# RECOGNITION OF INHERENT RIGHTS THROUGH

# LEGISLATIVE INITIATIVES

These materials were prepared by David C. Nahwegahbow of the firm, Nahwegahbow, Nadjiwan, Corbiere, North Bay, Ontario for a Conference held in Toronto, Ontario hosted by Indigenous Bar Association, October 18, 2002.

# RECOGNITION OF INHERENT RIGHTS THROUGH LEGISLATIVE INITIATIVES

## INTRODUCTION

The Minister of Indian Affairs, Robert Nault, caused an uproar recently with comments he made during a CBC interview on October 7, 2002, when he announced that the federal government was walking away from a number of negotiating tables across the country that he deemed to be unproductive. These tables – thirty in all, out of a total of approximately 170 – deal with a range of matters, according to the Minister, from specific claims to self-government negotiations and comprehensive claims within the BC Treaty Process. One of the things that was startling about the Minister's announcement was his rationale for walking away from certain tables. He characterized some of the demands of First Nation leaders as excessive, such that it would be bad faith to continue to negotiate under such circumstances. When asked by the interviewer to "give us an example of where you think the other side has been negotiating in bad faith, or where their demands are considered preposterous", the Minister responded:

> For example, jurisdiction. If certain jurisdictions are asked for that are outside of my mandate ... for example, some First Nation leaders have been promoting the whole notion of being sovereign, and being sovereign meaning that they don't need delegated authority from the federal government, that they can make their own laws, that's way outside of my mandate. That is an example when it is important for the Minister and the negotiator to send the message that this is not on and it is not part of the framework agreement that we signed. [1]

I find these comments shocking with respect to self-government because they directly contradict the Liberal government's self-government policy, which is stated to recognize the inherent right of self-government as an existing Aboriginal and treaty right.[2]

In this paper, I will argue in favour of the inherent right of self-government, and that if the

[1] Transcript of Interview done by Mary Lou Finley with Minster Nault, CBC, As It Happens, October 7, 2002.

federal Parliament is to legislate in respect of this right it must do so through legislative initiatives that are based on recognition.

I put forward Minister Nault's comments as a context for this presentation because I have been asked to, among other things, assess the Minister's recently re-introduced legislative proposal, the *First Nations Governance Act*, as an example of "recognition of inherent rights through legislative initiatives." Although it would appear that the proposed *First Nations Governance Act*, now known as *Bill C-7 (*formerly *Bill C-61),* does not purport to recognize the inherent right of self-government, the *Bill* and the Minister's comments do raise some questions which are germane to our discussion.

These questions, which shall serve as an outline for this presentation, are as follows:

- Do Aboriginal peoples possess an inherent right of self-government?
- Is it appropriate and possible to recognize the inherent right of self-government through legislative initiatives?
- If such recognition is possible and appropriate, what will the legislative initiative look like and how will it operate?
- What is the Canadian federal policy on recognition of the inherent right of self-government?
- What are the international trends, do they support recognition?

[2] Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, 1995.

## THE INHERENT RIGHT OF SELF GOVERNMENT

The first question is whether there is an inherent right of self-government and, more specifically, whether it is possessed by the Aboriginal group in question. This is an important question because if Aboriginal peoples do possess that right, then, the right is protected as an existing Aboriginal and treaty right by s. 35 of the *Constitution Act, 1982*, and cannot be unilaterally regulated by the federal legislation. Also, because of the fiduciary obligations arise from these rights, the federal Parliament and the federal government have a duty to ensure that their laws and actions do not infringe Aboriginal and treaty rights without proper justification .[3] Moreover, since Aboriginal peoples can be expected to resist legislation that potentially infringes upon their constitutional rights – like any other people who value their constitutional rights – the only way in which the inherent right of self-government can be legislated, manageably and with some level of cooperation, is if the legislation is based on recognition.

Under s. 35, self-government as an "Aboriginal right", is based on the notion accepted by the Courts, that Aboriginal nations were organized societies with their own laws and customs when Europeans arrived in North America.[4] In terms of "treaty rights", it is argued that either the right of self-government continues as a residual Aboriginal right which was not extinguished by treaty, or that the right of self-government is itself a treaty right which was recognized when the Crown entered into treaties with Indian nations.

