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Indigenous Governance: Questioning the Status and the Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights

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Indigenous peoples have always had governance. This fact has been a matter of great debate among Canadian politicians and scholars for many years, but there is little doubt that Indigenous Nations had developed for themselves complex systems of government prior to colonization. The important questions that need to be asked today do not concern the pre-existence of Indigenous government but instead raise question of the existence of Indigenous government today. Are Indian Act band councils governments? What about 'traditional' governments? What about self-government? This paper responds to such questions concerning the status of Indigenous governments as governments and considers their place in the federal and constitutional order of Canada. These questions are addressed from the vantage of my existing work on treaties, treaty federalism and/or treaty constitutionalism, 'traditional' governance, Aboriginal public policy and Indigenous constitutional visions.

More specifically, this paper will question whether Indigenous governments are governments (focusing on Indian Act band councils). It considers possibilities for reconciling these governments with Canada's constitutional order and its constitutional commitment to Aboriginal and treaty rights. This paper argues that Indian Act governments are not 'true' governments and that it is possible for Indigenous peoples to reconcile their chosen governments with the Canadian constitutional order. This paper begins with a consideration of 'traditional' government and its constitutional status. It then proceeds with a discussion of regime replacement (the imposition of the band council system) and its status as a government. Finally, the paper concludes with a discussion of how Indigenous governments can be reconciled with

and strengthened within the Canadian constitutional order. Before proceeding with a discussion of Indigenous governance, it must be noted that while attempts are made to draw upon a range of examples and to address diversity, it is next to impossible to write about Indigenous governance in a manner which speaks to the histories and experiences of all Indigenous nations and First Nations communities. The complexities of history, the divergent experiences with colonialism, and the fact that all nations have different political traditions and political systems makes any conversation about Indigenous government – past, present, and future – extremely difficult and extremely complex. As such, what is presented in this paper is a generalized account of Indigenous governance that focuses on the nature and meaning of Indigenous governance (traditional and band council) and possibilities for decolonization (reconciling and strengthening Indigenous governance) while paying some attention to diversity.

‘Traditional’ Governance

Whereas all peoples have governance, Indigenous governance is exceedingly different from most. Indigenous governance is extremely different from the political tradition which emerged in Europe. European systems of government were designed by and designed to maintain the privilege and power of those ‘superior beings’ who claimed dominion over the earth and the right to rule other humans. Meanwhile, as a previous study of Indigenous governance suggests that:

within the parameters of Indigenous thought, governance is “the way in which a people lives best together” or the way a people has structured their society in relationship to the natural world. In other words, it is an expression of how they see themselves fitting in that world as a part of the circle of life, not as superior beings who claim dominion over other species and other humans.ⁱ

Indigenous political systems were and are complex structures of governance. By and large, they were designed to fit with the realities of a peoples’ territory and to provide opportunities to make, interpret and enforce ‘laws’ in a manner that was consensual and inclusive. In constructing their political systems, each nation created unique and complex systems of government. The Blackfoot Confederacy, for instance, created a complex web of clan, society and bundleⁱⁱ structures of governance at the sub-national, national and confederal levels, each of which operated within its set area of responsibilities or jurisdictions and in a manner defined and

confined by their own constitutional order.ⁱⁱⁱ Meanwhile, their neighbors the Plains Cree had a more individualistic system of government consisting primarily of a council of family representatives with societies and bundles (as institutions) playing a more limited role than is the case in the Blackfoot political system.^{iv} Created to fit within completely different territorial realities and to address different political, social and economic realities and needs, Indigenous political systems were extremely diverse. For example, the nations of the North West Coast (such as the Haida and Nisga'a), developed the potlatch system of government using inter-dependent and complex structures of clan and national governance. As on the plains, though similar in structure and function (especially for the untrained eye), each nation had their own distinct political system.

Indigenous political systems were created and are maintained by a constitutional order. Interesting – because most non-Indigenous people do not think of Indigenous peoples as having had constitutions prior to colonization.^v In fact, most would be likely to suggest that the only constitution Indigenous peoples have (or ever had) is the Canadian Constitution. But Indigenous peoples were not sitting around waiting for colonists to provide them with government. Nor were they waiting for settlers to provide or assist in creating constitutions which define and confine a system of government, the rights and/or responsibilities of government officials, matters of jurisdiction, or the rights and/or responsibilities of citizens. Still, we tend not to think in terms of Indigenous constitutions or of Indigenous peoples having had constitutional orders historically. Yet, these constitutional orders provided the teachings, 'supreme law', political philosophies and jurisdictions that were operationalized within the political system.^{vi}

Examples of Indigenous constitutions include the *Haudenosaunee* Great Law of Peace,^{vii} the Mi'kmaq teachings of the seven districts that comprise the Grand Council and the rights and responsibilities of individuals, families, clans and leadership within each district^{viii} and the *adaak* and *kungax* of the Gitxan and Witsuwit'en nations which lay out the laws (rights and responsibilities) of each of the houses and the each of the nations.^{ix} Each Indigenous constitutional order set forth a system of government, provided a defined and limited ability to make, interpret and enforce 'law' within a territory and set forth the rules of the 'political game' and the roles and responsibilities of all members of the nation. Such constitutions were not written documents and quite often – as is the case with the British Constitution – these

constitutional orders consisted of a myriad of documents (albeit ‘oral documents’ such as songs, stories, ceremony, orations and bundles). Whatever the case, all Indigenous constitutional orders consist of an array of constitutional ‘documents’ or sources. These constitutional orders provide for and confine a great diversity of Indigenous political systems and their ability to make, interpret and enforce law within a given territory. Such constitutional orders were not subject to the authority of another nation or another government, but they were subject to the people of the nation and the manner in which they decided to live within and relate to their territory (and other beings in their territory). This did not change with colonization.

