (McLachlin and Bastarache JJ.), paras. 99–100 (L'Heureux-Dubé J.).

cally, the Court held that the Crown had not met the requirement of showing minimal impairment of the section 15(1) rights of off-reserve members.<sup>137</sup>

As suggested above, the Crown would probably have a difficult time today establishing a compelling and substantial legislative objective for infringement of the inherent right of self-government by the band governance provisions in the *Indian Act*.<sup>138</sup> But even if the Crown could surmount this hurdle, the *Corbiere* decision suggests that the Crown might also have difficulty proving that the objective (whatever it might be) has been met with as little infringement of the inherent right as possible.

Even more to the point, however, the Court in *Corbiere* suggested that Aboriginal governance rights might take precedence over the band governance provisions in the *Indian Act*. McLachlin and Bastarache JJ. observed that, if a "band could establish an Aboriginal right to restrict voting, as suggested by the Court of Appeal, that right would simply have precedence over the terms of the *Indian Act*."<sup>139</sup> L'Heureux-Dubé J. commented as follows:

If certain bands can demonstrate an Aboriginal or treaty right to restrict non-residents from voting, this in no way affects the constitutionality of the impugned section of the *Indian Act*. It is the order in council made pursuant to s.74(1), bringing the band within the application of the *Indian Act's* electoral rules, which would have to be challenged under such a claim. In analysing such a case, it would have to be determined whether an Aboriginal right had been proven, whether the legislation as it then stands infringes that right, and whether that infringement is justified....<sup>140</sup>

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

### III. CHALLENGING THE APPLICATION OF LEGISLATION LIKE THE *FIRST NATIONS GOVERNANCE ACT*

From the foregoing, it appears that the application of the *Indian Act's* band governance provisions has probably infringed the inherent right of self-govern-

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

138 See *supra* notes 88–93 and accompanying text.

139 *Corbiere*, *supra* note 43 at para. 22. See also the Federal Court of Appeal decision, *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs)*, [1997] 3 C.N.L.R. 21, especially at 26–31, 58–59, varied *Corbiere*, *supra* note 43.

140 *Corbiere*, *supra* note 42 at para. 112, relying upon *R. v. Sparrow*, *supra* note 52, and *R. v. Van der Peet*, *supra* note 85.

ment of at least some First Nations.<sup>141</sup> Furthermore, amendments to those provisions since the enactment of section 35(1) of the *Constitution Act, 1982* might also violate the inherent right of self-government of particular First Nations.<sup>142</sup> The same can be said as well of the alterations to band governance that were contained in the *First Nations Governance Act (FNGA)*. These included significant changes in relation to the selection and authority of band councils, as well as to band administration, financial management, accountability, and the application of the *Canadian Human Rights Act*.<sup>143</sup> As the proposed legislation was complex and has now been withdrawn, an analysis of specific provisions will not be undertaken. It may, nonetheless, be useful to offer some general comments on how the application of the Act might have been challenged by First Nations, as this will shed light on the way the constitutional recognition of the inherent right of self-government in 1982 has limited the legislative authority of Parliament.

It needs to be acknowledged at the outset that the *FNGA* did not purport to infringe the inherent right of self-government. On the contrary, the following section, which was added to Bill C-7 on May 28, 2003, was evidently included to make clear that Parliament did not intend to infringe any Aboriginal or treaty rights:

- 3.1 For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the Constitution Act, 1982.<sup>144</sup>

The effect of this non-derogation clause would, however, have been uncertain. While there can be no doubt that it would have provided direction to judges to construe the Act *if possible* so as not to abrogate or derogate from any existing (i.e., unextinguished<sup>145</sup>) Aboriginal or treaty rights, they should be interpreting legislation in this way in any case.<sup>146</sup> But what if that were *not possible* because there was an irreconcilable conflict between the legislation and the inherent

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141 See text accompanying notes 57–77, *supra*.

142 See text accompanying notes 107–22, *supra*.

143 R.S.C. 1985, c. H-6.

144 Bill C-7, *First Nations Governance Act*, 2nd Sess., 37th Parl., on-line: <[http://www.parl.gc.ca/PDF/37/2/parlbus/chambus/house/bills/government/C-7\\_2.pdf](http://www.parl.gc.ca/PDF/37/2/parlbus/chambus/house/bills/government/C-7_2.pdf)>, (accessed 7 August 2003).

