FEDERAL-PROVINCIAL RELATIONS IN INDIAN AFFAIRS

A Report on Highlights of Provincial
Positions Regarding Status Indians.

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INTRODUCTION

The role of provincial governments in Indian affairs cannot be dissociated from the Provinces' changing functions in the context of the evolution of Canadian federalism itself. As a result of intensified governmental activity at all levels in the war effort during the Forties, and for various other reasons emerging from the immediate post-war era, there were almost three decades which saw both the federal and provincial governments undertaking increasing initiatives in the affairs of Canadian society. The growing federal involvement in and support for many constitutionally-defined provincial functions can be seen, for example, in federal conditional grants to the Provinces which increased 17 times over a period of nearly twenty years, between 1945 and 1964. This growing "interventionism" by both levels of governments had a dual purpose: to regulate the economy - a Keynesian approach prompted by the depression years - as well as to ensure a minimum standard of well-being for their citizens. The Indian people did not begin to be beneficiaries of provincial services until well into the Fifties while all other Canadians had been recipients of programs and services from all levels of government. The extent of the adverse effects of the exclusion of Indians from other than federal services was pointedly noted in the 1966 Hawthorn Report:

> "... it would seem that the seriousness of Indian exclusion from provincial government services can be measured by the relative significance of those services to all government services. It is generally evident (from statistics) that the positive impact of provincial governments on the standards and styles of living of their citizens has markedly increased in recent years. While these are blunt standards of assessment, they are sufficient to reveal that an absence of provincial involvement with Indians constitutes a graver disservice to the Indian people than hitherto was the case." (Vol I, p. 208)

The Hawthorn report further substantiates the position that the almost total exclusion of Indians from provincial services until the latter Fifties was undersirable by noting that, on the whole, provincial administrations had acquired a greater skill and understanding in the various service areas and that such competence clearly surpassed the federal capacity to deliver similar services on reserves. When it became apparent, particularly through testimony provided to parliamentary committees which will be further discussed below, that material conditions on reserve were clearly inferior when compared to general Canadian standards, in other communities throughout the country, the argument for the extension of provincial services to Indian communities became more compelling.

Certain issues which emerge from an analysis of the material consulted for this report are summarized below:

1. Historically, until at least the end of the Forties when the Joint Parliamentary Committee of the Senate and the House of Commons examined the conduct of Indian affairs between 1946 and 1948, both federal and provincial governments appear to have accepted as a foregone conclusion that Indians were the sole responsibility of the federal government. The past twenty years saw various attempts by the federal government to change this perception and have the Provinces accept some measure of participation in providing services to Indian communities.

2. The realization that severe health and economic problems existed in Indian communities and the disparity between reserve conditions and those in most other Canadian communities until the mid-Fifties pointed to the inadequacy of the federal government as provider of all services to Indian people and to the consequent need for greater involvement by increasingly competent provincial governments in the area of services. In addition to the factor of competence the federal government could not attempt to provide the quality and range of services to Indian people equivalent to the total effort of all levels of government to the rest of the population without considerable costs due primarily to the duplication of existing and superior provincial and municipal services.

3. Initially, in the post-war era the Provinces appeared to accept a certain degree of responsibility for Indians, although the condition for such acceptance was in many instances total payment by the federal government for services normally provided and paid for by the Province to its other residents. However, the growing awareness by the Provinces that Indians on reserve are "high cost" recipients of services due to their economic circumstances and to their special needs, imposed an increasingly cautious approach on the part of provincial governments. Provincial caution, in turn, led to deep concern for two basic reasons: the new phenomenon of increased migration off-reserve which in 1966 represented about 18% and which escalated in less than a decade to approximately 30% in 1975; the federal position (as seen in the Canada Assistance Plan, for example) that the provision of services to off-reserve Indians is a provincial responsibility. Given these factors the off-reserve issue became a key jurisdictional and therefore constitutional issue in federal-provincial relations regarding status Indians since the permissive jurisdiction of the federal Parliament over "Indians and lands reserved for Indians" (B.N.A. Act, S.91(24)) has remained unclear with respect to Indians residing off-reserve.

4. The 1969 White Paper which proposed full access by Indian people to provincial services also met with vigorous opposition from Indians who considered that the policy changes advanced in the document would jeopardize their special relationship with the federal government. For some time, therefore, it was difficult, if not impossible, to address the issue of provincial services with Indian representatives without reviving the persisting doubts caused by the 1969 policy proposals.

Today, for some Indian groups, this difficulty still remains and it could therefore be said that the 1969 document represented, until fairly recently, a marked setback in federal-provincial relations concerning Indian affairs. However, at the present time there are indications that certain Indian groups are increasingly inclined to make demands on provincial governments based both on what they perceive to be their rights as provincial tax-payers, and on their view that they should have a more equitable share of the wealth and attendant opportunities available within provincial jurisdictions.

5. It appears from the documentation reviewed that, among all the provinces, Ontario was the first to seriously address and respond to status Indian concerns, and that it has also, on a fairly continuous basis since the mid-Fifties, maintained an active, positive role in federal-provincial relations regarding its Indian residents. Various other constructive initiatives have been undertaken in recent years, particularly by Manitoba, Alberta and Saskatchewan, in meeting certain responsibilities for Indian communities in those provinces.

HISTORICAL SYNOPSIS

Improved modes of communication brought aspects of the once remote Indian reserves to public attention. Certain issues such as the relatively poor state of health of many Indians living in almost indigent conditions in comparison with the rest of the population became crucial because they were perceived by the public as a potential threat to non-Indian communities.

Even before the Hawthorn study, the Joint Senate and House of Commons Committee was told in hearings prior to the 1951 revision of the Indian Act that the mortality rate due to tuberculosis was 14 times higher among Indians than among other Canadians, and that the infant mortality rate was almost 4 times higher among population. Unlike other Canadians, Indians received welfare assistance directly from the Indian Affairs Branch, not from established federal and provincial programs. Indians moreover were only eligible for basic relief in the form of "rations", usually in compensation for work assignments, rather than cash. Also, band funds were often used for relief assistance although in some instances no federal funds whatsoever were provided for this purpose. The parliamentary Joint Committee of 1946-48 found that Indians were not only excluded from many normal federal programs and from all provincial programs, but also that the services they did receive were in most cases inferior to those available to other Canadians (Hawthorn, 1966, Vol I, pp. 213-217).

The public hearings of the Joint Committee and the subsequent 1951 revision of the Indian Act contributed to promoting Indian interests. Newspapers pointed to the exclusion of Indians form old age pensions and the generally poor conditions on reserves as they were being described in documented form to the parliamentarians of the Committee. Not only were Indians segregated from other Canadians in terms of the fewer and inferior services available to them, but the Committee also heard that there was no recourse or appeal possibility with respect to the Indians agent's general decision-making role and to his dispensation of federal services. A 1933 federal directive stated that Indians were not to have direct access to headquarters since this would involve duplication and inefficient use of time, and that they must go through the agent. The joint brief of the Canadian Welfare Council and the Canadian Association of Social Workers to the parliamentary Committee concluded that Indian children received a very inferior degree of protection and almost no specialized care when compared to that afforded to other Canadian children.

At the 1951 Federal-Provincial Conference on Social Security, the Provinces agreed to extend old-age assistance and blind persons' allowances to Indians on a 50-50 cost-shared with the federal government. This was the first time the Provinces had agreed to assume a significant degree of financial responsibility toward assisting Indians residing within their boundaries.

After this initial effort, the province of Ontario took the lead in addressing some of the needs of its Indian citizens. The public hearings

of the parliamentary Committee had raised some acute problems which seemed to have stirred public opinion in Toronto in particular. In 1954 a special committee of the provincial legislature issued a report entitled "Civil Liberties and Rights of Indians in Ontario". The most immediate effect of this report was to give Ontario Indians the right to vote in provincial elections, a right granted by the federal Parliament only six years later. Another recommendation of the provincial report was that a federal-provincial agreement should be reached to extend services of children's aid societies in Ontario to reserves.

In 1959 Ontario amended its General Welfare Assistance Act to consider bands as municipalities for the purpose of the Act and to therefore provide for the participation of certain bands, principally in the southern part of the Province, in the benefits under the Act. Under the amended legislation, bands which until the federal government assumed the costs in the early Sixties, continued to provide some assistance monies from their trust funds, would recover 80% from the Province in the same manner as municipalities and the federal government would, in turn, reimburse 50% of the cost to Ontario.

Almost equally important as the assumption of financial responsibility by the Province was the fact that, in order to qualify under the Ontario Act, bands had to acquire greater control over their own revenues, a measure which was effected through a federal Order in Council. By the mid-Sixties, almost half of Ontario Indian bands were administering social assistance under the Act.

