

INDIAN GOVERNMENT POWERS

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Indian Government PowersI Introduction

The stated objective of the proposed charter system for Indian Government is to provide a flexible means for Indian communities to select and design a local government system suitable to their traditions, their needs and their capabilities. By choosing to "opt-in" to a charter system under the revised Indian Act, it is envisaged that Indian communities would be able to develop their own government structures with powers and responsibilities ranging from those which would foster a high degree of local autonomy to other arrangements with varying degrees of latitude for independent action for bands who either sought fewer powers under a charter or for whom (for other reasons to be discussed later in this paper) certain powers would not be appropriate, given their current circumstances. In practical terms this would enable communities desiring to do so to possess broader by-law powers, to be freer to administer their own programs and manage their own finances apart from the legal and administrative constraints of the existing band government system.

Essential to this granting of greater powers is the notion of responsibility of the local government, which manifests itself in two fundamental directions. Primarily, responsibility by the local government towards its constituents to act in a manner that will further the interests and the peace, order and good government of the citizens of the local community or communities it serves. Secondly, responsibility to the federal government to administer

its affairs in a manner consistent with democratic principles and to assume responsibility and accountability for its decisions.

Purpose

The purpose of this paper is:

- (i) to identify the principles, objectives and assumptions made or required to develop local government powers granted to chartered bands;
- (ii) to identify the means, the problems and issues relating to the granting of further powers to Indian bands and the limitations and constraints which should be placed upon them;
- (iii) to indicate how and why such powers should be set out in a revised act, charter or agreement;
- (iv) to set out alternatives available where appropriate;
- (v) to seek reaction and guidance to the proposals made for inclusion in draft legislation to an amended Indian Act.

II Principles, Objectives and Assumptions concerning Indian Local Government Powers Proposals

(1) Principles

Powers granted to an Indian local government under the Proposed Charter System should:

- (a) attempt to accommodate the diverse nature of Indian bands across the country by providing sufficient latitude in the powers granted to individual bands commensurate

with its needs, abilities and desires;

- (b) be of a nature and kind that reflect the form of local government institutions desired by the local (band) constituents;
- (c) establish the local Indian Government as the center of decision - making for the reserve communities;
- (d) safeguard and maintain the integrity of Indian reserves by providing conditions favouring their social and economic development and cultural preservation;
- (e) preserve the integrity of band membership;
- (f) support the protection of individual rights of band members;
- (g) sustain and enhance the unique and continuing relationship between members of Indian bands and the Federal Government.

(2) Objectives

The objectives sought in granting powers to Indian local governments involve:

- (a) the establishment and development of local Indian government bodies as governments with their own powers and authority and not as mere administrative

extensions of the Department of Indian Affairs;

- (b) the enabling of the local Indian governments to initiate and make authoritative and responsible political, managerial and administrative plans and decisions and to be accountable for these to their local constituents;
- (c) the establishing of responsible management of band assets by the Indian local government or agency of that government for the present and future generations of the band;
- (d) the ensuring of the protection of individual rights in the community by providing for guarantees:
 - (i) against the invasion of the privacy of individuals at the hands of the local government;
 - (ii) of individual freedom of access to information controlled or held by the local government;
 - (iii) for public participation in the decision-making processes of the local government;
 - (iv) for the initiation of acts by the local government at the request of it's constituents or by members of the band notwithstanding the local government;

- (v) the review and appeal of the acts and decisions of the local government;
- (vi) securing of community review and consent prior to the local government undertaking certain measures or exercising certain powers;
- (vii) the sanction of completed or intended Acts of the local government in certain circumstances where no prior community consent is required;
- (c) the protection and preservation of traditional community occupations and support of local cultural practices.

IV Assumptions

- (1) While Indian local government will entail primarily the assumption of powers and duties of a local nature, it will also involve the local government authority acting as an agent of the federal government in discharging duties pertaining to the administration of certain federal programs on reserves. Indian local government will constitute the focal point for sustaining the unique relationship between the Federal Government and its Indian constituents, and as such, should be viewed as a form of authority unique to the Indian community and distinct from traditional "municipal" forms of government.
- (2) Notwithstanding the particular nature of Indian local

government, the scope of powers that can be granted to it cannot extend beyond those authorized by the revised statute and the charters. Generally, Indian local government, will be enabled to assume powers at a level comparable to those enjoyed by municipalities within provinces unless constitutional amendments were made to include a new tier of government in the federal system. Since current thinking on the subject does not appear to contemplate such steps, the federal government will continue to exercise ultimate constitutional and legal power over Indians, their lands and their local governments. In short, certain powers are to be retained by the federal government in the Act and its regulations.

- (3) The revised Act and the charters will set out the range of local functions which the Indian local government can perform. In general, limitations on the powers of the Indian local government will need to be provided for in the revised Act to ensure that the powers exercised by the Indian local government cannot escape the authority of, or be contrary to, the higher law. Powers exceeding the authority of the local government would be subject to challenge, could be declared ultra vires and of no effect being superseded to the extent that Parliament has acted.

- (4) While the Act will fix the ultimate scope of powers, which Indian local governments can exercise, it will provide that the charters themselves can be renegotiated as bands seek to assume greater or amended powers than those which they received in their initial charter.