Section 3.1 was part of a package of amendments presented to the House of Commons by the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, 27 May 2003, on-line: <<http://www.parl.gc.ca/InfoComDoc/37/2/AANR/Studies/Reports/AANRRP04-e.htm>> (accessed 7 August 2003).

145 See *R. v. Sparrow*, *supra* note 53 at 1091.

146 General rules of statutory interpretation include a presumption that legislatures do not intend to abrogate or derogate from vested rights: see *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638; *A.G. Canada v. Hallet and Carey Ltd.*, [1952] A.C. 427 at 450 (P.C.). Moreover, ambiguities in statutes are to be interpreted in favour of the Aboriginal peoples: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 402; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 98–100 (Dickson C.J.) at 142–43 (La Forest J.).

right of self-government of a particular First Nation? Should the Act be declared inoperative to the extent of the conflict, thereby avoiding any infringement of the inherent right? Alternatively, should the Act be taken to apply to that First Nation because it could not be construed otherwise, thereby raising the issue of justifiable infringement? While the former approach would eliminate the possibility of justifiable infringement of the inherent right by the Act, one might expect clearer words to have been used to communicate that intent. For example, instead of the words "nothing in this Act shall be construed," the drafters could have employed language like "this Act is not intended and shall not be applied so as to abrogate or derogate from any existing aboriginal or treaty rights."<sup>147</sup>

In any case, to avoid the application of the *FNGA* a First Nation would still have had to prove that it has an inherent right of self-government in relation to matters dealt with by the Act.<sup>148</sup> If it could show that the Act would have derogated from that right and the non-derogation clause was held to be effective to protect the right, the Act would simply not have applied to the First Nation to that extent. If, however, the Act were held to apply despite the non-derogation clause so as to cause a *prima facie* infringement of the inherent right, the federal government would then have had the opportunity to try to prove the infringe-

147 While space does not permit this matter to be pursued further here, some indication of the possible effect of s.3.1 might be found in judicial decisions dealing with other non-derogation and construction clauses. For example, s. 25 of the *Canadian Charter of Rights and Freedoms*, *supra* note 43, contains language similar to that of s.3.1: "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...". Commentators on this section have generally concluded that it provides substantive protection against the *Charter* to Aboriginal and treaty rights, including rights of self-government: for an insightful discussion of the literature and case law, see K. Wilkins, "... But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49 *U. T. L.J.* 53 at 108–18. Other Canadian statutes contain a provision similar or identical to s.3.1: e.g., see the *Canada Petroleum Resources Act*, R.S.C. 1985, 2nd Supp., c.36, s.3; *Canada Wildlife Act*, R.S.C. 1985, c.W-9, s.2(3), added by S.C. 1994, c.23, s.4; *Migratory Birds Convention Act, 1994*, S.C. 1994, c.22, s.2(3); *Firearms Act*, S.C. 1995, c.39, s. 2(3); *Oceans Act*, S.C. 1996, c.31, s.2.1; *Canada Marine Act*, S.C. 1998, c.10, s.3. Regarding the non-derogation clause in the *Firearms Act*, see *Bellegard v. Canada (A.G.)*, 2002 F.C.T. 1131. Also, the *Canadian Bill of Rights*, S.C. 1960, c.44, s.2 provides that [e]very law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared...

In *R. v. Drybones*, [1970] S.C.R. 282, the dissenting judges were of the view that this provision merely expresses a rule of statutory interpretation, but the majority held that it provides substantive protection so that the *Bill of Rights* prevails over other statutory provisions in the event of irreconcilable conflict. In *Authorson v. Canada (A.G.)*, [2003] S.C.J. No. 40, Major J., for the Court, affirmed the ruling in *Drybones* that, "[w]here federal legislation conflicts with the protections of the Bill of Rights, unless the conflicting legislation expressly declares that it operates notwithstanding the Bill of Rights as required by s.2, the Bill of Rights applies and the legislation is inoperative". See also *Curr v. The Queen*, [1972] S.C.R. 889.