In addition to the amendment of its welfare legislation, by 1959 Ontario had also signed an agreement with the federal government providing for the extension of Children's Aid Society services for the protection of children in Indian communities. Arrangements were also made with British Columbia for the extension of provincial child welfare services to be reimbursed fully by the federal government until 1961 when the Province assumed the cost of certain protective and adoption services. At that time, the new Social Allowances Act was gradually being applied to Indians by the government of Nova Scotia. Manitoba had drafted a completely revised social security program covering status Indians which was on the legislative order paper. While there was an initial degree of recognition by the provinces that they had certain obligations to Indians as members of the provincial citizenry, in 1959 the federal government was still attempting to persuade the provinces to consider off-reserve Indians as eligible for the same services and benefits as other Canadians.

By 1960 Indians had acquired the right to vote in federal elections. They became full-fledged provincial citizens while still experiencing in most instances the living conditions resulting from unequal or lack of access to many benefits and services available to other Canadians. In 1961 the Joint Senate and House of Commons Committee once more pointed to the increasing need for greater provincial involvement in Indians affairs, specifically through the extension of services to reserve communities.

The Hawthorn Report notes that although the share of general government expenditures in 1939 for all three levels of government (including municipal) was almost equally divided, the war pushed the federal share up to 87%. However, by 1963, the federal share was down to 46%, with 26% and 28% of the fiscal burden assumed by the provincial and municipal governments respectively. It was therefore not surprising that at the 1963 Federal-Provincial Conference an important theme of discussion was equalization payments to the Provinces and the possibility of block-funding (this was not the term used then although it is an accurate description) and the total transfer of certain shared responsibilities to provincial governments. With specific reference to Indian people, the Conference recommended that, in order to achieve equality of opportunity for Indians, they should benefit from the same treatment by all levels of government afforded to other communities. More explicitly, federal and provincial policies and responsibilities for health, welfare, education, community development and other essential services were to be correlated, according to the Conference members, if the condition of Indian people was to become comparable to that of the majority of Canadians. It further recommended that a basis on which the widest possible range of federal and provincial services could be extended to Indians was to be found without delay. This latter recommendation became the mandate of the 1964 Federal-Provincial Conference on Indian Affairs.

At the 1964 Federal-Provincial Conference on Indian Affairs, the federal government indicated it had firmly adopted the policy of fostering the extension of provincial services to reserves and that, in its view, the problems were limited to the manner of achieving such extension and to the mode of consultation with Indian groups, an undertaking both levels of government had agreed to in 1963. In fact the federal government submitted two major proposals for provincial consideration: one on welfare and general assistance which had already been discussed at length with the Provinces, and another on community development.

Both these proposals foresaw the active involvement of the provinces in implementation on-reserve. The Quebec Minister at the Conference carefully worded the general objective:

> "The task of this conference is to start a progressive transfer to the provinces not of constitutional jurisdiction but of the initiative and responsibility which the central government has so far exercised alone in this sphere".

Despite the general atmosphere of cooperation, the Provinces did not hide some very real concerns. Manitoba pointed out that it had conducted a study just prior to the Conference which indicated that nearly all status Indians lacked full-time employment while half of the Métis labour force was in the same position, and that welfare payments would triple within ten years unless current trends were reversed. For Manitoba there was "no value in merely substituting provincial service for federal service" and it favoured a broader approach to socio-economic programming for native people.

Although Alberta accepted the principle of a comprehensive agreement to cover the extension of a wide range of services to Indian people, it cautioned that the existence of special "privileges" for Indians should be accompanied by attendant responsibilities. Alberta also made it quite clear that the additional funds needed to cover what the federal government acknowledged to be due to the "high cost" characteristics of the clientele applicable to on-reserve services, should also be awarded to provinces for off-reserve Indians. Also the Province was adamant in not accepting the cost-sharing suggested in the welfare proposal since the provincial administration had already undertaken financial responsibilities for off-reserve Indians.

At the Conference, Saskatchewan announced the creation of an Indian and Métis branch in its Department of National Resources, "to give special study to the needs" of Indian people, and to administer certain programs in order to deal specifically with those needs. The province's Minister saw a greater integration into the mainstream of society as one approach to creating equal opportunities for Indian people. For example, in order to improve on-reserve education, reserves should be incorporated into existing school districts; and to improve infrastructures, reserves should be amalgamated into surrounding municipalities.

The members of the Conference indicated basic agreement with the view that the social and economic cost to Canadians would be prohibitive if the federal government attempted to expand its services on reserves in order to provide quality and range to Indian people equivalent to the combined efforts of both levels of government to the rest of the population. Moreover, the duplication involved would aggravate the cost factor. In preparation for the future extension of services by the provinces, in July 1964 prior to the federal-provincial conference, the federal government adopted provincial welfare assistance rates and regulations on reserves, thus upgrading the range of assistance to Indians to that of other needy Canadians. However, a retrospective analysis of the cost of this type of improvement of conditions for Indian people some years later revealed startling increases which could explain a certain reluctance on the part of provinces on the degree of their participation in Indian affairs. During the period 1963-66 the cost of cash assistance and assistance in kind rose by 100% in some regions. In dollar terms, budgetary requirements for these purposes rose from $8.8 M in 1963-64 to $17.4 M in 1967-68. While some portion of the increase could be attributed to the higher cost of living, and to the increase in the Indian population the most significant factor was the application of improved provincial standards to federal administration on-reserve.

Federal-provincial coordinating committees of officials to deal with the implementation of the objectives discussed at the 1964 Conference were established in some of the provinces. The cost-sharing formula for welfare agreements proposed by the federal government involved a maximum 10% payment by the provinces. While Alberta, for example, readily signed a

community development agreement, it did not accept anything but 100% payment by the federal government for welfare services. As a result of this position, the federal government declined to sign the community development agreement since it essentially viewed the two as complimentary and expected that the impact of community development would be to eventually bring down the cost of welfare to the level in non-Indian communities. Manitoba and Saskatchewan basically disagreed with the function-by-function approach suggested by the Federal government and insisted that a comprehensive agreement was needed. These disagreements were founded on the view that the federal government should assume total cost of on-reserve services because of its constitutional responsibilities and that only a comprehensive approach could permit financial control by the provinces. These views were to be major obstacles to fulfilling the objectives discussed in the 1964 Conference.

In the early Sixties, a fragmented approach to provincial involvement in the provision of services to Indian people emerged. British Columbia had signed a federal-provincial agreement on social assistance and health services covering Indians off-reserve and non-Indians residing on reserve, and Saskatchewan and Alberta agreed to the provision of rehabilitation services. Manitoba and Nova Scotia assumed responsibilities in the child welfare area and the federal government had undertaken individual agreements with diocesan agencies in Quebec for family and children services. By 1965, Manitoba and New Brunswick had signed agreements covering education for Indian children.

During 1965 negotiations led Ontario to sign a more comprehensive welfare agreement with the federal government thereby undertaking the delivery of a wide range of services to Indians residing on reserves equivalent to those available to other provincial residents. Day care, counselling, rehabilitation, child care, social assistance are some of the services covered by the agreement. Some of these such as welfare payments and child welfare are largely paid for by the federal government while others such as benefits to the unemployable and rehabilitation are assumed by the province. However, a basic principle applies to cover the "high cost" factor discussed above: the province can claim the extra cost over and above that required to provide the same services to other citizens in the province. It was thought that this extra cost to the federal government would diminish as conditions improved on reserves. The province, however, accepted another basic principle in the agreement; namely, that it would not be reimbursed for indirect costs since provincial structures were already in place and functioning for the non-Indian majority. This principle and the increasing migration off-reserve of Indian people in later years, would cause provinces to express concern regarding the fiscal burden of the provincial extension of services to Indian people.

Special mention should be made of the situation in Newfoundland. At the time of union in 1949 there was no clarification of the special position of Indians and Inuit, and they were therefore generally considered to be citizens with the same rights and responsibilities as other residents of the province. Furthermore, they did not have reserve land set aside for

their benefit. Until 1964, the federal government provided for medical costs and $200,000. per year for capital costs of projects targeted for Indian and Inuit people. Since 1965 there have been three consecutive, comprehensive federal-provincial agreements covering five years each under which the Province has undertaken to deliver a complete range of services and provides more than half the funds required for the task. At the present time Ottawa provides $4.5M per year, and Newfoundland's contribution is $6.5M per year to serve ten communities in which the majority of residents are Inuit and Indian, although these are not exclusively native communities, and are in no way comparable to reserves.

Agreements signed with every province pursuant to the 1966 Canada Assistance Plan (CAP) Part I provided for health and welfare assistance to provincial citizens irrespective of residence. However, several provinces - British Columbia, Alberta, Saskatchewan, Manitoba and Nova Scotia required and are still requiring off-reserve Indian people to maintain a period of residence in a municipality before becoming eligible for assistance under the Plan. These provinces were consistent with their stated positions at the 1964 Conference, and given the relatively modest tangible results in the form of follow-up agreements, they could not have been expected to suddenly revise their views on services to Indian people, despite their acceptance of CAP, Part I.

There was a second part to CAP entitled "Indian Welfare" which proposed special cost-sharing arrangements for the extension of provincial welfare-related services to Indian people. The federal government subsequently suggested it would refund 95% of the cost of these services to the Provinces. However, this part of CAP was never implemented nor agreed to by the Provinces which maintained that Ottawa's constitutional responsibilities dictated a 100% payment for provincial services on reserves. Moreover, the Prairies continued to insist on a broader comprehensive arrangement which would cover all matters, including off-reserve Indians.