*Amendment
formula*

The charters will enumerate in specific form the powers of the particular local government and the grant of these powers and any amendments to them following negotiation will be made by the Governor-in-Council on the recommendation of the Minister.

- (5) The establishment of Indian local governments under charters without a concomitant provision of sufficient funds or access to sufficient revenues to enable them to effectively discharge those responsibilities would be a sham. Assuming bands generally have insufficient funds to perform even minimum government functions and since a fundamental principle of the charter system is the maintenance of the special relationship and the on-going fulfillment of the Minister's obligations to Indians, some federal funding of Indian local governments will be required.

- Not m.c. so
spirit of the act*
- (6) The nature of funding mechanisms and delivery techniques will need to be changed to accommodate new powers granted to Indian local governments, unless the latter are to remain merely as administrators of programs designed by the Department subject to the mercy of annual allocations by Parliament.

V Issues


Previous papers on Indian local government have identified areas of power which might be exercised by bands under a charter.¹ While not necessarily conclusive, the range of powers outlined reflects to a large degree areas of power appropriate to ^{be} assumed by local Indian government administrations to achieve the objectives of greater autonomy at a community level. What needs to be addressed, among other things, is the question of what controls and limitations should be placed on the exercise of those powers to make Indian local governments accountable and responsible to their constituents and the federal government, while at the same time furthering the objectives of the chartered system.

(1) External Criteria and Principles of Negotiation

As a starting point of enquiry a fundamental question requiring discussion is whether the charter system should provide that there be certain external criteria (size, resource base, location, experience in administering programs, etc.) which bands have to meet before they would be eligible to assume charter powers, or whether the question of criteria should be confined to what areas and degrees of power a band might be able to negotiate for itself once it chooses to exercise its option for chartered band status. Should the granting of chartered band status to a restricted number of applicant bands who met predetermined criteria, confer a broad range of

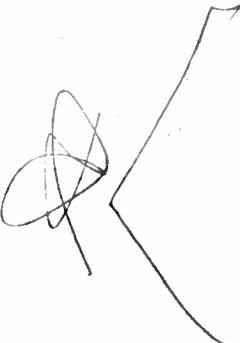
¹ See draft paper entitled An Act to Amend the Indian Act by H.B. Shaffer, Department of Justice, July 20, 1979.

fundamental and mandatory government powers which all of them would then be required to assume in order to receive their charter, or should the range of fundamental and mandatory powers be more tightly circumscribed to allow any band wishing to do so, to negotiate the most elementary of charters that might only confer powers only marginally different from those that the band might be able to exercise with equal facility under the current Act.



Consistent with the principles of the choice to opt-in and the desirability of maximum flexibility in the system, the second alternative is clearly preferable, since the optional principle would not be undermined and bands could not be precluded from seeking a charter for reasons of historical, demographic or geographical circumstance. In this fashion even a very small or isolated band could begin to assume powers and responsibilities of a kind and at a pace consistent with its own level of development. Under municipal legislation, distinctions between the types of powers assumed by different types of municipal entities are not a question of whether some form of local administration should exist or not but arise from a determination of whether powers conferred are appropriate to the type of community concerned. This principle should apply to local Indian governments as well.

Some disadvantages of such an approach include the possibility that the Department could be under considerable pressure to begin negotiations for charters with many bands whose demands for powers exceeded their needs and capacities. The number and length of individual negotiations and their cost could become an inhibiting factor in the granting of charter powers unless government establishes some form of prioritizing of applications on the basis of need and of types of powers to be conferred.



It is submitted, however, that notwithstanding administrative difficulties included in the negotiation of an individual charter, that the only formal limitation as to whether a band should be free to apply for charter powers should rest with the band itself. Twenty per cent of band electors has been suggested as a minimum number for the band to be able to commence discussions to adopt a charter.^{2.} A further precondition which might be suggested is that the band's application to negotiate a charter should set out a proposal outlining what local government powers it is seeking to assume and why. The requirement for proposals would serve to assist government negotiators in setting their negotiation priorities and could serve to discourage any frivolous proposals. Moreover, without prejudice to the kind of charter the band succeeds in negotiating, government would become fundamentally apprised at the outset of the expectations, desires and capacities of the band.

2. The type of charter it receives, however, is another matter.

applicant community and thereby could begin to devise charter proposals for the applicant band consistent with the needs identified.

(2) Powers

Assuming that the "screening" of bands applying for charters is conducted in limited fashion and that the "opting-in" principle remains undisturbed, the limitations on the kinds of powers a band can exercise under its

charter becomes a question of what kinds of powers are conferred under the Act as mandatory, which are optional and which are to be reserved to the federal government.

It has been suggested that if the "opting-in" principle is to be maintained, that the mandatory or "core" powers of chartered band governments might consist of a few limited powers in that these powers could be exercised by all chartered bands irrespective, for example, of their levels of sophistication, their size, their location or their ability to administer government funds and programs.

The range of proposed powers which local Indian governments might exercise under charters fall into four general categories, each of which can be made subject to several different kinds and varying degrees of limitations. These limitations can be made explicit by prohibitions in the revised Act, or by inference in the Act, by regulations under the revised Act, by limitations in the charters themselves, by the types of mechanisms employed in the delivery

of funds and by terms, conditions and standards set out in agreements for programs and services to be transferred to and administered by the chartered band.