The inherent right of self-government has not yet been legally recognized by the Supreme Court of Canada. However, as aforesaid, it has been recognized in policy by the federal government; and the Royal Commission on Aboriginal Peoples has recognized it. Moreover, the basis and framework for its recognition has been established by the Supreme Court of Canada in *Sioui*[5], *Van der Peet*[6] , *and Pamajewon*[7]; and the BC Supreme Court recognized an inherent right of

[3] R. v. Sparrow, [1900] 3 C.N.L.R. 160 (S.C.C.)
[4] See for example: Calder v. Attorney General of British Columbia, [1973] S.C.R. 313, at p. 328.
[5] R. v Sioui, [1990] 3 C.N.L.R. 127 (S.C.S.)
[6] R. v Van der Peet, [1996] 4 C.N.L.R. 177 (S.C.C.)
[7] R. v Pamajewon, [1996] 4 C.N.L.R. 164 (S.C.C.)

self-government in the *Campbell* Case[8].

Aspects of this right, namely matters of leadership selection/elections, also find expression as Aboriginal and treaty rights in a more specific way as customs. Section. 2(1)(b) of the *Indian Act*[9] -- which is a form of legislative recognition of the inherent right of self-government -- recognizes councils chosen "according to the custom of the band". This has spawned considerable case law, including the case of *Bone v. Sioux Valley Indian Band No. 290*, wherein Justice Heald of the Federal Court, said:

> [i]t does not confer a power upon a Band to develop a custom for selecting its council. Rather, it recognizes that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors. The definition of "council of a band" acknowledges that prior to the enactment of the Indian Act in 1951, Indian Bands had their own methods for selecting the Band Council. The power or ability to continue choosing the Band Council in the customary manner is left intact by the Indian Act, except in those cases where the power is removed by a ministerial order under subsection 74(1) of the Act...Thus in my view the Band may exercise this **inherent** power unrestrained by subsection 2(3)(a) of the Indian Act.[10] [emphasis added]

Customs respecting the manner of selecting leaders, particularly historic customs, comprise the system of laws of Aboriginal societies, which Canadian common law recognizes as the basis of Aboriginal rights. As former Chief Justice Lamer said in *Van der Peet*, " in order to be an Aboriginal right, an activity must be an element of a practice, custom or tradition..."[11]

It would be appropriate at this stage to have a closer look at the framework for proving Aboriginal rights set out in *Van der Peet*.[12] The same legal principles are applicable to

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[8] Campbell v British Columbia (Attorney General), [2000] 4 C.N.L.R. 1 (B.C.S.C)
[9] Indian Act, R.S.C. 1985, C.I-5, as amended
[10] [1996] 3 C.N.L.R. 54 (F.C.T.D), at p. 65
[11] Supra, note 6, at p. 201[emphasis added]

[12]However, many people are critical of the current domestic law with respect to Aboriginal and treaty rights — particularly its interpretation of the historic treaties. See for example, the paper

asserting customs regarding self-government.

The Court has made it clear that it will review all Aboriginal rights claims on a case-by-case

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prepared by Sharon Venne, for the *Building the Momentum: A Conference on Implementing the Recommendations of the Royal Commission on Aboriginal Peoples*, April 1999 entitled, "Treaty-making and its Potential for Conflict Resolution between Indigenous Nations and the Canadian State."[hereinafter Venne] In her review of the interpretation of the treaties between Indigenous peoples and the Canadian state she concludes:

> Indigenous treaties have merited meagre consideration by the legal history of the Canadian state.

See also for example, the paper prepared by John Borrows, for the *Building the Momentum: A Conference on Implementing the Recommendations of the Royal Commission on Aboriginal Peoples*, April 1999 entitled, "Domesticating Doctrines: Aboriginal and Treaty Rights, and the Response to the Royal Commission on Aboriginal Peoples." In his review of Canada's approach to Aboriginal and treaty rights he concluded:

> Canada continually uses its legislatures to modify, infringe or extinguish aboriginal and treaty rights. Courts have continued to develop, support and implement this framework. The domestication of Aboriginal and treaty rights in this way represents another stage in the development of colonialism for indigenous peoples.