Colonization

Indigenous peoples did not cede to the newcomers their constitutional orders or subject themselves to the powers of foreign authorities (be they French, British or Canadian).^x By and large, these Indigenous constitutional orders were instead maintained and protected by the treaties which were negotiated between representatives of Indigenous nations and settler societies. That is to say, Indigenous leaders sought to protect and thus, maintain their constitutional orders through treaty relationships just as they had in the past in their dealings with other Indigenous nations. While the spirit and intent as well of the texts of the treaties are testament to this, and to the corresponding promises made by colonial nations to this effect, history tells a story of broken promises. In situations where no treaties were negotiated, Indigenous constitutions were quite often recognized, affirmed and protected by the terms of the original relationship between Indigenous nations and the newcomers. Recognized or not, protected or not, in situations where no treaties were negotiated Indigenous constitutional orders remain intact. No rights and responsibilities were afforded to other nations to govern within (or claim) any part of their territories for their own colonial nations. Most importantly, no rights and responsibilities were delegated by Indigenous nations to colonial nations claim jurisdiction over or to govern Indigenous nations or their territories. Thus, for Indigenous nations without treaty (such as those in British Columbia) all rights and responsibilities for governance continue to be vested in Indigenous constitutional orders.

Where treaties were negotiated, Indigenous peoples did not cede their sovereignty or give up their constitution orders or their system of government. Rather, they negotiated agreements and formalized relationships that dealt with such matters as creating and maintaining peace and friendship between the nations, favourable trading relationships, the sharing of resources (such as land) within one's territory and the terms or laws that would govern their relationship. Such treaties (and other such agreements) were not only negotiated on a nation-to-nation basis - they also formalized a commitment to a nation-to-nation relationship. These nation-to-nation agreements allowed the newcomers (and their perpetual offspring) and Indigenous peoples to peacefully co-exist as autonomous nations within the same territory.^{xi} As such, treaties recognized and affirmed a right to self-government and sovereignty for each nation (newcomer and Indigenous) within Indigenous territories. They did not limit such rights, except in areas of jurisdiction that were explicitly delegated or dealt with in each specific treaty.^{xii}

For example, between 1725 and 1779, a series of treaties between the British Crown and the Mi'kmaq were negotiated to secure peaceful relations and to establish favourable terms for trade.^{xiii} These treaties were not land cession treaties nor did they involve cession of Mi'kmaq responsibility for governing within their territory or living in accordance with their own constitutional order. Instead, the treaties dealt with matters such as peace and friendship, trade, and the terms of their relationship. In so doing, the treaties provided rights to the English in Mi'kmaq territory, while recognizing and affirming Mi'kmaq 'hunting, fishing, shooting, and planting' rights and the continuation of their sovereignty.^{xiv} It should be noted that while the British used treaties to acquire rights within Indigenous territories such as that belonging to the Mi'kmaq, and used the treaties to justify and expand their acquisition of land and resources, the rights of Indigenous nations were typically ignored and colonial responsibilities and/or promises vis-à-vis Indigenous nations were seldom acknowledged.

Though Indigenous constitutional orders and Indigenous governments were recognized and protected in the original agreements and in the treaties between Indigenous nations and the newcomers, colonial authorities have continuously acted as though they had the (god given) right to acquire all Indigenous territories and to impose their own system of governance over both Indigenous nations and their lands. Thus, despite promises to the contrary, the treaties, and the

protection that they provided for Indigenous constitutional orders were ignored by colonial governments and never implemented. Instead, by the mid-1800s, colonial governments were developing legislation and directly involving themselves in the affairs of Indigenous nations. This early legislative development of policies of interference and colonization culminated in the introduction of the *Indian Act* in 1867. The *Indian Act* was created by the federal government to pursue the policy goals of protection, civilization and assimilation.^{xv}

In pursuing their goals, the federal government set forth on a mission of political genocide. By political genocide I am referring to the federal government's policies and practices which were designed to eliminate Indigenous sovereignty, Indigenous governments and Indigenous constitutional orders.^{xvi} The idea was that Indigenous forms of governance were to be eliminated by the federal government and replaced by 'civilized' governance. These 'civilized' governments - the band council system - were modeled after municipalities with very limited scope and delegated authority. Band councils were created primarily to serve as puppet governments of the federal government and were charged with the responsibility of providing local administration for Indian Affairs. One should note that the framers of the Canada's Indian policy thought that the band council system of government would provide Indigenous peoples with the opportunity to familiarize themselves with 'civilized' government and to practice governing themselves.^{xvii} Their idea was that once enough experience had been gained, Indigenous peoples would cease being Indians under the terms of the *Indian Act* and First Nations would be granted 'self-government' by way of remodeling band councils as regular municipal governments (just like other municipalities which fall under the jurisdiction of provincial governments).^{xviii} To put it another way, the policy goal was simple – once 'civilized', Indians and their governments would be assimilated. Such a policy was openly advocated as a final solution in the *Indian Advancement Act* of 1884 and in 1969 White Paper.^{xix}