The general categories of proposed powers break down as follows:

- Represented further*
- (i) General enabling powers relating to the establishment, maintenance, changing and dismissal of the local government itself and its responsibility to its constituents, including the form of government to be adopted, the selection, appointment and duties of officials, the composition of the government and terms of office, the holding of meetings, voting and referenda, the payment of councillors, a chief and other officials;
- Regulated*
- (ii) regulatory powers affecting and controlling the rights and activities of band members and other persons coming onto the reserve, including the regulation and licensing of businesses and trades, the supervision of places of amusement, the regulation of games and events, zoning and management of reserve land, the allocation of reserve lands to band members for various purposes, the establishing of priority lists for housing, the control of domestic animals, traffic by-laws, etc.;
- all activities*
- (iii) financial powers over the control of community assets including band capital and reserve funds, power to levy taxes and to appropriate and expend monies raised, power to borrow for band purposes and power to lend

money borrowed for band purposes;

- allo*
- (iv) powers over the design, administration and implementation of services and programs on the reserve, including health, health services and disease control, education, housing and infrastructure, economic development and other miscellaneous services.³.

- (i) In order to establish limits for the exercise of the first kind of power, that is, the general enabling powers of Indian local governments, it should be noted that this category of power pertains to a delineation of the structure of Indian local government as determined by the band, which will form the basis for how the band will be governed in future years. The limits of this kind of power can be best achieved by setting out provisions in the Act stating what the charter will require and empower the Indian government to do. In general terms, this power is in the hands of government to determine the areas in which the local Indian government may be empowered or compelled to act. The fetters on a particular general power, once granted, arise from a detailed version or variation of that power as acceptably negotiated and set out in the charter of an individual band. To illustrate, it is envisaged that one of the enabling powers would consist of the election or selection of a chief or chiefs, councillors, or other officers and procedures therefor. The Act itself would require that there be an election or selection process and

3. This categorization, in addition to illustrating types

(3. cont'd) of powers and the kinds and degrees of limitation appropriate to each of them, has been designed to attempt to relate certain types of powers to criteria which may be required of a band before it will be enabled to assume certain responsibilities. The kinds of criteria relating to the program powers of a band, for example, would be different from those which might be associated with its other functions. Moreover, between programs, different criteria might be applicable in determining whether or not a band could be empowered to administer an education program or a health program. Within program areas, different criteria might be employed to determine the range of powers a band could exercise over that program and the corresponding kinds of funding arrangements which might be available to it for such purposes. Factors such as the size of band population, size and location of the reserve, reserve resources and potential revenue base, cash flow, substantial band fund per capita dollars, and previous satisfactory experience in developing and administering government programs might be applied to provide some clues as to the appropriate degree to which a band could be empowered to administer its own programs, the funding mechanisms and techniques required and the probabilities of success or failure and the costs of a band run program. What is difficult, however, is to imagine how such criteria could be spelled out in part II of the Act, as the basis upon which a band would or would not be granted the power to administer a program. Clearly, if reasonable size of a band and a demonstrated capacity to run a local school were taken into consideration together, the granting of powers to administer a similar program would, in most instances, be assured. However, different criteria would be required to determine that band's ability to administer with respect to infrastructure, economic development or housing. The question is put, not to suggest that predetermined criteria are not appropriate, but in order to seek guidance as to how the subject of criteria can be accommodated with reasonable tidiness into part II of the Act.

It is submitted that any criteria set out in the Act should be presented in general terms in order to be sufficiently flexible to permit "exceptions" for cases where bands might fall short of the prescribed criteria but by virtue of other qualities and a potential capacity could assume some powers to administer program areas under closer monitoring by government. The term "guidelines" might more appropriately describe the basis and degree upon which program powers

(3. cot'd) could be conferred on bands. Any refusal to grant a given power or any limitation on the range of the power conferred could be rationalized and yet the dangers inherent in open-ended negotiations could be avoided.

With respect to the "enabling" and "regulatory" power categories, it is proposed that the "enabling" powers would be mandatorily assumed by any band in order to receive a charter. Provided a band undertook to establish a form of government consistent with democratic principles and providing for the recognition of human rights and set out processes for the election/selection, terms of office, members, and removal of its government. The size of the band and the amount of band revenue available to support the basic functions of the government would be taken into consideration in determining the extent to which the government would make funds available to support it.

The "regulatory" powers could be assumed at a band's option without the requirement for any particular criteria except with respect to powers associated with the maintenance of community infrastructure where funding by government could be made at different levels depending on the amount of band revenues. A band not assuming all or some of these powers would continue to be governed by the appropriate provisions of Part I of the Act.

The financial powers associated with the incorporation of a band under charter are again at the option of the band to assume without having to meet any particular criteria, other than those associated with the "enabling" group of powers. If a band did not opt to incorporate obviously it would have no powers to borrow and contract off-reserve other than from the federal government, nor could it levy taxes or appropriate and expend moneys. The implications of incorporation or non-incorporation and some reasons for proposing it as an optional rather than a mandatory characteristic of charters are discussed later on.