1966 was a significant year in Indian affairs since it also saw the publication of the first volume of the Hawthorn study which was commissioned in 1964 to examine the social, educational and economic situation of Indians in Canada and to make recommendations for the improvement of that situation. Basically, the report pointed to the federal position enunciated at the 1964 intergovernmental Conference, that as provincial citizens who pay most provincial taxes, Indians are entitled to the same provincial services as everybody else - a position with which the report concurred. In fact the authors of the study further elaborated their agreement with the federal position in the following way:

> "It would be infinitely preferable if Indians <u>fought</u> their way into the provincial community as recipients of services than if the federal government <u>bought</u> their way into the provincial community in all circumstances". (Vol I, page 390)

While the report admits that certain steps had been taken in the post-war years to overcome discrimination particularly in the provision of services to Indians, it nevertheless takes the provinces to task for continuing to exclude Indian people from many benefits afforded to other Canadians. Ultimately through 1966-67, the study team would elaborate recommendations on ways of increasing provincial involvement in the Indian world.

Spurred on by agreement among themselves on a comprehensive rather than a function-by-function approach to extending services to Indian people, ministers of the Prairie Provinces met in Winnipeg in October 1966 to discuss native affairs. They decided that future consultations with the federal government on services to Indians should be based on a comprehensive approach and they asked for a review of all government agreements and programs affecting Indians. These points were referred to the Prairie Economic Council which, in turn, recommended the creation of a federal-provincial task force of officials to develop ways of implementing the provincial ministers' decisions. However, these recommendations were conveyed to the Prime Minister just prior to his resignation and there was no further follow-up to that initiative.

During the period 1966 to 1969, prior to the White Paper, there seems to have been no tangible progress in developing further agreements with the Provinces. The arrangement in Ontario seemed to be quite successful and an increasing number of bands availed themselves of the benefits of the agreements under which the federal government funded 97% of the costs. The Provinces appeared to initially accept the federal proposal to transfer funds normally provided for Indian programs to provincial administration which, in turn, would extend the full range of their services to Indian people according to the 1969 policy proposals. However, the negative Indian reaction to the document caused Provinces to retreat to a more cautious stance whereby extension would be available only upon agreement by the Indian groups concerned.

The impact of the 1969 White Paper was to be long-lasting, even to the present day for some issues, particularly the Indian perception that dealings with the Provinces somehow implies the abrogation of federal responsibilities and particularly of the special federal "trust" relationship with the Indian people. In the immediate aftermath, in 1971, the Quebec government indicated its willingness to conclude an agreement under CAP Part II, although it unofficially communicated the view that the cost-sharing aspect was not acceptable for Quebec nor for the other provinces. The federal government subsequently revised its initial position and decided to assume 100% of the cost for on-reserve Indians, and as in the case of all provincial residents, 50% for services to off-reserve Indians. Although certain provinces indicated an interest, Indian leaders insisted that such arrangements were, in fact, an implementation of the 1969 policy proposals.

Between 1972-76, there was a general hiatus in federal-provincial relations regarding Indian people. The federal government withdrew its revised

position on CAP part II and suggested that piecemeal agreements may be developed with interested provinces and with the concurrence of Indian representatives. Ottawa was still shaken by the furious reaction of Indian leader to the White Paper, and was deliberating on the mode of consultation it would adopt in order to repair some of the lines of communication with the Indian people. In 1976, it announced its intention to develop a relationship with the Indian people which would be based on guarantees of the continuation of special status, and on consultations at all levels to involve Indians in decision-making processes affecting them, while at the same time devolving local self-administration and government functions to them. In this perspective, all transactions and agreements with the Provinces would be tripartite.

Manitoba had, in some way, pre-empted the federal government by asking the provincial Indian association in 1974 to assist in tripartite discussions with Ottawa because the Province wished to examine the question of services to Indian people. The Indian population was increasing at a faster rate than the rest of the Canadian population and a study completed in 1977 for Secretary of State indicated that between 1969-75, British Columbia and the Prairie provinces experienced a heavy out-migration rate due to the changing aspirations of Indian people. They were leaving reserves principally because of perceived economic opportunity in urban centers and to experience a different life-style. The implication for the Western provinces was that an increasing "high cost" potential clientele was requesting services in urban centres, and in many instances were either sent to the regional offices of DIAND or were given services for which the federal government was subsequently fully billed for the cost.

It was with this background that the government of Manitoba undertook a study of services to status Indians in order to determine the degree and implications of provincial involvement in services to Indian people. Manitoba concluded from its analysis that provincial costs for status Indians had risen from 15% in 1970 to 30% in 1976, and that, at that rate, the projected costs would rise to 50% by 1984. The study emphasized the relative youth of the Indian population and the fact that one-third of all status Indians lived in off-reserve communities. With an almost uncanny return to its position in 1964 and thereafter, the Province asked for a comprehensive master agreement to cover all provincial services to Indians while delineating the responsibilities of each party and providing for subsequent tripartite subsidiary agreements.

Although the federal government did not agree with certain aspects of the Manitoba analysis, particularly with some of the financial data, it agreed to tripartite consultations which began in 1977. In fact the Prairie Provinces (later joined by Ontario) thereafter met at the ministerial level to discuss common concerns regarding their role with respect to Indian people, although no common position seems to have emerged from these consultations. Undoutedly prompted by ongoing constitutional discussions, in the summer of 1979 officials from all provinces held an unpublicized meeting to discuss key issues, some of which apparently touched upon status Indians and other native groups.

The Manitoba experience was to set the stage for a reopening of lines of communication in certain provinces in terms of defining provincial involvement in Indian Affairs, an area which had not been addressed, except on an ad hoc, issue-by issue basis since the 1964 Federal-Provincial Conference on Indian Affairs. In the last few years, however, both levels of government have been increasingly looking to the constitutional revision process as a national forum which might lead to a clearer, mutually acceptable delineation of roles and responsibilities vis a vis Indian people.

With tripartite discussions underway in Manitoba, in 1978 both Ontario and Alberta took important steps in addressing the needs of Indians in their respective provinces. In Ontario, together with four provincial Indian associations and the federal Minister of DIAND, the provincial Secretary of Resource Development agreed to establish a tripartite mechanism to examine mutually agreed upon priority issues such as policing, hunting and fishing, and land-related problems. Shortly thereafter, Ontario further emphasized its commitment to resolve certain problematic issues regarding Indians by forming a Cabinet Committee on Native Affairs, an initiative it had already undertaken more than a decade before, in 1965, in order to address matters arising from the federal-provincial agreement governing general welfare which had been finalized at that time.

Alberta which had begun discussions regarding Indians with the federal government in 1976, has also recently changed its native affairs secretariat to a full-fledged ministry, an indication perhaps of the Province's willingness to address specifically native issues; including those regarding status Indians. In Alberta, where two bands (Blackfoot and Sturgeon Lake) had been negotiating individually for an extension of provincial social services, the provincial government adopted a policy in 1978 undertaking to extend all provincial services to Indians on-reserve on the condition of 100% reimbursement for costs by the federal government, while accepting to meet the cost of services for off-reserve Indians. Essentially, Alberta's position had not changed since the 1964 federal-provincial conference. In 1978, the principle of total federal responsibility for the cost of services to on and off-reserve Indians was also expressed by British Columbia. For the past two years Quebec has been willing to undertake tripartite discussions but Indians in that province are reluctant to accept any but the essential degree of provincial involvement in their affairs.

Saskatchewan's social planning secretariat has recently developed a five-year plan at an estimated cost of $500 M to assist primarily urban native people in the fields of employment, education and housing. The plan which was announced in September 1979 includes an affirmative action program through which the Province plans to employ native people in its public service roughly equivalent to the 10% ratio which they represent in Saskatchewan's population.

It should be noted that the sections hereunder address issues selectively in order to highlight certain provincial positions and attitudes in areas

with significant impact on Indian affairs. Due to long-standing jurisdictional problems and to the ongoing discussions on constitutional reform, it is understandably difficult to present a more comprehensive data-based picture of these positions on a province-by-province approach.

OFF-RESERVE INDIANS

Both the extension of provincial services to reserves, and services to off-reserve status Indians have been the two dominating themes in federal-provincial relations on Indian affairs. In the post-war era to the present time, the federal government has taken the position that off-reserve status Indians should be viewed as any other provincial citizens by the Provinces, a clear departure from previous positions as exemplified in Western Canada where, until World War II, Indian people needed special passes to leave their reserve. Moreover, prior to 1951, Indian people residing off-reserve for one year were automatically enfranchised. During the late Fifties and the early Sixties, many provinces indicated varying degrees of willingness to extend certain services to reserve communities and in many cases, also to provide the full range of their services to the relatively few Indians at that time who chose to establish their residence off-reserve. This was prior to the significant migration of Indians from reserves to urban communities. In Saskatachewan, for example, the off-reserve Indian population doubled in less than ten years, from 15% in 1967 to 30% in 1975. Nationally, in 1966 some 18% of Indians were off-reserve while today the figure is approximately 27%. It was also prior to the federal government's attempt to formalize arrangements regarding Indian people through the Canada Assistance Plan.

