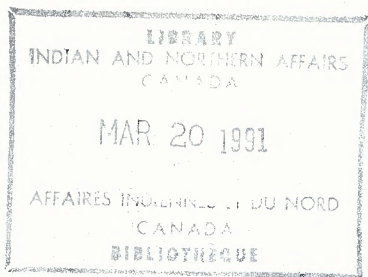


BAND/TRIBAL GOVERNMENT:  
POLICY OPTIONS AND PROPOSALS  
FOR INDIAN ACT REVISIONS

Policy Branch  
P.R.E.  
August 14, 1978.

E92  
T382





R. Paton  
Working copy

## P R E F A C E

The following document has been developed by a Task Group on Band/Tribal Government. This task group is co-ordinated by Richard Paton and its members are Harvey Goldberg, Herb Nabigon and Fred Caron. In addition Bill Henderson and David Hunter have provided some input on legal status and land questions. The overall guidance and direction for the work of the task group was provided by Peter Gillespie and Huguette Labelle.

## TABLE OF CONTENTS

### EXECUTIVE SUMMARY

#### 1. INTRODUCTION

#### 2. LOCAL GOVERNMENT UNDER THE PRESENT INDIAN ACT

Legal Status of the Band  
Role of the Band and Band Council

#### 3. THE CONCEPT OF BAND GOVERNMENT - PRESENT AND PROPOSED

Municipalization  
Transfer of Departmental Programs  
Band Autonomy

#### 4. FRAMEWORK FOR BAND CHARTERS

Legislative status  
Relation of charter to General Act

#### 5. INDIAN ACT CHANGES

- (a) Legal status
- (b) The band as delegator or delegatee of government powers.
- (c) By-law making and by-law approval
- (d) Protection of individual Rights
- (e) Administration of Services
- (f) Elections
- (g) Band Capital and Revenues

#### 6. THE CONCEPT OF AN INDEPENDENT AGENCY OR COMMISSION

#### 7. PROGRAM IMPLICATIONS AND REALITIES

Band situation  
Program organization  
Band Funding  
Miscellaneous

### APPENDIX A

The status of Tribal Government:

Band Situation - National Data

Regional Data (Alberta) Government

Profiles.

## EXECUTIVE SUMMARY

The overall purpose of the attached background paper is to further define and develop the Band/Tribal Government proposals outlined in the "Draft Discussion Paper on Indian Act Revisions".

Following the review of this document by senior management, it is suggested that the Task Group on Band/Tribal Government undertake a series of low-key discussions with regional and headquarters staff in order to refine the details of proposed Indian Act Revisions. These discussions combined with the guidance provided by senior management will provide the basis for a further paper which will specifically define the general contents and provisions of the charter section of the Indian Act. It is the latter document that will provide the direct input for the proposed Cabinet Document on Indian Act Revisions.

The main focus of this document is therefore to clarify the concept and major policy issues involved in the Band/Tribal Government question and to establish the parameters for the development of specific proposals for Indian Act Revisions. The structure and main conclusions of the paper are as follows:

### Local Government under the Present Indian Act

Band government under the present Act is viewed as a subordinate village type of government with minimal powers and considerable ministerial discretion and responsibility. The ambiguity of the legal status of bands is a reflection of this subordinate status.

### The Concept of Band Government - Present and Proposed

Band government has often been viewed as a combination of a village or municipal-type government and an administrative agent of the department. The concept of band/tribal government that should be used to guide the development of charters should recognize that

band government has a significantly different character than municipal government. Band/tribal governments should have clear roles, powers and responsibilities for basic community functions without ministerial intervention or authority.

#### Framework for Charters

In order to clarify the framework for charters two major options have been explored in this document.

- (1) A fixed range of charters (4 or 5) outlined through an Order-in-Council or
- (2) Provision for a range of options within each of the components of charters.

It is suggested that the second option may provide a more flexible framework to meet the diverse needs of bands. In terms of the contents of charters it is suggested that it may be difficult to deal with the legal status issue solely within the charters section.

#### Proposed Indian Act Revisions

In order to determine the contents of the charters and their potential impacts on related sections of the Indian Act, policy options and directions have been prepared on the following aspects of the Act.

(a) Legal status; (b) The band as delegator or delegatee of governmental powers; (c) By-law making and by-law approval; (d) Protection of individual rights; (e) Administration of justice; (f) Elections; (g) Band capital and revenues. Although proposed revisions of band government will have considerable implications for the land management provisions of the Act, these have not been dealt with in this document.

#### The Concept of an Independent Agency or Commission

After an assessment of alternative roles for the proposed Independent Agency or commission, with respect to the development and implementation of charters, it is suggested that a relatively narrow role be defined for the Commission. This role would focus on those areas that the department will have the most difficulty performing (i.e. appeals and adjudication, with respect to the implementation of charters).



### Program Implications and Realities

In order to ensure that the program implications and constraints of increased band autonomy are considered in the policy development process, some analysis has been undertaken of the program impact (e.g. funding manpower, decision-making) of increased band autonomy. It is suggested that changes should be initiated to parallel Indian Act revisions. Otherwise, a considerable number of bands may be incapable or unwilling to assume greater authority.

On the basis of the preliminary analysis of the task group, the proposed Framework and contents for the Charters can be described as follows:

a. Charters Section of Indian Act

Provides that the Minister may with the consent of bands enter into charter agreements that could involve one or more of the components of the charters.

The components of the Charters section (e.g. by-law powers, capital, revenue, justice) would be written so as to describe the maximum powers that would be allowed under the charter.

b. In addition, the Charters section would provide for the role of the Independent Agency and outline all the provisions of the present Indian Act that would be inapplicable to charter Indian bands.

c. Order in Council

The Order-in-Council would outline the principles and criteria that should be used in the development of charters if, for example, a band wanted to control band capital provisions would also have to be made to ensure band members played a strong role in major decisions. The Order-in-Council could recognize that some charters may include only selections from the total list of components in the Charter Section of the Act (e.g. education).

d. Charter Agreements

The specific charter agreements could be signed by the Minister or be the subject of further Orders-in-Council. They will have the force of law if they are Orders-in-Council and may provide the Minister with some protection against continual changes.

e. Local Service Agreements

The Charters themselves could require comprehensive local service agreements to be negotiated for periods of 2-5 years. These agreements could deal specifically with administrative questions, funding, decentralization of programs, training requirements, etc.

Service Agreements could be modelled on General Development Agreements or sub-agreements used by DREE and involve other department programs or programs delivered by provinces.

A final issue that should be raised is the potential conflict between provisions for charter and provincial jurisdiction under S. 92 of the B.N.A. Act. This question is presently being reviewed by a legal consultant.

STATEMENT OF OBJECTIVES FOR  
BAND/TRIBAL GOVERNMENT

The Draft Discussion Paper on Revisions to the Indian Act (June 13, 1978) included a list of eight underlying principles on which to base revisions to the Act. These principles have been closely adhered to in the development of the general philosophy and policy proposals discussed below.

These basic principles have been slightly revised as a result of comments received from various sources:

1. The aim of band government: local self-government

The goal of Indian band government is to enable the Indian people, through responsible and accountable authorities at the band level, and in accordance with their capabilities and desires, to make major decisions regarding the political, economic, social and cultural well being of their communities.

2. The constitutional position

The British North America Act charges the Government of Canada with exclusive legislative authority for those matters which relate to "Indians and Lands reserved for Indians." The formal legal powers and responsibilities vested in band government derive their legitimacy from legislation passed by Parliament under this authority. However it must be kept in mind that the Indian people had institutions of self-government before the arrival of the Europeans and that this tradition forms an important foundation for the development of band government.

3. The nature of band government

Band governments are not "local" or "municipal" governments in the traditional meaning of these terms. Their particular relationship with the Federal government, the nature and character of their concerns and responsibilities and their function as a focus of common identity make band governments different from the governments of typical town or village. They should be viewed as a different form of authority and the structure, and responsibilities of band government should be matched to their particular needs and characteristics.

4. Band government as the center of decision making

Band governments should be the center of decision making for reserve communities. District, regional or national



associations or groupings of bands should not have any inherent powers but rather should derive their authority from the constituent bands.

5. Flexibility/elective principle

The band government system must have the flexibility to cope with the wide divergence in economic, cultural, political and administrative development of Indian bands across the country. Bands should have the opportunity to choose the level of governance best suited to their needs, desires, and capabilities.

6. Responsibility and accountability

- (a) The Band government system should be based on the principles of responsibility and accountability. The members of a band, individually and collectively, must have at their disposal the means to ensure that the band government exercises its powers in a way whereby it is held responsible for its actions.
- (b) To as great an extent as possible band governments should be financed in a way which will enable them to be fully accountable and responsible for their own expenditures and which decrease the need of the Department for detailed control of budgeting and expenditures. At the same time band governments must remain accountable to Parliament for funds received from the Federal Government.

7. Advisory role for DIAND

The DIAND should act primarily in an advisory rather than a supervisory or a control capacity in relation to band governments.

8. Continuing Federal Obligations

Band governments should be able to exercise their authority without adversely affecting in any way:

- (a) The trust relationship between the Federal Government and the Indian people;
- (b) The unique and continuing relationships of the Indian people to the Federal Government or;
- (c) The responsibility of the Federal Government to meet commitments under law or the various treaties or

- (d) The special status of Indians and Indian lands;  
or
- (e) the number and quality of local services available  
to band members.

**Band Tribal Government:  
Policy Options and Proposals for  
Indian Act Revisions**

---

**1. INTRODUCTION**

The purpose of this paper is to further develop the band government proposals that were outlined in the Draft Discussion Paper on the Revision of the Indian Act (June 13, 1978). Given the complex and multidimensional nature of the whole question of band/tribal government and its critical implications for the relationship between the federal government and Indians, it is necessary to provide a thorough analysis of the major aspects of band tribal government before proposing specific Indian Act revisions.

In order to establish a clear understanding of the present band government system this document will:

- (a) Describe and analyse the present Indian Act;
- (b) Analyse the present concept or approach to band government and develop proposals for a new concept;
- (c) Analyse and define the charter approach to the devolution of powers a way of achieving more autonomous band governments;
- (d) Review the role of an independent agency or Commission in light of these policy proposals. Provide policy options and proposals for the wide number of areas in the Indian Act that are related to band government.

**2. LOCAL GOVERNMENT UNDER THE PRESENT INDIAN ACT**

Before developing policy options or proposals for Indian Act revisions, it is first necessary to define and analyse the present powers of Indian bands and to illustrate the major problems that exist under the Act.

One of the fundamental aims of the 1951 revision of the Act was to give bands a greater degree of local autonomy within the framework of a system patterned, in part, on the municipal government model. This was accomplished by increasing the bands' powers to pass by-laws and by decreasing the Minister's power to act arbitrarily with regards to band affairs.

Although the nominal aim of the Act was to increase band autonomy, it was very clear that the Government still intended to exercise a significant amount of control and supervision of band affairs. The by-law making powers (S.81), although greater than in previous legislation, were still very limited and related primarily to very basic local functions (e.g. bee-keeping, weeds, roads, traffic, cattle). Moreover, even within this limited realm of band jurisdiction the Minister still retained the power to disallow band by-laws.



It is also very significant to note that since the Act does not give bands any powers with respect to the numerous program areas that relate to the socio-economic development of their communities bands are not able to pass by-laws with respect to these matters.

Thus, the degree of power of bands under the present Indian Act depends on the following:

- a) the extent to which the council uses the limited by-law powers granted to it under the Act in Section 81 and the extent to which the Minister exercises his prerogative under section 82(2) of disallowing the by-law within 40 days.
- b) the extent to which the governor-in-council declares a band to have reached "an advanced stage of development" and therefore to be brought under Section 83 which grants the band power to enact money by-laws.
- c) whether or not the band has been brought under Section 69 of the Act which allows a band "to control, manage and expend in whole or in part its revenue moneys".
- d) whether the band has requested and received under Section 60 of the Act "the right to exercise such control and management over lands in the reserve occupied by that band as the governor-in-council considers desirable".

#### Legal Status of the Band

One of the most evident problems in the present Indian Act is the question of the legal status of the band or band council. This problem has two major dimensions: (1) the lack of clarity of the degree to which the Minister can delegate powers or authority to bands within the Indian Act and (2) the confusion between the role of the Band and the Band Council.

An organization which has corporate status is usually regarded as having a legal identity distinct from that of the individual persons who form such a body. A corporate body can sue and be sued and enter into contracts in its own name. Although there has been considerable discussion as to whether the Indian Act implicitly gives bands a corporate status under Section 60, it is generally agreed that the legal status of bands is more likely to be that of an unincorporated association: (Mintuck V. Valley River; Mathias).

An organization composed of a body of persons united without a charter for the prosecution of some common enterprise, it is not a legal entity separate from the persons who compose it. (Meinhart V. Contresta 194 N.Y.S. 593, 594)

Although an unincorporated association has no legal personality a contract which purports to have been entered into by or with such a group is not necessarily invalid and the person or persons who actually made the contract could be held personally liable. (Anson's Law of Contract).

The confused legal status of Indian Bands is a reflection of the subordinate status or role that was envisaged for bands under the 1951 Act. Unlike non-Indian municipalities, bands were not provided with the means to incorporate. They are therefore faced with a severe constraint on their ability to undertake actions on their own behalf and accept responsibility for such decisions as a group. (See section on Indian Act Revisions for a definition of proposals with respect to legal status).

### Role of the Band and Band Council

One dimension of the legal status question and the whole issue of band powers is the role of the band and band council. Section 2(3) of the Act distinguishes the two as follows:

- (3) Unless the context otherwise requires or this Act otherwise provides
  - (a) a power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band, and
  - (b) a power conferred upon the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council.

Sections 64 and 66 enable the Minister, with the consent of the council of a band to authorize the expenditure of capital and revenue moneys, but 69 states that the Governor-in-Council may "permit a band" to control, manage and expend ... its revenue moneys. Section 60 also enables the Governor-in-Council to "grant to the band the right to exercise such control and management over lands in the reserve ..... as the Governor-in-Council considers desirable".

Although the Act provides a clear distinction between band and band council, it is not always certain which body is to exercise these powers. For example, should the powers allotted to the band be exercised through the Council? In addition, the logic behind the separation is difficult to follow. Thus, one of the dimensions of the Act along with the issue of legal status which must be re-assessed is the respective roles of the band and the band council and the relationships between them. This question will have added importance if bands or band councils acquire increased decision-making powers.

### 3. THE CONCEPT OF BAND GOVERNMENT - PRESENT AND PROPOSED

In order to develop proposals for band or tribal government it is essential to acquire a clear understanding of the fundamental assumptions, or philosophy that is embodied in the present Indian Act and to outline a new approach or concept that can guide future work in this area. The key question that will be considered in this Section is: what is the nature of band or tribal government and how should it "ideally" relate to the Federal Government or more specifically the Minister?