See also for an international example, *Study on treaties concluded between Indigenous peoples and States*, E/CN.4/Sub.2/AC.4/1988/CRP.1 [hereinafter Martinez Treaty Study]. The Martinez Treaty Study concluded:

195. It is not possible to understand this process of gradual–but incessant–erosion of the Indigenous peoples' original sovereignty, without considering and, indeed, highlighting the role played by "juridical tools", always arm in arm with the military component of the colonial enterprise.

196. In practicality, all cases – both in Latin America and in other regions mentioned above –, the legal establishment can be seen coming together and serving effective tools in this process of domination...have all been present to juridically "validate" the organised plunder at the various stages of the colonial enterprise.

More importantly, these conclusions are also supported by First Nation peoples. They believe that the current state of the law does not respect their rights

basis. The practices, traditions or customs on leadership selection for each First Nation, "must be an element of a practice, custom or tradition **integral to the distinctive** culture of the aboriginal group claiming the right."[13] The Court concluded that the highlighted aspect of this passage was important to the test.

Next, First Nations must be able to trace the practices, traditions or customs with respect to governance to a period "*prior to the arrival of Europeans in North America*".[14] This may pose a problem for some First Nations — based on how long the *Indian Act* has been applied to First Nations. Oral historical and documentary research would have to be undertaken to meet this branch of the test.

This onerous requirement was somewhat tempered by the Court when it concluded:

> I would note that the concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain and continuity between their current practices, traditions and customs, and those which existed prior to contact. It may be that for a period of time an Aboriginal group, for some reason, ceased to engage in a practice, tradition or custom which existed prior to contact, but then resumed their practice, tradition or custom at a later date. Such an interpretation will not preclude the establishment of an Aboriginal right.[15]

To summarize on this point, the trend in policy and jurisprudential developments in Canada seems to be toward recognition of the inherent right of self-government as an existing right under s. 35. Judicial determinations will be on a case-by-case basis, of course. But legislators need to be mindful of the constitutional character of this right in seeking to pass laws, which may affect it.

An additional consideration is the application of the *Charter*. It should be underlined that if a right of self-government, or an aspect thereof, qualifies as an Aboriginal and treaty right, it may

[13] Supra, note 6, at p. 201
[14] Ibid, at p. 205
[15] Van der Peet, supra, note 3 at 206.

not be subject to the *Charter*. There are two reasons for this: (1) The *Charter*[16] only applies to legislation enacted by the federal Parliament, provincial legislatures or their delegates: and First Nation customs are not federally delegated legislation: (2) Section 25 of the *Charter* shields Aboriginal and treaty rights from being abrogated and derogated by the *Charter*. However, s. 35(4) of the *Constitution Act, 1982* provides that Aboriginal and treaty rights are guaranteed equally to male and female persons.

**IS RECOGNITION THROUGH LEGISLATION APPROPRIATE AND POSSIBLE**

First of all, is it appropriate to recognize an inherent right of self-government through federal (or provincial) legislative initiatives?

This is an important question on both the philosophical and constitutional levels. On a philosophical level, there are those that would argue that if Aboriginal peoples possess an inherent right to govern, how can an outside authority legitimately legislate over them? This is a valid point. Here, I think the distinction ought to be made between legislation, which purports to regulate the exercise of the inherent right and legislation, which prescribes the way in which the Canadian government proposes to interact with and recognize Aboriginal peoples who assert an inherent right of self-government. The former is clearly unacceptable intrusion into the internal affairs of the Aboriginal people, but the latter is not: although the law will have some impact on the Aboriginal group from a practical standpoint, it will nevertheless, not be directly and intrusively applicable. Perhaps this is a fine distinction, but I believe it is an important one. In the end, the terms of the legislation needs to be assessed on the extent of its intrusiveness.

[16] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutions Act*, 1982.

From a constitutional standpoint, of course, we know that both federal laws and provincial laws may be held to apply to an Aboriginal people, even if the effect of those laws would be to infringe on existing Aboriginal and treaty rights. However, such laws must undergo the justificatory test established by the Supreme Court in *Sparrow*[17], *Van der Peet*[18] and *Delgamuukw*[19]. Presumably legislation, which recognized the inherent right of self-government, would not be seen as an infringement and therefore would not be in contravention of s. 35 of the *Constitution Act, 1982*.