As already mentioned above, the Canada Assistance Plan requires the provinces to provide social services without a residence requirement yet certain provinces have chosen not to provide such services to Indians without stipulating the residence requirement. This issue has broader implications than might be surmised since many Indians do not necessarily establish themselves permanently off-reserve, but rather they migrate from urban centres to their communities, often due to seasonal employment as well as other factors such as the hunting season.

In Saskatchewan, for example, many social services to off-reserve Indians are directly provided by the federal government, although until 1973 the province provided such assistance without asking for federal reimbursement. At the present time, the Province provides services to off-reserve Indians after one year of residence away from their reserve, and only when Indians chose to seek provincial services. The result of this arrangement is confusion for Indian people who are shunted from one agency to another because they are told they do not meet provincial residential requirements.

The treatment of off-reserve Indians by most provincial governments is still a contentious issue today. The only exception is Newfoundland where a comprehensive federal-provincial agreement has been in place since 1965.

Only a few provinces such as Prince Edward Island, New Brunswick and Quebec accept full responsibility for off-reserve Indian people, without imposing residential or other prerequisites. In Ontario and Nova Scotia, the provincial governments offer certain forms of social assistance such as family benefits without asking for federal reimbursement. Under the 1966 welfare assistance agreement, Ontario extends its services on-reserve for which it receives 95% of direct costs from the federal government (Ontario pays indirect costs as noted above), and to Indians who have lived off-reserve for a year or less, with federal government reimbursement to the Province for 50% of the costs. Manitoba is reimbursed 100% for assistance to Indians off-reserve who do not meet provincial residence requirements. Since 1977, British Columbia, has not asked for reimbursement for services to off-reserve Indians and the federal government has not charged the Provinces for services to non-Indians residing on reserves.

Many factors are involved in the off-reserve issue. The quality and costs of provincial services have increased over the years and for various reasons many off-reserve Indians remain "high cost" recipients of services, although some adjust to the new environment and find adequate employment. In its 1976 study of services to status Indians the Manitoba government stressed the "high cost" factor as a rationale, in addition to constitutional considerations, for putting forward the position that it will not accept responsibilities for Indians beyond what it receives from them in the form of tax revenues and from the federal government in the form of transfers. In addition, to cover the "high cost" element, the federal government would have to assume the exceptional costs that some Indians incur over and above the provincial per capita cost.

Also, and this is particularly true in Saskatchewan, some Indians are reluctant to accept any provincial services because they contend such acceptance constitutes an abrogation of federal responsibilities for Indians regardless of whether they are on or off reserves and because it signals a return to the 1969 White Paper policy which sought to consolidate their position as provincial citizens equal to all others. In fact it is in Saskatchewan (incidentally the province with highest ratio of Indians in its population) where both Indian groups and the provincial government seem to have agreed over the years that Indians are under the absolute and unique jurisdiction of the federal government.

The positions of the provinces also depend on the varied impact which they perceive Indian people to have on demand for services. For example, whereas status Indians constitute just over 1% of the total population, they represent over 4% in Manitoba and 5% in Saskatchewan. With the exception of the Maritimes where the Indian population is very low, Indian people in those Western provinces are also more economicaly depressed than in other parts of Canada, and therefore seek economic opportunities off-reserve in greater numbers.

There have been certain positive initiatives designed to meet some of the needs of Indian and other native people who have migrated to urban areas. The federal government maintains certain specific types of involvement with

respect to off-reserve Indians in areas such as post-secondary education and housing. Friendship centres, first established in 1958 in Winnipeg, and originally instituted to assist native people in establishing links with the larger society, have today in many instances become referral centres and even providers of services which provinces normally offer to their other citizens. Prior to 1972, there were several federal-provincial cost-sharing agreements since the provinces recognized the fact that many centres, to varying degrees, were delivering certain provincial social services. However, since 1972, when the number of centres had increased to 37, the federal government assumed the basic or core funding for these centres, while only some provinces provided limited demonstration funds for specific projects.

Although the native courtworker program will be discussed further in this paper, it too provides a supportive and sometimes a preventive mechanism for native defendants and offenders. The program is in place in most provinces and is cost-shared, usually approximately 50-50 by the two levels of government.

In the urban milieu, identity and cultural support for Indian people who have recently left a way of life on reserve are almost as important as economic assistance. While friendship centres provide some of this support, other rather modest mechanisms are being tried and yet others are being contemplated. One example is British Columbia's "First Citizens' Fund", under which a limited sum of approximately $1 M is provided to native people for special projects. Both Ontario and Saskatchewan have speical ministerial branches dealing with native affairs which also serve as clearing houses and coordinators for access by native people to other provincial agencies. The Alberta government has recently intituted a native affairs ministry and in Quebec there is a special secretariat with access to the Premier's office, which addresses native concerns. The Ontario government has provided some grant money for projects associated with friendship centres in the past few years and Saskatchewan has assisted off-reserve Indians in placement and related services through its Human Resources Development Agency. In the mid-Sixties, Manitoba also offered assistance in placement and relocation through its People Opportunities Services and has encouraged native employment in the provincial public service through its New Careers Program.

CLAIMS

The joint parliamentary Committee on Indian Affairs 1959-61 was given lenghty accounts about long-standing grievances and claims, particularly from British Columbia Indians. The Nishga Tribal Council formed in 1955 raised the issue of aboriginal rights through its leader Frank Calder who was to take it to the courts a decade later. The parliamentary committee repeated the recommendation made by its predecessor during the 1946-48 hearings that an Indian Claims Commission be established as an objective forum for receiving and examining claims. The American experience was a

point of reference in this regard: in 1945 the United States Indian Claims Commission had been established as a judicial body to hear and resolve Indian claims.

Although several attempts were made to present legislation in Parliament, the Canadian Indian Claims Commission was created as a result of the White Paper policy proposals in 1969 to study grievances and recommend measures for the adjudication of claims. In that year the federal government acknowledged its lawful obligations with respect to treaties. The Commission operated for a few years, then fell into disuse and was resuscitated briefly under Justice Hartt until he assumed his position as Ontario Indian Rights Commissioner in 1978. In 1973, the second component of federal claims policy was enunciated: it would consider comprehensive claims based on the loss of traditional use and occupancy of land in areas where there had never been an extinguishment of native interests by law or treaty, and would also address specific claims, that is, those resulting from the administration of reserve land and Indian assets, and from the interpretation or fulfillment of treaties. In the process of formulating its claims policy, it should be noted that Ottawa did not consult the Provinces about these policies, and that those aspects of implementation which through subsequent years obviously necessitated provincial involvement, were made more difficult as a result of the unilateral federal approach to the claims issue.

Ever since Indian interests in land have been expressed in formal government documents, initially through the Royal Proclamation of 1763, and thereafter, through treaties and legislation, the issue of claims has been a major theme in the conduct of Indian Affairs. Although a good portion of responsibility lies with the federal Parliament's jurisdiction over "Indians and lands reserved for Indians", through the years, the Provinces have been involved in various degrees due to both jurisdictional reasons and to the nature of the evolving federal system.

a) Cut-Off Lands

One example of such involvement is the "cut-off" lands issue in British Columbia, an ongoing problem for the past several decades, which resulted from the Province's disposition of over thirty-thousand acres of reserve land without the consent of the Indians in 34 reserves and without compensation to them during the early part of the century. This transaction was a result of recommendations of a federal-provincial Royal Commission on Indian Affairs which, between 1913 and 1916, decided the federal government had the right to expropriate reserve land and transfer it through sale or lease to the Province, which would thereafter dispose of it according to its own priorities.

The background of this issue dates from the province's union with Canada in 1871. Since then, British Columbia had consistently insisted that the federal government's initial recommendation to set aside reseve land by

allocating 80 acres per family was not acceptable and that 20 acres per family would be sufficient. Finally the Province took the position that each group of Indians should be dealt with separately, that no fixed acreage be the basis of discussions and that a joint federal-provincial mechanism consisting of three Commissioners be charged with the establishment of reserves. However, this approach proved unsuccessful and in 1909, British Columbia advised the federal government that it would make no more land available to Indians unless Canada paid for it. This led to the 1913-16 Royal Commission, and by 1941 the two governments had developed a formal agreement whereby the province undertook the full administration and disposition of cut-off lands. The revenue was to be equally shared, and the federal portion was to be used for the benefit of Indians.

By 1969, the federal government on behalf of one band, the Squamish Indians, advised the B.C. government that the band had at least moral grounds for reclaiming unused areas of land cut-off from their reserve. In 1973, the federal government insisted that in light of changed circumstances the Province should return cut-off lands because they were taken without the Indians' consent and without compensation to them for the loss.

