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UNDERSTANDING THE CONCEPT OF SELF-GOVERNMENT
LIFE IN MIKMAQ PRIOR TO BRITISH OCCUPATION

For many centuries, if not millennia, before the intrusion of Europeans, we, the Mikmaq, were free from any external control. Sovereign in our territory - now comprised of Nova Scotia, eastern New Brunswick, Prince Edward Island, the Gaspe and southern Newfoundland, we evolved our own system of government, religion and education. Norsemen may have ventured into Mikmaq lands and waters some 1,000 years ago, however, we did not have regular contact with Europeans until the late fifteenth century. In the context of Mikmaq experience, the European struggle for empire in North America is a relatively recent event.
SELF-GOVERNMENT

The issue of self-government is current with meetings of the Federal Government, Provincial premiers and Native leaders and the position put forth by the Assembly of First Nations (AFN) bringing the issue to the fore for natives and non-natives. For Conne River, as for other native communities, the question of our own self-government aspirations has emerged. Your Band Council recognizes that it is probably one of the most self-governing Bands in the Atlantic region. However, the form of self-government presented in the National debate is far different from what we are experiencing at present. Furthermore, the Band has never fully pursued the delegated form of self-government available through Federal policy or Federal legislation.

In considering the two forms of self-government, many issues and concerns materialize. This is further complicated by various legal issues, court cases, and terminology. This paper serves to inform Band councillors and members on the issue of aboriginal self-government. The two forms of self-government are presented along with the historical and legal context of each. The writer puts forth a detailed description of the issue with the view of informing the reader. There is no attempt at simplicity so the paper will appeal to a narrow base of people. For those who wish
to better understand the concept of self-government, and who have the time to carefully read and ask questions, the paper should prove informative.

**SELF GOVERNMENT DEFINITION**

Self-government is defined as an "action or process of a self-identified autonomous (independent) cohesive group of people within a nation state governing themselves". The powers or authority for native self-government can come either from aboriginal right (as asserted by aboriginal governments) or delegated from the Crown (as the Federal Government maintains). First Nations assert that the right to self-government has never been extinguished either by competent legislation or through treaty making process and that since 1982 it has been presented as an existing right in section 35 of the **CONSTITUTION ACT, 1982**.

Section 35 (1) reads:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The problem with section 35(1) in its present form is that it leaves to judicial interpretation (courts) what "existing" means. The present self-government framework to be entrenched under a new section 35 of the **Constitution Act** provides a more detailed description of self-government. The proposed section 35 will be discussed latter in this paper.
Basically, there are two forms of self-governments delegated and entrenched. First Nations generally prefer the entrenched form and assert that an aboriginal right provides the authority for self-government. Constitutional entrenchment will recognize and protect this aboriginal right.

**ISSUE OF CONTROL AND MANAGEMENT OF INDIAN AND INDIAN LANDS**

The two forms of self-government address aboriginal concern with control and management of aboriginal people and aboriginal lands. Aboriginal peoples are dissatisfied with the application of Federal and Provincial laws, with the Federal Government determining membership and form of government, and with Federal and Provincial jurisdiction in areas such as policing and education. The basic premise being that aboriginal peoples historically and presently govern themselves. For example the Mikmaw Nation have always governed its own affairs through the Holy Assembly, the Sante Mawomi Wijit Mikmaq.

To better understand the concern with Federal and Provincial control one must understand the extent and underlying jurisdiction of Federal and Provincial control of aboriginal peoples and aboriginal lands.
The Federal Government has legislative jurisdiction under section 91(24) of the Constitution Act. The Constitution Act 1867 made no provision for Indian jurisdiction or government. The Federal Government in 1868 exercised its authority by enacting the Indian Act. The Indian Act provided for a broad range of Federal control of aboriginal people. The extent in which the Indian Act subjugates Indian people will be discussed latter.

**SUBJEGATION UNDER PROVINCIAL LAW**

Prior to 1951 the application of Provincial legislation to Indians tended to depend on whether the incident in question took place on or off reserve. In 1951, section 87 (now section 88) of the Indian Act was introduced:

Subject to terms of any treaty and any other act of parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this act or any order, rule, regulation or by-law made thereunder and except to the extent that such laws make provision for any matter for which provision is made by or under this act.