The above proposals concerning criteria need further consideration and possibly other alternative approaches to the question need to be explored.

procedures, while the charter as negotiated would set out in that particular instance what the operative limits of the power would be, namely what kind of process could be employed to select the leadership i.e. election by a majority of electors, choice by the elders of a community. informal community consensus through consultation, election solely of a chief who would appoint his councillors or some other method suitable and complementary to the particular band's wants and needs. If the kind of selection/election process proposed by the band is not compatible with other powers and responsibilities which the local Indian government seeks to assume, or threatens to prove contrary to the interests and well-being of the members of the band, it would be considered unacceptable at the stage of negotiation and a selection/election process, which both sides agreed to, would have to be negotiated before the charter would be granted. Once the charter was granted, however, the power itself could only be altered by the provisions governing the amendment of charters provided for in the revised Act. Any violation of the procedures established for the election/selection of Indian governments could be contested before the Indian Government Commission, or perhaps a court established with jurisdiction over Indian-related disputes.

It is submitted that other powers lying in this general category, including such matters as terms of office,

disqualification and referenda powers can be most appropriately limited in similar fashion, that is, by providing in general terms in the Act what the local government is enabled to do and then by ensuring through the negotiation process and the approval required by the Minister, the limits and forms of those powers in the individual charter. Recourse from any abuses of the system established would be to the Indian Government Commission or a special court, thereby ensuring that the form of government and procedures were adhered to. Any fundamental changes desired by the band or Indian local government itself in this area could be accommodated by an amendment of the charter, as provided in the Act.

Consistent with the principles that Indian local government is to be statutorily recognized under Part II of the proposed Act and that the opting for a charter should not diminish but rather enhance the development of Indian local government, it is recommended, given the general absence of funds to support Indian local governments in most communities, that a form of guaranteed funding be made available to support Indian local governments for the purposes of its basic functions.⁴ The payment of salaries to chiefs, councillors and band officers, operation and maintenance costs of the local government for meetings, elections, etc. should be provided in a way consistent with the nature of the charter system, which would require minimum levels of accountability

4. It has been suggested that the degree of funding to be made available should take into account the potential revenues of a band and that bands should bear varying portions of the cost.

from the Indian local government to the Minister and in turn from the Minister to Parliament, and maximum accountability by the Indian local government to the constituents it serves. The Act could provide for payment of funds for these purposes by way of statutory grant from the consolidated revenue funds on the basis of a formula developed according to the number of local government officers and employees as provided for under an individual band's charter. A statutory grant might constitute the most appropriate means of making funds available to chartered bands for basic government functions, since it would meet the objective of providing guaranteed funds of a continuing nature. However, the further one moved away from basic functions and into areas where it might be deemed desirable that the local Indian government should become more accountable for the expenditure of public monies, as, for example, in the establishing of boards and agencies where target objectives for the band could be more readily quantified (e.g. the number of homes to be built or services delivered) and/or where the possibility for abuse or mismanagement was greater, a different funding arrangement could be established.

The alternatives available will be addressed later on in the section on powers relating to services and programs.

This first group of powers, that is, those dealing with the establishment of a local Indian government would obviously be mandatory, since there would be little point in a band negotiating a charter if it did not assume the responsibility of determining the selection of its own government, providing for its officers, their terms of office and ways in which they could be dismissed.

- (ii) The second general area of powers, involving the internal regulation of reserve life by the local Indian government, addresses the types of powers currently exercised by band councils under s. 81 of the Act (by-law powers of band councils)⁵; regulatory powers of the Governor-in-Council, the Minister acting alone or with the consent of the band council.

The existing limitation over s.81 powers which cover a broad number of subjects regulating reserve life is that the by-laws enacted by a council shall not be inconsistent with the Act or regulations made by the Governor-in-Council. Since 1951 when this power was granted to band councils, 234 councils have enacted about 1200 by-laws, the majority of which have dealt with the regulation of traffic, curfew and the observance of law and order. According to officials in the Statutory Instruments Branch, the disallowance power of the Minister under s.82 has been employed rarely since the areas in which bands may pass by-laws is sufficiently

5. For an itemized indication of how bands have exercised their by-law powers see Table I.

clear as to what a council may or may not do. This disallowance power has usually only been used when it appeared as if the enactment of the proposed by-law would come into conflict with existing laws of general application.

It has been suggested under the charter section of the Act that the power of the Minister to disallow by-laws would disappear and that this responsibility would be assumed by the Indian Government Commission. The operative limitations on the exercise of this power by Indian local governments would become the specifying of areas over which Indian local governments could be empowered to act under part II of the Act, the individual charter empowering the Indian local government to act in certain areas, and the power of the Commission to disallow for illegality a given by-law. Challenges of by-laws by interested parties, including band members and possibly the Minister, would constitute further curbs on the potential abuse of by-law making powers and could be provided for in part II of the Act by providing for public hearings to be held by panels of the Commission. A further constraint which would continue to restrict the by-law making powers of local Indian governments albeit in more limited fashion than under the existing Act would be in the continuance of regulation by the Governor-in-Council over such matters where the Government of Canada wished to ensure the exercise of certain local responsibilities if the local Indian government failed to act. These areas

would correspond generally to the program responsibility areas undertaken by bands in the areas of health, housing, education and welfare, which are the subjects of a later section of this paper.

It is proposed that in setting out in part II of the revised Act a broader variation of what are now s.81 powers which a band may be empowered to exercise pursuant to the terms of its charter, that it include the following matters which are currently the subject of Governor-in-Council regulation or Ministerial discretion.