Attempting to realize its goal of creating 'civilized' government and assimilating these governments into the regular municipal system of government, the federal government made many changes to the Indian Act. Despite all of its efforts (including the *White Paper* of 1969 and the recent *First Nations Governance Act*), the Canadian government failed to meet its policy objectives of 'protecting' Indigenous peoples from their own forms of governance, creating

‘civilized’ band council governments and then assimilating such governments into mainstream Canada as municipalities. Under the Indian Act, self-government was never achieved on a Canada-wide scale. Indigenous governments were not destroyed. In some cases, the institutions ceased to exist as governments and continued on as cultural, social and ceremonial institutions and as the institutions and laws (rights and responsibilities) became associated with the teachings of the ancestors. In other situations, Indigenous governments were altered as they ceased to exist as ‘recognized’ governments and were forced ‘underground’ (where they continued to exist as governments despite the new Indian Act system). Others simply ceased to exist as ‘official’ or ‘recognized’ governments but never went underground and thus, continue to operate as governments alongside the band council. Still, in other situations Indigenous governments transformed themselves where necessary into (or simply acted like) band council government. Aside from the institutions of governance themselves, Indigenous constitutional orders and Indigenous ways of doing politics were not destroyed as the teachings of the ancestors still inform political life in every community and influence (if not define and confine) the way that politics and this the *Indian Act* band council system is operationalized (works) in the community. Still, the Canadian government and their colonial predecessors did succeed in creating and institutionalizing the band council system of government. In most communities, the band council system of government has done more than simply take root in the community - it has taken over as the government within that community. But, are these governments? Are band councils actually governments? More importantly, are they Indigenous governments?

Assessing The Status Of Indian Act Band Councils

In 1924 the Canadian government divested the community of Six Nations at Grand River of the last remaining ‘traditional’ governments and forcefully imposed the elected band council system. Since then, the government of Canada has all but refused to deal with traditional governments. For the Canadian government, it is as if Indigenous governments ceased to exist when they were supposedly eliminated and replaced by *Indian Act* band councils. In reality, however, these regimes continued to exist (and in many cases continue to exist) as the unrecognized government of the people or those governments which Canada refused to deal with. For all intents and purposes, Indigenous governments and Indigenous constitutional orders have ceased to exist – at

least according to the Canadian state. But in reality, they continue to exist in most situations (in some form or another).

Traditional governments continue to be a driving force in many communities. In some they act independently of the *Indian Act* band council system (seemingly as an unofficial opposition). In others they act in harmony with the elected system. Still, in others, traditional governments act within the imposed government in manner that has transformed the band council system into some semblance of a hybrid of the two systems.^{xx} Not every community has been able to maintain their traditional forms of government (in the open or underground) due to the continuous barrage of assaults by both the state and the church. Still, Indigenous constitutional orders (or remnants thereof) continue to ground political action and aspirations within communities. Indigenous peoples – working as individuals or as part of traditional governments, band councils, national or tribal organizations - continuously seek to exercise the rights that are vested in their own constitutional orders. Such rights include those pertaining to the harvesting of resources within their territory, education, chilled-welfare, environmental management, justice, policing and their right to self-determination.

Unlike the governments of the past, however, Indian Act band councils and organizations such as tribal councils were not created or maintained by (or within) these Indigenous constitutional orders. As such these governments do not derive their authority to make, interpret and enforce laws within a certain territory from Indigenous constitutional orders. Instead, their authority to govern is vested in the Canadian constitutional order and the delegation of power from the federal government to Indian Act band councils (and in some cases, organizations such as tribal councils and the Assembly of First Nations). Though they may accommodate and incorporate elements drawn from Indigenous constitutional orders, the Indian Act band council system remains a creature which is vested in and which draws its authority from the colonial order. Fundamentally, band councils are colonial institutions. Nonetheless, they are colonial institutions that have taken root in some Indigenous communities and which are regarded by many individuals and/or communities as legitimate and Indigenous governments. While they are often viewed as illegitimate governments, institutions of foreign control, and/or simply that form of government which is required for financial considerations - there is no disputing the fact that

in *some* communities band councils have gained legitimacy over the years and have come to be viewed as Indian governments. Despite this, the band council system is, in and of itself, far from being an Indigenous system of government. It remains a creation of the colonial regime, exercises only those powers that have been delegated to it by the federal (and in some cases the provincial) government and is subject to the authority of that regime as established in the *Indian Act* and subsequent delegations of financial and administrative authority. Beyond the necessary questioning of the legitimacy of these governments, one has to question whether these creations of the colonial regime even governments? Setting aside all other questions, let us consider the question, are band councils actually governments? The answer to this question lies within the theoretical realms of law, political science and public administration, and in the practical realm of local government.