The extent of the power conferred to the Provincial governments by virtue of section 88 is not settled. The Supreme Court of Canada recognizes that section 88 was not a mere statement of Provincial jurisdiction that would exist in an event, but a deliberate grant of jurisdiction to the Province over Indians and their lands. Section 88 remains a contentious issue, child welfare
exemplifies the ongoing debate. Section 88 applies Provincial laws of general application to Indians. It does not refer to lands reserved for Indians, for section 88 to function Provincial laws must regulate to some extent the use of reserve lands. The application of Provincial child welfare legislation to reserves necessarily confers on Provincial child welfare officers the right of access to reserves.

The Federal Government has sought to dispel the uncertainty by applying Provincial standards and rules in the area of resource development on reserve lands. The Indian Timber Regulations, the Indian Mining Regulations, and the Indian Oil and Gas Regulations all provide for the application of Provincial laws with respect to forest, mining, and oil and gas development on reserve lands. However the Federal Government can grant control and management to Indian lands and deny the intrusion by Provincial Governments. In Dick v. R., Butz J declared for the Supreme Court of Canada:

It would not be open to parliament in my view to make the Indian Act paramount over provincial laws simply because the Indian Act Occupied the field. Operational conflict would be required to this end but parliament could validly provide for any type of paramountcy of the Indian Act over provisions which it alone could enact.

The Supreme Court of Canada thereby recognized the power of parliament to deny the application of Provincial laws to Indian reserve lands. Such protection being approved by virtue of section 91(24). This approach would require a rejection of a provision
such as section 88 and substantial changes to Indian Act and regulations. But the Supreme Court of Canada has at least made it clear that parliament can declare that paramountcy of the powers of Band Councils (ie delegated self-government). To date the Federal Government has not fully declared the paramountcy of Band Councils.

SUBJEGATION UNDER THE INDIAN ACT

The Indian Act and the Oil & Gas Act and regulations made thereunder vest control, management and disposition of Indian Lands and resources in the department of Indian Affairs. The Acts and regulations do not allow for aboriginal self-government or self-management. The following are examples of Federal control under the Indian Act:

1. Management and disposal of reserve lands - Section 60 of the Act.
5. Band membership - Section 8-10 of the Act.
Virtually all powers conferred to Band Council's through the by-law making process are subject to the Ministers power of disallowance. The jurisdiction of a by-law is confined to the reserve. Such power is often meaningless such as in the case of wildlife management which requires considerations of movement of wildlife on and off the reserve.

DELEGATED SELF-GOVERNMENT AND COMMUNITY MANAGEMENT

Having presented a review of the Federal and Provincial powers in which aboriginal communities are subjugated we can now review the delegated style of self-government. The delegated form of self-government is designed to grant Indian Bands greater control over their affairs. The delegation can be in the form of greater control of programs and services (ie federal policy) or through legislation which provides for greater control and independence.

The Indian Act has treated Indian Bands (constituted under the Act rather than under tradition) as a form of local or municipal government. The Band's powers, exercised in the form of bi-laws, have derived their authority from the Act not from any inherent or constitutionally entrenched jurisdiction. By-laws are subject to the powers of disallowance of the Minister of Indian and Northern Affairs, and to being overridden by inconsistent legislation and regulations. Band membership and status as an "Indian" have been determined by the Federal Government rather that by the aboriginal people themselves. The Indian Act is not very supportive of aboriginal self-government.
With the past failure of the Constitutional process focus has shifted to the delegated form of self-government. This form of self-government can be introduced via Federal legislation or through section 60 of the Indian Act (ie Federal Policy).

The 1983 report of the Special Committee of the House of Commons on Indian Self-Government (The Penner Report), recommended that "... the right of Indian peoples to self-government be explicitly stated and entrenched in the constitution of Canada... Indian First Nations Government would form a distinct order of government of Canada" Pending the constitutional entrenchment of Indian self-government, the committee recommended that parliament should move to occupy the field of legislation in relation to Indians and lands reserved for Indians and then vacate these areas of jurisdiction to recognize Indian Governments. The legislation would authorize the Federal Government to enter into agreements with First Nations as to the jurisdiction of each government.

The Committee further recommended that the powers of self-government include full control over the boundaries of Indian lands, including land and reserve use, revenue raising and economic and commercial development. The report also called for the provision of an adequate land and resource base to provide the foundation for the effective exercise of Indian self-government.
Bill C-52, the Indian Self-Government Act, was the Federal Government's response to the Penner Report. The Act in itself fell short of implementing the recommendations of the report. Bill C-52 was given first reading in the House of Commons on June 27, 1985 and it died with the dissolution of parliament that year.