The question: whether it is legally possible to recognize the inherent right of self-government through legislation, has been canvassed by both the Penner Committee and the Royal Commission on Aboriginal Peoples. Interestingly, the Penner Committee in examining this issue relied heavily on a position paper presented by the Canadian Indian Lawyers' Association, the predecessor of the IBA, which argued that this was possible even in areas of provincial jurisdiction:

> Representatives of the Canadian Indian Lawyers' Association pointed to the exclusive jurisdiction of the federal government over Indians and Indian lands, even with respect to matters otherwise falling under provincial jurisdiction..... The Committee's view is that Parliament should move to occupy the field of legislation in relation to "Indians and Lands reserved for the Indians" and then vacate these areas of jurisdiction to recognized Indian governments. [20]

**THE MACHINERY REQUIRED TO IMPLEMENT LEGISLATIVE RECOGNITION**

As aforesaid, both Penner and RCAP recommended self-government recognition legislation and significant changes to the machinery of the federal government to oversee the implementation of the legislation. The *Penner Report* advocated explicit constitutional recognition of the inherent

[17] Supra, note 3.
[18] Supra, note 6.
[19] Delgamuukw v. British Columbia, [1998] C.N.L.R. 14 (S.C.C.)

right of self-government, but in the interim recommended that:

> [the] federal government introduce and Indian First Nations Recognition Act which would confirm the federal government's willingness to recognize the maximum amount of self-government now possible under the Constitution.[21]

The proposed Act would establish the criteria for recognition, and Penner recommended that the legislation be jointly developed by First Nations and the government.

The *Penner Report* recommended two additional legislative initiatives. One Act would authorize the federal government to enter into agreements with First Nations as to the jurisdiction each would occupy after recognition. A third piece of legislation, referred to above, was intended to occupy the field of s.91(24) of the *Constitution Act, 1867* to preclude the application of provincial laws to First Nations in all areas of jurisdiction "necessary to permit Indian First Nation to govern themselves effectively".[22]

The *Penner Report* recommended a new Ministry of State for Indian First Nation Relations to oversee the implementation of the proposed new legislative measures. In connection with this, the *Penner Report* also recommended the creation of a Panel to review First Nation requests for recognition. The Panel members would be jointly appointed by the Ministry and First Nations. To facilitate First Nation participation in the process, the *Penner Report* recommended special funding.

RCAP made similar recommendations[23]. In short, RCAP recommended, among other things, the promulgation of a new Royal Proclamation and an Aboriginal Nations Recognition and

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[20] Canada, House of Commons, Special Committee on Indian Self-Government, "Indian Self-Government in Canada," (Queens Printer for Canada: 1983), at p. 59
[21] Ibid, at p. 57
[22] Ibid, at p. 59
[23] Canada, Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Volume 2, Part 1, (Canada Communications Group Publishing, 1996).

Government Act. This Act is similar to that proposed by the *Penner Report* and would establish a process of recognition of Aboriginal governments. RCAP recommended the creation of a new Department of Aboriginal Relations to oversee the implementation of the Recognition Act. RCAP goes beyond the *Penner Report* in making significant recommendations with regard to capacity building. The most significant recommendation it makes in this regard is for the creation of an Aboriginal Government Transition Centre.

More recently, the Senate Standing Committee on Aboriginal Peoples, in a Report entitled *Forging New Relationships: Aboriginal Governance in Canada*[24], also recommended new legislation "for the purposes of providing a broad statutory framework to guide the Government of Canada in the negotiation and implementation of relationships by way of treaties and other agreements with Aboriginal peoples."[25] The Committee suggested that this legislation "might provide for: ..... recognition of the inherent right of self-government as an existing right under section 35 of the Constitution Act, 1982 ..."[26]. And, like the two previous reports, the Senate Committee recommended the establishment of a new body – an Office of Aboriginal Relations – which would be charged with the responsibility to negotiate and implement these new relationships.

Significantly, all three Committee reports are highly critical of the Department of Indian Affairs and strongly recommend that the new governmental structures be located outside the existing Department.