Government, may be defined as:

a body that has the authority to make and the power to enforce laws within a civil, corporate, religious, academic, or other organization or group. In its broadest sense, "to govern" means to administer or supervise, whether over a state, a set group of people, or a collection of assets.^{xxi}

Band councils are technically governments, in the sense that they have the power and authority to make and enforce laws within reserves as established in the *Indian Act*. But, they are extremely different than Canada's two constitutionally defined orders of government – in that both federal and provincial governments are established by and have their responsibilities set forth in the Canadian constitution. This is not the case for band councils. In this way, band councils are similar to municipal or local governments. They are so similar that it is important to understand the history and status of local governments if one is to fully ascertain the status of band councils as governments.

Learning From Local Government

The establishment of local or municipal government in Canada occurred during the early colonial period. Faced with the challenges of centrally administering large colonies, British authorities created local structures to provide for decentralized (local) administration. These administrative structures were neither democratic nor representative and were essentially the

appointed administrative arms and ears of the colonial governments. Increased demands for representative government in the early 19th century gave rise to the *Baldwin Act* in 1843 that established a limited franchise and created local governments. Local governments were created as ‘bodies corporate’ which provided services (such as sewers and roads) that were of interest to property owners as a corporation.^{xxii} In essence, property holders were provided the administrative responsibility for those responsibilities decentralized or delegated by colonial governments.

In 1867, the Constitution provided the provinces with the responsibility for local government in much the same way as it created Indians and Indian lands as federal responsibility. As provincial jurisdictions or ‘creatures of the provinces’, local governments are completely dependent upon the provinces for enabling legislation, delegating or mandating responsibilities, and providing the means with which to operate. In terms of enabling, local governments are created by provincial legislation – legislation that can be (and has been) changed at any time regardless of the demands and needs of local governments. In fact, as was demonstrated in the 1990s in both Ontario and Quebec, local governments (such as Hull and Scarborough) can be terminated, and/or amalgamated with ‘the stroke of a provincial pen’ without any consultation.^{xxiii} In terms of delegated responsibilities, local governments have no inherent jurisdictions and no independent ability or constitutional authority to make, interpret and enforce laws. Instead, local governments exercise those powers and administrative responsibilities delegated to them by provincial governments. While such responsibilities vary provincially, most municipalities have been provided express legal authority over those matters essential to the property owners (such as sewers, water, dog pounds, pest control, and planning) and many exercise delegated administrative responsibilities for social services, community health and education. Finally, in terms of the financing of local government, the provincial government provides local governments with transfer payments, the ability to collect property taxes and the ability to charge user fees for local services (such as public transit). Without such transfer payments or the delegated ability to collect property taxes, municipal governments would not be able to operate.^{xxiv}

Local governments in Canada appear to be governments in that they are democratically elected bodies charged with the responsibility for governing in a certain territory. But, they are not true governments. Though typically defined as governments, they are not constitutionally defined governments. Instead, they are publicly elected corporate entities that are responsible for looking after the interests and needs of property owners and for performing all other duties and administrative responsibilities as delegated or mandated by provincial governments. In short, they are subordinate governments. Subordinate or inferior, because local governments are mere creatures of the provinces such that municipal governments are created by provincial legislation - legislation that can be repealed or unilaterally altered at any time. They are a subordinate, lesser form of government because they are not equal players in that they act in areas of delegated jurisdiction and have no constitutional standing and no areas of jurisdiction of their own. In short, they are subordinate to federal and provincial governments because they are mere creatures of provincial government such that they were created by and continue to fall under the jurisdiction or authority of provincial governments.

In many ways, band councils are similar to municipal governments. Both are subordinate governments as neither is autonomous within their own defined sphere of influence or jurisdiction. Neither band councils nor municipalities have an inherent capacity to generate revenue through taxation. As a result, neither has the capacity to exist as a government and engage in administration and service delivery without the federal and/or provincial government providing resources and/or powers of taxation. Neither has the unfettered authority to make, interpret and enforce laws within a given territory. This is because power is delegated and authority is vested in those governments whose authority is defined by the Canadian constitution and in accordance with the jurisdictions set out therein. Neither are full-fledged governments. They are instead, subordinate to the constitutionally recognized levels of government.

Band councils are even more of an inferior and subordinate form of government than are municipalities. This is because municipal governments are not subject to the authority of the provincial governments on a day-to-day basis whereas band councils are consistently subject to the authority of the federal government and increasingly the provincial governments. Since confederation, municipal governments have increasingly secured more autonomy in conducting

day-to-day operations and are increasingly being treated as an independent actor within the federal arena. This is not so for band councils as Indian Affairs continues to influence and interfere with the day-to-day operations of band councils.

Band councils have the ability under section 81 of the *Indian Act* to make by-laws in a variety of areas of interest to local governments (including traffic regulations (excluding speed), the establishment of dog pounds, the construction and maintenance of local infrastructure such as roads and ditches, and the regulation of bee-keeping).^{xxv} Band councils have been delegated much responsibility for administering federal policies and programs such as health care, education and social services.^{xxvi} Still, Indian Affairs consistently influences and interferes with band council government. Indian Affairs is able to influence and interfere in a multiplicity of ways including through its control of all band funds, departmental administrative and accountability requirements, the use of third party management, its ability to override election results and thus call elections or appoint new band councils (sections 74-79), its local law making capacity (section 73 allows the Minister of Indian Affairs to make regulations for such matters as compulsory hospitalization and the treatment of infectious disease, dog control, fish and wildlife, and the borrowing of monies for housing and band projects) and its ability to override all by-laws made by the band council (as outlined in section 82).^{xxvii}