If enacted the Bill would not have provided for self-government or even full self-management. It would provide for the possibility of negotiating with the Minister an agreement which could confer powers of self-management over Indian lands. The extent of the powers of self-management would depend on the terms of the agreement. The Bill provided a framework for such an agreement but a framework that contemplated such limitations with respect to superintendence, disallowance and the application of laws of general application as to deny self-government.

Since Bill C-52 failed to make it past first reading, the Cree-Naskapi Act and Sechelt Indian Band Self Government Act offer examples of Federal Government legislation. Since the enactment of the Sechelt Act no other Indian self-government legislation has been enacted. There is a Federal policy initiative of the Department of Indian and Northern Affairs. The Federal self-government policy provides for alternative funding arrangements, broadened bi-law making capacity, devolution of program services
delivery to Bands, and community specific recommendations for self-
government. The legislation and department policy forms of self
government often fall short of community expectations and at times
has been fraught with bureaucratic encumbrances.

A short review of the Sechelt Act and the Cree-Naskape Act
reveal that the legislation serves to entrench the terms of the
agreement constitutionally by virtue of parallel Federal and
Provincial legislation and by section 35 of the Constitution Act
1982. Therefore a delegated form of self-government legislated by
the Federal Parliament offers a degree of constitutional
protection. However, the terms of the final agreement or Act will
depend on the will of the Federal and Provincial governments. The
Cree Naskapi Act and the Sechelt Act fall short of abrogating
Federal and Provincial control over Indians and Indian lands. Had
the agreements declared the abrogating of Federal and Provincial
authority over aboriginal lands, the abrogation would be
entrenched. Instead of abrogating Federal and Provincial authority
the agreements entrench it.

THE CREE NASKAPI ACT:

The Cree Naskape Act is a comprehensive piece of legislation
which provides for the local government of the Cree and Naskape
Bands who were signatories to the James Bay and Northern Quebec and
Northeastern Quebec agreements. This Act establishes the legal
capacity of Bands as corporations and describes their government
structure, their powers, the external political
accountability mechanisms, and procedures for dealing with Band and resources to the extent accorded under the agreement. Except for the provision respecting "status" the Act supersedes the Indian Act. Under the Cree Naskape Act the Bands have by-law powers in a variety of areas (including the power to determine membership) which can be exercised without interference from the Minister. However, the Minister retains power in regard to wildlife harvesting and protection by-laws and election by-laws and can intervene in the area of financial management. There are also a variety of areas in which regulations may be enacted. These include a general "prescription" power allowing for the application of Provincial law to certain lands, establishing and maintaining land registry systems, and regulating Band taxation powers, relations, spiritual Band meetings, and long term borrowing.

The Cree Naskape Act represents the first piece of self-government legislation to be enacted by Parliament. The Cree Naskape Act and the proposed bill C-52, Indian Self Government Act was not well received by aboriginal leaders. The main criticism was that the Acts represented a political manoeuvre to reduce the pressure for Constitutional recognition of the right to self-government.
THE SECHELT INDIAN BAND SELF-GOVERNMENT ACT

The Sechelt Indian Band Self-Government Act was introduced in 1986. It established the Band as a legal entity and authorized the enactment of a Band constitution. Under the Act the Band constitution is brought into force by an Order in Council once it has been approved by a majority of Band members. It also required Governor in Council's approval. The Act requires that the constitution be in writing and that it include composition, procedures for election, and tenure for council; systems for political and financial accountability; a membership code; rules and procedures for referendum to amend the constitution or transfer powers to the Sechelt Indian Government district; and rules and procedures for the disposition of land.

The legislative powers which are described in the Act must be exercised by the Band. This means that they must first be negotiated with the Federal Governments and must be enacted in compliance with the Bands criteria for amending the constitution. The Indian Act provisions will continue to apply unless they are inconsistent with the Band’s constitution or Band law or until the governor in Council declares otherwise.
The Sechelt Act transfers title to all of Sechelt's reserve land to the Band in fee simple, and enables the Band Council to authorize registration of interest in lands in the Provincial land title system. This is different from the Cree Naskape Act which allows for regulations establishing a registration system.

In addition to the provisions relating to registration of land, the Sechelt Indian Band Self-government Act anticipates Provincial co-operation in the area of regional government. The Act allows for the recognition of a district as a legal entity and permits the establishment of a District Council as its governing body. It also permits the transfer of legislative powers from the Band to the District Council. However, these sections can only come into force by an Order in Council after Provincial legislation has been enacted and the Band has approved the transfer of powers.