[24] Canada, Senate, Standing Committee on Aboriginal Peoples, "Forging New Relationships: Aboriginal Governance in Canada" (February 2000).
[25] Ibid, at p. 28
[26] Ibid, at p. 25

## CANADIAN FEDERAL POLICY ON RECOGNITION OF THE INHERENT RIGHT OF SELF-GOVERNMENT

Minister Nault's comments to the CBC, noted in the introduction to this paper, reflects the schizophrenic approach, which the federal government currently takes on the issue of recognition of the inherent right of self-government.

Until the Liberals came into power in 1993, the government had maintained a consistent policy of non-recognition and this position prevailed throughout the period of intense constitutional debates of the 1980's and early 1990's. The *Penner Report,* which was issued in November 1983, was not able to move government to change its position. The government's response, which was released on March 5, 1984, graciously acknowledged the *Penner Report*, and agreed "with the argument put forward by the Committee that Indian communities **were** historically self-governing ..."[27] .[emphasis added] However, it was careful not to put this in contemporary terms. As a follow-up to this response, then Minister of Indian Affairs, John Munro, tabled the Indian Self-Government Bill in the House of Commons on June 27, 1984. Though the Bill had some features which were responsive to Penner, such as a proposed "recognition panel", in the end the proposal was rejected by First Nations because it did not recognize the inherent right of self-government. It was not enacted into law.

During this period, the closest Canada came to modifying its position was when the notion of a delayed justiciable right of self-government was put forward, as part of a package of constitutional amendments in the Charlottetown Accord[28]. The Accord was put to a national referendum in 1992 and was rejected.

What I term the schizophrenic approach to dealing with the inherent right, started when the

[27] Canada, "Response of the Government to the Report of the Special Committee on Indian Self-Government" (Minister John Munro, Department of Indian Affairs and Northern Development, March 5, 1984), at p.1

Liberals were elected in 1993. When the Liberals came to power in 1993, they were elected on a platform[29] which had as one of its planks, a commitment that a Liberal government would recognize the inherent right of self-government as an existing right within the meaning of s. 35 of the *Constitution Act, 1982*. Pursuant to this political commitment, the Chretien government issued its *Federal Policy on Aboriginal Self-Government*[30] in 1995. Obviously, the Prime Minister never fully understood or believed in the notion of an inherent right of self-government, or the officials convinced him against it when he got into power. Although the policy purported to recognize the inherent right, in truth, the recognition was so circumscribed as to render the recognition meaningless. For example, the inherent right could only be exercised after certain powers were negotiated with the government. The powers, which needed to be negotiated included those respecting internal governance matters, which RCAP had said did not need negotiation. The federal policy also made Aboriginal laws subject to the *Charter* and and required them to be harmonized with federal and provincial laws. The policy has been overwhelmingly rejected by First Nations.

That the federal policy of recognition is in effect no recognition at all, became clear after the disclosure of instructions to federal negotiators in 1996. The *Guidelines for Federal Self-Government Negotiators*, purportedly issued by the Department of Justice, draw a distinction between "general recognition" and "specific recognition" of the inherent right of self-government. While the instructions acknowledge the former -- in other words, that an inherent right may exist in the abstract -- it directs negotiators not to concede that any particular Aboriginal group possesses such a right.

The Chretien government's paradoxical approach to self-government policy has produced two ill-advised legislative initiatives, including that of the current Minister. The first was introduced by Minister Ron Irwin in 1997, the same Minister who issued the Federal Self-Government

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[28] Consensus Report on the Constitution, Charlottetown, August 28, 1992, Final text, part IV.
[29] Liberal Party of Canada, Greeting Opportunity: The Liberal Plan for Canada, (1993).

Policy. The *Indian Act Optional Modification Act*, known as *Bill C-79,* as the title indicates, was optional for those First Nations who wanted to opt in. However, it was not based on recognition of the inherent right of self-government and was accordingly rejected by First Nations. It was not enacted into law.

This brings me to the current legislative initiative, the proposed *First Nations Governance Act*, which is being put forward by the current Minister of Indian Affairs, Robert Nault. The proposed legislation does not purport to recognize, or be based upon, the inherent right of self-government. It is based on a purely delegated model. It operates from the starting assumption that the *Indian Act* is the only source of governance structures and authorities for bands. The Preamble to the Bill says that "effective tools of governance have not been historically available under the *Indian Act*" and that bands "require effective tools of governance".