Tripartite negotiations on cut-off lands began in March 1977 and the Province finally agreed to return about thirty-thousand acres under its control to reserve status, to compensate for assessable damages to these lands, and to pay current market value for certain lands it retained for public use. However, the financial compensation, only one aspect of the offer, has not to date been acceptable to the Indians, since the question of historic market values of lands are involved.

b) Comprehensive Claims

Cut-off lands is an example which shows one facet of British Columbia's treatment of issues of direct concern to its Indian citizens. Another facet, however, is revealed in its position on comprehensive claims. Quebec and British Columbia were the only two provinces in which the federal government in its 1973 claims policy perceived the possible existence of comprehensive claims, based on Indian interest in land where such interests had not been extinguished by treaty or superseded by law. The 1973 federal policy had stated the need for provincial participation in the resolution of comprehensive claims because of provincial jurisdiction over lands and resources, and because of the need to protect the rights of other citizens, third parties, who may be affected by claims settlements. In 1970, the B.C. Indians had raised the issue of "aboriginal title" in the Calder case in the courts, and judicial doubts on the validity of such title in law was manifested in the Supreme Court's subsequent split decision on the issue. Particularly since the Calder case, British Columbia has denied liability for any aspect of Indian "aboriginal title", insisting on the federal government's primary responsibility in this area.

Although since 1976 the Province has participated in tripartite negotiations on the Nishga claim, it has clearly indicated that its participation would be limited to seeking improvements in the Indians socio-economic conditions, notably in public services and other existing programs for Indians of the province and that it would not discuss claims as such or native interest in land. It has so far refused to consider claims from other groups.

The only comprehensive claims settlement of modern times in Canada is the James Bay Agreement which became effective through enabling legislation in 1976. The province was very much involved in the settlement since through the 1912 Quebec Boundaries Extension Act it had undertaken to obtain surrenders of the rights and interests of native people in the area and to compensate them accordingly. In 1971, the Dorion Commission on Territorial Integrity, in a special volume dedicated to Indian affairs, concluded that native interests existed in Northern Quebec and could only be extinguished by providing just compensation. Provincial feasibility studies on the project began in the James Bay area as far back as 1965 and tripartite discussions on general problems (excluding the James Bay project) of concern to Indians in Quebec had been established at the end of 1969.

Despite these factors and the Dorion recommendation, the Province made no mention of native interests when it formally announced the hydro-electric project in April 1971. Although the federal government repeatedly indicated its concern for Indian and Inuit interests in the area, and indicated the need for a tripartite meeting, the James Bay Development Corporation was nevertheless established through provincial legislation and began its preliminary work almost immediately. In a subsequent meeting with Indian representatives, the Province stated the Corporation would not modify its initial development plans. It was only in 1973, as a resulf of a court injunction, that the Indians, with the financial assistance of the federal government, successfully brought the Province's attention to its responsibilities to them. Shortly thereafter tripartite negotiations began.

In the final Agreement, most of the bare title to the over 4,000 square miles of land to be occupied and/or used by over 10,000 native people remains with the Province. The Agreement includes a host of provincial responsibilities and functions, from the provision and funding of health services to the provision of an income security program for Cree hunters, fishermen and trappers. It is interesting to note that the Agreement contains elements of the 1971 Dorion Report. For example, the system of municipalities under Indian and Inuit regional governments flows from the suggested establishment of "Amerindian municipalities" in the Report which, of course, would be under provincial jurisdiction.

In 1977, the Quebec government established the Secrétariat des affaires gouvernementales en milieux amérindien et inuit (SAGMAI) whose original function was to facilitate the implementation of the James Bay Agreement.

It has since, however, served as advisor to the Premier on native affairs and has been a general coordinator of native concerns with respect to the administration of provincial government departments. The establishment of this organization which began with a handful of officials and which now employs some twenty persons indicates the Province's intention to maintain a closer, more organized overview of the situation of native people in Quebec, including status Indians.

c) Residual Treaty Entitlement

In 1930 the Natural Resource Transfer Agreement transferred federal Crown lands to the Provinces. Normally, with the exception of federal Crown lands (principally reserves and parks) Ottawa generally has no authority over lands and resources in the provinces. When negotiations to effect the 1930 Agreement were underway it became clear that not all Indian bands in the Prairies had received their complete treaty entitlement. Provisions were therefore included in the Agreement to enable Canada to avail of provincial land in the Prairies in order to fulfill its treaty obligations, subject to provincial agreement.

In 1975 the federal government sought to meet its lawful obligations in Alberta, Saskatchewan and Manitoba in order to ensure full acreage of reserve lands based on the resident Indian population as promised in the treaties. However, the 1930 provisions proved to be problematic and imprecise since they did not indicate the level of population to be used in calculating a band's entitlement, nor were there specifications regarding the quality of land set aside, or even whether other forms of compensation could be offered in lieu of land. However, with the significant increase of the Indian population since 1930, and the diminishing supply of Crown land, together with the growing general need for mineral wealth, the Prairie governments, particularly Alberta and Manitoba, have questioned whether historical, administrative practices might not have been more generous than the actual obligations under the 1930 transfer conditions. Moreover, they pointed to a scarcity of unoccupied provincial Crown land in the southern portion of the Prairie provinces and were obviously concerned about transferring prime land. The federal government was therefore asked to consider the possible selection of federal lands or even financial settlement as another alternative.

In 1976, Saskatchewan proposed a formula whereby it agreed to set aside an amount of land based on the 1976 Indian band population level times 128 acres, minus the land already received under treaty entitlement. It was calculated that approximately 1 million acres of land would be needed for this purpose in Saskatchewan. The federal government has already indicated that because there is less available land in the southern portion of the province, federal Crown land could also be made available for selection by the Saskatchewan bands. Although the issue of cash compensation in lieu of land has been discussed, Saskatchewan has not to date indicated a willingness to provide monies for this purpose.

Although in 1978 the Federal Government decided to approach both Manitoba and Alberta on this issue using the Saskatchewan formula as a possible model, neither province agreed to those conditions and offered, instead, a more limited calculation to land under treaty entitlement. Alberta suggested setting aside 24,000 acres while Manitoba calculated 95,000 acres. In March 1977 Alberta amended its Land Titles Act to retroactively remove the legal procedure for filing caveats on unoccupied Crown land, thus avoiding the possibility of future litigation on the part of Indians in particular. This was in reaction to the filing of a caveat in 1975 by seven isolated Indian communicities in northern Alberta, declaring an interest in about 25,000 acres of land. At this time, however, the Province is primarily interested in reaching an overall settlement of all outstanding land entitlement under treaties and a subsequent formal relase from Canada from any future responsibility to provide land under treaty entitlement.

To date, the greatest progress has taken place in Saskatchewan where 15 bands are presently involved in land selection. This entails negotiations with both levels of government as well as third parties holding leases or other title to specific parcels of Crown land in which bands have expressed an interest.

Although what is now known as the "headland to headland" issue does not properly come under residual treaty entitlement, it involves a claim that certain lands which the Indians had understood to be included under treaty for their use and benefit had in fact been excluded. In 1894 an Agreement was reached between Ontario and the Federal Government under which the province was guaranteed to be a party to land surrendered under treaties. One provision in the Agreement stated that lands under water lying between the headlands of reserves, together with all islands totally within the headland, would form part of the reserve and therefore Indians would have the exclusive rights of fishing therein. However, by 1896 the Privy Council, then the highest court of appeal, decided that the beds of all rivers and lakes which had not been granted to Indians, belonged to the province in which they were situated and that inland waters were under provincial jurisdiction. In 1915 the Ontario legislature passed legislation in order to assert title over headlands and underwater rights adjacent to treaties. In fact, however, the 1915 legislation was never confirmed by federal Order in Council. Today Indians contend that the 1894 Agreement was made between the two levels of government without their participation although there had been an undertaking to consult Indian people at the time treaties were negotiated. Treaty 3 Indians believe that the expropriation of what they consider the richest portions of their reserve has been unjust and that the present circumstances makes it difficult to plan for future development or even to clearly define the water boundaries of reserves. They also claim that by taking headland waters the province denied the Indian people rich fishing grounds. In June 1979 the Chiefs of Treaty 3 presented the Minister of Natural Resources of Ontario with a document outlining their grievances and asking that negotiations begin on the issue. It is now being discussed within the tripartite forum.

HUNTING & FISHING

Some treaties provide for hunting and fishing rights for Indians, most of which are subject to varying degrees of qualifications. Many Indians however are convinced that the spirit of these provisions in treaties is to provide unqualified rights to pursue these activities which a significant number still consider to be necessary to both their livelihood, and to their way of life.

Hunting and fishing have been increasingly pressured over the years by environmental conditions, a growing population and competing sport and commercial uses. Moreover, there is the issue of overlapping jurisdictions: the federal government's responsibility for Indians and for the Migratory Birds Convention Act as well as the Fisheries Act, and the provinces' responsibilities with respect to resource management, including the regulation and enforcement of the aforementioned federal Acts.

Also Section 88 of the Indian Act states that "subject to the terms of any treaty and any other Act of the Parliament of Canada", provincial laws of general application apply to Indian people. Historically, the courts have, on the whole, held that the effect of S.88 has been to exempt Indians from provincial game legislation which contravenes treaty guarantees. In one area, inland fisheries, the courts have over the years, tended to restrict federal powers over inland fisheries which are increasingly viewed as an adjunct of the provinces' proprietary interest. As a matter of fact, in the Prairie Provinces there are cost-sharing agreements to allow for the increased participation of Indians in the fresh-water fishing industry. Federal legislation, however, prevails over treaty provisions according to the courts.