148 See *R. v. Pamajewon*, *supra* note 7.

ment was justified by showing a valid legislative objective and respect for the Crown's fiduciary obligations.<sup>149</sup>

If we assume that, despite the non-derogation clause, justifiable infringement of the inherent right of self-government by the *FNGA* would have been possible, would the federal government have been able to meet the requirements for justification? Given that the issue of whether an infringement had occurred would generally have depended on proof by a particular First Nation of its right of self-government and of interference with that right by specific provisions of the *FNGA*,<sup>150</sup> it is difficult to speculate on whether these requirements could have been met in specific cases. Nonetheless, it may be worthwhile to offer some general comments on the Crown's obligation to justify infringements.

Regarding the obligation to prove a valid legislative objective, the *FNGA* (unlike the *Indian Act*) explicitly stated the legislative objectives of Parliament in section 3:

3. The purposes of this Act are
  - (a) to provide bands with more effective tools of governance on an interim basis pending the negotiation and implementation of the inherent right of self-government;
    - (a.1) to enable bands to achieve independence in the management of their affairs;
    - (a.2) to reduce the degree of involvement by the Minister in band affairs;
  - (b) to enable bands to respond more effectively to their particular needs and aspirations, including the ability to collaborate for certain purposes; and

149 This is the approach L'Heureux-Dubé J. outlined in *Corbiere* in relation to justifiable infringement by the *Indian Act* of an Aboriginal or treaty right to restrict voting rights: see quotation in text accompanying note 140, *supra*.

150 Note, however, that in cases involving selection of leaders by custom, the Federal Court has held that Indian bands have an inherent right to do so without requiring proof of this right: see the cases cited in note 75, *supra*. The reason for not requiring proof of this right appears to be that it is acknowledged by necessary implication by the *Indian Act's* definition of "council of the band": see text following note 43, *supra*. Apparently, it is a right that all bands have. Nor would it have been extinguished by a ministerial order bringing a band under the Act's electoral system, as revocation of such an order automatically revives the right to choose leaders by custom: see *Jock v. Canada (Minister of Indian and Northern Affairs)*, [1992] 1 C.N.L.R. 103 (F.C.T.D.), at 110–11; *Sparvier, supra* note 75 at 185. See also *Badger v. Canada*, [1991] 2 C.N.L.R. 17 (F.C.T.D.), affirmed (1992), 146 N.R. 79 (F.C.A.); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1994] 1 F.C. 394 (F.C.T.D.), at 405; *Jenniss c. Jenniss, supra* note 56; *Mohawk of Kanesatake v. Mohawk of Kanesatake (Council)*, [2003] F.C.J. No. 156. As a result, First Nations should have been able to mount a general challenge to the constitutionality of the leadership selection provisions of the *FNGA* by relying on the right that all Indian bands have to choose their leaders by custom and showing how the *FNGA* would have infringed that right (which the Act would have done by placing restrictions on the right that are not in the current *Indian Act*). For more detailed discussion, see McNeil, *supra* note 77 at 15–21, 25–26.

- (c) to enable bands to design and implement their own regimes in respect of leadership selection, administration of government and financial management and accountability, while providing rules for those bands that do not choose to do so.

While this would have made it easy to identify Parliament's objectives, a court would still have had to determine whether these objectives were valid in the sense of being so compelling and substantial that they justified infringement of the constitutional right of self-government of the First Nation in question. As discussed above in the context of the *Indian Act*,<sup>151</sup> this would probably involve comparing the system of government provided by the *FNGA* (or specific aspects of it) with the inherent-right government of the First Nation.

Assuming, however, that the Crown could have established that the legislative objectives for the *FNGA*'s band governance provisions were valid in the sense required for an infringement of section 35(1) rights to be justified, it would still have had to prove that the legislation respected the fiduciary obligations the federal government owes to particular First Nations. As we have seen, two aspects of this branch of the justificatory test are minimal impairment of the infringed right and consultation with the Aboriginal peoples concerned.<sup>152</sup> Regarding minimal impairment, the Crown would have had to show that the Act's provisions met the purposes stated in section 3 in a manner that did not impair the right of self-government any more than necessary.<sup>153</sup> This burden could not have been discharged by evidence of a general nature. As justification of infringement must relate to the specific rights of the Aboriginal peoples who hold those rights,<sup>154</sup> the Crown would have had to present factual evidence on a case-by-case basis justifying the application of the Act's provisions to each First Nation that was able to establish a *prima facie* infringement of its right of self-government.