From 1951 to the present the DIAND approach to band government has been characterized, at least nominally, by three major perspectives: (1) Municipalization, (2) Transfer of departmental programs, (3) Band autonomy.

## Municipalization

Since at least the 1880's it has been the policy of the Federal Government to promote the establishment of municipal type forms of government on Indian reservations. This policy direction was motivated by the belief that local control of municipal affairs would be an important step in imbuing Indian people with a sense of civic pride and responsibility.

Models of band government have been consistently based on provincial local government statutes. The 1951 Indian Act band government sections are, for example, patterned on Ontario laws in force at the time. There appears to have been little consideration as to whether the municipal form of government was suited to the needs and desires of Indian people.

One of the basic premises of political organization in any society is that the type of government must be designed to adequately reflect its environment (e.g., land, size, people, culture). The concept of municipal government that has often been used as a guide to local government for Indian communities was developed in a European urban context and it has limitations in its application to Indian communities.

One of the most important differences between Indian communities and municipalities is that Indians are a minority cultural group within a complex interdependent society. Regardless of the similarities in the scale of communities or even the local functions, Indian communities are much more responsible for the total welfare, identity, and socio-economic development of their inhabitants than municipalities. ✓

Municipalities are a form of government that has been developed largely to provide basic services to municipal land (roads, sewers, recreation). Because they are part of the dominant free-enterprise culture the economic development or welfare of the community is largely viewed as separate from municipal government functions and cultural development is left to private individuals or groups. Services are largely provincially run or controlled. Thus, unlike an Indian community where social, economic, cultural and governmental functions are combined the municipality functions primarily to provide services to property.

The novel aspects of the government of Indian reserve communities is reflected by the wide variety of programs and activities that bands, in contrast to municipal units of governments with similar populations, are involved in. A recent departmental study of selected Indian communities and municipalities in B.C. illustrates that many bands already have considerable powers or responsibilities beyond those of comparable municipalities.

Despite the broader scope and required responsibilities, band or band councils are provided with less powers than even the smallest municipalities (e.g. by-law powers) and do not have the advantage of incorporation (legal status).

Although the functions of band government may have some similarities to municipalities, the unique socio-economic and cultural requirements of Indian bands as well as their relationships with the Federal Government considerably limits the value of the municipal model for the development of band or tribal governments. ✓



### Transfer of Departmental Programs

The most recent initiative with regard to band government has been the thrust towards the transfer of Departmental programs.

In past years bands were usually the consumers of services provided by the Department. The bands played a relatively passive role in the system with little involvement in the administration or delivery of programs. In recent years this has changed and bands have become much more involved in the administration of Departmental programs. This process was largely initiated through the recommendations of a Parliamentary Committee in 1962 and was implemented through the contributions to Bands' Program in 1965 and the Local Government Program approved by Treasury Board in 1974. The Local Government Program provided for the transfer to Band Councils or District Councils of funds for any Capital and O & M programs approved in the Estimates and for Band Core Funding.

When the Department began to transfer programs to bands this procedure was viewed by the Department primarily as an administrative refinement. Bands were viewed as agents for the delivery of Departmental programs. As bands have demanded greater autonomy and scope for planning and decision-making this concept has been modified to enable bands to play a more significant role. Despite these changes, the predominant reality is that bands are administering programs that are created for them by the Department and that there is an inadequate scope for the design of programs (i.e., socio-economic development) that are a reflection of community requirements. Thus, to a large extent bands have been viewed as simply an extension of the Department.

As George Anderson has pointed out in a paper on "Indian Affairs and the Government of Indians", it should be realized that, in principle, administration and control can exist separately. The lack of band administration need not in itself prevent a large measure of band control nor should local administration mean local control. It is the confusion of the relationship between these two that has raised some problems for the concept of band government.

Anderson pointed out that there are theoretically four options in terms of Department/Band Control and Administration.

	Departmental Administration	Band Administration
Departmental Control	1	2
Band Control	3	4

Before the transfer of programs to bands most of the bands were in Box 1 (Departmental Administration and Control). Despite the increased Band Control of Programs administered by the Department there appears to be a strong tendency for the bands and the departments to operate under a system of Department Control and Band Administration. This, in effect, puts the band in the position of acting as an agent of the Federal Government rather than as a government entity itself.

If the Government is prepared to provide increased powers to Indian Bands it must be recognized at the outset that this will necessitate an increased role on the part of the bands in the design of programs that affect their communities. Given that a large number of bands are very small in size, a considerable proportion may not be able to manage or administer large programs. In other cases, large and more sophisticated bands will not only want to administer programs but to develop them as well. Thus, an important consideration under a new concept of band government will be to provide ways in which bands can have more control over departmentally administered programs and to provide more decision-making capability or band control over the programs that they will administer.

### Band Autonomy - Relationship between the Minister and the Band

The ultimate question in considering the overall concept of band government is the degree of autonomy of Bands and their relationships with the Federal Government through the Minister.

In order to understand this relationship a useful framework for distinguishing the current concept of Band Government under the Indian Act and the concept that might be used in developing charters for the most autonomous bands has been presented by F. Sherwood in an article "Devolution as a Problem of Organization Strategy". Sherwood distinguishes between deconcentration, devolution and decentralization. The first two of these concepts he describes as follows:

Deconcentration the delegation of authority adequate for the discharge of specific functions to staff of a central department who are situated outside Headquarters. (hierarchical)

Devolution: the legal conferring of powers to discharge specific or residual functions upon formally constituted local authorities. (non-hierarchical)

Sherwood points out quite clearly that devolution implies some measures of autonomy - i.e., the freedom to behave outside the constraints of direct control .... and a "system integrity in the sense that a system must have boundaries and therefore identity". Thus devolution of responsibilities requires that local government have generally agreed upon limits of authority and responsibility. Within these areas they are responsible to their electors not the Minister or the Department. ✓

If bands under the charter system are to become the focus of community decision making, it will be necessary to adopt an approach which embodies the concept of devolution rather than deconcentration.

"Devolution in this context means the transfer of power to geographic units of local government that lie outside the formal command structure of the central government." Hence devolution of powers represents the concept of separateness, of diversity of structures within the political system. It represents an interorganizational patterns of power relationships rather than an intraorganizational hierarchy.

While devolution may be an ideal concept for the definition of powers that are transferred to bands, it may not be appropriate for describing the continued role that the department may play in some program areas. It is likely that despite the increased powers of bands that there will, in varying degrees, still be bands or charters that require departmental guidance, administration or control. Thus, there will probably be a continuing intraorganizational relationship between the department and bands.

The third concept - decentralization - as defined by Maddick\* combines both inter-organizational and intraorganizational characteristics. Decentralization indicates a dispersal of power throughout an organization and refers more closely to number 3 in the Box Diagram (Department Administration: Band Control). In terms of the Indian Act or charter, decentralization means that bands have a greater decision - making role in programs, but that the department and the Minister are still ultimately responsible. Under the concept of devolution, the major level of responsibility is the band itself.

The concepts of deconcentration, devolution, and decentralization help to clarify and systematize our thinking the present approach under the transfer of programs to bands has largely pursued a process of deconcentration. The aim of the Indian Act revisions should be to establish a charter system of devolution of powers as illustrated by Chart II combined with increased decentralization of those programs that are retained by the department.

### SUMMARY

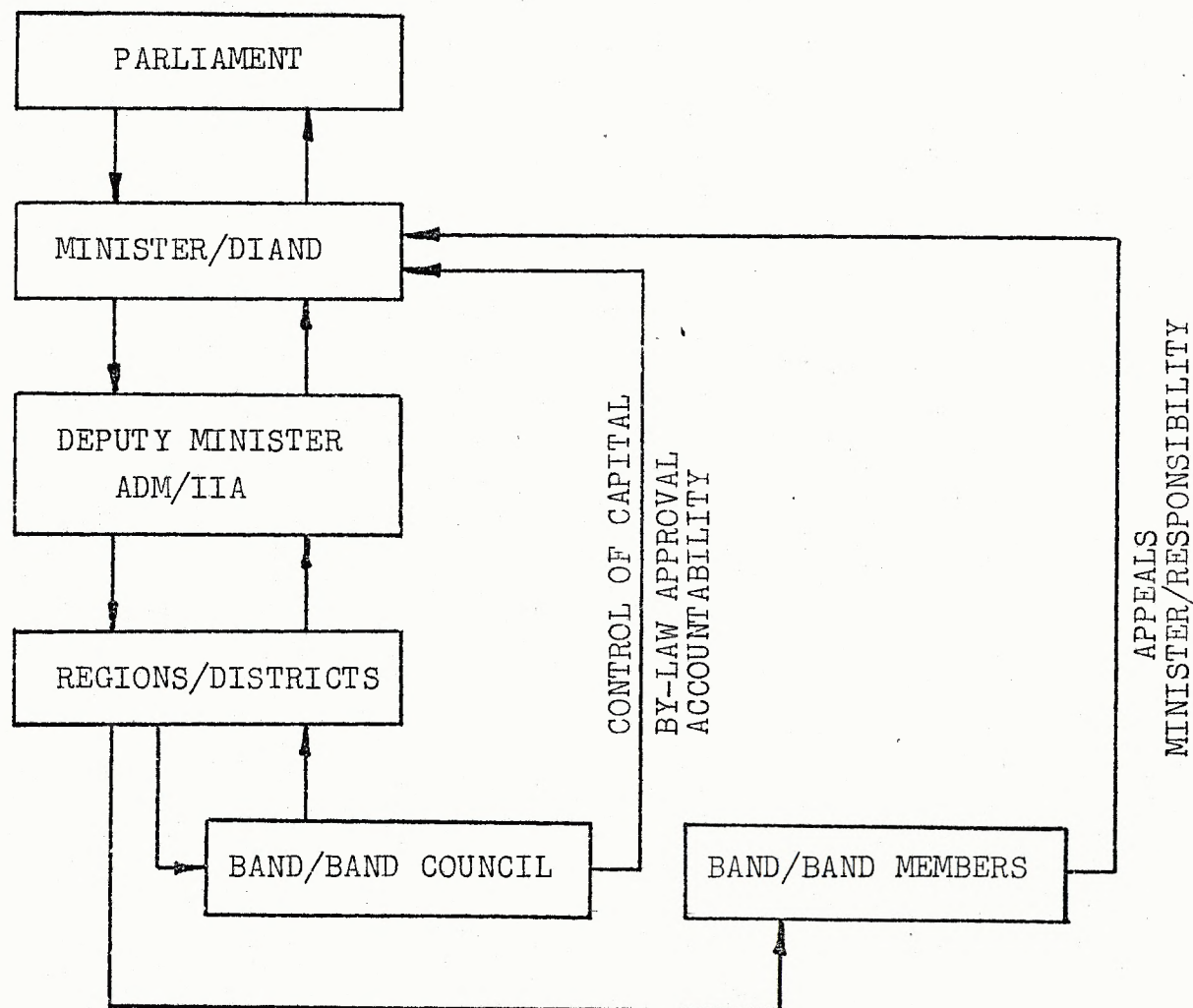
The concept of band government that has been outlined under the Indian Act and departmental programs has viewed the band as a low-level village or municipal authority which to a large extent is an extension of the department for the purpose of delivery of programs. As illustrated earlier in this document, the status of bands and their powers and responsibilities indicates that bands were largely subordinate to the Minister and had a very limited jurisdictional base.

The concept of band/tribal government that is proposed for the most advanced bands is based on the devolution and decentralization concepts outlined earlier. Thus, band/tribal government would have the following characteristics:

- a. Band/Tribal governments should be viewed as more than municipal-type governments. Given the broader socio-economic responsibilities of bands, they should be viewed as having powers and a level of authority which would be beyond that of comparable municipalities.
- b. Band/Tribal governments must have clearly defined powers and a corporate identity (i.e. legal status). Within their jurisdictional areas, bands should be responsible for their actions and the Minister would play no authority role. Disputes or appeals should be directed through an independent agency to the courts. *clarity*
- c. The band powers that would be transferred to the bands should relate most directly to basic community functions, particularly the management of land and community services.



LOCAL/BAND GOVERNMENT  
PRESENT CONCEPT UNDER THE INDIAN ACT



CHARACTERISTICS:

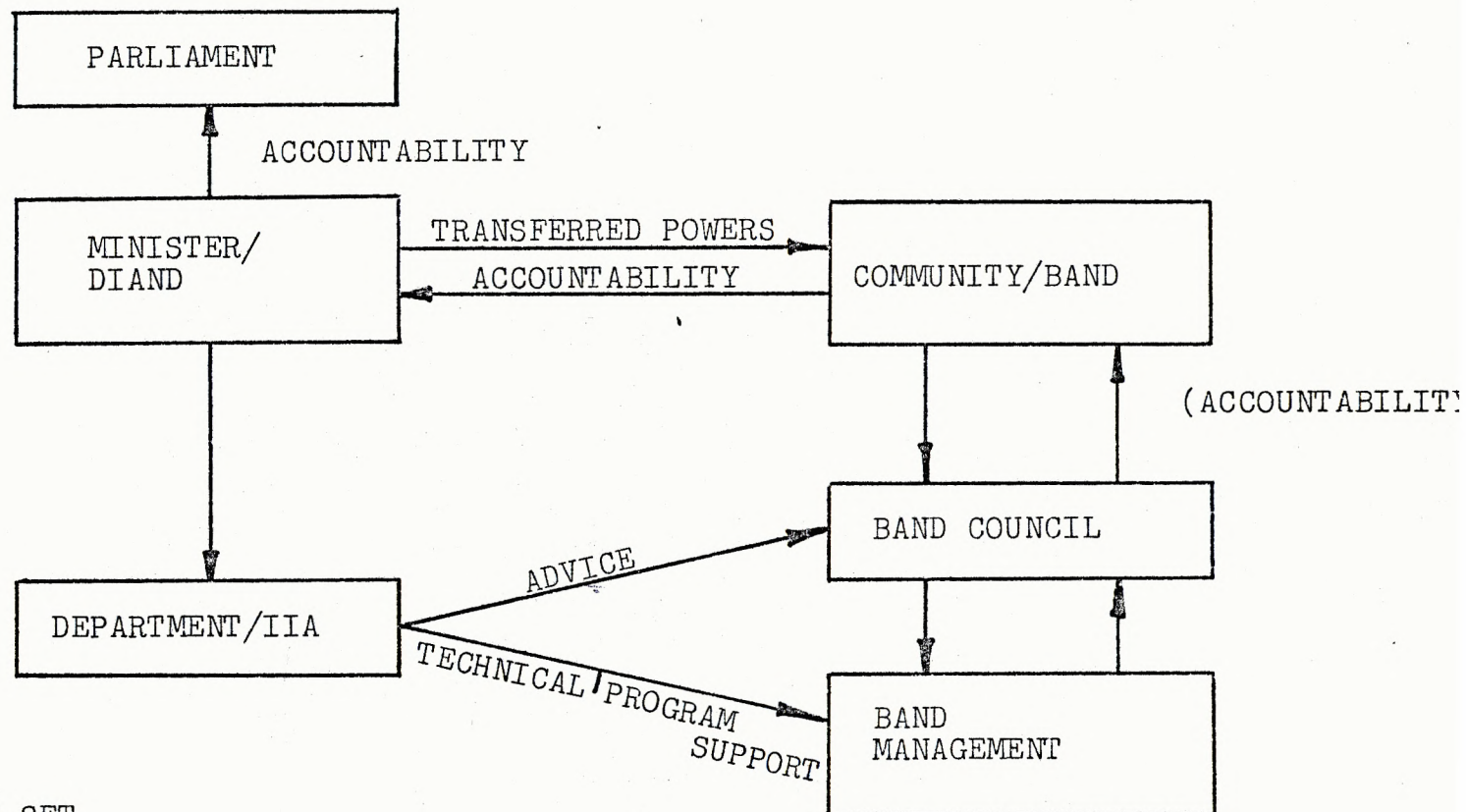
- BAND: LIMITED BY-LAW POWERS.
- MINISTER RESPONSIBLE FOR APPROVING BY-LAWS.
- BAND ADMINISTRATIVE EXTENTION OF DEPARTMENT AND ACCOUNTABILITY IS REQUIRED.
- MINISTER RESPONSIBLE FOR BAND MEMBERS AND MUST CONTROL ACTIVITIES IN ORDER TO CARRY OUT SUCH