The reality is, band councils have no decision-making ability that is not subject to the authority of the federal government, no inherent or constitutionally defined jurisdictions or responsibilities and no ability to generate revenue (delegated or otherwise) or to create the financial capacity to operate as a government aside from government transfers and income from band owned businesses (note: several communities have created significant revenue generating capacity through band owned and operated businesses but this is rare). The subordinate position of band councils and the federal government's ability to interfere is further evidenced by the most recent (2002) attempt to transform the *Indian Act* and overhaul the band council system. Though this attempt failed, the plan was to transform the band council system with provisions which included: different electoral procedures; administrative requirements that would have forced councils to act even more like administrators of federal policy than like governments with

decision-making capacity; and to make band councils more fiscally accountable to the federal government.^{xxviii}

That band councils are unequal and subordinate governments is further evident when one considers that this subordinate position is not even resolved by self-government. That is to say, the situation is not resolved by the negotiated and imposed system of self-government that the federal government advocates or the way in which self-government has been defined and confined by and within federal processes. The federal government recognized the existence of the inherent right to self-government in 1995 (the Inherent Right policy). Still, federal policies and programs continue to speak of Indigenous governments exercising delegated responsibilities rather than of Indigenous governments having inherent and constitutionally recognized autonomous spheres of influence, responsibility or jurisdiction.^{xxix} Thus, as a number of scholars have argued, the reality of the situation is far from a realization of self-determination or an implementation of the inherent right. Such that while the federal government has officially recognized that Aboriginal peoples have an inherent right to govern themselves, they continue to insist that the operationalization of this right is dependent on negotiations and the delegation of jurisdiction. According to existing policy guidelines, the federal government is 'willing' to negotiate the devolution of a range of responsibilities, which include: governing structures, electoral processes (subject to the *Charter*), Aboriginal languages and cultures, property rights including succession and estates, and on-reserve hunting, fishing and trapping. Further to this, the policy also states that the government may be willing to negotiate the sharing of law-making authority (for such matters as divorce, fisheries co-management and environmental protection) whereby primary law-making authority would remain with the federal and/or provincial government.

Essentially, self-government is about continued subordination of Indigenous governments through delegated rather than inherent jurisdictions or responsibilities. This subordination is evident if one considers that all areas of jurisdiction that Indigenous governments will want to exercise already exist as the jurisdiction of one of the two existing, constitutionally recognized, orders of government. Self-government in such areas will therefore be subject to the delegation of authority. More importantly, even with self-government, it would be impossible for First

Nations to obtain equal footing vis-à-vis provincial and federal authorities. First Nations governments will continue to be subordinate governments which are continuously subject to the terms of that delegation of authority since the power or responsibility remains that of the originating government, as defined by the Constitution. Further, First Nations will continue to be subordinate governments because of financial dependency and the fact that they will continue to be subject to the terms of delegation, imposed financial agreements and measures, and the realities of fiscal imbalance and the federal spending power. This means that self-government in 'non-essential' areas will require compliance with the policies and programs of the constitutionally responsible government.

The continued subordination of band councils post-self-government is further evidenced by the fact that self-government agreements recreate band councils as corporate bodies. The designation as bodies corporate does not reflect the status of self-governing First Nations as Indigenous governments, as treaty nations (or non-treaty nations with all of their original powers and responsibilities) or as nations with the inherent right of self-determination. It is a status which subordinates municipal governments and the same is likely to hold true for self-government.

Examining municipal governments and band governments in a comparative context and using their status as subordinate governments allows us to understand that many of the problems associated with band governance are not unique. Both forms of local government are creatures of other governments that lack jurisdictional independence and the ability to generate revenue. Both therefore lack the ability to act as full-fledged governments, sovereign within certain constitutionally defined jurisdictions, within a given territory. More importantly, the status of municipalities as subordinate governments allow us to easily identify and understand some of the major deficiencies associated with Canada's existing self-government policies and practices. Such that the aforementioned discussion highlights the fact that the taking of a more municipal styled system of government and negotiating an expanded array of delegated responsibilities does not alleviate the subordination of Indigenous governments or fundamentally transform the political system. Self-government simply loosens the ties that bind and reduces the degree of subordination. This is an extremely problematic conclusion. So problematic that it causes one

to question whether Indigenous governments could ever attain the status of a third order of government (constitutionally recognized not constitutionally subordinate) given Canada's existing Constitution and the division of powers therein.

Reconciling Constitutional Subordination With Aboriginal And Treaty Rights

The inclusion of Aboriginal and treaty rights in the Canadian Constitution in 1982 ushered in great possibilities for Indigenous peoples, their governments and their constitutional orders. Its potential is tremendous. The opportunities it imagines for decolonizing both 'Indian country' and Canada are almost limitless. It raises the possibility of decolonization because of the recognition it affords to Indigenous governments and Indigenous constitutional orders in s. 35 as part of the rubric of Aboriginal and treaty rights. As Henderson *et. al.* argue, "The spirit and the intent of section 35(1), then, should be interpreted as "recognizing and affirming" Aboriginal legal orders, laws and jurisdictions unfolded through Aboriginal and treaty rights. ..."^{xxx} This is to say that Aboriginal and treaty rights are the constitutional manifestation of Indigenous constitutional orders or the means by which these constitutional orders were recognized and affirmed in the Canadian constitution. Viewed in this light the potential for decolonization is tremendous as the constitution not only affords protection to Indigenous constitutional orders but it incorporates their recognition - through Aboriginal and treaty rights - into, and reconciliation with, the Canadian constitutional order.