- a) s.18 powers involving the determination of the purposes for which lands in a reserve are used or are to be used, should become a matter of local responsibility, not one requiring Governor-in-Council approval. The Act could provide under a general provision, that the band could determine under its charter the purpose or purposes to which lands could be put. In the band's charter, it could be decided to delegate the power to the local Indian government or a committee of the government, or the band could decide by community consultation, or approval by community vote, either all determinations of use or merely some specified types of use involving, for example, the leasing or granting of interests to non-band members or non-Indians or where the decisions would affect the fundamental land use patterns of the reserve or where substantial acreages were involved.

s.19

b) powers enabling the Minister to authorize surveys, to subdivide and determine the location and direct the construction of roads in a reserve are matters of local concern which should be among the powers which could be transferred to a band under part II of the Act. The role of the Department in this area would become one of providing expertise and support to bands who requested it by making available personnel and resources to assist and make recommendations to the bands. Any decision reached, however, would be made by the band, its council or other body which the band established to approve and decide on issues pertaining to the management of reserve land.

c) s.32 powers currently exercisable by the Minister to prevent Indians in Manitoba, Saskatchewan and Alberta from selling cattle, grain or hay unless approved in writing by the superintendent should be deleted.

d) s.34 powers of the Minister to ensure maintenance of roads, bridges and ditches on a reserve could, under a charter, be turned over to the local Indian government as part of its responsibilities for construction and repair of local works. Revenues and funding for such projects could be obtained from band funds, by the issuance of debentures, loans or capital grants or contributions. With the provision of capital grants or contributions the chartered band would be accountable for the attainment of the terms and conditions set out in either the grant or

the contribution agreement. In spite of the requirement for monies from the federal purse, the maintenance of roads, etc. on a reserve is very much a matter of local concern which most local Indian governments under charter would be capable of managing without outside influence and for which, in the final analysis, it should be accountable to its constituents. Accordingly, any grants ^{necessary} to support what is, in effect, a basic community service might be more appropriate where a band has already demonstrated a high degree of competence to maintain the infrastructure and local works of its community. On the other hand, if the band has not demonstrated a capacity to manage this aspect of its affairs or where large sums of money were involved for major projects, funds could be provided by contribution with more stringent requirements. In all cases, however, bands would continue to have an obligation to contribute towards the cost of infrastructure programs from their own band funds. Any government funding would be based on a sliding scale related to their income and on-reserve population and would be made only if the band ^{could not bear} the cost.

e) s.73 powers of the Governor-in-Council to make regulations on reserves could, in certain instances, be more properly made the responsibility of the local Indian Government to administer without a parallel requirement for Governor-in-Council regulation if the powers were among

the "mandatory" powers associated with chartered band governments. The Act could provide in part II generally for Indian local governments to regulate on reserves under their by-laws powers in the following areas:

- (i) the protection and preservation of fish and game;
- (ii) the destruction of noxious weeds;
- (iii) the control of traffic and vehicles;
- (iv) dog and animal controls on the reserve;
- (v) the operation and supervision of places of amusement; and
- (vi) the construction and maintenance of boundary fences.

The rationale underlying the removal of these powers from the ambit of regulation by the Governor-in-Council rests on their particularly local nature and the demonstrated capacity on the part of a number of bands to enact and administer by-laws of this type.

- . Other subjects under s.73 including the control of diseases, the providing of medical treatment and health services, compulsory hospitalization and treatment of infectious diseases, the inspection and destruction of premises and the empowering of a band council to borrow money for housing and to make loans for housing are matters with broader implications involving the administration of programs, the expenditure of public funds, and in some cases, national policies. Accordingly,

the basis upon which Indian local governments could assume these powers would be more restrictive and at the direction of the senior government. (See infra section on program and service powers.)

(iii) The third area dealing with the financial powers of Indian local government concerns, in large part, the principal existing hurdle in vesting autonomous authority in bands, namely that they are not legal entities.

It has been suggested in a number of papers and it has been proposed in preliminary draft legislation that the granting of a charter should involve of itself the constituting of a band or bands under a charter as a public corporation. The desirability of incorporation is readily apparent in that an incorporated band could exercise much greater financial direction and control in being able to contract with respect to its own land and resources, it could borrow funds from a broader number of sources and the role of the Minister to approve and enter into agreements on behalf of the band would disappear. However, incorporation is a concept which many Indians have traditionally viewed with reservation as it would remove special immunities which they currently enjoy under the Act and could expose bands to lawsuits and impose duties, obligations and responsibilities

which some are not ready to assume. It should also be noted that the powers which chartered bands could assume, referred to earlier in this paper, as well as the fourth category of powers involving band control over government programs, do not require that a band be incorporated. It would be possible, therefore, to grant limited charters to bands which give them greater powers than they currently enjoy, without requiring their incorporation. Whether incorporation should constitute a mandatory power which all bands seeking charters would be required to assume, is open to question. Clearly however, the incorporation of a band would give it far greater authority to control and manage the funds, resources and, in certain respects, the lands of a reserve, and would be a desirable element in the establishment of reserve self-sufficiency.