DRAFT: FOR DISCUSSION ONLY

R. PATON  
 POLICY BRANCH  
 AUGUST 1978

CONCEPT OF BAND/TRIBAL  
GOVERNMENT UNDER DEVOLUTION OF POWERS

CHART 2



- COMMUNITY HAS A DEFINED SET OF RESPONSIBILITIES. DEFINES POLICY DIRECTION
- BAND COUNCIL ACTS A REPRESENTATIVE OF COMMUNITY. (POLICY DECISIONS)
- BAND MANAGEMENT IS ADMINISTRATIVE ARM OF THE COMMUNITY.
- COMMUNITY ACCOUNTIBLE TO MINISTER IN GENERAL WAY FOR OVERALL EFFICIENCY AND EFFECTIVENESS OF EXPENDITURES - NOT DETAILED

DRAFT: FOR DISCUSSION ONLY

R. PATON  
POLICY BRANCH  
AUGUST 4, 1978

- d. The program areas or functions that will probably need to be shared or decentralized will be those which require discretionary expenditures or involve accountability or standards beyond the community itself.
- e. The powers that should be reserved for the Minister should be very limited. The Minister will have to maintain a trust responsibility over individual Indians and as an agent of the crown, he will have to retain ultimate responsibility for land.
- f. Under the terms and conditions of the charter the Minister should retain the power to revoke, change or to postpone the provisions of the charter in cases of incompetence, (e.g. use of capital funds) criminal behaviour, abuse of individual rights, or acting beyond the confines of the charter.
- g. It should be clear within the confines of the Act that areas where bands are the authority, the Minister is not responsible.

In order to clearly define these roles and responsibilities of the Minister/the band/the band council and the Commission, the next two sections will look at the overall framework and characteristics of the charters themselves and the independent agency proposal.

#### 4. A PROPOSED FRAMEWORK FOR CHARTERS IN A REVISED INDIAN ACT

##### Rationale of Charters

Since the last revision of the Indian Act, considerable changes have taken place in the development of Indian Communities. With the need for more local autonomy and self-government, the Indian Act no longer provides the flexibility and powers required for some Indian bands. Given the fact that within the next ten years, reserves and native communities will represent a continuity of community types at various stages, it will be necessary to ensure that the Indian Act has enough flexibility to deal with this diversity.

The charter "approach to band government will provide the flexibility for bands to choose the type of government best suited to their local conditions". "Through such a system of charters, Indian band governments could include several types of autonomous or semi-autonomous charter bands, and a group of statutory bands who would remain directly under the administration of the Federal Government/Department along the lines that exist under the present Indian Act." (Draft Discussion Paper).

On the basis of the elective principle, bands would enter into the charters best suited to their particular situation and they could re-negotiate their charter to suit changing needs.

In terms of the Indian Act, one of the major advantages of the charter system is that within the Act's parameters, it can provide a means to adjust band government without undertaking revisions of the Act itself. Charters are therefore a much more flexible instrument for responding to changes in Indian communities.



### Description of Charters

The "Draft Discussion Paper on the Revision of the Indian Act" indicated several characteristics of the proposed charters. First, it was outlined that the "Charter Band Option" would be part of an optional section of the Indian Act. The charters themselves would provide for:

- A functional description of the responsibilities, powers and functions the band(s) wished to assume under the charter
- The transfer and/or delegation of responsibilities and powers formerly exercised by the Minister/Department under the existing Act
- The scope of the bands by-law jurisdiction selections from a revised list of by-law powers under Section 81-83
- By-law enforcement arrangements and procedures
- Implications as regards Federal/Provincial laws of general application (e.g. Section 88)
- The electoral system preferred by the band for its own band government
- Financial arrangements
- Budgetary requirements
- A termination and amendment procedure

In addition, it is suggested that "at least the Governor in Council would be empowered to adopt 2-5 charters" and that the "bands in question" would be established as a legal personality under an appropriate revision of the Indian Act.

### Factors and Considerations for the Charter Framework

Although the description in the "Draft Discussion Paper" provides a clear and logical direction for the charter system, there are a number of areas that need be clarified in the course of preparing Indian Act Revisions and some sub-options could be considered for the overall structure and contents of such charters.

The issues that require further consideration are:

- (1) legislative status of charter (Act or delegated legislation)
- (2) contents of charter within Act and related changes required in general Act
- (3) range of Charters
- (4) shared, transferred and residual powers

## Legislative Status of Charter

There are two major options with respect to the relationship of charters to the Indian Act; (1) charter incorporated in the statute, (2) charter as delegated legislation. The first approach would provide for the major components of the charter within the Act itself or at least the maximum provisions. The second approach would necessitate only some enabling clauses within the Act for the creation of charters and the charters themselves would become part of an Order or Order-in-Council.

There are advantages and disadvantages to both of these approaches. The detailed outline of charters within the Act would limit the flexibility of the charter system (one of its main objectives). On the other hand it may be doubtful if Parliament would accept a "carte blanche" for Cabinet to create Orders-in-Council for Band/Tribal government without clear direction in the legislation.

It will probably be necessary to include a definition of the outside parameters of charters within the Act or at least provide for more flexibility within the areas of making up proposed charters. This can be done without actually defining Charter A, or B etc. or the groups of powers that would relate to specific charters.

The overall framework for charters that is envisaged is as follows:

### Indian Act: Charter's Section

Definition of the major components of charters and the maximum powers that may be provided to bands by the Minister.

Definition of the role of the Commission or agency.

### Framework of Charters: Order in Council

Outlines the framework of charters that will be adopted. This could include a range of 4-5 charters or it may simply be one or two basic charters with potential variations.

### Charters: Orders in Council/Minister

Following the general framework outlined in the Order-in-Council, a series of Orders in Council could be approved for each specific charter. It may be preferable to provide the Minister with the authority to negotiate and sign the specific charters in the context of the general Order in Council.

### Local Service Agreements

A more comprehensive approach to present local service agreements could provide the way in which the department, other departments and possibly provinces agreed to provide programs to bands in the context of a given charter. These agreements may provide for areas where the department or other departments must maintain some accountability and would therefore be closely linked to the decentralization approach outlined earlier.

### Contents of the Charter provisions in the Act

In reviewing the policy directions in the Draft Discussion Paper, several difficulties emerged in defining the contents of the charter section as opposed to the general act.

The two major problem areas were elections and legal status. In addition the more closely that the Act is studied the more evident that it became that a large number of provisions of the present Act would have to be considered inapplicable to bands operating under the charters.

The problem with including elections in the charters is that the type of election procedures term of office voting age do not necessarily vary with the need for increased autonomy. Perhaps there will be a requirement for more referenda or band support (i.e. for major capital expenditures) but the election provisions themselves might be best treated in the general Act. If the procedures are only modified under charters the government is placing bands in a difficult situation of either choosing from an outdated system or being required to adopt a charter in order to obtain more flexible elections. It is therefore suggested that elections be subject to revisions under the existing Act and that they be part of the first round of revisions. Alternatively, elections could be omitted from the charter section of the Act and remain as is.

Under the present proposals bands would acquire legal status only if they opted for charters. Since legal status has major implications for many of the provisions of the Act - particularly the role of the Minister - it is logical to confine it to the Charters. However, at the present time bands are being viewed by the courts as "unincorporated associations" and band members could be personally liable. It is suggested that if legal status is to be simply confined to the Charters, that efforts be made to clarify to bands and to the department the present legal status of bands in order to avoid a flood of court cases and problems.

The final area of concern about the contents of charters is that there are a number of sections of the Act that are either inconsistent with increased autonomy or which could be confusing for bands with legal status. Sections which provide the Minister to unilaterally act in the basic community functions such as road maintenance or fences (S-34(2)) would definitely have to be inapplicable to bands under charters. Other



sections such as S.60 with respect to land management will have to be much clearer. Although an accurate estimate of the number of these sections is not available at this time, it is anticipated that there are considerably more of these than expected and that in some cases it may require re-writing new sections under the Charters section.

### Range of Charters

There are two basic approaches to the establishment of the range of charters. (i) fixed range of charters - by Order in Council; (2) self-constructed charter.

The fixed range of charters (i.e. 4-5) would enable the department to limit to some extent the variety of charters that it would have to deal with administratively. The major problem with this approach is that bands, despite many common characteristics, are an infinite variety of types of communities. One community may show the management ability to handle capital funds but lack the necessary democratic processes to involve band members. It will be very difficult to develop consistent packages of powers on a continuum of autonomous to least autonomous bands. Even if such charters were developed there will be strong forces that will continually press the department to alter these basic charters. In fact this is one reason that most provinces have tended to move away from charters embodied in legislation.

The second approach is to provide a system of self-constructed charters. Instead of providing packages of provisions in the context of a number of fixed charters, this approach would provide for a number of variations within each defineable area of band government (e.g. band/council powers, capital, elections). The mixture of these components that would be chosen would be arrived at through negotiation or discussion in accordance with fixed criteria. This approach has the potential for flexibility, but could mean an infinite variety of situations and cause some difficulties. In addition, it should be recognized that band government is a system of relationships. One cannot increase the powers of the band council-through legal status - and not compensate for this in term of the relationship of bands to band councils. Thus, the guidelines for designing the charters would have to be very clear.

This issue of the range of charters and their contents needs further analysis. At this time, it is suggested that one of two possibilities be pursued and mentioned in policy documents:

A fixed range of charters by Order-in-Council with the provision for some variations in areas of secondary importance to the structure of the government and its powers. This could allow for some variation of charters within the 4 or 5 models.

A charter framework which outlines a range of options within each category of the charter with some fixed criteria in terms of the assembly of such options into charters.

## 5. CHANGES IN THE INDIAN ACT

A preliminary study of the specific elements of the Indian Act which would have to be altered or eliminated in order to implement the tribal government philosophy discussed above has been undertaken.

Following are the specific subject areas which have been identified for study:

- (a) legal status;
- (b) agreements: band as a delegator or delegatee of governmental powers;
- (c) by-law making and by-law approval;
- (d) protection of individual rights;
- (e) administration of justice;
- (f) elections;
- (g) band capital and revenue;
- (h) alcohol control;
- (i) land tenure.

To date preliminary reports have been compiled on all areas except land tenure. The whole question of lands is currently being studied by Research Branch and their findings will be available shortly.

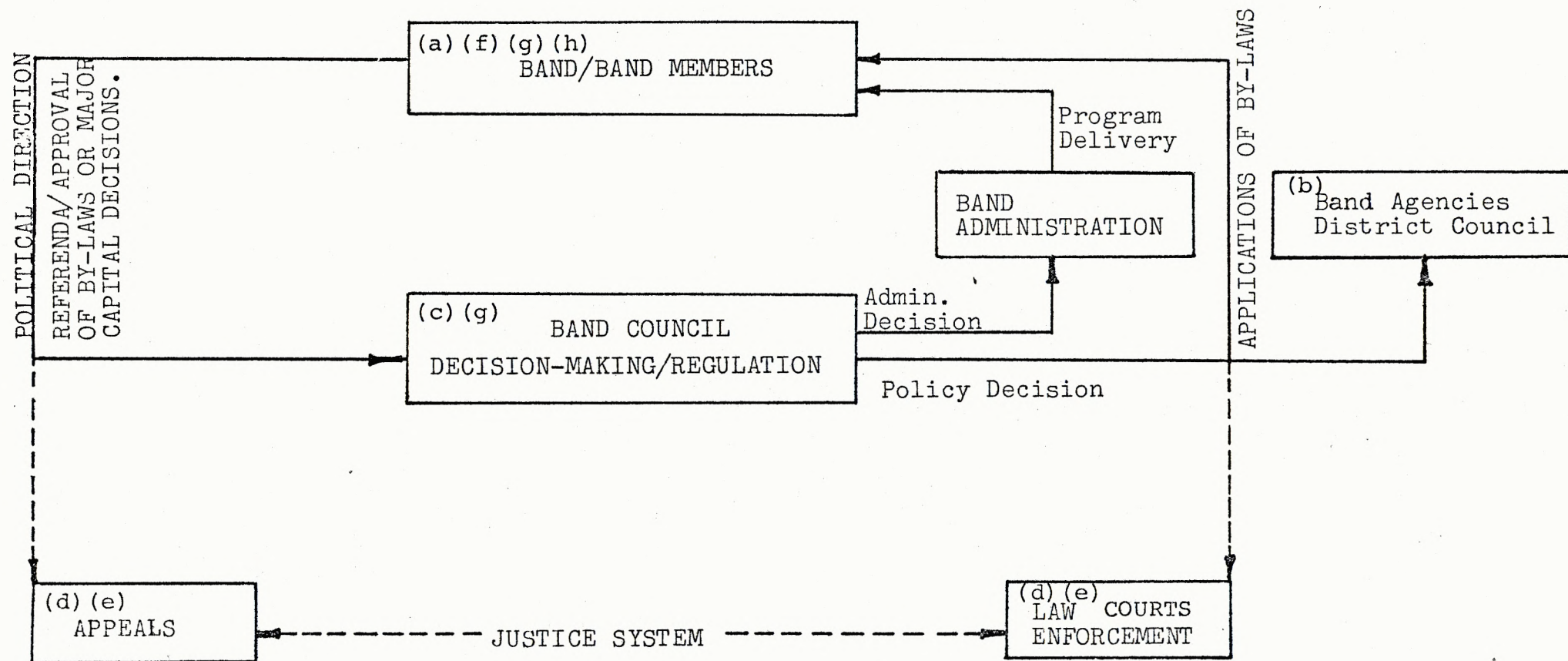
Diagram 3 illustrates how the various elements (a) - (h) interrelate to each other and how they would fit into a tribal government framework. The letters in the upper left hand corners of the boxes on the diagram indicate the direct connection between the elements of tribal government and the specific revision topics noted above. This diagram should be studied in conjunction with the notes on the specific topic (a) - (i) presented below and with the general philosophy of tribal government discussed previously. The diagram will be refined and clarified as the study continues.