Assuming the Crown could have surmounted this hurdle of proving minimal impairment, it would still have had to show that Canada's fiduciary obligations had been met by consultation. Chief Justice Lamer commented on the duty to consult in relation to infringement of Aboriginal title in *Delgamuukw*:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to

151 See text accompanying note 93, *supra*.

152 See text accompanying notes 94–104, *supra*. It would probably have been necessary to determine as well whether the *FNGA* could reasonably be expected to accomplish the purposes that are set out in s.3, just as the criteria for the application of s.1 of the *Charter* require that "the rights violation must be rationally connected to the aim of the legislation": *Egan v. Canada*, *supra* note 132 at para. 182 (see text accompanying note 133, *supra*). For example, to the extent that the *FNGA* would have restricted the right of Indian bands to choose their own leaders by custom, one might ask how it would have met one of the purposes stated in s.3(c), namely "to enable bands to design and implement their own regimes in respect of leadership selection": see McNeil, *supra* note 77 at 21–22.

153 See the passage from *R. v. Sparrow*, *supra* note 53 at 1119, quoted in the text accompanying note 94, *supra*.

154 See *supra* note 76.

aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.<sup>155</sup>

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

The inherent right of self-government is fundamental to every First Nation. It relates to and affects all their Aboriginal and treaty rights because, given the communal nature of those rights, decisions respecting them are made through the political structures of each community.<sup>156</sup> So if any Aboriginal practice, custom or tradition “truly *made the society what it was*”,<sup>157</sup> it would be that of self-government. The vital importance of governance to Aboriginal societies was clearly recognized by the Supreme Court in the *Corbiere* case.<sup>158</sup> Canada’s constitutional values of democracy and respect for minorities<sup>159</sup> also provide general support for the fundamental importance of Aboriginal self-government. So the nature and scope of the consultation necessary to justify infringements of the right of self-government should be stringent and might even require the actual consent of individual First Nations.

The communal nature of Aboriginal rights generally, and of the right of self-government in particular, means that consultation has to be with the rights-holding people *as a community*, not as individuals.<sup>160</sup> The Canadian government claimed that it had consulted extensively with First Nations people before drafting the *FNGA*. The “Backgrounder” that accompanied the Act on the government’s website contained the following statement:

The proposed First Nations Governance Act is the result of one of the most extensive consultations with First Nations people ever undertaken in Canada. Throughout the spring, summer and fall of 2001, First Nations people across Canada participated in community meetings, information sessions and discussion groups, and pro-

155 *Delgamuukw*, *supra* note 9 at para. 168.

156 See the passage from *Campbell*, *supra* note 12 at para. 137, quoted in the text accompanying note 13, *supra*.

157 These are the words Lamer C.J. used in *R. v. Van der Peet*, *supra* note 86 at para. 55 [emphasis in original], to describe the practices, customs and traditions that give rise to Aboriginal rights.

158 *Supra* note 43.

159 See *Reference Re Secession of Quebec*, *supra* note 4. This is not to suggest that Aboriginal peoples are simply minorities, but acknowledges that they are a minority of the Canadian population *demographically*, and so are vulnerable to the will of the majority expressed through Parliament. In fact, their Aboriginal and treaty rights were accorded constitutional recognition and affirmation in 1982 to provide them with some protection against majority rule: see *R. v. Sparrow*, *supra* note 53 at 1103–10.

160 On identification of the Aboriginal group in which the right of self-government is vested, see *supra* note 77.

vided their opinions and ideas through correspondence, the First Nations Governance Web site and a toll-free call centre. More than 10,000 individuals and leaders expressed their views.<sup>161</sup>

While the government obviously attempted to meet its obligation to consult with First Nations before enacting legislation that could have a significant impact on their Aboriginal and treaty rights, apparently it did not approach this matter of consultation in an appropriate manner if it expected to justify infringements of the inherent right of self-government. For an infringement to be justified, consultation must take place with the actual holders of the right as a community. Consultation with First Nations people generally, or with individuals who are members of a First Nation, will not serve to justify the infringement of a communal Aboriginal right held by that First Nation.