In the Prairies, the 1930 Natural Resources Agreement protects hunting and fishing rights for food in all seasons on unoccupied Crown lands and any other lands to which Indians have access, although general provincial laws governing game would apply to Indians in all other circumstances. Court cases indicate that the protective provision in the Agreement relating to Indians prevails over provincial legislation restricting hunting and fishing activities. However, according to the courts, for example, the Migratory Birds Convention Act, which flows from the 1916 international Convention between the U.S. and Canada, takes precedence over the 1930 protective measures under the Agreement since the Act comes under Canada's international obligations.

However, jurisdictional disputes have broader implications than court cases alone, and Indians have often been involved in these, sometimes in a violent manner. In the summer of 1978, for example, there were clashes between R.C.M.P. and fisheries officers and Indians on both the west and east coasts. Provincial concern for non-Indian third party interests, particularly those representing commercial and recreational activities, as well as the general contention that conservation management should override

the livelihood pursuits of a minority such as the Indian people, has led to further difficulties in federal-provincial relations. Although a Federal-Provincial Conference on Wildlife as far back as 1928 had unanimously agreed to establish exclusive areas for Indian hunting and trapping activities, today neither the purely jurisdictional issues, nor the special consideration for the hunting and fishing livelihood activities of Indian people have been resolved to the satisfaction of all concerned.

Conscious of the pressures from Indian and non-Indian interests alike, Manitoba, for example, issued a directive in 1976, before tripartite discussions began with federal officials and Indian representatives which stated:

> "Enforcement officers are asked to be cautious rather than zealous where Treaty rights are concerned; but just the reverse to Indians and non-Indians alike, where non-Treaty matters are concerned, e.g., wastage of games, etc."

However, in the Catagas case subsequent to the directive, the Manitoba Court of Appeal ruled that the Province could not exercise this type of leniency under the Migratory Birds Convention Act, thus reducing the options for dealing with Indian rights to amending the Act and the Convention. The Convention was jointly amended by the U.S. and Canada in March 1979, thereby enabling future legislative amendments in order to permit the hunting of migratory birds by Indians and Inuit for their essential needs during any period of the year, in accordance with seasonal conservation measures. The Manitoba tripartite process which includes hunting and fishing will undoubtedly address the follow-up to the amendment, and federal officials will be discussing it with provincial counterparts over the next few months.

The James Bay Agreement and existing land claims negotiations to date recognize the priority of Indian fishing and hunting activities over competing uses. The Province of Quebec has not only endorsed this recognition in James Bay but has also recently signed bilateral agreements with certain bands to facilitate salmon fishing. In its recently completed "Strategic Plan for Ontario Fisheries", Ontario has recognized the priority of Indian food fishery over competing commercial and recreational uses. The general subject of game harvesting is an integral part of tripartite discussions in Ontario.

Some provinces, such as Alberta, Saskatchewan, British Columbia and Newfoundland make specific provisions in their regulations for Indian food fishing. British Columbia issued hunting permits under the B.C. Wildlife Act authorizing Indians to take game out of season for food. Despite these measures, certain problems arise. A case in point is nightlighting, in which in 1964 the Supreme Court decided in the Prince case in British Columbia that this activity is a lawful hunting method for Indians under the 1930 Transfer Agreement, but for which the Court subsequently qualified its decision in the Myran case of 1973 by stating that nightlighting is not lawful if it constitutes a danger to life and

property. This type of case not only illustrates the conflicts between Indian and provincial government interests, but it also leads to certain difficulties in relations between Indian and non-Indian communities.

Some Indian bands have recently passed by-laws, pursuant to the Indian Act, regulating the management of fish on their reserves. This has been a contentious issue for both the federal and provincial governments, notably for New Brunswick, British Columbia and Ontario, and for conservation groups, but the by-laws have been permitted to stand so far.

ENVIRONMENT & DEVELOPMENT

The impact of technological and economic development on the natural environment is an issue which has particular relevance to Indian people. In addition to the concern shared by most people regarding pollution and related adverse effects, for many Indians, the natural environment is often a source of food, a habitat and also a setting for their particular lifestyle. Although the Indian's frequent objection to development may be viewed by the outsider as one based on hard-line traditionalism, for Indians the issue is related to, and perceived as involving physical and cultural survival.

As already noted in the claims section above, Provinces understandably promote development while protecting the public, i.e. the majority's, interest wherever possible but they usually have to be reminded - gently or otherwise - about Indian interests. The federal government often enters the scene, so to speak, either as mediator, or as spokesperson on behalf of Indian interests, and usually provides financial and other support to Indian groups in their discussions and disputes with the Provinces. The result is that the federal government is sometimes seen by provincial governments as "instigators" of controversy whereas it is in fact often responding to a request by Indian groups for assistance in achieving provincial recognition of their responsibilities for their Indian citizens.

One example of this dilemma is the flooding of reserve lands by Manitoba Hydro. In 1966, the federal government and Manitoba agreed to plan and develop hydro-electrical and transmission facilities to meet the growing and future demands for electricity. The project was to be completed by the end of 1975 and a subsidiary agreement was signed by the two levels of government in 1971 which included provisions to examine the impact of the construction of facilities. Implicit in the agreement was the probable requirement to transfer or expropriate federal Crown land for this purpose. Although there was public controversy over the impact of the project on a Métis community, the Province continued to disclaim any adverse effects of reserve land. By late 1973, however, the Province informed the Nelson House Indian band that some flooding would occur on its lands. In 1974, five bands in the area formed the Northern Flood Committee and the federal government thereafter agreed to fund it and provide the necessary support for the satisfactory resolution of the issue.

In July 1975, the Province was compelled to address the Indian issue in relation to Manitoba Hydro's plans because a study entitled Summary Report of the Lake Winnipeg, Churchill and Nelson Rivers Study Board was released stating that about 12,000 acres of reserve land would be flooded (eventually only 9,100 acres were actually to be flooded) and would therefore become uninhabitable. The report recommended compensation for all damages and the continuation of negotiations with the Northern Flood Committee which the Province had unsuccessfully undertaken a short while before.

Protracted negotiations resulted in the Northern Flood Agreement of December 1977 through which the Committee, the federal government, the Province of Manitoba and Manitoba Hydro agreed to the establishment of a band-controlled economic development corporation to manage a $5M fund for various projects and to the setting aside of four acres of new land for each acre to be lost, as well as other compensatory measures. However, this entire issue could probably have been handled differently had the Province recognized its responsibilities from the outset, and had it consulted with the Indian groups affected from the time it was known that substantial amounts of reserve lands were to be affected.

Because of a growing awareness of the many possible implications of development on the natural environment, the two levels of government are increasingly seeking ways to minimize adverse effects through careful study and planning. The Thompson River Basin pre-planning Agreement of May 1979 is a recent case in point of this new cautious approach. Under the Agreement, British Columbia and Canada undertake to study and report on the effects in water resources of emerging and prospective developments in and around the Basin.

The Province of Saskatchewan has in the past few years not only indicated a certain sensitivity concerning the effects of development but has also, like some other provinces, attempted to ensure that spin-off benefits from such developments would accrue to its residents. After having received representations from Amok Ltd., a subsidiary of a foreign crown corporation (France), to develop the uranium potential of Cluff Lake, the Province instituted a board of enquiry in early 1977 to hold public hearings and make recommendations on whether and how the proposed development should proceed. The provincial Ministry of the Environment asked that the environmental assessment part of the study include health and safety factors. The uranium development area is significant to several Indian bands who, under treaty entitlement, were to proceed with the selection of additional reserve land in that part of the province, in accordance with the 1930 transfer Agreement which assigns provincial responsibility for making available unoccupied Crown lands for this purpose. The bands have the right to select lands which may contain uranium. The federal government would be observing events with special interest due to its responsibilities both for Indian people and for the eventual use of the uranium. Of course, under the 1930 arrangements, the Province otherwise has control over resource development.

So far the jurisdictional issue has not emerged, principally because of Saskatchewan's foresight in establishing the enquiry process. In May 1978, the board published its findings and recommended that the mining and milling of uranium should proceed at Cluff Lake. However the provincial Premier immediately noted that no mine would be built until Amok meets the demands for more thorough environmental studies. Also the board's report recommended and the Province agreed to the establishment of a Northern Development Board to ensure that northerners benefit from uranium mining and related activities since the resource life-span would be limited to about thirteen years, and long-term planning was needed to avoid the "boom and bust" effects of all non-renewable resource development. A leasing agreement subsequently signed between the Province and Amok Ltd. not only places stringent environmental controls upon the company but sets out an elaborate set of northern employment and training requirements, including the hiring of one native employee who is fluent in one or more native languages and who can communicate with senior management about problems experienced by northern native employees. To date the company's native staff component is about 30%, an impressive record when compared with Syncrude's which is less than one-third this figure, despite the fact it is a domestic enterprise in which Alberta, Ontario and Canada are part owners.