### **Subject Areas**

Following is the Task Forces preliminary analysis and recommendations regarding areas (a) - (i).

In some cases specific policy recommendations are presented while in others a range of possible options are noted. In cases where only one recommendation has been noted it was felt that recommendation was the only efficient and effective solution identified to date. In cases where several options are noted, the efficacy of any one option is still open to question and will require further study and guidance from senior management.

ELEMENTS OF BAND/TRIBAL  
GOVERNMENT FOR CONSIDERATION IN THE REVISED INDIAN ACT



NOTE: RELATIONSHIPS THAT MUST BE CONSIDERED IN THE INDIAN ACT ARE:

1. Band role in guiding Band Council.  
(i.e. Elections Referenda)
2. Band Council power of Decision.
3. Band Council ability to enforce By-Laws and Regulate on Behalf of Community.
4. Role of Band Administration vis á vis Band and Band Council
5. Role of Band Council re: Band Agencies
6. Appeal Mechanisms For Individual Indians.
7. Law Enforcement Requirements.

R. PATON  
POLICY BRANCH  
AUGUST 4, 1978



## (a) Legal Status

### Present Situation

The legal status of bands and band councils, pursuant to the Indian Act, is uncertain. Unlike municipalities, bands/band councils are not specifically incorporated and consequently the exact nature of their status is difficult to determine.

Recent court decisions appear to ascribe the status of an unincorporated association to bands/band councils. (Mintuck v. Valley River Band No. 63A et al (1977) 2 W.W.R. 309). This would mean that in the case of a successful suit against a band, each and every member of the band could be held personally liable. Such an interpretation of legal status is clearly detrimental to the development of an autonomous band government system.

Apart from the question of legal liability the lack of certainty with regard to the legal status of bands has serious consequences for the functioning of band governments. Their ability to carry out the normal functions and responsibilities of a typical local government authority such as entering into contracts suing and being sued is extremely limited.

The judicial interpretation and the functional effect of the present legal status of band/band councils is clearly inappropriate pursuant to the present Indian Act. It is even more clear that implementation of the proposed statute/charter system will require that the question of status be dealt with definitively.

### Policy Proposal

As part of the charter approval process built into the statute/charter system the band will be permitted to adopt a corporate character.

The following would be the basic elements of the Band Government's corporate nature to be stipulated in the charters:

- 1.) a corporate name and seal;
- 2.) membership as defined by those resident within the corporate limits; *on on*
- 3.) territory, the defined limits of which also confine jurisdiction;
- 4.) perpetual succession;
- 5.) power to acquire and hold property for authorized purposes and to alienate same; *— (except for reserve land)*
- 6.) power to sue and be sued;
- 7.) power to contract in its corporate name;
- 8.) exemption of agents from liability when acting on behalf of the corporation; *— (language)*
- 9.) a governing body which exercises the powers of the corporation (e.g., council, community assembly, etc.);

- 10.) right to exercise through its governing body authority over the population of its defined territory;
- 11.) the manner in which decisions can be made and their binding power on members.

(b) Agreements: the band as a delegator or delagatee of governmental powers:

Bands should be given the power to enter into agreements respecting the exercise of their jurisdiction with the Government of Canada, a provincial government, another band or group of bands. This power would enable bands, if they desire, to delegate certain of their powers to another body or act as the delegatee of powers delegated by another body.

Such agreements would be essential if bands desire to participate in the delivery of Federal Government programs for which they are not prepared to assume total responsibility. Bands would also need this power if they desire to delegate certain of their powers and responsibilities to regional or district associations of bands.

Agreements concerning questions of jurisdiction would be conducted on the basis of one government dealing with another. The agreements would not alienate powers from any of the bodies involved but would rather transfer them under specified conditions which would allow the agreement to be terminated on notice.

An agreement between a band and a regional or district group of bands (or any other association of bands) should clearly indicate that the association has no inherent powers and that all their powers are derived from the bands involved.

Section 119-122 of the Cree Act Draft (March 17, 1978) (see below) outlines provisions similar to these that would have to be included in revising the Indian Act.

## **XV. Agreements**

119. Notwithstanding any other Act, a Cree community (Band Corporation) may conclude agreements with respect to the exercise of its jurisdiction with the Government of Canada or its bodies, the Government of Quebec or its bodies, another Band Corporation, or a Cree Village Corporation.
120. A Cree community may likewise conclude agreements with respect the exercise of its jurisdiction with all public bodies including a school commission or a municipality, or with the James Bay Regional Zone Council established by the Act constituting the James Bay Regional Council (1978 L.Q. c. ) as amended from time to time.

The Band Corporation of Great Whale River may conclude such agreements with the Kativik Regional Government as well as the Northern Village Corporation of Great Whale River constituted by or in virtue of the Act respecting the Municipal organization and Kativik Regional Government of Northern Quebec (1978 L.Q. c. ).

121. An Agreement contemplated by articles 119 and 120 may provide for the creation of a joint committee composed of representatives of the Cree community and the other party to such Agreement. The community may delegate to such joint committee all or part of its powers with respect to the subject-matter of the Agreement with the exception of those matters provided for at Sections \_\_\_\_\_ of this Act.
122. Cree community may conclude agreements with the Cree Regional Authority. Such agreements may contemplate the delegation to the Cree Regional Authority of provision of municipal services established by the Band Corporation, the administration of municipal services established by the Band Corporation or the coordination of such services with other services or programs of Cree Village Corporations or other Band Corporations.

(c) By-law making and by-law approval

General: Recommendations must be formulated as to a method(s) of by-law enactment, approval and ability to challenge. The decisions which will be arrived at are central to the philosophical questions of: 1) the locus of local government power and control (as between the Minister, the Band and perhaps an independent agency) and, 2) individual and collective rights of Indians.

Possible Options:

Many different techniques are available to implement a system of by-law enactment and approval. It is possible these techniques may be used exclusively or in combination in order to arrive at a fixed scheme. Outlined below are some of the possible techniques which could be employed. As is evident, there are many possible combinations and the list of options below is not exhaustive.

(a) All by-laws enacted by elected council: This would more or less be identical to the system which presently exists under the Indian Act. The council would be responsible for enacting by-laws within their allotted range of power with no concurrent power of the band as a whole to enact by-laws or to petition them. The question then arises as to which authority(ies), approves laws made by the council, and in what circumstances this approval is necessary. In addition to the requirements for approval, further safeguards may be imposed on the power of the council; such as requirements for publication of relevant documents, attendance of band members at council meetings, ability to submit matters to a referendum, etc.

(b) Enactment of by-laws by the band as a whole: Under this system, the band membership as a whole, in a form of meeting which would have to be carefully considered, could enact by-laws within a given range of powers. As mentioned in the introduction to this paragraph, it could operate exclusively of the power of the council to enact or in conjunction with it. The central questions related to an enactment power vested in the band are the modalities of the band meeting such as majorities, notices, method of voting, frequency of meetings, matters to be considered at band meetings, etc. In addition, if the band power to enact by-laws is to operate in



conjunction with a power of the council, it should be determined in what circumstances, if any, the band could override an exercise of power by the council, what matters would be required to be decided by the band alone or submitted to it for approval, and what majorities would be required for such approval. The manner in which a band could override an exercise of power by the council would have to be carefully examined.

(c) Referendums: Another means of enacting by-laws or obtaining approval thereof is the technique of referendum. This system could operate in conjunction with that discussed in (a) and (b) above or a mixture of (a) and (b). It could be a requirement to submit certain matters to the band in the form of a referendum (taking into account any other provisions which may require approval by a certain majority of the band) or it could be completely discretionary either at the request of the band, a certain portion of the membership thereof, or the council to submit matters to referendums. As in the case of approval of by-laws by the band the modalities surrounding the referendum such as notice, required majorities, method of voting, etc., require careful consideration in order that the referendum technique not lend itself to abuse.

(d) By-laws by petition: This method is somewhat similar to (b) in that the band membership could initiate requests for passage of a by-law and dictate its terms. The method of procedure could be mandatory (i.e., that a given number of voters suggesting a by-law would force council to enact it) or could be persuasive in that council would be forced to consider the matter and then enact the by-law in the normal manner if they so desired. The important matters to consider in terms of this method are the required majority to initiate the requests, whether or not it must be mandatorily dealt with by council, how, if at all, it relates to the power of the band to enact by-laws, and whether the council could override a by-law made upon petition by a subsequent by-law.

(e) The role of the Minister: The Minister's role in by-law enactment and approval could fall within any one of three categories: (1) complete approval power: This would be similar to that which exists in the Indian Act presently with the Minister having to approve all by-laws submitted by a band council or a band; (2) limited approval role: The Minister could limit his authority to approve by-laws only to certain classes of by-laws such as for example, financial matters and land surrenders; (3) no power of approval; The Minister might wish to relinquish all power of approval over by-laws with the exception of the general power to review the operation of the charter or the residual power of Parliament. This is discussed more fully under the heading of the statute/charter system. In considering the role of the Minister, the size and level of sophistication of each band should be borne in mind. Also, in determining his role, an attempt should be made to coordinate the philosophies of increased responsibilities for bands and the Minister's overall responsibility for supervision of Indian Affairs. Also taken into account in determining the Minister's role should be the safeguards which may or may not be contained in the Act or charter for the benefit of the individual, the mechanism of review of the charter and amendments thereto (discussed in the section of this paper dealing with the statute/charter system) and the possible role of an outside agency. ✓

(f) Role of outside agencies: Another possible option would be to establish an independent agency for purposes of reviewing by-laws and/or the operation of the charter process generally such as a commission which would have defined responsibilities. It would be important to determine what type of role this body would play (i.e., whether it would approve by-laws, oversee operation of the system generally, serve as an ombudsman, as a quasi-judicial body, or any combination thereof). The constitution of such an outside agency would have to be carefully examined in light of the matter which were delegated to it.

(g) By-law challenges: Perhaps as important as the method by which by-laws are granted approval or enacted is the method by which the enacting authority can be challenged by individuals. This question is also discussed in the sections of this paper dealing with individual rights and administration of justice. Some of the options which exist for by-law challenges are:

(1) Challenges in court (presumably the Federal Court) on the same grounds on which an individual residing in a provincial municipality would have to challenge a municipal by-law. This would enable the individual to challenge a by-law on the grounds that it was illegal, discriminatory, made in bad faith, unreasonable, or ultra vires. This would afford an Indian basically the same protection as a citizen of any other municipality vis-à-vis the local government.

(2) Challenge of by-laws before an independent agency: It may be advisable to provide an independent agency to deal with by-law challenges. This may be a method of avoiding some of the expenses of litigation in addition to enabling the individual easier access to decision-making authority. This independent agency could operate together with or in lieu of a court. The agency could serve either as a tribunal for hearing challenges on by-laws or, as mentioned above, act as an ombudsman generally for individual complaints and to oversee the operation of the charters generally. Challenges could be made to by-laws on defined grounds or under a general ombudsman-type power of such an agency.

(3) Role of the Minister: The Minister could also play a role by having an approval or disapproval power, or in being able to intervene at the request of an individual or at his discretion on defined grounds such as discrimination, etc. The Minister could also act as a quasi-judicial body such as that proposed under subparagraph (2) above.

(h) Power of the Minister to enact by-laws: Another option is that the Minister would have positive power to enact by-laws at his discretion or in defined circumstances. This could be identical to the Governor-in-Council regulatory powers now contained in S.73 of the Indian Act or wider powers if that were considered advisable. This power would be especially valuable in emergency-type situations.

*Use other  
terminology  
powers*



(d) Protection of individual rights

General: Recommendations for revision must, of necessity, address the question of band control over the elected council (this is more fully discussed under the heading By-laws and By-law approval). Equally as important, however, is the question of the individual rights under the law. Individual rights in this sense refers to a system of safeguards for the basic freedoms and rights of the individual vis-à-vis both the local government authority and the Act itself. The main objective, of course, is to prevent the charter systems from being used as an instrument of coercion against individuals. There are various methods by which protection of these fundamental rights may be embodied in a statute or charter depending, of course, on what degree of protection is felt will be adequate in the particular situation. Listed below are a number of techniques which could be applied in a revised Indian Act.

Possible Options:

Following is a list and brief explanation of some options available for protection of individual rights in any system established in a new Indian Act. These mechanisms could be used exclusively or in conjunction with each other to achieve the desired objective.

(a) Existing legislation: Existing safeguards which would apply to federal statute would include the Canadian Bill of Rights, and the commonlaw principles of fundamental freedoms. The Canadian Bill of Rights embodies certain fundamental freedoms which serve as an interpretative guide for every federal statute. As it is not enshrined in the constitution, however, it would not be as strong a protection as, for example, statutory provisions. It is possible, however, to reference the Canadian Bill of Rights in a new Act which would provide a stronger base than it now does. The major question in this regard then becomes whether the Bill of Rights would be adequate to deal with individual rights in relation to Indian local government.

Aside from the Bill of Rights, another existing protection is contained in the commonlaw principles of fundamental freedoms which have been recognized by the Supreme Court of Canada. However, as these principles lack definition to a certain degree, they are a less viable safeguard than specific provisions of the Bill of Rights. They are, however, a valuable supplement to existing measures.

It should also be noted that a new Constitutional Bill is currently under discussion which would build into the constitution a number of protections for individual rights and to which every law would be subject. This statute may go further in protecting individual rights than does the Canadian Bill of Rights. It is not anticipated, however, that this law will be in force for some time. As such it could perhaps be re-evaluated at the time a revised Indian Act or proposals therefore are put forward to Parliament. For the time being, however, it should not be regarded as an option other than in the theoretical sense and perhaps as a guide for statutory provisions.