In assessing the constitutionality of the *Bill*, a key issue in a section 35 analysis will be whether the nature of the self-government provided for in the proposed legislation – i.e., whether it is based on the inherent rights model or the delegated model – makes a difference in determining whether potential infringements are justified. If it does, then, the delegated nature of the *Bill* could be a fatal flaw.

Probably with a view to justification, the drafters of *Bill C-7* obviously wanted to indicate, in the *Bill*, that the legislators were cognizant of, and have accommodated elsewhere, the inherent right of self-government in bringing forward this legislation. The 6th and 7th recitals of the Preamble state:

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

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[30] Supra, Note 2.

> Whereas neither the *Indian Act* nor this Act is intended to define the nature and scope of any right of self-government or to prejudge the outcome of any self-government negotiation;

But these clauses do not turn the proposed legislation into an Act based on recognition of the inherent right – this seems to be the intent of the 7th recital. On the other hand, the explicit legislative reference to the federal policy recognizing the inherent right of self-government is an apparent contradiction. It begs the question: if you recognize it, how can you justify infringing it with delegated legislation federally imposed?

Section 3 of the *Bill* gives further definition to the intended purpose of the Act, *vis-à-vis* the inherent right of self-government. Paragraph 3 (a) says that one of the purposes of the Act is,

> 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;

The cumulative effect of this and the preambular clauses referred to above, seems to be that while Canada has a policy ( probably intended to be non-justiciable ) of recognizing the inherent right of self-government, its view is that this right is one which is contingent on negotiation. Unless and until that right is negotiated and implemented, the only tools of governance which bands have are those that are in the *Indian Act*. The *Bill* is intended to afford some interim relief in this regard by providing some more effective tools of governance, but these are clearly out of a delegated toolbox.

The theory upon which *Bill C-7* is based, is at odds with what the Royal Commission on Aboriginal Peoples said about the inherent right of self-government. RCAP said that the right of self-government is an existing Aboriginal right within s. 35 of the *Constitution Act, 1982.* The right allows First Nations to make laws on their own initiative with regard to internal matters, (such as those covered in Bill C-7), without the need for any approval or authorization by the

federal government[31]. The recent *Campbell*[32] decision of the BC Supreme Court also decided in favour of the existence of an inherent right of self-government. In light of these developments, and the federal policy recognition of the inherent right of self-government, the fundamental premise and principle of *Bill C-7* appears to be flawed constitutionally.

A significant consideration for First Nation leaders, in deciding whether *Bill C-7* is an acceptable interim solution, is the likelihood of being able to negotiate an acceptable self-government agreement in the near future under current policies and processes, namely under the Comprehensive Claims Policy and the Federal Self-Government Policy. This in turn requires a critical examination of those policies and the experiences under them, so *Bill C-7* cannot be viewed in isolation. It should also be noted, that neither policy has kept in-step with recent developments in the case law and both have been rejected by First Nations. The most significant consideration for First Nations in BC however, is that as a result of the recent Referendum, the provincial government is legislatively bound to negotiate only delegated "municipal style self-government" under the BC Treaty Process. This effectively makes the *Bill C-7* "interim" solution a dead-end street for First Nations in BC.

This is reinforced by Minister Nault's recent announcement that the federal government has decided to walk away from certain negotiating tables across the country, including comprehensive claim and self-government negotiations. This concern applies equally to First Nations outside BC.

In many ways, *Bill C-7* is a repeat of previous legislative initiatives, in that it deals with the issue of legal status of bands, increasing band by-law powers, accountability, and especially to the extent that it does not recognize the inherent right of self-government. On the other hand, it represents a serious regression in federal policy from the Munro Bill, which contained features

[31] Canada, RCAP, Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution, (Canada Communications Group, 1993).

that attempted to respond to the *Penner Report*; to the Charlottetown Accord, which recognized a delayed justiciable inherent right of self-government; and even to the Irwin Bill, which was at least optional in nature.

This degeneration in native policy and the paradoxical approach to self-government is confusing, troublesome and not conducive to the development of sound public policy.

**INTERNATIONAL DEVELOPMENTS**

These domestic developments are to be contrasted with promising developments in international human rights of Indigenous peoples, especially with regard to treaties, self-government, and self-determination.