The treaty entitlement issue in the Cluff Lake area is not yet resolved, however at least one band has already selected land on which Amok is operating and is seeking a transfer of the lease arrangements which the company has with the Province to its own control. Selection of these lands by Indian bands include not only the general benefits of guarantees for environmental controls and the economic spin-offs but also a range of financial benefits from royalty revenues to possible joint venture undertakings with Amok and other companies which may choose to develop the area.

Although recent initiatives indicate a more positive and productive approach to the environmental consequences of development, many issues are addressed by the Provinces after the fact. In the mid-Seventies, the Whitedog and Grassy Narrows reserves in northwestern Ontario came to public attention with the discovery that the English-Wabigoon river system was polluted with dangerously high levels of mercury. The bands began preparing for major litigation against Reed Paper Ltd. and Ontario Hydro because of pollution and the adverse effects on wild rice crops and other resources due to flooding for hydro development and to other factors. Reed Paper was proposing a further major development of 19,000 sq. miles of northwestern Ontario timberland.

The provincial response to a potentially embarassing situation of a possible major court case involving Ontario Hydro was to form a Royal Commission on the Northern Environment in early 1978, headed by Justice Patrick Hartt. Initially, the Province was assertive of its powers. The Secretary for Resource Development told the Commission that the resources of the North belong to all the people of Ontario, not just to

Indians and will be managed in the best interest of all citizens of the province "including native people" and that the provincial government "intends to continue to make decisions concerning resources and development in all of Ontario". After conducting a series of hearings, in September 1978 the provincial government agreed to the Commission's recommendation to establish an Indian Commission of Ontario headed by Justice Hartt to assist and facilitate decision-making within the newly-formed tripartite process involving Indians, the Province and the federal government. In December of the same year, a mediation agreement was concluded among the three parties and although the following were not signatories, Reed Paper Ltd., Ontario Hydro, and the Lake-of-the-Woods Control Board were to participate in the process to resolve the environmental and related problems affecting the Grassy Narrows and Whitedog reserves. Recent mediation proposals to the two levels of governments from the bands concerned which include provisions for socio-economic development and education appear to be generally acceptable although decisions have not yet been finalized. This year the Ontario government gave Reed Paper Ltd. formal notice that the company had only three more years to achieve acceptable pollution control under provincial guidelines.

This particular mediation process, which subsumes environmental issues and broader concerns not only indicates the Province's commitment to resolve certain problems involving Indian people, but also demonstrates the type of mechanism which could be a desirable alternative to disputes and litigation elsewhere in the country.

The balance between the imperative of development close to Indian reserves and the protection of Indian interests in the areas affected will probably never be achieved to everyone's satisfaction. In Quebec, for example, when mercury pollution appeared in Abitibi area, the Province's role was limited to taking certain tests, although its clout could potentially be more considerable, particularly in enforcing laws and regulations with respect to industrial waste in the inland waterways. To convince the provinces to exercise their clout in providing environmental protection, particularly in remote areas where many Indian communities are located, is a difficult challenge at any time, particularly when economic growth is an overriding priority. Yet there are certain viable solutions: the Grassy Narrows-Whitedog mediation process in Ontario, Saskatchewan's use of a board of enquiry together, with its recognition of certain land-related responsibilities to Indians are two examples. Of course, the James Bay Agreement already discussed above represents the conciliation of developmental, environmental and a broad range of Indian interests including the more elusive interest derived from the traditional use and occupancy of land. It should be noted however that both the James Bay Agreement and the Grassy Narrows-Whitedog mediation process within tripartite discussions in Ontario were cases in which provincial involvement emerged only when there was no alternative, that is, by threat of court action or through injunction.

ADMINISTRATION OF JUSTICE

Jurisdictional issues again appear to be central to matters relating to the justice system and Indian people. For example, in 1967 the Canadian Corrections Association published a survey at the request of the Indian Affairs Program entitled Indians and The Law which noted that jurisdictional responsibilities for policing, legal aid, probation and after-care services for Indians required clarification. The administration of justice and the enforcement of laws are a provincial responsibility, while Indian people on-reserve are within the purview of the federal Parliament. The administration of justice on-reserve therefore becomes a complex matter of intertwined and overlapping responsibilities.

A national conference on "Native Peoples and the Criminal Justice System" was held in Edmonton in 1975 and was attended by federal and provincial ministers and by native representatives. The purpose of the conference was to examine why there was a high ratio of native offenders in correctional institutions, and why there was a general lack of preventive approaches on reserves. The lack of understanding of the workings of the criminal justice system among native people and the lack of consultation with their representatives were emphasized as major obstacles to the resolution of problems during the conference.

One general result of the conference was the undertaking by some provinces to sensitize their judicial, correctional and policing systems to native concerns. There are joint federal-provincial programs such as the Allied Indian and Métis Society in British Columbia which assists native people on parole. The Indian Justice of the Peace Program in Saskatchewan which decentralizes the court system by having courts held on reserve and employing Indian Justices of the Peace is an example of a provincially-sponsored program for status, on-reserve Indians. Another is the Ontario Native Council on Justice, which the Province established primarily in order to provide formal communication between organizations representing native people, including native inmates, and the various agencies which control the justice system.

Until the Fifties, all policing on Indian reserves was supplied by the RCMP. As bands began to manage their own affairs, there were growing demands to hire their own Indian constables. The progressive involvement by Indian bands in policing on reserve was accompanied by growing cooperation between band councils and provincial and other policing authorities. Certain provinces began to realize that Indian band policing was a useful component of general, provincial law-enforcement functions.

In the late Sixties, there were further developments in provincial involvement in band policing on reserve. For example, the Ontario Provincial Police extended the use of its training program to band constables and similar training programs took place in the three

Prairie provinces and in British Columbia. In 1968, the Province of Quebec agreed to allow the Caughnawaga band to establish its own municipal-type policy force, and in recognition of the fact that this arrangement replaced Provincial Police services, the Province paid $45,000. annually towards the band's police expenditures and also paid $18,000. annually to the St. Regis band for the same purpose for some years.

The preferred option of both levels of government and the majority of Indian groups was defined in a 1973 report produced by a federal task force on "Policing on Reserves" as "option 3(b)" and entails the use of Indian policing under the direction and control of the provincial police forces, including the RCMP where they serve as the provincial police. Except in Quebec and Ontario which have their own, unique provincial police, in the rest of the country this option meant the hiring and training of Indian police officers who would be special constables in the RCMP (like the airport special constable RCMP units) which the provinces contract from the federal government to carry out provincial policing. The special constable who is empowered to enforce provincial and federal laws is not to be confused with the band constable discussed above who can only enforce local, band-council by-laws.

Federal-provincial cost-sharing agreements placing 60% and 40% respectively of the financial responsibility for the special constable program were signed with most of the provinces following the general acceptance of the 1973 report. In 1975 agreements were sought with Ontario and Quebec where the Indian constables are not members of the provincial police forces but are band employees. They are sworn in as peace officers under the respective provincial Police Act with the full powers of provincial officers, and they are trained and supervised by the provincial forces. There are currently over one hundred special R.C.M.P. Indian constables in six provinces and the two Territories and almost one hundred fifty constables on band staffs in Quebec and Ontario. It should be noted that the Quebec government has not, to date, paid any of its share in the policing arrangement and the federal government has thus assumed 100% of the costs.

New Brunswick and Nova Scotia also have band-employed constables. Evaluations conducted in 1978 in Ontario and some other R.C.M.P. provinces have indicated a marked improvement in the quality of on-reserve policing, and both the Provinces and the federal government are committed to expanding the program by the end of 1981. Furthermore, the studies have shown that preventive policing is slowly developing, and that police-Indian tensions are easing somewhat.

Over the past few years, provincial Attorneys General, during their annual conference with their federal counterpart, have increasingly asserted the provincial responsibility over policing on Indian reserves. In fact, the renewed policing agreement which Ontario signed in 1976 explicitly states that policing on the province's reserves is a provincial responsibility.

Although the greater provincial involvement in Ontario and Quebec where the federal force, the RCMP, does not carry out provincial police duties, has been generally working well, there are some indications that many Indians would prefer the federal presence. Once again, the magnitude of a direct provincial role in policing is viewed in somewhat the same light as other provincial functions relating to status Indians; namely, a possible return to the positions enunciated in the 1969 White Paper.

One problem area has emerged in the Caughnawaga reserve in Quebec which has had a band constabulary for some years. At first, each member of the band police force had both R.C.M.P. and Quebec Provincial Police appointments. The R.C.M.P. later dropped its involvement on the reserve as it had throughout the province and in Ontario. The band chief felt strongly that the constables should be sworn in under the R.C.M.P. Act alone, not under the Quebec Police Act. Under the Police Act, the Province oversees the qualification procedure for the certification of Indian on-reserve police officers, and this is seen as an intrusion into the affairs of Indian people who perceive themselves to be solely under federal jurisdiction. There are many reasons for this position, among them the fact that the Quebec Provincial Police has raided on-reserve establishments on the grounds of possible violation of provincial laws governing the sale and consumption of alcohol. These police incursions have resulted in confrontations with band members.