(b) Statutory grounds for by-law challenge: Most municipal statutes have a system of by-law challenge built in as a safeguard for individual rights. In addition, some provinces have human rights codes to which such municipal by-laws and statutes are subject in the same manner as federal statutes are subject to the Bill of Rights. The provincial municipal statutes provide that by-laws can be challenged on the grounds that they are "illegal". The definition of "illegal" includes by-laws which are made in



bad faith, for improper purposes, discriminatory in nature, which do not comply with required formalities, which are ultra vires or beyond the power of the elected council, or which are contrary to public policy. As such, the individual has a relatively broad range of grounds on which to challenge the power of the local government authority. In order to do so, however, he must take the matter to litigation, often a costly process. In addition, definition of "illegality" may not encompass all situations where it is felt desirable to afford protection to the Indian individual. It is, however, the only method available to citizens in non-Indian municipalities

(c) Role of a supervisory agency: As discussed under the section of this paper dealing with by-law enactment and approval, there could possibly be a role which independent agency could play in regard to this question. This role could assume any number of forms such as: (1) A quasi-judicial body which would administer and rule on human rights provisions contained in the statute and charter. (2) An ombudsman-type body which would receive complaints from individuals and either report to a superior body such as Parliament or have the capacity to take affirmative action in order to rectify a situation which it considered violated the human rights provisions of the legislation.

As regards alternative (1) above, the strict set of guidelines under which a quasi-judicial body would operate may be more restrictive than those given an ombudsman-type body, but they may also have more force as regards the ability to actually rectify the problem.

(d) Preamble and/or Statutory provisions: Perhaps the most effective way of dealing with this question is to incorporate the necessary provisions in the statute or charter. As opposed to relying on the Bill of Rights and the commonlaw principles, individual rights and freedoms could be specified in either the statute or the charter thereby subjecting all local government laws, and perhaps the entire Act to the underlying principles established. These principles could for example be similar to those proposed for the new constitutional bill. (Attached is a copy of the Human Rights Provisions of the proposed constitutional bill). This method of approach would eliminate any uncertainties as regards the application of Canadian Bill of Rights.

A preamble, as opposed to statutory provisions, would have the effect of providing an interpretative guide to the actual provisions of the statute and charter. This would not afford the same measure of protection as would statutory provisions.

If the option of providing statutory provisions dealing with human rights were adapted, careful consideration would have to be given to which were most relevant to the Indian situation. It should also be borne in mind that to adapt this option would be to grant Indian people perhaps more in the way of fundamental rights than other Canadian citizens. It is a serious policy consideration as to whether this is desirable. Also, as a more general consideration which is also applicable to most of the other options discussed above, it must be determined what effect the human rights provisions will have on the efficient functions of the local government system.

(e) Role of the Minister: This Minister could also play a role in the protection of the individual rights. This role could assume any number of forms such as outlined in paragraph (c) above in addition to the Minister having a power to disallow by-laws. The power to disallow by-laws could operate in one of two ways: The Minister could have the authority to disallow any by-law at his complete discretion or he could have the power to disallow any by-laws which, in his opinion, conflicted with certain established principles of fundamental rights. The power of disallowance, however, establishes a rather large degree of discretionary power in the Minister in this sensitive area.

(e) Administration of Justice

General: In the event that a comprehensive local government scheme is provided for in a revised Indian Act, it must be accompanied by a system for administration of justice whereby the charter or laws passed pursuant thereto, may be enforced. The two main features of this system would be policing and the court system. This paper will discuss the administration of local government laws alone.

Possible Options:

(a) Policing: A policing agency which is responsible for the enforcement of the provisions of the charters and laws passed pursuant thereto must be identified in order that jurisdiction is clearly established on reserves. Consideration must be given to whether the same agency which administers the criminal law and provincial laws of general application would also be responsible to administer the charters on reserves or whether it would be advisable to establish a system whereby native constables could be responsible for enforcement of these by-laws. As is evident, the two systems could operate conjunctively or in the alternative. The major consideration in establishment of such a system is of course, the question of costs.

(b) The Court System and the rights of the individual: An authority must be identified which would be capable of interpreting the charter or laws passed pursuant thereto. As it now stands the Federal Court of Canada would likely be responsible to discharge this function. Due to the fact that the Federal Court does not normally function as a municipal court, however, other options should be considered. (The involvement of the Federal Court will be further discussed with officials of the Department of Justice). Other possible alternatives for a court system might include delegation of responsibility to provincial courts or the establishment of quasi-judicial body as referred to in the sections of this paper dealing with individual rights and by-law making and by-law approval. Again, the question of costs is an important factor.

(i) The quasi-judicial body: In order to minimize both costs and the involvement of courts, a quasi-judicial body could be established whose function it would be to hear challenges on by-laws, charter provisions, and/or matters relating to individual rights. This body could render authoritative decisions without the necessity of a formal process of litigation thereby saving costs and possibly enabling the individual to deal in a less formal atmosphere in which he would feel more comfortable. This body could be independent of the Department and should be composed of individuals capable of administering such a quasi-legal function. This constitution of such a body should be considered in conjunction with the comments on the role of an independent body made in the sections of this paper dealing with by-laws and by-law approval and individual

✓

rights. A quasi-judicial body could be empowered to make its own laws regulating procedures which could be adapted to Indian customs and usages much more efficaciously than could rules of a normal court. The circumstances in which such body could exercise its jurisdiction would have to be clearly defined. The decisions of the tribunal would necessarily be appealable, preferably to the Federal Court of Appeal.

(ii) Indian magistrates or justices of the peace: Another available option would be the establishment of a system of Indian magistrates somewhat similar to that provided for presently in the Indian Act who could exercise jurisdiction in regard to both civil or local government matters as well as criminal matters. These magistrates would have to be established as a subdivision of an existing court, most likely the Federal Court. If a subdivision of an existing court were created there could perhaps be built in a flexibility in the rules of practice court in order to provide for Indian customs and practices. An appellate body would also have to be established for decisions issuing from the magistrate system.

While the above paragraphs attempt to present certain alternatives in relation to a system of administration of local government laws, there are wider issues which are raised which deal with role of the Indian in the justice system generally which should be incidentally considered such as the role of a native in administration of the court, special court procedures to accommodate native customs and usages, the role of natives in policing, and the role of natives in the prison system. It is not intended, however, that these should be examined in any great detail in this exercise so as to preclude the formulation of general recommendations on the system of administration of justice as it relates to local government.

(f) Elections

Present Situation

The Indian Act allows a band to choose its chief and council either "according to the custom of the band" /S. 2(1) (b)/ or pursuant to S. 7479. At present approximately 366 bands conduct their elections according to the Act and 199 according to band custom.

The method of carrying out elections has not been significantly altered since the Indian Band Election Regulations (SOR/54-425) were brought into force in 1954. Since that date the conduct of elections has become a matter of concern for the Department and many bands. There appears to be a general feeling that significant aspects of the election procedure are confusing and outmoded and that there isn't sufficient provision for the protection of individual rights. There also appears to be a desire among bands to have a system which is more flexible to local needs and desires.

One indication of the inadequacy of the present system is the fact that approximately 15% of all statutory elections are appealed to the Minister each year. The most common reason for appeal concerns questions regarding the eligibility of voters.



The election system would likely be a more contentious issue were it not for the safety valve provided by the custom selection option. Most custom systems are, in fact, almost identical to the system provided for in S. 74-79 differing only in minor details such as age of voting or vote eligibility. By opting for the custom system bands can make minor alterations which would not be possible if the band was under the statutory system. The Act does not define what custom means and consequently bands can adapt any system they desire under this option. There are, of course, also those bands which have true customs systems based on historical traditions and values.

The use of the custom option to create election systems which are based on the Act rather than tradition has serious consequences for the protection of individual rights. Custom systems do not have the sanction of law; consequently there is no way of ensuring that basic rights, such as secrecy of the ballot, are maintained despite the fact that custom elections are for all intent and purpose carried out according to statute rather than tradition.

### Principles

In revising the sections of the Act dealing with band council elections the following principles, as well as the principles outlined in the Draft Discussion Paper (June 13, 1978), should be kept in mind.

1. Indian communities must retain the right to select their leadership either according to custom or on the basis of statutory provisions.
2. Elections held according to statutory provisions should ensure that band governments are accountable and responsible to their electors.
3. Statutory election systems must ensure that basic standards, such as secrecy of the ballot, are maintained. There also must be provision for appealing elections and overturning elections conducted improperly.
4. In accordance with the principles of the "charter system", communities should be given the opportunity to adopt an election system that satisfies their basic needs and desires.

### Policy Proposal

#### 1. Free choice of systems

Bands will be able to select their leadership either according to custom or on the basis of statutory provisions laid down in a revised Act, charters and/or individual band by-laws. The choice between custom and statutory will be decided by referendum.

#### 2. Custom Systems

The custom option is intended to let bands use traditional systems of selecting their leaders if they so desire. The electoral system should be designed to discourage bands from using the custom option to circumvent the statutory provisions of the Act, charters and by-laws.

3. Flexibility in statutory system

The statute/charter system will enable bands to suit the electoral system to their needs and desires. This can be done either by including the election procedures as part of the charters or if even more flexibility is desired by providing that each band establish its own procedures according to a by-law. If the by-law option is adopted it might be wise to require that the by-law require ratification by the general membership of the band and that the coming into force of the by-law be subject to verification that it meets certain basic criteria (see 4). If the election procedure is included in the charter it will be ratified as part of the process of ratifying and adopting the entire charter.

4. Protection of basic rights

The general statute will include a section on elections which will make it mandatory that the election bylaws adopted by bands meet certain basic criteria. The following is a list of some of the areas which would have to be subject to such criteria: secrecy of the ballot, balloting procedures, basic eligibility to vote, right of appeal, freedom from bribery, fraud, corruption, basic procedures for accepting nominations, notice of a poll.

As long as these basic criteria are satisfied a band will be able to establish its system as it pleases.

5. Appeal mechanism

Provision must be made for electors to appeal the results of an election to either the courts or to an independent board or commission which would have the right to overturn improperly conducted elections. The Minister's right to overturn an election and his appeal function should be ended.

Comments

1. Allowing bands considerable flexibility in establishing a statutory electoral system should discourage them from opting for a custom system when in fact they only want to make minor alterations in the statutory system. Bands should not be discouraged from adopting true custom system if that is the majority's desire but the custom option should not be used to deny voters basic rights and privileges in a system which is in fact patterned on the statutory provisions and not on traditional concepts.
2. Bands will have the right to decide on eligibility requirements. The question of eligibility will probably center on whether band members living off reserve should be eligible to vote for the chief and council of their bands. While this basic decision should be left at the discretion of the band it may be necessary to provide that off-reserve members of the band are given some say, perhaps by referendum, in making decisions affecting the management of the bands economic resources which they hold in common with all other members of the band.

3. An issue related to the conduct of elections is the question as to where the locus or loci of decision-making should be. Should decisions be made by the Chief and council, referendum, community meeting or by some other system? The answer to this question will determine the basic nature of the political system of the community and should be a matter determined by the communities involved. The Federal Government will have to ensure that whatever system is adopted meets basic criteria as to representivity, accountability and responsibility.

(g) Band Capital & Revenues

The question of band funds is a critical dimension of the relationship between bands and the Minister and must be considered as an integral part of proposed Indian Act Revisions on Band or Tribal Government. These items raise all the questions of the role and responsibilities of the Minister vis-a-vis Band members, the decision-making powers of Band Councils as well as the general questions of responsibility and accountability.

Band Revenues

Under Section 69 of the Indian Act the Governor-in-Council may permit a band to "control, manage or expend" its own revenue monies (leases, surface rights, etc.) and can make regulations concerning the expenditure of such funds or the applicability of the Financial Administration Act. Most bands in Canada presently have control over their own revenues. According to a memorandum under the signature of Ciaccia the transfer of control of revenue to Bands absolves the department of responsibility for the expenditure of such funds. Regardless of this departmental position, some regional offices feel that there is a need for clearer regulations for bands who control band revenues in order to protect the Band members or carry out the Ministerial trust responsibilities. The B.C. region, for example, have submitted proposals in this area last February and have presented another proposal concerning the Fort Nelson Band (memos by D. Sparks).

Assuming that there is a requirement for clearer regulations for Band revenues there are basically two approaches that could be taken to this section of the Indian Act.

- (1) Section 69(2) could be expanded to clearly indicate the types of regulations that are required.
- (2) The band charters could require as part of its conditions a set of guidelines required for the band control of revenues.

In addition to Section 69, Section 66 of the Indian Act, enables the Minister "with the consent of the council of a band" to "authorize and direct the expenditure of revenues for any purpose that in his opinion will promote the general progress and welfare of the band or any member of the band".

One of the present problems with this section is that it is not clear if this section enables the expenditures of revenue for loans, grants or guarantees. This should be clearly indicated in the section.



At the present time most bands control their own revenues and powers under this section. In this situation, sections 66(1)(2)(3) may be unnecessary or could become part of an expanded section 69(2). Thus, under a revised Section 69, the Minister would transfer control of revenue to bands subject to regulation and would retain the right to reverse this decision if the regulations are not adhered to. It may also be necessary under Section 69 to enunciate the principle behind Ciaccia's memo -(i.e. dept. not responsible as long as terms of regulations are adhered to).

### Band Capital

Under Section 64 of the Indian Act (Band Capital) the Minister is the primary decision-maker "with the consent of the Council of a band". Capital is usually considered to be non-renewable resources such as: sand and gravel, minerals or oil. For example, the revenue from the sale of a resource would be considered to be capital but the surface rights a "revenue". Several suggestions have been made by Robin Dodson (memo attached) concerning control of band capital. These recommendations indicate the need for a revision of section 64 that would both clarify this aspect of the Act and expand the band's power to manage its capital funds.

Robin has suggested three major types of changes to Section 64:

1. The authority for a band council to manage and control the expenditure of capital by the band.
2. The authority for the band council, or the Minister, with the consent of the band council, to authorize expenditures of band capital monies for the acquisition of off-reserve assets.
3. A mechanism should also be provided to enable the band by way of referendum or approval of an annual capital investment budget to decide on use of capital funds.

Another way to deal with capital may also be to expand section 69 to enable the Governor-in-Council to enable a Band to control, manage and expend the whole or part of its capital, as well as its revenues subject to regulation.

The key question for band capital, in terms of tribal government is whether the Minister should retain some type of trust responsibility for the expenditure of such funds. If the Minister has some residual or final responsibility it will be necessary for the Department to develop and implement regulations, guidelines and controls to ensure that bands use such funds wisely. Otherwise, the Minister could be the subject of suits by individual Indians for mismanagement.