Because of the clear multiplicity of functions with which a local Indian government could become involved, it may even be desirable in certain instances when incorporating a band, to create, separate from the local Indian government, a body with sole responsibility to develop and manage reserve resources while leaving the council to provide and administer services of a local nature. The board of directors of a band corporation could, in effect, consist entirely or partially of members of the band council, but the functions the corporation would

perform would be separate from those of the local Indian Government. This might be desirable in a case where several bands amalgamated and performed a number of complex functions. At the other extreme, where a band was small and its government functions did not entail a high degree of complexity, the management and control of reserve resources could be undertaken by the Indian local government council itself.

The powers associated with corporate status should enable the local government or a corporation to make leases or contract with non-band members with respect to reserve lands at present prohibited by s.28 of the Act. Similarly, at least with respect to leases, s. 37 which prohibits the sale, lease or other disposition of reserve land without surrender to the Crown, should not apply to an incorporated

band. An incorporated band could be empowered to deal with reserve lands by adding a section in part II of the Act to permit, in the case of lands not allotted to, or otherwise in the lawful possession of an individual Indian, the leasing of reserve lands and the sale of certain resources such as sand, gravel, clay, trees, and hay, by the Indian local government, without a surrender. Ministerial permission to remove or permit removal of minerals, clay, crops or trees from reserve lands as required by Section 93 of the current Act would be transferred to the local Indian government. The limitation on the authority of the local Indian government or corporation with respect to leases could be restricted to a maximum time period provided in the charter, say, not exceeding seven years, unless the

approval of the band had been given by vote at a special meeting.

Similarly, the council or corporation could be authorized to lease for the benefit of any band member at his request, the lands of which he is in lawful possession without surrender, or arrange for the disposal of sand or gravel or trees, hay and crops which he might wish to sell. Depending on the type of possession of lands on a reserve which may be considered desirable for an individual Indian to have under a charter system, provision could even be made to allow individual band members make their own leasing arrangements (subject to a more limited time frame, say, one year at a time and for limited purposes, e.g. those which would not alter the fundamental use of the land). Whether the disposal of sand and gravel or other resources on lands in the possession of individual band members should be permitted could be determined by the band in negotiating its charter.

On balance, however, it may be more desirable to restrict the power to permit the leasing or taking of resources from reserves by non-band members to the local Indian government in order to better preserve the integrity of the reserve. A check on the local Indian government, itself, to ensure that it acts responsibly with respect to leases or contractual commitments, could be provided in part II of the Act by requiring consultation, a

referendum vote or other form of community involvement for leases beyond a specified number of years, or those involving the use of certain amounts of reserve land over a specified percentage. Leases which would fundamentally alter the character of reserve land or contractual arrangements involving the taking of certain resources which would alter the reserve's appearance, e.g. gravel pits, open pit mining or the removal of forests, should also be made subject to some form of community approval, set out in the Act. In addition to managing crops and surface resources, authority to enable an incorporated band to manage and control the disposition of mines, minerals and timber should be considered for inclusion in part II of the Act. Current regulations under the s.57 of the Act would require revision, and responsibility to confer licenses and impose the terms, conditions and restrictions associated with the grant of such licenses could be prescribed by the Indian local government. Similarly, the Minister's power under s.58 to grant leases of agricultural land and to expend the capital funds of a band for agricultural improvements or machinery or materials, should be turned over to incorporated chartered bands, the leases being subject to limitations mentioned earlier.

The question as to what freedom a local Indian government would have over the handling of band funds is, in part,

already answered by s.69 of the current Act which provides for the Governor-in-Council to permit a band to control, manage and expend its revenue moneys in whole or in part. An incorporated band could be empowered under its charter, to control, manage and expend all of its revenue moneys for purposes promoting the general welfare and progress of the band. The authority of the Minister under s.66 to authorize the expenditure of band revenue moneys for the destruction of weeds, to control disease on reserve, to inspect premises, prevent overcrowding, provide for sanitary conditions and construct and maintain boundary fences would be put in the hands of the local Indian government.

As for capital moneys, their expenditure could be authorized by the local Indian government rather than the Minister on the basis of the existing purposes outlined in ss.64 and 65 of the Act. This would include per capita distribution not exceeding 50% of the individual band's capital money, and the use of those moneys for the construction and maintenance of roads, bridges, ditches and boundary fences, the purchase of land for the band as a reserve, the purchasing of the interest of a band member in reserve lands for the band, the purchasing of livestock and farm equipment, the construction of permanent works, the loaning of moneys to band members and the construction of houses on the reserve.^{6.}

6. In order to determine the degree of expenditure of public moneys bands should be compelled to submit an audited statement of the band's capital and revenue funds to the department. ... 29

Assuming that revenue-producing projects undertaken by an incorporated band involving the leasing of band lands, the disposition of reserve resources or the establishing of band businesses are successful, the Indian local government or the corporate entity established will come into possession of funds which can be used for general operations.

The question of how these funds shall be used, and how any surplus funds can be disposed of will have to be prescribed in the articles of incorporation. It would be highly desirable that government negotiators recommend that articles of incorporation provide for the investment of any surplus funds.

Also, incorporation should provide that the use of band funds should be subject to regular independent audit and that a report, explaining in comprehensive terms the ways in which moneys were expended, be provided by the auditing firm to all band members and the Department.

Under s.89 of the present Act the real and personal property of an individual Indian or a band situated on a reserve is protected from seizure under process of law and it has been suggested that part II of the Act provide that these sections should continue to apply except to the extent that an Indian local government considers it to be in the interest of the band to subject specified assets to a mortgage, charge or lien in order to raise money.