CONCLUSION – LEGISLATIVE/DELEGATED SELF-GOVERNMENT

It has been shown that the legislated form of self-government and the Federal policy on self-government fall short of the expectations of aboriginal leaders and aboriginal communities. The self-government initiatives provide more of a self-management system than actual self-government. The Federal and Provincial governments maintain much power and control over aboriginal peoples and aboriginal lands. Moreover, the final agreement is always contingent on the will of the two levels of government to negotiate and delegate.
The Federal government has always contemplated Indian Band Councils as municipal governments. The limitations placed on the powers of Band Councils by the Indian Act, were always such as to deny "government" as a proper description.

**CONSTITUTIONAL ENTRENCHMENT OF THE INHERENT RIGHT TO SELF-GOVERNMENT**

Previously, I stated that First Nations assert self-government as an aboriginal right that has never been extinguished by the Crown. It is further positioned that section 35 of the Constitution Act, 1982 serves to constitutionally entrench the aboriginal right to self-government. However, there is no clear understanding of what the word "existing" in section 35 actually means. The courts are left to determine its meaning and scope. First Nations are not overly pleased with the historical position taken by the Canadian judicial system, although recent court cases tend to be more favourable.

The present round of First Minister talks have seen a highly organized and effective strategy by native leaders to have the inherent right to self government entrenched in a more clear and concise manner. The last attempt at constitutional entrenchment at the 1987 First Ministers conference ended in failure. Although the
present constitutional reform package agreed to by the First Ministers include recognition of the inherent right to self-government there is still Provincial concern over what self-government will actually entail. Quebec is concerned over the wording and how it will affect its distinct society aspirations. The reform package represents a considerable accomplishment by native peoples.

The success of native leaders in the present round of First Ministers meetings can be credited to:

2. the election of a national native leader with a strong mandate.
3. a highly effective planning and lobbying strategy.
4. emphasis on settlement of the constitutional issue and attempt to include Quebec in the new Canadian order.
5. recent court cases in favour of aboriginal rights.

The following are the major elements of the self-government package:
1. **CANADA CLAUSE**
   The following text will be added on aboriginal peoples:
   "The Aboriginal peoples of Canada, being the first peoples to
govern, have the right to promote their languages, cultures,
traditions and to ensure the integrity of their societies, and
their governments constitute one of three orders of
governments in Canada";

2. **INHERENT RIGHT**
   . recognition of the inherent right to self-government
     within Canada in a new provision, section 35.1.
   . recognition of aboriginal governments as one of three
     orders of government in Canada.
   . legal transition provision to provide for an orderly
     transition.

3. **TREATY RIGHTS**
   . interpretive provision on treaty rights to ensure treaty
     rights are given a just, broad and liberal interpretation
     and taking into account spirit and intent.
   . bilateral (nation-to-nation) process for implementation
     clarification or ratification.

4. **COMMITMENT TO NEGOTIATE**
   . federal government, provinces and aboriginal people
     commit to negotiate in good faith jurisdiction, lands,
     resources and financial arrangements.

5. **DELAY OF JUSTICIABILITY**
   . five year delay on section 35.1 based on conditions set
     out in a political accord including a commitment by the
     Federal Government not to undermine the right during the
     delay period.

6. **NON-DEROGATION FOR DIVISION OF POWERS**
   . provision to protect against any division of powers which
     will abrogate or derogate aboriginal, treaty rights, or
     self-government.
7. **CONSENT TO FUTURE AMENDMENTS**

- aboriginal peoples' consent required for amendments which directly refer to aboriginal peoples (e.g. Part II, 91(24)) will be required. A mechanism for consent will be worked out in the next few weeks.

8. **GENDER EQUALITY**

- no change to section 35(4), issue on agenda for future First Ministers Conferences.

9. **CHARTER OF RIGHTS**

- the Charter will apply to aboriginal governments, however, with several important protection for collective rights and traditional governments protection will be given for aboriginal and treaty rights, including, for example, a strengthened non-derogation clause in section 25, use of notwithstanding clause (section 33), protection for traditional governments and hereditary systems.

10. **SENATE**

- there will be Aboriginal representation in the Senate. Details will be worked out by September 1992 before the package is ratified.

11. **POLITICAL ACCORD**

- the elements of the political accord on aboriginal matters includes the following:

  - financing provision for aboriginal governments.
  - conditions for the delay of justiciability.
  - provision for future FMCs on amending formula, financing, other issues.
  - negotiations, and guidelines for the negotiation process.