The provincial police actions are also viewed as undermining the powers of the band constabulary which in any case is duly certified by the Province and is considered to be, for all purposes, part of the provincial force except that it is employed by the band. Another factor is that Caughnawaga Indians, like the majority of Indians in Quebec, are anglophone and they see provincial activities affecting the reserve as part of a deliberate and aggressive part of a policy to drive out the federal presence from Quebec.

On a province-wide basis, there are other difficulties in Quebec. The Amerindian Police Commission is an incorporated body of band representatives established in 1976 to oversee the special Indian constable program on-reserve, thereby providing an apolitical, technical function not unlike that of the Montreal Urban Community police commission. However, the Quebec Provincial Police has been making overtures to bring the Indian Commission under its direction, an attempt which is being resisted by the Indian leadership at all levels. This approach on the part of the Province is in line with the arrangements in the James Bay Agreement in which the provincial force has authority in Cree and Inuit communities. In general, the Province appears determined to exercise its legitimate, constitutional responsibilities as visibly as possible.

In New Brunswick, Indians have taken a similar position to that enunciated by the Caughnawaga chief, that is, that the administration of justice on reserves should be entirely federal. However, most provincial police forces have adopted the policy of not intruding in reserves unless they are called

by a reserve resident. In fact, if they have dealings with an Indian who happens to be off-reserve but who is a reserve resident, they often call the Indian special constable for assistance, sometimes to provide an escorted return to the reserve.

In 1977, the Manitoba Dakota Ojibway Tribal Council developed a proposal as an alternative to both band and special constable programs for an initial, trial three-year period. It proposed to form its own Tribal Police Force, a project to be directed by a committee consisting of band, provincial, federal and R.C.M.P. representatives. The Province, however, is contemplating withdrawing its share of 27% of the cost because the pilot project proven to be more expensive than the regular R.C.M.P. - based program.

Current funding arrangements have developed from the initial 60-40 formula in 1973 to the 52% federal share and 48% provincial share for the special constable programs under the R.C.M.P. in most of the provinces where it serves as the provincial force (except New Brunswick and Manitoba) and in Ontario. The federal government still assumes full costs for the special constable program in Quebec and the band constable programs on reserves which have not yet adopted the approach under "option 3(b)".

The judicial system is another area where Indian people experience difficulties ranging from language barriers to an insufficient understanding of the laws and of the right of every defendant. In 1971, a pilot project was cost-shared by the federal and Alberta governments to train native people as courtworkers in order to assist native defendants. The projeect was so successful that in 1972 the federal government undertook cost-sharing agreements for native courtworker programs with the four Western provinces, Ontario, Prince Edward Island and both Territories. Initially these were all to be pilot projects which could be renewed after two years. Provinces agreed to assume 50% of the cost and to monitor the program in order to ensure certain minimum standards of quality. The 1975 conference on "Native Peoples and the Criminal Justice System" agreed it was one of the few programs in this area, directed to native people which was successful. Both levels of government agreed it should be expanded.

Evaluations in all the provinces funding the program were positive except for Nova Scotia where status and non-status native groups disagreed on a mutually acceptable carrier agency for the implementation of the program. From the initial court-work functions, the program has developed to provide family counselling, alcohol counselling and pre-release counselling for native inmates. Both the provinces of British Columbia and Alberta had exceeded their initial 50% share of costs by 1978 due to rising costs and the expansion of the program. In 1977, at the request of some provinces, the program became permanent. Only the Province of Quevec has not opted for cost-sharing arrangements and has, instead, instituted its own provincially-funded and controlled courtworker program.

OTHER ISSUES

Jurisdictional difficulties have also emerged due to uncertainty regarding the status of leased or surrendered reserve lands. The courts have ruled that municipal by-laws do not apply to reserve land. The federal Department of Justice is of the opinion that band by-laws do not extend to surrendered reserve lands. Furthermore, most provinces, with few exceptions such as the Welfare Agreement in Ontario, do not consider reserves as municipalities under their laws. The implications for surrendered or leased reserve land is that it does not come under provincial planning legislation, or municipal zoning regulations, nor under band zoning or taxing regulations. Although the federal government has the power to regulate the use of these lands, it has no authority from Parliament under which to do so. In terms of local planning, administration services etc., these lands are "no man's" lands, not governed by the necessary laws of either jurisdictions which would make their development by Indian people financially feasible.

Because many Indians have reached the conclusion that revenue from traditional uses of reserve land such as agriculture use will never be economically viable, and because some have accepted the need to undertake profitable business ventures to increase band income, certain communities have decided that real estate investments using reserve land could be one approach to economic development. Recently, the Enoch band near Edmonton and the Sarcee band near Calgary have conditionally surrendered their lands to develop major non-Indian residential subdivisions. The Sarcee development is the more advanced of the two but the projects are similar: long-term leases are held by band-controlled corporations which sublease lots in the subdivision to non-Indian residents. In the Calgary area where there is a severe housing shortage, this initiative could be very profitable. The conditions of the leases are the same: title remains with the federal Crown and the land reverts to reserve status upon the termination of the lease.

The reaction of the Alberta government was to point to the jurisdictional issue, that is, to the uncertain status of conditionally surrendered or leased reserve land, rather than to attempt to reach an agreement with the bands and Ottawa if necessary on how to resolve the difficulties of what could become a profitable venture for both the Indians and the Province. The provincial government went on record to publicly warn those who would move onto major on-reserve or surrendered land housing projects that they would lose their civil rights as well as the potential benefits of the normal services of municipalities. For example, the Province could not provide schools on federal Crown land since their ownership would eventually revert to the band. Discussions are ongoing with respect to this issue but the Province has not, to date, indicated a willingness to facilitate this type of Indian economic development nor to find a basis for resolution of this issue which would not focus solely on jurisdiction.

The proposed Esso heavy oil development project near Cold Lake, Alberta also reveals certain provincial attitudes toward Indian economic development. The Cold Lake band and six other bands of the Northeastern Tribal Chiefs' Association and the federal government have been making representations regarding the environmental and socio-economic impact of the project to the Energy Resources Conservation Board in hearings conducted by that agency. The Board is expected to shortly make recommendations to the provincial government based on its findings. Through DIAND, the federal government outlined a series of concerns related to Indian interests and warned about possible litigation if federal Crown lands were to be adversely affected by the project. In addition to the environmental issue, that of economic development emerged as the Tribal Chiefs' Association sought to reach an agreement with Esso Resources Ltd. to provide extensive training and employment in the project for Indian people. In addition to its non-commital posture regarding other concerns expressed by Indian groups, the Alberta government communicated its view that such an agreement would contravene existing provincial human rights legislation. Alberta is one of a few provinces which does not have "affirmative action" laws to promote the employment of women and minorities. At the present time approaches to resolving the problem are being examined, including the possibility of special legislation. Although the Province last year adopted a comprehensive policy for the extension of its services to status Indians, it has not yet recognized the obvious general benefits derived from supporting, whenever possible, the economic improvement of Indian communities.

In British Columbia too the recognition that Indians should have some share of the province's wealth has been a slow and difficult process. The Fort Nelson band some years ago asserted sub-surface mineral rights on their reserve which the Province was quick to claim the band did not have. Only after protracted discussions, and a final threat by the band that it would not renew arrangements governing a nearby pipeline, did the Province agree that some benefits from mineral revenues should accrue to the band. However the provincial government agreed to negotiate with the band only, provided DIAND did not participate in the discussions, a condition probably dictated primarily by the concern for setting a precedent. The result has been an agreement to cover the sharing of mineral revenues, an outcome which could not have been possible wihtout considerable pressure on the provincial government by the Indian community concerned. This approach consisting of Indians speaking on their own behalf with the Provinces, and without federal participation is the one suggested in the Hawthorn report and is one which reveals a new awareness among some Indians that, as provincial citizens, they could and should be getting more attention from the Provinces.

As resource development becomes an increasingly important issue, especially in the energy field, provincial governments will eventually have to adopt positions or policies regarding Indian communities when reserve lands are

involved or otherwise affected. The consideration of several factors will be involved in the options open to them: the priority of resource development in relation to other concerns such as environment, the mitigation of adverse effects, the degree to which the Indians as provincial citizens can and should partake of the wealth of the provinces and the opportunities which resource development can offer, the degree of social responsibility of the private sector with respect to Indian communities, and whether such responsibility could be a condition of the issuance of provincial permits and of other facilities. The degree to which the Provinces, particularly those with non-renewable resource potential, can address and resolve some of these issues as they are related to the needs and rights of their Indian citizens, will indicate whether or not solutions can be developed through negotiations, or whether they will be imposed by the courts as a result of litigation. It seems increasingly apparent that Indians will proceed with their current position that, as provincial citizens, certain benefits have been long overdue. They are certainly beginning to assert this view in the field of resource development, and in the related area of residual treaty land entitlement, especially in the selection of lands which are or could be affected by (or be the source of) resource development.