Presumably, s.29 of the current Act providing that reserve lands are not subject to seizure under legal process would continue to apply, thereby limiting the Indian local government from exposing reserve lands to seizure. Any lands purchased by the band that were not reserve, or any fixtures, chattels and other assets of the incorporated band could, however, be pledged as security to obtain credit. Consideration might also be given to expanding the freedom of individual band members to pledge personal property as security for credit, as there would appear to be little justification for continuing to prevent Indians on reserve from commanding credit on the same basis of other Canadians.

In the event of mismanagement, the draft legislation provides for suspension or revocation of the band's charter or any part of it. In the event of suspension, provision has been made for the replacement of the Indian government, but provision should also be made for the appointment of a person or persons to adjust and settle the band's assets and liabilities if and when a charter was revoked. The person or persons appointed would be authorized to convert band assets into money to liquidate the band's liabilities and dispose of any remaining assets as directed by the Indian Government Commission. If the liabilities exceed the realizable

assets of the band the appointed person could be empowered to collect and enforce payment from the band. If, on the other hand, the assets exceeded the liabilities, the surplus could be placed in a trust account to the credit of the band and be expended as directed by the new band council, for the benefit of the band.

- (iv) The powers and limitations of the powers of chartered bands with respect to program and service responsibilities in such areas as education, health, housing and economic development, do not admit of easy definition. The proposed draft revisions to the Act provide that a charter may empower Indian local governments to pass by-laws over these subjects, but what these powers should entail remains to be determined.

Because the charter system is designed to be flexible .. to accommodate bands in varying stages of development, the federal government should have discretion to determine the program powers of bands on the basis of certain criteria. Before criteria can be considered, however, consideration should be given to the question of what range of powers over existing programs government is prepared to turn over to Indian local governments in a given program area. The basic range of options available might be as follows:

- (a) Department designs, implements, administers and funds the program - Band has no involvement other than as recipient of the program or service;
- (b) Department designs, administers, and funds the program - Band implements limited aspects of the program subject to guidelines and budgets determined by negotiation with the Department;
- (c) Department designs and funds the program - Band administers and implements, subject to Governor-in-Council regulation. Funds are provided on the basis of annual appropriation by way of loans or contribution agreements providing terms, conditions and standards to be met;
- (d) Department designs and funds program - Band administers and implements, funds are provided as grants on the basis of annual appropriations;
- (e) Department funds program on the basis of annual appropriation - Band administers and implements program;
- (f) Government funds under statutory grant - Band designs, administers and implements program.

The range of options illustrated above points out some possible variations of the kind of responsibilities which might be assumed by a given band over different program

areas such that a band might have type (d) powers over education but only type (a) powers over health.

Similarly, the range of powers desirable or even feasible over a given program area in relation to all chartered bands might extend through options (a) to (f) in one program area, but only through (b) to (d) in another.

Once the range has been determined, (with the exception of option (f) which, if used as an option, would require a provision in part II of the Act providing for the making of statutory grants) the operative limits of the power a band would exercise with respect to programs and services, would be negotiated and set out in the band's charter.

A further implication of these options is that they affect the degrees of Ministerial and band accountability. As the band's powers over programs increased, so too, would its accountability. Ministerial accountability would correspondingly decrease, from detailed accountability at one extreme to virtually very little accountability or discretion at the other, if payments for programs were made to a band under authority of the Act.

While the possible ranges of power a band would exercise under the terms of its charter would be subject to negotiation, it is necessary to consider whether the full range of options outlined above would be appropriate

for application to a given program area or whether some programs, by their very nature, would lend themselves to greater limitation. The basis for such limitations could lie with a desire by government not to become committed to certain types of funding commitments, with respect to a program area, or government's view that bands, as presently constituted, should not be empowered to assume broad responsibilities over a specific program area, because ^{they} could not ensure that standards essential to the program or service would be maintained.

One area where the broadest range of options might be exercised is in education, where bands have demonstrated a capacity to design and administer aspects of the education program and where it is perceived by government as desirable that bands tailor the program to meet their individual needs. The objectives of contemporary education for Indian children are generally shared by government and Indian bands to the extent that education should be available to all Indian children, that the quality of education should meet the same standards as for non-Indian children and that it take into account and provide for the teaching of local culture and language. Under a charter, therefore, it would be most desirable to permit certain bands to design and administer their own education programs, to establish school boards responsible for the selection of teachers and the

designing of curricula provided that educational standards comparable to the standards in force in the province where the reserve is located are met. Optimally it may be desirable to fund the fundamental aspects of Indian education programs by way of statutory grant in order to guarantee, for as long as the Act is in force, basic funding on a continuing basis. In this way the funding of Indian education would be free from the vagaries of annual appropriations and shifts in government policy and could be made out of the consolidated reserve fund on a per capita basis comparable to funding for the education of non-Indians in a province. Any special aspects of an Indian education program which exceeded provincial standards could be provided for by way of non-statutory grants and could be made subject to greater Ministerial discretion.

Alternatively, all basic education on Indian reserves could continue to be made subject to grants by way of annual appropriation preserving, to a greater degree, the Minister's control over the education expenditures. Bands could still establish their education programs and school boards but would be subject to variations from year to year. "Special" education programs could be even more closely controlled by providing, in a charter, that the culturally oriented programs of bands would be funded by way of contribution subject to audit, terms and conditions and conditional upon performance.