One of the principal initiatives in the international forum at this time is *The United Nations Draft Declaration on the Rights of Indigenous Peoples*. This instrument is currently working its way through the United Nations process and will not likely be adopted by the United Nations General Assembly for some time. Nevertheless, it is developing some currency already, so it is useful to refer to it. Article 3 of the *Declaration on the Rights of Indigenous Peoples* is a key provision on the right of self-determination, which provides as follows:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 31 is also pertinent:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing,

[32] Supra, note 8.

> employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

RCAP recognized that Aboriginal peoples in Canada had not just the right of self-government, but also the right of self-determination. It is also worth mentioning that Canada has not completely implemented the *International Covenant on Civil and Political Rights* into domestic law. As a result of the Indigenous lobby, Canada's respect for this Covenant has repeatedly been scrutinized by the Human Rights Committee. This Committee's general role is to review the implementation of this Covenant. Recently, in the Committees' review of Canada's report, they were quite critical of Canada's treatment of Aboriginal peoples, particularly with respect to the right of Aboriginal peoples to self-determination[33]**.**

The debate and study on Indigenous issues in the International community has resulted in many positive initiatives. For example, in the Treaty Study undertaken by Martinez pursuant to a resolution of the Commission on the Prevention of Discrimination and Protection of Minorities. Martinez says:

> 264. Another general Conclusion to be made is that, as recognized in the Draft United Nations Declaration on the Rights of Indigenous Peoples submitted by the Working Group to the Sub-Commission and adopted by the latter, all the human rights and freedoms recognized in international instruments – either legally binding norms or non-binding standards – accepted by the State in which they now live, are applicable to Indigenous peoples and individuals now living within their borders. This also applies to all rights and freedoms recognized in the domestic legislation of the State concerned, for all individuals and social groups under their jurisdiction**.** In the view of the Special Rapporteur this is so, provided that the manner in which said rights and freedoms are recognized in said instruments is, in fact, consistent with Indigenous customs, societal institutions,

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[33]See: UN Press Release, of March 26, 1999, Human Rights Committee Begins Consideration of Canada's Fourth Periodic Report.

and legal traditions.[34]

If Canada is to maintain its international stature as country with high standards and respect for human rights, it will have to take a more enlightened approach to recognizing and respecting the right of Aboriginal peoples to self-determination and self-government, which is consistent with emerging international norms.

**CONCLUSION**

In conclusion, I want to revisit and respond in summary fashion, to the questions I posed at the beginning of this paper. First of all, do Aboriginal peoples possess an inherent right of self-government? RCAP said yes, the BC Supreme Court said yes in the *Campbell* case, and even the federal government said yes in the federal self-government policy.

Second, is it appropriate and possible to recognize the inherent right of self-government through legislative initiatives? Two Parliamentary Committees and a Royal Commission, after hearing from experts and numerous Aboriginal representatives, recommended recognition legislation. Moreover, legislation, which recognizes the inherent right of self-government and does not infringe it, would not likely be found to be contrary to s. 35 of the *Constitution Act, 1982*.

Third, what would the recognition legislation and machinery of government look like to implement the recognition of the inherent right of self-government? This has been thoroughly studied by RCAP, Penner and the Senate Standing Committee on Aboriginal Peoples. Their recommendations are similar, basically what is needed is a Recognition Act, a new Ministry or Office located outside the current Department of Indian Affairs to oversee the implementation of the Act.

[34] Supra, note 12, pp. 51-52[emphasis added]

Fourth, what is the federal policy on recognition of the inherent right of self-government? This might seem like a simple question, but it is not. Though the current government professes to recognize the inherent right, its actions do not reflect this. Indeed, the proposed *First Nations Governance Act* is a case in point. This paradoxical approach to native policy gives rise to much confusion and is not conducive to sound public policy development.

Fifth, what are the international trends? Emerging international norms are toward greater recognition of the rights of Indigenous peoples to self-determination and self-government. Canada is finding itself, more and more, the object of criticism by international agencies for its failure to recognize these fundamental human rights.

Clearly, a more enlightened and common sense approach to native policy is one which is based on recognition of inherent rights, rather than one base on their denial such as that reflected in the current *First Nations Governance Act* proposal.