It can therefore be concluded that the changes to band governance in the *FNGA* probably would not have applied to First Nations that could establish an inherent right of self-government. If the non-derogation clause in section 3.1 was more than a rule of construction, justifiable infringement of that right by the Act should have been excluded by the terms of the Act itself. In other words, if section 3.1 would have had the substantive effect of making rights of self-government prevail over the Act in the event of irreconcilable conflict, justifiable infringement would not have been able to occur. If, however, justifiable infringement would have been possible despite section 3.1, and a First Nation proved that the Act did infringe its inherent right to govern itself, the Crown would then have had the opportunity to prove justification. To do so, it would have had to show that the Act's legislative objectives were compelling and substantial and the Crown's fiduciary obligations had been respected, in particular by proving minimal impairment of the right and adequate consultation with the First Nation. As we have seen, it is very unlikely that the Crown would have been able to surmount these hurdles.

#### IV. CONCLUSION

The band governance system in the *Indian Act* was generally imposed on First Nations without their consent, in many, if not all, instances in violation of their inherent right of self-government. While they probably had no legal recourse against this prior to 1982, recognition of their Aboriginal and treaty rights by section 35(1) of the *Constitution Act, 1982* changed this situation. As the inherent right of self-government is no doubt an Aboriginal right, it has enjoyed constitutional protection since 1982. This means that any infringements of it, including infringements that occurred prior to the enactment of section 35(1), are challengeable. If an infringement is shown, the burden is then on the Crown to prove it can be justified by showing a valid legislative objective and respect for the Crown's fiduciary obligations.

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161 "Backgrounder: First Nations Governance Act", on-line: <[http://www.fng-gpn.gc.ca/FNGA\\_bkgnd\\_e.asp](http://www.fng-gpn.gc.ca/FNGA_bkgnd_e.asp)> (accessed 17 June 2002). For more detailed information on the consultation process and results, see "Communities First: First Nations Governance Consultation Report – Phase 1, January 2002", on-line: <[http://www.fng-gpn.gc.ca/CRPI\\_J02\\_e.html](http://www.fng-gpn.gc.ca/CRPI_J02_e.html)> (accessed 1 July 2003).

This article has attempted to demonstrate ways in which application of the *Indian Act*, through successive amendments up to the present, has probably infringed the inherent right of self-government of at least some, and possibly all, First Nations in Canada. This is not to suggest that a legal action against the constitutional validity of the Act's band governance provisions would succeed. It is not so much the Act itself as its imposition on individual First Nations that has infringed their inherent governance rights. Moreover, as infringement is in part a factual matter that depends on proof of an Aboriginal right, individual First Nations would bear the burden of proving how the Act has infringed their inherent rights. Any challenges to the Act's band governance provisions therefore should be framed as challenges to their application to individual First Nations, rather than as challenges to the constitutional validity of the provisions themselves.

Consequently, the initiative is in the hands of individual First Nations. They can choose to continue to live with the *Indian Act's* band governance provisions, until such time as new governance arrangements are negotiated with them, either individually or as part of broader changes to the relationship between the Canadian government and First Nations generally. Or they can challenge the application of those provisions, in whole or in part,<sup>162</sup> in Canadian courts by showing how they infringe their inherent governance rights. Because such a challenge would not question the constitutional validity of the provisions, it would not affect their application to other First Nations who choose to continue to be governed by them for the time being. The political stability of First Nation communities generally would therefore not be threatened by legal challenges brought by individual First Nations.

The analysis in this article also reveals the extent to which the Canadian government is probably stuck with the *Indian Act's* band governance provisions until such time as different arrangements can be negotiated with First Nations. Changes such as those proposed in the *First Nations Governance Act*, while they may or may not be constitutional, would certainly be challengeable in their application to individual First Nations. Our discussion has shown that, were a First Nation to prove that the proposed legislation infringed its inherent governance rights, the Crown would be hard pressed to convince a court that the infringement was justified. Quite apart from the persuasive political arguments against this legislation, it is therefore just as well the federal government has chosen to withdraw it. No one needs the protracted litigation, with its inevitable aggravation and cost, that unilateral federal action like this would have provoked. It is better for everyone concerned to devote available energy and resources to negotiating the way out of the *Indian Act* and into new relationships where the inherent right of self-government will be respected and can be fulfilled.

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162 It would be possible to challenge some, but not all, of the Act's band governance provisions because in constitutional cases courts generally consider only the specific provisions being challenged. For example, in *Corbiere*, *supra* note 43, the Supreme Court only ruled on the constitutionality of s.77(1) of the *Indian Act*, even though other provisions in the Act (e.g., s.77(2)) probably suffer from the same defect.