This is essentially an argument of treaty constitutionalism, post-1982. It is a logical understanding of s. 35 and the Canadian constitution from the vantage of treaty constitutionalism or treaty federalism. It is an understanding that is both historically grounded and widely held (as it was in 1982) as it honours the spirit and the intent of the treaties, it does not deny or obfuscate (real) Indigenous government or Indigenous constitutional orders and it provides a foundation for decolonization rather than supporting the continuation of the colonial regime and its practices of political genocide. Further, it is an understanding of the Canadian constitution that speaks of political reconciliation and thus, the formal reconciliation of Indigenous and Canadian constitutional orders in a manner that does not avoid the 'big issues' of sovereignty, subordination and negotiated inferiority, colonial legacies, decolonization, and the continued

existence of Indigenous governments (as governments). Most importantly, it is an understanding of the Canadian constitutional orders that does not deny the third order of government or the mere existence of Indigenous governments as true governments which are constitutionally recognized and thus, not subordinate to or creatures of either the federal or provincial governments.

Understood in this light, s. 35(1) is an affirmation of treaty constitutionalism. As explained previously, this historically based understanding of the treaties contends that treaties recognized and affirmed Indigenous constitutional orders, delegated certain powers and responsibilities to the Crown and provided colonial orders with the ability to govern its own people within the shared territories. Meaning that each constitutional order would continue to exist independently - limited only by the terms of their treaties. Where no such treaty was negotiated, the prerogatives of both 'sovereigns' remain intact as neither constitutional order has ever been subsumed by, limited by and/or incorporated into the other. Thus, regardless of treaty or the lack thereof, Indigenous rights and responsibilities are vested in and limited by Indigenous constitutional orders. Further, they are merely 'recognized and affirmed' and not created or vested in s. 35(1) of the Canadian constitutional order.

Accepting that Indigenous constitutional orders not only continue to exist but exist as part of the Canadian constitutional order as Aboriginal and treaty rights in s. 35(1), leads one to question the meaning of Indigenous constitutional orders in the contemporary and the meaning of Indigenous government. Section 35, as so many have argued, contains within it the inherent right to self-government (not simply self-administration); a right which is recognized in but not created by the Canadian constitution. Self-governance is a right and a responsibility vested in Indigenous constitutional orders and as such contains all jurisdictions essential for contemporary Indigenous governance in Canada. In other words, the right to self-determination is vested in "Aboriginal legal orders, laws and jurisdictions and unfolded through Aboriginal and treaty rights"^{xxxix} and it contains all matters of jurisdiction, subject to the limitations agreed to in each nation's treaty (historic or future).

Indigenous government is today, just as it was in the past, an expression of or is vested in Indigenous constitutional orders. That said, the patriation of the Constitution in 1982 radically transformed Indigenous government in that these constitutional orders are now recognized and affirmed in the Canadian constitutional order as Aboriginal and treaty rights. In other words, post-1982 things changed (really, that change has yet to be understood and realized) because Indigenous constitutional orders (and thus, Indigenous governments) gained recognition within the Canadian Constitution through Aboriginal and Treaty rights. But, it is not just the Indigenous governments (i.e. traditional governments) that seek to exercise those rights vested in Indigenous constitutional orders and expressed as Aboriginal and/or treaty rights. As was suggested earlier, Indigenous peoples – working as individuals or governments and Aboriginal organizations - continuously seek to exercise the rights that are vested in Indigenous constitutional orders. Unlike the governments of the past, however, Indian Act band councils and contemporary organizations were not created or maintained by (or within) these Indigenous constitutional orders. Though some may argue otherwise, they do not, as such, derive their authority to exercise rights and responsibilities or to govern from Indigenous constitutional orders. Instead, the authority of band councils to govern is vested in the Canadian constitutional order and the delegation of power from the federal government to Indian Act band councils. This is the reality of today. Indigenous (traditional) governments are not the primary governments in most communities. Instead, it is the foreign/imposed system of band council government that exercise the rights and responsibilities vested in Indigenous constitutions. Indigenous nations and their constitutional orders must respond to this reality. Indigenous nations will have to engage in their own constitutional renewal processes to resolve and reconcile this inconsistency. Further, they will have to engage with other governments and gain recognition as ‘governments’ by others – it will be particularly necessary to gain recognition from federal and provincial governments.

Thus, while there is no need to engage in a discussion of self-governance with Canadian governments in so far as jurisdictional matters, legal orders, laws and structures of governance are concerned, such a need likely exists within each nation. Indigenous peoples will need to engage in processes of decolonization for Indigenous governments and Indigenous constitutional orders have not been predominant in Indigenous politics since the Canadian government

institutionalized the *Indian Act* system of government in 1876. Just as the Haudenosaunee say of their treaties such as the Covenant Chain, Indigenous constitutional orders need to be dusted off and polished by both Indigenous governments (possibly by both traditional governments and band councils – working in a coordinated manner) and the people of the nation. In rekindling and re-empowering Indigenous constitutional orders or in dusting off and polishing these orders, Indigenous peoples are likely to need to engage in discussions of renewing, and possibly even recreating, Indigenous legal and political systems.