Because capital is so important to the assets of Indians and their future development potential it is difficult to see how the Minister can avoid some ultimate form of decision-making power. Unlike revenues, which are renewed annually capital is an asset that is not recoverable. Once it is spent what may be required then is a series of provisions that enables the band to have greater control, over capital, but at the same time providing enough checks and balances to protect individuals and the crown from mismanagement. There are several ways to do this:

- (1) Provide that major capital investment decisions have the support of Band members and that appropriate information is provided for decisions.

- (2) In order to resolve the problem that bands that want to spend capital on non revenue producing items (e.g. arenas) a total percentage (e.g. 20%) of the capital assets could be allowed for such expenditures. This would enable poor bands with significant capital assets to improve their communities without endangering the long term assets of the Band.
- (3) If bands, under a given charter, control capital, the Minister should not be responsible for decisions made by the Band. If under the terms of the charter a band contravenes the regulations there must be a way for the Minister to intervene on behalf of band members. One way to do this without the Minister accepting responsibility for band errors would be to provide a capability for the Minister to revoke the charter and put the band into receivership. This will, in effect, put the band in a holding position until it was able to adhere to regulations.
- (4) It would also be useful to allow bands under the Indian Act to transfer revenues to capital funds. At the present time they must spend revenue. In addition the Minister, in a situation of receivership should be able to transfer revenue to capital in order to compensate for any losses of capital assets that were the result of band management.

#### (h) Alcohol Control

##### Present Situation

Sections 94 - 99 of the Indian Act deal with the consumption and possession of alcohol by Indians on and off reserve. These sections are, in general, very restrictive and date from a period when it was felt that it was the government's social and moral responsibility to protect Indians from the evil of "demon rum".

##### Policy Proposal

The general question of alcohol control will be examined as part of the general overhaul of the Act. There are, however, some aspects of this issue which have direct relevance for band/tribal government.

At present Section 98 provides for a local referendum to decide on whether a reserve should be 'wet' or 'dry'. In line with the principles of increasing band autonomy and encouraging local decision making, it would be desirable to include this referendum option or some other system of local control with the decision making powers given to the council under the charter/statute framework.

It might also be desirable to give bands the power to make by-laws regarding the control of alcohol on the reserve. Care would have to be taken to ensure that bands do not pass by-laws which conflict with federal or provincial legislation.

## 6. THE CONCEPT OF AN INDEPENDENT AGENCY OR COMMISSION

One of the proposals in the "Draft Discussion Paper on the Revision of the Indian Act" is the creation of a commission, board or tribunal that would have the following types of responsibilities:

- receiving, hearing and making recommendations on the band applications for charter
- ensuring that each party, that is, government and band, discharged its responsibilities and obligations under the charter agreement
- ensuring that the band government discharged its responsibilities to individual band members as prescribed in the charter and otherwise in the Indian Act
- possibility exercising some broader surveillance of the general relationship of the Government/Department and Indian government
- provision would be made for appeal to the Minister of decisions made by the agency

The Draft Discussion Paper also indicates that the agency would be quasi-judicial and an instrument of government rather than an autonomous commission. It would also set criteria for charters as well as receiving, negotiating, and regulating them.

Given the importance of the concept of the Independent agency, it is extremely important to further clarify this concept in relation to aspects of the Indian Act such as: individual rights, by-law powers, and more importantly, the development of charters. In order to accomplish this, two charts or models have been developed which provide both a broader and a more restricted role for the Commission than outlined in the "Draft Discussion Paper". This will hopefully help to define the issues and questions relating to this concept. The first chart and model assumes a broad all-encompassing role for the Independent body. This proposal raises several fundamental questions:

- can or should the Independent organization be responsible both for developing criteria for charters and hearing appeals under such charters?
- what would be the role of the department under such a model and would the department be able to play an effective policy role? (i.e. would it retain enough knowledge and expertise?)
- can an organization effectively manage to perform such a vast number of functions?
- if the agency plays a vital role in all of these areas, will it threaten the trust relationship between the Minister and the band?
- is there a possibility that such an agency could add a level of control over bands rather than a device to increase the independence of band government?
- could an agency with such broad functions simply add more institutional complexity to the Indian/Government Relationship?
- how would the agency operate if only a few bands opted for charters?



MODEL "A" (BROAD ROLE)

Power	INDEP.AGENCY	MINISTER	DEPARTMENT	BAND C.	BAND MEMBERS
1. <u>Charter</u> a) application b) negotiation c) recommendation d) approval e) signing	✓✓	✓✓	✓	✓	✓
2. <u>Operation</u> a) <u>funding</u> i) application ii) allocation-recomm iii) agent signing iv) auditing b) <u>by-law</u> i) approval ii) enforcement iii) monitoring iv) reporting c) <u>monitoring</u>	✓✓  ✓✓✓✓	✓✓	✓✓	✓✓	
3. <u>Appeal</u> a) initiated b) review c) decision 1st level d) referral i) Minister ii) Courts	✓✓	✓		✓	✓
4. <u>Amendment</u> a) initiation b) recommendation c) decision i) minor ii) major iii) new charter	✓✓✓	✓✓	✓	✓	✓
5. <u>Reporting</u>	✓			✓	
6. <u>Policy</u> a) advice b) approval	✓	✓	✓		

Institution Power	INDEP. AGENCY	MINISTER	DEPARTMENT	BAND C.	BAND MEMBERS
1. <u>Charter</u> a) application b) negotiation c) recommendation d) approval e) signing		✓ ✓ ✓	✓ ✓	✓	
2. <u>Operation</u> a) <u>funding</u> i) application ii) allocation-recomm iii) agent signing iv) auditing b) <u>by-law</u> i) approval ii) enforcement iii) monitoring iv) reporting c) <u>monitoring</u>	✓ ✓ ✓		✓ ✓ ✓ ✓	✓	
3. <u>Appeal</u> a) initiated b) review c) decision 1st level d) referral i) Minister ii) Courts	✓ ✓ ✓	✓		✓	✓
4. <u>Amendment</u> a) initiation b) recommendation c) decision i) minor ii) major iii) new charter	✓ ✓	✓ ✓ ✓ ✓ ✓	✓ ✓	✓	✓
5. <u>Reporting</u>	✓				
6. <u>Policy</u> a) advice b) approval		✓	✓		

The second model of the agency is much more restricted in scope. It would place the primary role for the negotiation and revision of charters with the Minister and the Department and place the agency in the role of adjudicator of disputes or difficulties that will arise from the implementation of such charters.

The agency would therefore undertake a monitoring role on both bands and the department, advise the Minister of problems under charters and interpret the powers under the charter. In addition, the quasi-judicial character of the organization would enable it to hear appeals, by individuals or band councils and to assist in the development or application of a justice system.

The concept has several major advantages over the first proposal:

- it provides for a clearer division of labour between the department and the agency
- it provides a more manageable mandate for the commission
- it maintains strong Ministerial responsibility in the development and revision of charters
- it focuses the role of the agency on the functions which are most difficult for the department to perform - e.g. appeals, monitoring of department and disputes over the powers under the charter

In considering the concepts of the agency in the "Draft Discussion Paper", and the two alternatives to it, it is suggested that the most logical course of action at this time would be to initially allocate to the Independent agency the roles or functions that the department will have the most difficulty performing. On the basis of the above assessment, it is suggested that the more restricted model "B" would be most appropriate.

## **7. PROGRAM IMPLICATIONS AND REALITIES**

In order to assure that proposals on band government are implemented at the regional, district and band level, some assessment is necessary of the impact of such proposals on departmental programs and of the capabilities of bands to assume greater powers.

One of the most sobering realities that must ultimately be faced in the development of proposals for band government is the extent of change that will be required at both the band and departmental level in order to promote greater autonomy.

### **Band Situation**

A quick analysis of the national population of bands across the country indicates that 80.72% of bands are under 500, 12.6% are between 500 and 1,000 and only 6.4% have more than 1,000. Most bands therefore are very small units upon which to base a strong autonomous local government.



It is an inescapable reality that the size of a community has a significant impact on its capability to govern. Larger communities can develop the needed diversity and scale of expertise required to manage or direct programs. In order to determine the relationship between population size and the management of programs by bands, a case study was undertaken of bands in Alberta. Appendix A illustrates that the population of bands is a critical factor in the number and type of programs presently administered by bands. Larger reserves tend to manage community-oriented programs such as community services, housing, as well as broader socio-economic programs such as social services or education. Very few bands seem to play a strong role in economic development. In contrast the Alberta analysis indicates that smaller bands generally assume responsibility for those programs which are the most closely related to basic community services.

It is recognized that there are exceptions to the correlation between size and band administered programs, and that the administration of programs does not necessarily mean management effectiveness. However, the figures show a clear enough relationship between size and administration to indicate that community scale is a critical variable in the degree of autonomy that bands can assume.

Under a situation of extreme fiscal restraint, it is doubtful that the department or the government could afford to provide funds for large numbers of experts at the band level. Thus, the decentralization or devolution of powers to bands will raise some significant budgetary problems.

One of the alternatives to band staff is for bands to create their own administrative or professional units for bands on a district basis. This type of approach has been attempted in several places (e.g. Lilloet\*, Sandy Bay). However, District Councils have very difficult role problems and find it nearly impossible to balance administrative questions with the political concerns of bands. Thus, this model may be useful in some regions but could have a scattered application.

Regardless of the thrust towards band autonomy, there will be critical resource constraints that will make it difficult for bands to support strong local governments or administrations.

In order to enable bands to accomplish a stronger decision-making capability, the most likely possibilities are: the department will have to significantly improve its advisory and training capabilities; regional associations may provide bands with professional expertise, bands with considerable revenue will fund their own staff, or technical service centres could be established to replace district offices (Ghana experiment).

### Program Organization

The organizational implications of the implementation of an independent agency are dramatic for this department, for other departments and possible provincial governments.

If we assume that, under the most autonomous charter, bands will play a much stronger role in decision-making with respect to program (e.g. housing, economic development, social services) considerable changes will be required in the nature and structure of these programs.

\*See Reports by Management Consulting Services (M. Sims).

For departmental programs, arrangements would have to be made with Treasury Board to assure that bands have considerably more flexibility to design programs (e.g. housing). This could be inconsistent with the trend to more effective controls and accountability of expenditures. Major changes would also be required in programs which are normally administered by other federal departments (DREE, E&T, Health) and they, in turn, may have to adjust or modify their program criteria.

Finally, in some provinces (e.g. Ontario and Alberta) there will be direct provincial delivery of programs in areas such as social services. Such program areas have always been oriented to provincial or national standards and will require modifications at the band level. Will provinces be willing to be flexible in the delivery of programs to bands? Will they provide for band participation in decision-making and program development? These questions will have to be resolved in order to make increased band powers a reality.

The overriding question that must be considered in all these program questions is: How much decentralization is really possible? Can standards for social services or the criteria for economic development projects really be decentralized? What program areas are the most conducive to local control and which areas will require a continued governmental involvement? These questions are extremely important considerations that cannot be omitted from the analyses of band powers and band government. The approach that the department takes to such issues will have significant impacts on questions such as the delivery of programs under federal-provincial agreements. Although it is recognized there the proposals for Indian Act Revisions will not have to deal with these questions directly it is very important that such issues be raised at this time in order to respond to questions that could be raised about the charters and to clarify some of the implications on constraints that will need to be faced.

### **Band Funding**

An organizations ability to acquire resources and the conditions upon which funds are received are central to autonomy. If, under a new Indian Act, bands are provided with a significant increase in autonomy and powers, the government will have to re-consider its present method of funding bands.

The annual allocation system based on the requirement for department accountability to bands and band accountability to the department may require major modification. If bands are to be considered as units of government with their own areas of powers, the funding system and accountability requirement will have to reflect this new arrangement.

One possibility that needs to be thoroughly explored is the allocation of blocks of funds from the government to Indian bands (e.g. for basic community functions such as band government, services, road maintenance). The provision of blocks of funds - perhaps through Finance or T.B.S. - for such basic functions would remove the requirement for the band to be accountable to the department for such functions. The real accountability would be where it should be - to the community. These funds would cover areas where powers are transferred to bands.

Although funding questions will have to be dealt with in later stages of Indian Act revisions, it is essential to begin to understand the types of arrangements that are feasible both within the context of the government budgeting system and the administration of the department and bands.\*

\*NOTE: This is the subject of an agreement with M. Sims to indertake a study of alternative financial arrangements.

### Miscellaneous

The experience of many countries in the decentralization of programs is that short-term and medium-term success of such initiatives is largely dependent on administrative efficiency. Questions such as technical support, management capability, training, personnel functions (staffing benefits) are critical to any decentralization program. Without these elements in place the whole purpose and effect of these policy initiatives can become ineffective and even counterproductive. It is, therefore, essential to develop the critical administrative capacity for increased band autonomy in parallel with the Indian Act revision process. It can even be anticipated that without improved efforts in these areas, Indian bands will be reluctant to assume increased powers.



APPENDIX

THE STATUS OF TRIBAL GOVERNMENT

BAND SITUATION

NATIONAL DATA

REGIONAL DATA (ALBERTA)

GOVERNMENT PROFILES

AUGUST 11, 1978

## THE STATUS OF TRIBAL GOVERNMENT

### BAND SITUATION:

The general purpose of the data collection so far has been to present an assessment of tribal government at the regional and national levels. In order to achieve this goal for the regions, a typology of tribal government has been developed for the Alberta region. For the national situation, data was collected and summarized on the percentage of band population categories for each region. The information on government profiles will provide additional support to the data on the regional typology and national statistics.

### NATIONAL DATA:

Basic population data at the national level is vital to any revisions within the Indian Act. Information about the size of bands is highly critical to the successful implementation of any major changes within the structure of local government resulting from changes within the Act.

For the purposes of this research, the categories of population size employed are as follows:

- 1) less than 500
- 2) 500-1000
- 3) 1000-2000
- 4) more than 2000

Graph #1 indicates the percentage of all bands with a population of less than 500. i.e. 461 bands out of 581 bands (80.72%) have a population of less than 500. Graph #2 gives the percentage of all

bands with a population of 500-1000 (12.56%) or 73 bands out of 581 bands have a population of 500-1000. Graph #3 illustrates the percentage of all bands with a population of 1000-2000. i.e. 29 bands out of 581 bands have a population of 1000-2000. Finally, Graph #4 indicates the percentage of all bands with a population of more than 2000. i.e. 8 bands out of 581 bands (1.38%) have a population of more than 2000.

According to Graph #1, Yukon and the District of Mackenzie represent the highest percentage of population of less than 500 (100.0%) while Alberta at 64.29% represents the lowest percentage. At the national level, it is apparent that 80.72% of all bands have a population of less than 500. This finding is highly significant as it implies that the majority of all bands are relatively small in size being less than 500 people.