The entrenchment will basically provide for the ability of First Nations to negotiate the final format of their self-government (element #4 - Commitment to negotiate). The negotiation
will not depend on the willingness of the Federal or Provincial Governments to negotiate, the Constitution will provide the jurisdiction for First Nations self-government. Negotiations after entrenchment will just serve to enable first nations to design and implement a self-government system targeted to its specific needs.

A five year delay in justability (element #5) will enable the First Nations to revert to court action if the right to self-government is not properly recognized by the Federal and Provincial Governments during and after the negotiations.

Entrenching a right to self-government that will enable every native community to develop and exercise its own particular idea and brand of self-government appears to be a very arduous task. However, in introducing the right with a follow-up method of implementing community specific self-government appears to offer a solution. The disadvantage is that until the final form of self-government is agreed to, one cannot identify what it is exactly going to be like. The Federal and Provincial Governments in accepting and entrenching the inherent right will be effectively saying that within certain parameters you (First Nations) can design your own form of self-government and we by virtue of the entrenchment will have to agree to the final product. Some Premiers such as the Premier of Quebec and Newfoundland want
further clarification on what self government really means before they agree to entrenchment. Quebec is further concerned with what it refers to as "its territorial integrity".

First Nations are also voicing concerns over the reform package. There is concern with the delay in justiciability, with the political accord which provides for financing of self-government, and with the possibility of provinces opting out of the accord. Newfoundland has stated the possibility of opting out of a constitutionally entrenched self-government accord by virtue of section 38(8) of the Constitution Act 1982. The Assembly of First Nations' lawyers are reviewing the legal implications of section 38(8). Initial legal opinions suggest that the opting out provision will not apply.

Despite the degree of uncertainty and the debate over short and long term implications, the self-government package agreed to on July 7, 1992 represents a considerable advancement from the progress at the 1987 First Ministers' conference.

In 1987, the Federal and Provincial Governments did not accept the AFN amendments to section 35 that were then on the table. The AFN proposed amendments included positions on the protection and implementation of treaty rights. In fact, the 1987 First Ministers' conference ended abruptly before the AFN amendments
could be seriously discussed because governments could not agree to the very principle of the inherent right to self-government. As well, because of the abrupt end to the conference, issues such as treaty rights did not get to the table.

Most governments argued that they would accept an aboriginal right to self-government only if it was made clear in the constitution that the right was contingent on negotiations and if the right was not enforceable in the courts except in accordance with agreements. The July 7, 1992 accord provides a complete change in Provincial positions, Provinces are agreeing to entrenchment of the right to self-government without being contingent upon the negotiations clause. Furthermore, there is agreement on having the right enforceable in the courts. The AFN, since July 7, 1992 have been concerned with Federal and Provincial meetings held without the presence of the AFN. There is a general fear that the addition of Quebec to the talks will present a backsliding on what was agreed to in relation to aboriginal self-government. However, the AFN and its National Chief are adamant in having the right to self-government protected by the constitution of Canada. Support amongst native communities remains very high. It is hoped that the multi-lateral process will provide a favourable outcome for First Nations and advance the issue of self-determination.
As native communities follow the constitutional talks, thoughts often deflect inwards to the community and its self-government aspirations. For Conne River, it is recognized that a lot of work and education is needed before the community is ready to embrace self-government in any form be it constitutional or legislative. The community has to look at where it presently is in terms of governing itself and where it like to be in the future. The drive towards self-government and self-sufficiency has to be community driven not driven solely by leaders.

While lawyers and technical people can draft the framework, the laws, the regulations, and the structure of self-government, the people of the community have to determine what they basically want. Lawyers and technicians can only take the grass-roots desire and work it into a workable structure.

A particular community concern is the eventual funding of self-government. The Constitutional self-government package provides that the Federal and Provincial Governments shall fund community self-government taking into consideration the ability of the community to fund its own services.

This proviso is included in the political accord which will not be entrenched. There is also a concern that as long as the Federal and Provincial governments are providing funds, there will
be a degree of influence and control over Indian people and Indian several elements which the community have to address as it approaches any form of self-government.

1. legal capacity of the Band.
2. financial arrangement - funding
3. membership and status
4. band legislation to supplement Indian Act
5. band policy and justice system

I will conclude by stating my belief in the communities ability to continue its progress and its ability to achieve whatever goal it sets in its sight. The present leaders and the community signal a desire to further pursue the self-government initiative. It is recognized that the Band government and the Band membership must take upon itself to become knowledgeable in the concept of self-government. When this is accomplished, we can then determine what our own form of self-government will entail. Our present success in delivering our own programs and services already gives us a large degree of autonomy. We are now at a cross road, full self-government the next logical step.