Whether the traditional government is renewed, the band council system is recreated (under the Indigenous constitutional order) or a new political system is created (possibly as a hybrid), the fact remains, Indigenous governance will need to be dusted off, polished, updated and renewed within each nation. Such processes will need to engage in discussions of pertaining to issues of structure (i.e. traditional or band council) as well as matters such as legal capacity, law-making authority, jurisdiction, and administration. Legal, jurisdictional and administrative necessities that did not exist at the time of contact or when the Canadian government engaged in political genocide using the *Indian Act* exist and will continue to emerge from time to time. Indigenous governments and the constitutional orders within which their authority is vested, need to adapt and evolve to respond to ‘modern’ necessities such as the regulation of motor vehicles and traffic, environmental protection, emergency preparedness and power delivery. These processes of constitutional renewal have to be engaged just as the Canadian constitutional order is continuously renewed through constitutional interpretation; executive, legislative and/or judicial action; and, intergovernmental relations.

Regardless as to how these Indigenous constitutional orders are renewed, there is no need to negotiate self-government in so far as jurisdictional matters are concerned. But, such a need may exist to address the poverty that consumes most First Nations. Poverty and revenue sharing arrangements will need to be addressed because without the wealth of resources and development opportunities provided by their traditional territories, most First Nations cannot cope with the financial requirements of government. Beyond fiscal considerations, negotiations may also be necessary to reconcile and coordinate competing and shared areas of jurisdictions and to address the sharing of traditional territories and their resources. As such, new treaties will

have to be negotiated – especially where no treaties exist. They will be required to coordinate and/or reconcile competing jurisdictions, and to address the sharing of both traditional territories and resources. Resources here would be of vital importance, if Indigenous peoples are to regain their independence and venture forward with governments that not only have the constitutional authority to make, interpret and enforce law and public policy within their territory but are to have the financial capacity to fully engage their political capacity.

Final Thoughts: Looking Forward

Reconciliation of these competing constitutional orders by means of consultation, coordination, intergovernmental negotiation and judicial interpretation, would not necessarily force Indigenous governments to accept a position subordinate to federal and provincial governments. Indigenous government need not be subordinate as Indigenous constitutions provide Indigenous governments with the power and authority to make, interpret and enforce laws within autonomous spheres of influence or jurisdictions. Instead, Indigenous governments have the ability to exist as a parallel to federal and provincial governments, exercising those jurisdictions afforded by their constitutional order and treaty relationship and as recognized and affirmed within section 35 of the Canadian constitution while federal and provincial governments exercise those jurisdictions afforded by their constitutional order under section 91,92 and 93.

The choice remains. Continue the path of subordination whereby band councils have no power and authority of their own and where the goal is self-government or the negotiation of ones inferiority and subordination. Or, take up Indigenous constitutions, brush them off, polish them and renew governance under them as a parallel constitutional order. The first step is to make a decision. To do so, nations must gather, engage themselves in a discussion of, and educate themselves about, their constitutional order. They must address their options for the future collectively, and decide as a community how they want to govern themselves.

The choice remains. Indigenous nations cannot and should not wait around for the federal and/or provincial governments to ‘get with the program’ and provide opportunities for the decolonization of Indigenous governance and the renewal of Indigenous constitutional orders.

Indigenous peoples cannot wait around for Canada to act with honour the spirit and intent of the treaty relationship – through negotiation or implementation – thus making way for the renewal and recognition of Indigenous governments and Indigenous constitutional orders while making *Indian Act* band councils obsolete. Further, the decision to move forward is not that of the chief and council – nations in their entirety have to make the decision to brush off their constitutional orders and renew governance and communities cannot wait for employees of Indian Affairs to create opportunities for this to happen. While this may happen – chiefs and their political organizations have been able to negotiate political Accords in BC which have the potential to create a new relationship – communities themselves need to get involved in the decolonization process or in dusting off of Indigenous constitutional orders and in the renewal of Indigenous governance. To do so, communities must work from the ground up. People must educate themselves about their political traditions and begin to the process of dreaming – envisioning a future where they decide as a community how they want to govern themselves.

To facilitate this process all citizens of the nation must be engaged – Elders, youth, women, men, Traditionalists, Christians, supporters of traditional government and band council supporters. While nation-wide processes which facilitate renewal are unlikely to happen over night, the point is to start. Change must start somewhere. Someone must make a decision to take up their constitutional order and champion the renewal of governance in their community. That someone could be the youth as they engage with Elders, demand change and start to envision a different political reality. That someone could be the women as they change a nation from within by raising families who understand their political histories and political traditions and who engage in (or simply plot) transformative politics at the kitchen tables throughout the nation. In any case, that someone could be you. Think creatively. Learn. Make a choice – subordination or renewal. Dream – envision renewed governance. Act – spread the vision, facilitate dialogue, talk about change. Don't just talk – make change happen.

ⁱ K. L. Ladner, “Governing Within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance” (2003) *70 Studies in Political Economy*.