In practical terms, notwithstanding the good intentions of bands, it is difficult to envisage the Minister reporting to Parliament on the expenditure of public funds and the quality of educational services provided if the means to effect them lie beyond his control, whatever his accountability.

It is submitted that any charter would have to incorporate terms, conditions and standards for the education of Indian children if practically realizable educational goals are to be attained. Education programs could be developed jointly on a basis acceptable to both the government and Indian bands. School boards, Indian teachers and special curricula could still be accommodated. However, given the current climate of government restraint the need to ensure the highest and best possible use of available financing becomes of paramount concern. If the charter concept is to receive only those methods and systems which show a capacity for avoiding the potential waste of government funds and which will not further tax the already limited resources of the public purse can expect to enjoy any success.

Program and service powers in other areas such as housing and health, would probably be less flexible because of several reasons, including, primarily, the involvement of other government departments whose mandates have conflicting objectives with those of this department and who, for policy reasons, may expect to play an active role in ensuring the continuance of their overall responsibilities and in maintaining their own level of standards. Since those departments will be responsible for funding the programs, whether alone or in concert with this department, they may seek to apply more stringent controls over their expenditures. For example, although National Health and Welfare has developed proposals for the transfer of administrative responsibility to bands or Indian health bands, it has indicated that any transfer of administrative responsibility would continue to be subject to its own policies governing the conduct and delivery of health services, that monitoring of the conduct of health programs would remain with Medical Services Branch and that band budgets to administer the service should not exceed the total operating cost of that service as currently provided by Medical Services Branch personnel. Moreover, the Minister would develop health programs and ensure their effectiveness, provide experts and audit the accounts.

TABLE I

CUMULATIVE TOTAL OF BAND COUNCIL BY-LAWS, BY BY-LAW
(Selected Years)

	<u>1966</u>	<u>1969</u>	<u>1971</u>	<u>1974</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Traffic & Traffic Signs	67	94	114	133	145	169	
Curfew	50	64	69	73	77	90	
Garbage and Waste	42	51	65	71	74	88	
Pounds (Animal)	39	41	44	52	55	57	
Fish and Game	30	40	47	48	50	53	
Appointments of Band Officials	11	22	43	44	49	-	
Sanitation and Health	19	29	32	33	36	38	
Disorderly Conduct (Law & Order)	13	16	20	30	33	63	
Hawkers & Peddlers	22	25	26	27	27	42	
Administrative & Financial Regulations	-	-	20	27	27	33	
Licensing	24	24	26	26	26		
Recreation Programs		15	21	24	26	27	
Weed Control	23	24	24	24	25	32	
Zoning	3	8	13	16	17	-	
Trespass	-	-	-	9	11	17	
Dog Control	1	1	2	3	11	35	
Const., Repair of Building	-	4	9	11	11	18	
Expenditure of Money	10	10	10	10	10	-	
Police Commission Corps or Debts	-	1	1	4	7	-	
Raising Money	3	3	3	4	7	8	
Use of Band Buildings	2	3	4	5	6	7	
Electric Power	5	5	6	6	6	-	
Fire Arms	-	-	-	1	6	16	
Fencing	4	4	4	5	5	7	
Skidoos	2	1	1	2	4	-	
Burning Grass, Weeds & Rubbish	-	3	3	4	4	-	
Const. Repair of Roads	1	2	2	3	4	-	
Liquor	-	-	-	4	4	5	

CUMULATIVE TOTAL OF BAND COUNCIL BY-LAWS, BY BY-LAW
(Selected Years)

	<u>1966</u>	<u>1969</u>	<u>1971</u>	<u>1974</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Property Taxation	-	-	1	3	3	5	
Nuisances	-	-	-	3	3	-	
Fire Prevention	-	2	3	3	3	-	
Housing Authority and/or City Municipal Services	-	-	1	-	3	-	
Oyster Beds & Fisheries	-	-	-	3	3	-	
Local Developemnt Corp'n	-	-	2	2	2	-	
Anti-noise	-	-	-	2	2	4	
Band Staff Employment Regulations	-	-	-	1	2	4	
Fire Department	-	1	2	2	2	3	
Police Department Working Conditions	-	-	-	1	2	3	
Store and Business Hours	-	-	1	1	2	3	
Band Regulations and Constitutions	-	-	-	1	1	-	
Camping	-	1	1	1	1	8	
Counselling Service	-	-	-	-	1	-	
Fireworks	-	1	1	1	1	-	
Indian Village & Concession Stands	-	-	1	1	1	-	
Housing Regulations	-	-	-	-	1	-	
Appt. Lottery Licensing Officer	-	-	-	-	1	-	
Places of Amusement	-	-	-	1	1	2	
Pollution	-	-	-	-	1	2	
Preservation of Cultural Treasures	-	-	-	-	1	-	
Snow Disposal	-	1	1	1	1	-	
Street Lighting	-	-	-	1	1	-	
Use of Band Machinery	-	-	-	1	1	-	
Beekeeping	-	-	-	-	-	7	
Mobile Homes	-	-	-	-	-	1	
Veterinary Services	-	-	1	1	1	-	
	1966	1969	1971	1974	1976	1977	1978
TOTAL	408	548	681	789	868	1072	