It follows that the percentage of bands with 500-1000, 1000-2000 and more than 2000 are significantly smaller than the less than 500 category. It should be noted that a mere 1.38% of all bands have a population of more than 2000 and, upon inspection of Graph #4, it appears that Alberta contains a disproportionate number of these particular bands, i.e. 7.14% compared with the other 1% and 2%.

Summary of Findings:

% of Bands with population of less than 500

<u>Region</u>	<u>No./Total</u>	<u>%</u>
1. Yukon	14/14	100.0
2. District of Mackenzie	16/16	100.0
3. British Columbia	178/195	91.28
4. Maritime	25/30	83.34
5. Ontario	95/120	79.17
6. Saskatchewan	51/69	73.91
7. Manitoba	38/57	66.67
8. Quebec	25/38	65.79
9. Alberta	24/72	64.29



% of Bands with population 500-1000

<u>Region</u>	<u>No./Total</u>	<u>%</u>
1. Saskatchewan	15/69	21.47
2. Quebec	7/38	18.42
3. Manitoba	10/57	17.54
4. Alberta	7/42	16.67
5. Ontario	17/120	14.17
6. Maritime	3/30	10.00
7. British Columbia	14/195	7.18
8. Yukon	-*	-
9. District of Mackenzie	-	-

% of Bands with population 1000-2000

<u>Region</u>	<u>No./Total</u>	<u>%</u>
1. Manitoba	8/57	14.04
2. Quebec	5/38	13.16
3. Alberta	4/42	9.52
4. Maritime	2/30	6.67
5. Ontario	6/120	5.00
6. Saskatchewan	2/69	2.90
7. British Columbia	2/195	1.03
8. Yukon	-	-
9. District of Mackenzie	-	-

% of Bands with population of more than 2000

<u>Region</u>	<u>No./Total</u>	<u>%</u>
1. Alberta	3/42	7.14
2. Quebec	1/38	2.63
3. Manitoba	1/57	1.75
4. Ontario	2/120	1.67
5. Saskatchewan	1/69	1.45
6. Maritime	-	-
7. British Columbia	-	-
8. Yukon	-	-
9. District of Mackenzie	-	-

The national figures are as follows:

% of Bands with < 500	469/581	80.72
% of Bands 500-1000	73/581	12.56
% of Bands 1000-2000	29/581	4.99
% of Bands > 2000	8/581	1.38

\* - indicates zero

REGIONAL DATA:

The Alberta region can be considered to be a "test case" for the national situation. The typology of tribal government developed at this level may also be employed at the band and national levels.

Explanation of Typology:

The objective data gathered on band characteristics gives rise to a concept of a continuum of band types within the Alberta region. The significant features of this model are:

- 1) Two extreme categories designated as Type I and Type II;
- 2) Categories contained within the area between these two poles. It is advisable to say that a band tends towards Type I or Type II rather than try to fit the band into a rigid type.

According to the evidence, a Type I district is best represented by Fort Vermilion Agency (775). The main attributes distinguishing it from a Type II are: lower population, high % on reserve population, administration of a few, low-level management programs such as band management and community improvement. The availability of trained manpower and geographic location are related to the types of programs that will be administered.

At the other extreme, a Type II district is illustrated by Blackfoot Stony/Sarcee (772). This end of the continuum is distinguished by the former by the presence of the following characteristics: higher population on reserve, high percentage of on reserve population, and the administration of a greater number of high-level management programs such as social services, education and economic development. Also, there is a greater availability of trained manpower because of the higher population and the band or district tends to be located

farther south and much closer to major urban centres than are the bands within a Type I classification.

In essence, a Type I band or district indicates the control and administration of programs that require a low sophistication level of management. On the other hand, a Type II represents bands or districts which have gained control and administration of a higher level of management expertise than those in Type I. Other districts and bands within the region may be placed along the continuum according to their tendency to either extreme. The crucial attribute of type of program administered will determine where these bands or districts should be placed.

The basis of the research in this area has rested upon the assumption that the administration of certain programs requires a particular level of management skills, staff and manpower. The focus of the analysis of the findings is on the capability of the band to administer programs at the corresponding level of management ability. For instance, the administration of an education program requires a higher level of management than does the administration of band management.

Graphs #5 to #16 indicate program-type administration for band according to population levels. The individual bands have been ranked according to this level, i.e. from lowest to highest. The types of programs administered have been ranked according to level of management required to administer, i.e. the programs become increasingly difficult to administer so that higher management skills are required. Graph #5 shows the regional picture by combining the data for districts rather than for bands.

Graphs #12 to #16 illustrate the types of programs administered



by each band without considering the population levels. They help to indicate that the relationship between population and program administration does not hold perfectly for each band. In other words, there are exceptions to the general pattern of population and program administration.

Nevertheless, on the basis of these graphs (#5 to #16), it appears that the relationship between population (on reserve) and program-type administration does hold for the Alberta region.

Population (on reserve)		Management-level of the program administered
-------------------------	---	---

As the population increases, the level of management for the program administered increases also. Graph #5 illustrates this particular relationship the best.

#### Summary of Findings:

1. There is a great diversity in the types of programs administered within each district. For example, in the Saddle Lake/Athabaska District, there are 5 bands with population (on reserve) of < 500. They administer band management (low level) and social services (middle level of management). However, there are 3 bands > 500 population that administer higher level programs such as W.O.P. and education.
2. There is evidence that the administration of programs does not proceed from low-level through middle and then to high-level management. For example, the ideal situation would occur when Band X starts to administer programs such as band management, community improvement and then moves along to the higher level ones such as education. However, in reality, it appears that some bands do not follow a logical order of program acquisition. For instance, the Four Band Fnt. in the Edmonton/Hobbema district administers the lowest management level program as well as the highest but with no programs in between these two extremes. It is safe to say that a higher level of management ability is required to administer the education program and that this particular band may not have gained it because of the lack of middle-range programs and resulting experience from administering these.

This example could also be explained by the fact that a consultant or some other professional was hired to administer a particular program such as education.

3. All districts within the Alberta region have more than 50% of their total population on reserve.
4. All bands in the Alberta region administer the program of band management.
5. One band out of 40 bands within the Alberta region administers the highest level program of economic development. This represents 2.5% of all bands in the region. The band in question is the Sarcee in the Blackfoot Stony/Sarcee district (772) with a population (on reserve) of 502. As expected, this district is a Type II.
6. In the Type I district of Fort Vermilion (775), there are 3 out of 4 bands (75% of all bands in the district) that administer the low-level program of band management. One band, with a population of 1115, has taken over the administration of Community Improvement (O&M) as well. The four bands correspond with the characteristics of a Type I.
7. In the Type II district of Blackfoot Stony/Sarcee (772), all five bands administer band management, community improvement (cap) and (O&M), social services and education. Three out of five (60%) administer the W.O.P. program as well. Also, one band administers the highest-level program of economic development. All the bands within this district clearly represent a Type II end of the continuum.

Note:

It appears that the Alberta region may not be totally accurate in its representation of the national situation because of its disproportionate amount of high population categories, i.e. 1000-2000, and > 2000. The national data indicates that the majority of the population (on reserve) is concentrated in smaller units of less than 500 people. The larger centres of 1000 or more than 2000 people are exceptions to this pattern and should not dictate the outcome of any revisions which take place among local government structures.

## Tribal Government Profiles

### District Council

The present basic organizational structure of Lillooet District Indian Council is functional provided that the roles, responsibilities and authorities are clarified in order to clarify ambiguity and to ensure smooth delivery of programs.

A statement specifying roles and responsibilities of the District Council, the Executive Committee and the Administration should be part of the constitution.

### Band/Tribal Government: Type I

Whitefish Bay is a semi-isolated reserve located sixty miles south-east of Kenora.

Although no mention was made of Band/Tribal Government structure and its role and functions, Whitefish Bay seems to have very few management skills. Because of the lack of information regarding Band/Tribal Government, perhaps one can make some assumptions based on the following indicators:

- (a) The mean education level is grade 8.
- (b) Job histories show that people have worked at seasonal/traditional activities over the years.

These factors indicate that the transfer of authority and programs from DIAND would have to be done at a gradual pace.

### Band/Tribal Government: Type II

Bella Bella Band.

The Band Council is confirmed to the development of policy and exchange of financial information.

On April 1, 1976, the Council took over the administration of the following programs from DIAND:

- |                                |                        |
|--------------------------------|------------------------|
| - local government             | - band membership      |
| - social assistance            | - housing              |
| - infrastructure -public works | - economic development |
| - education                    |                        |

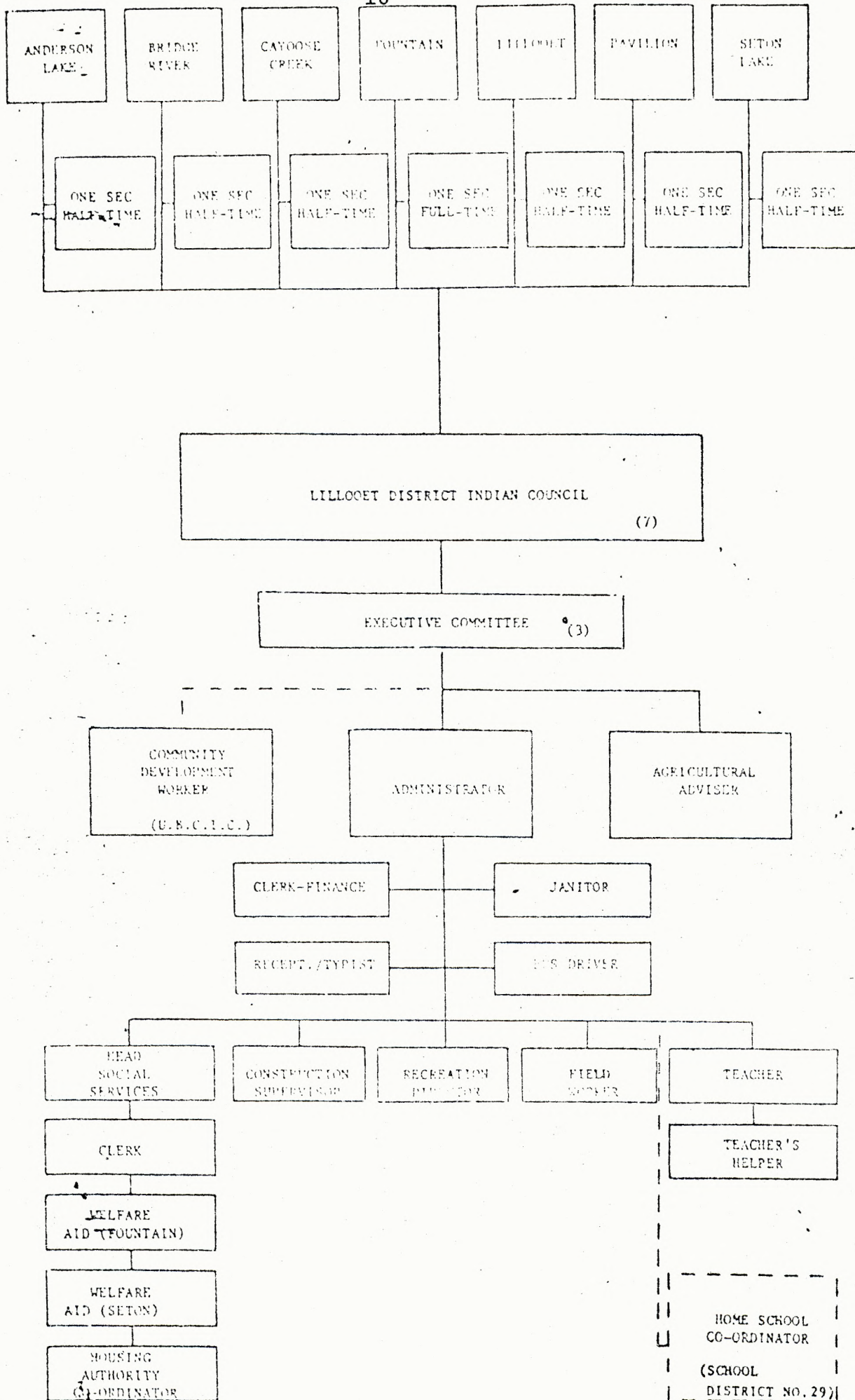


Comments:

1. Lack of qualified and capable individuals to administer programs.
2. The transfer of programs from DIAND to the Band may have been too quick, because of the above.
3. There is a need to define the roles, responsibilities and functions of Band/Tribal Government.

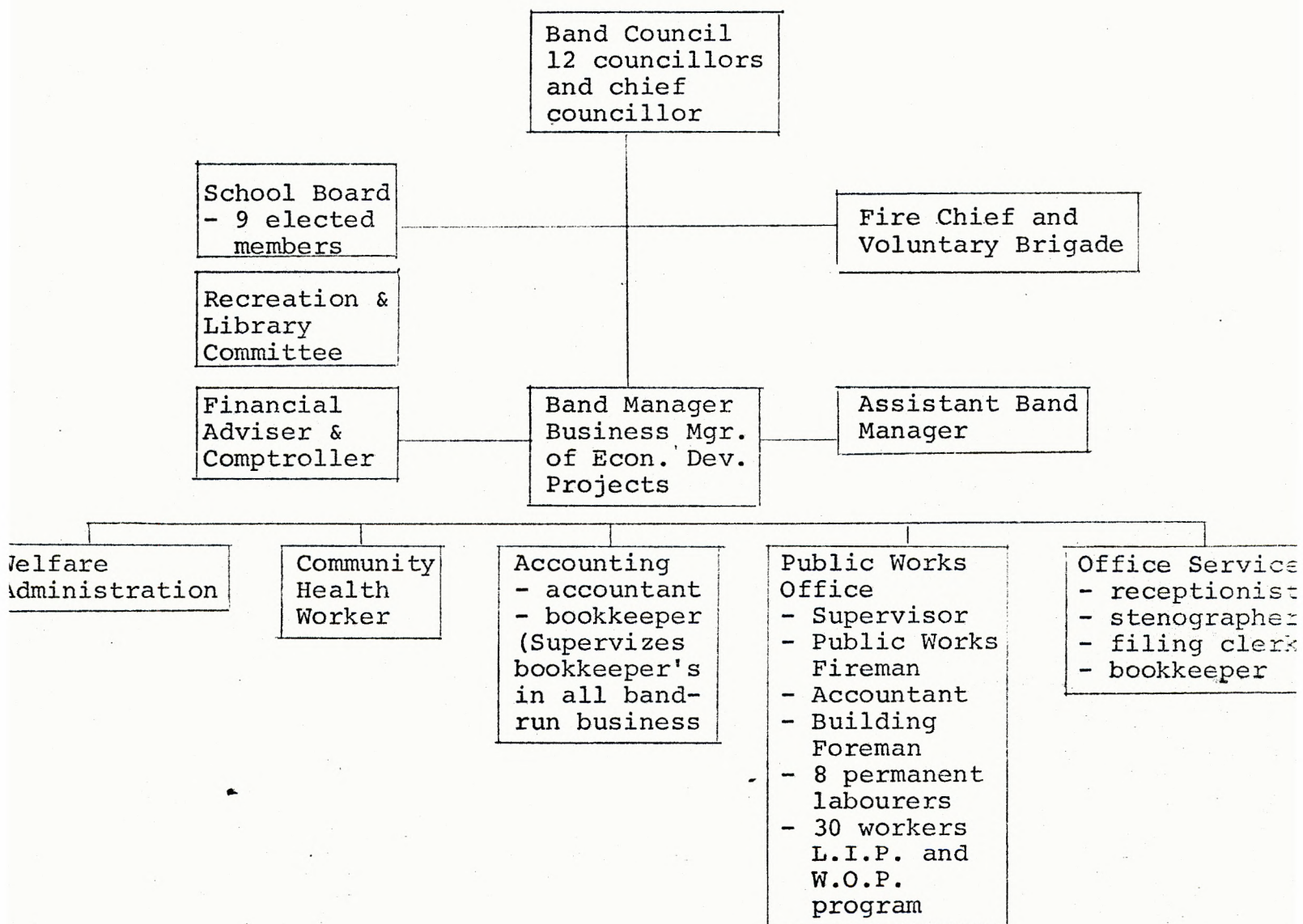
General Comment:

A review of the literature and discussions with Band/Tribal Government leaders strongly recommend the need for more training in such fields as administration and management.