ⁱⁱ Bundles are spiritual beings that contain knowledge, teachings and ceremonies. Apart from the spiritual, within the Blackfoot political system there are several major bundles that contain responsibilities for governance and in turn exist as institutions or structures of governance. These bundles are the foundation of the political system as they give it order, a political philosophy and they contain many of the laws and instructions for both government and the nation. Together with the holders of the bundles and their councils that are charged with responsibilities set forth in the bundles, the teachings, ceremonies, laws and philosophies contained in the bundles exist as a structure or institution of governance (alongside clans and societies).

ⁱⁱⁱ *Ibid.*

^{iv} J. S. Milloy, *The Plains Cree: Trade Diplomacy and War, 1790-1870* (Winnipeg: University of Manitoba Press, 1988).

^v It should be noted that there the use and/or applicability of such terms and concepts as constitution, government and sovereignty is debated among both Indigenous and non-Indigenous scholars. For example, Alfred argues that sovereignty is a completely foreign concept which is inherently incompatible with the political histories of Indigenous peoples. I agree with Alfred, to the extent that Indigenous understandings of constitutionalism and Western-Eurocentric theories and history of constitutionalism are extremely diverse and almost incomprehensible. But, given that the power of using the tools of the colonizer and the utility of a common language is tremendous, I have decided to employ the language of constitutionalism when engaging the colonizer and in constructing and promoting an Indigenous (pan-Indian) understanding of Indigenous political history and Indigenous governance.

^{vi} K. L. Ladner, "Up the Creek: Fishing for a Constitutional Order" (2005) 38:4 *Canadian Journal of Political Science*. Also see: T. Alfred Peace, *Power, Righteousness: an indigenous manifesto* (Don Mills: Oxford University Press, 1999).

^{vii} J. A. Gibson, *Concerning the League: the Iroquois Tradition as Dictated in Onandaga*, ed. and trans by H. Woodbury (Winnipeg: Alongqoian and Iroquoian Linguistics, 1992).

^{viii} J. Y. Henderson, *The Mikmaw Concordat* (Halifax: Fernwood, 1997). Also see: J. Y. Henderson, M. Benson & I. Findlay, *Aboriginal Tenure in the Constitution of Canada*. (Scarborough: Carswell Thomson Professional Publishing, 2002).

^{ix} A. Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: University of British Columbia Press: 1994).

^x P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

^{xi} J. Y. Henderson, "Empowering Treaty Federalism" (1994) 58 *Saskatchewan Law Review*. Also see: K. L. Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in M. Smith and F. Rocher eds., *New Trends in Canadian Federalism*, (Peterborough: Broadview Press, 2003).

^{xii} S. Cornell, *The Return of the Native: American Indian Political Resurgence*, (New York: Oxford University Press, 1988).

^{xiii} B. Wildsmith, "Treaty Responsibilities: A Co-Relational Model" (1992) 26 *University of British Columbia Law Review* at 324-336.

^{xiv} K. S. Coates, *The Marshall Decision and Native Rights*, (Montreal: McGill-Queen's University Press, 2000) at 28-39.

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- ^{xv} J. L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in J. R. Miller ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991).
- ^{xvi} K. L. Ladner, "Rethinking the Past, Present and Future of Aboriginal Governance" in J. Brodie and L. Trimble eds., *Reinventing Canada* (Toronto: Prentice Hall, 2003).
- ^{xvii} *Ibid.* Also see: Tobias *supra* note 12.
- ^{xviii} K. L. Ladner, & M. Orsini, "The Persistence of Paradigm Paralysis: The *First Nations Governance Act* as the Continuation of Colonial Policy" in *Canada: State of the Federation* (Queens: Institute of Intergovernmental Relations, 2005).
- ^{xix} *Ibid.*
- ^{xx} National Centre on First Nations Governance *First Nations Governance Pilot Projects: Challenge and Innovation, Final Report Volume 1* (2005) by Carleton University Centre for Community Innovation http://www.fngovernance.org/pdf/Carleton_Vol1.pdf
- ^{xxi} *Wikipedia*, http://en.wikipedia.org/wiki/Government#Governmental_operations.
- ^{xxii} C. R. Tindal & S. N. Tindal, *Local Government in Canada*, 6th ed., (Toronto: Thomson Nelson, 2004).
- ^{xxiii} A. Sancton, *Merger Mania: The Assault on Local Government* (Montreal and Kingston: McGill-Queen's University Press, 2000).
- ^{xxiv} Tindal and Tindal, *supra* note 19.
- ^{xxv} Canada, *Indian Act* (Ottawa: Minister of Supply and Services, 1989).
- ^{xxvi} P. D. Elias, *Development of Aboriginal People's Communities* (North York: Captus Press, 1991).
- ^{xxvii} Canada, *Indian Act*, (Ottawa: Public Works and Government Services Canada, 1985).
- ^{xxviii} Canada, BILL C-61, *First Nations Governance Act*, 1st Session, 37th Parliament, 49-50-51 Elizabeth II, 2001-2002. For an analysis of this Act see: Ladner & Orsini, *supra* note 15.
- ^{xxix} Canada, *Federal Policy Guide Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Self-Government*, (Ottawa: Public Works and Government Services Canada, 1995).
- ^{xxx} Henderson, et.al., *supra* note 6 at 432-434.
- ^{xxxi} Henderson et. al., *ibid* at 433.