Bella Bella Band

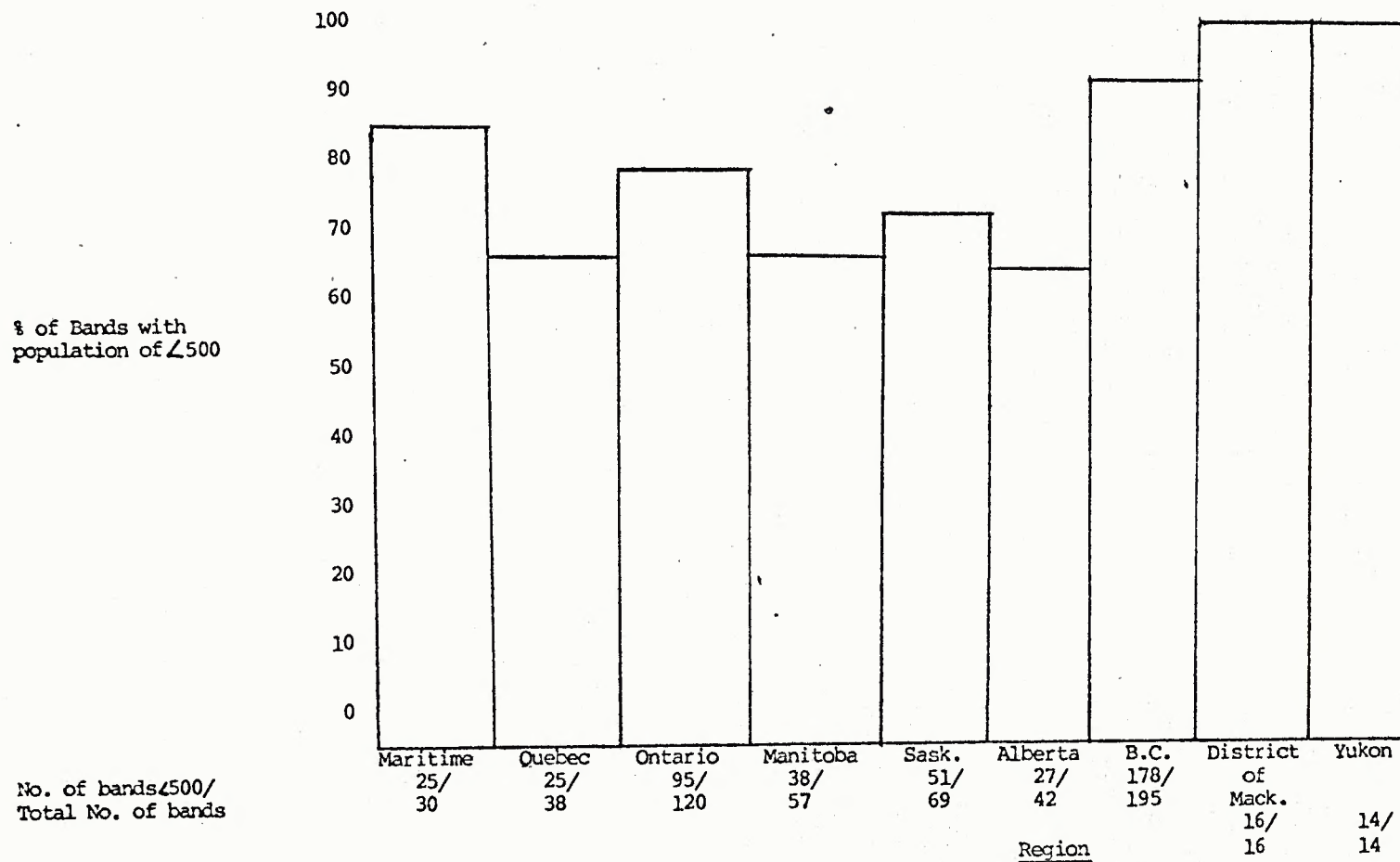
Organization Structure of Local Government Administration





Graph #1

National Data - Population

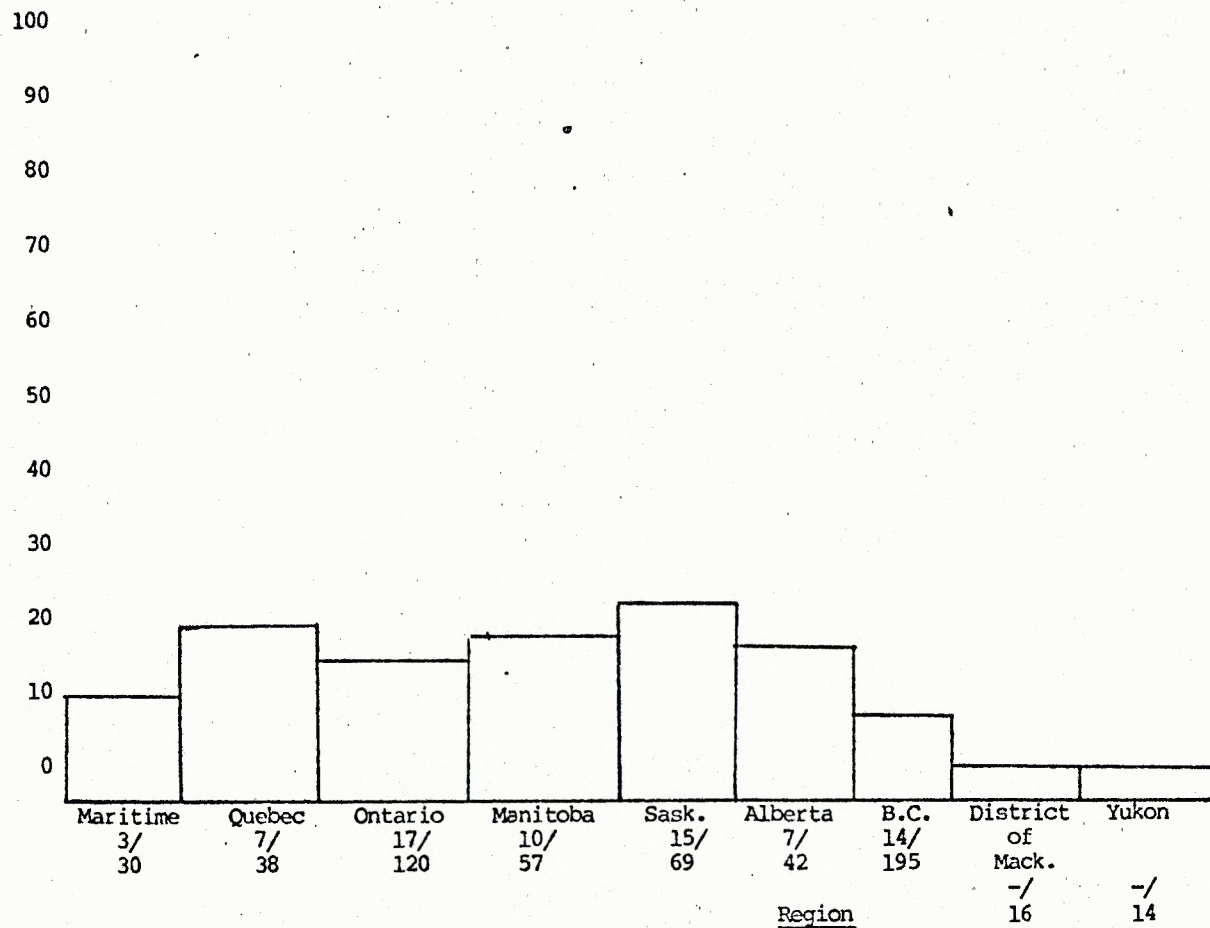


Total: 469/581 = 80.72%

Graph #2

National Data

% of bands 500-1000



% of Population  
with 500-1000

No. of bands 500-1000 /  
Total No. of bands

Total: 73/581 = 12.56%  
(national total)

Graph #3

National Data

% of bands 1000-2000

100

90

80

70

60

50

40

30

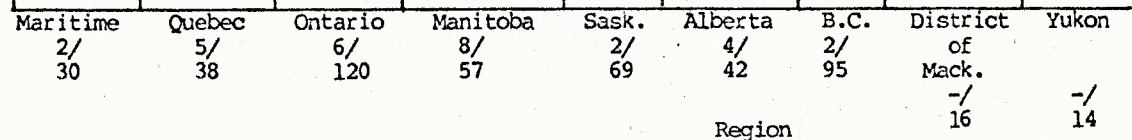
20

10

0

% of Population  
with 1000-2000

No. of bands 1000-2000/  
Total No. of bands

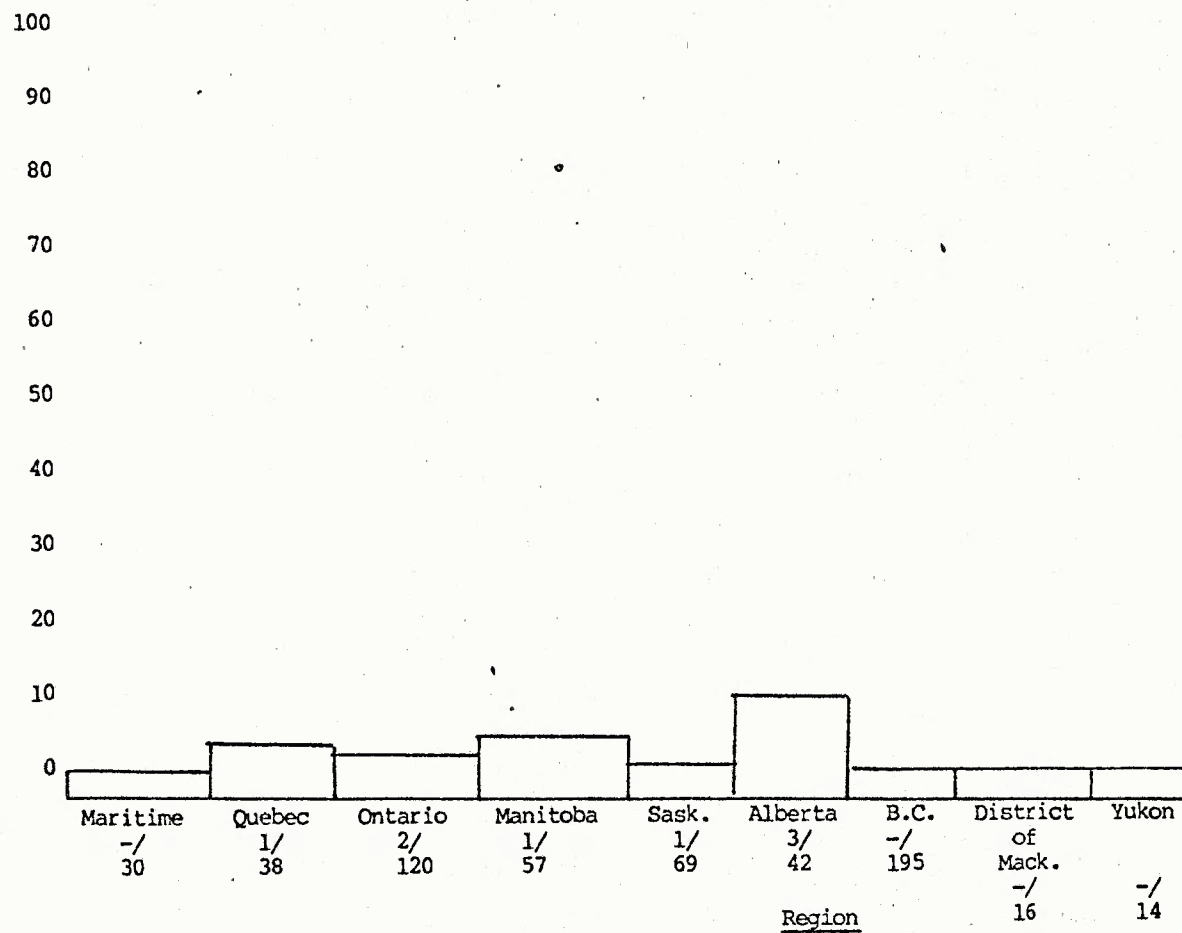


Total: 29/581 = 4.99%



Graph #4

National Data



% of Population  
> 2000

No. of Bands > 2000/  
Total No. of Bands

Total: 8/581 = 1.38%

Program TypesAlberta Region

7

	Band Management	Community Improvement (CAP)	Community Improvement (O&M)	Social Services	W.O.P.	Education	Economic Development
<u>Type I</u>							
1. Fort Vermilion Agency (775)	x		x				2422
2. Lesser Slave Lake (777)	x	x	x	x			2421
3. Edmonton/Hobbema (779)	x	x	x	x	x	x	4960
4. Saddle Lake/Athabaska (779)	x	x	x	x	x	x	4460
5. Blood/Peigan (773)	x	x	x	x	x	x	5563
6. Blackfoot Stony/Sarcee (772)	x	x	x	x	x	x	x 4981

Population (on reserve)

Type II

Graph #6

Program Types

Fort Vermilion Agency  
(775)

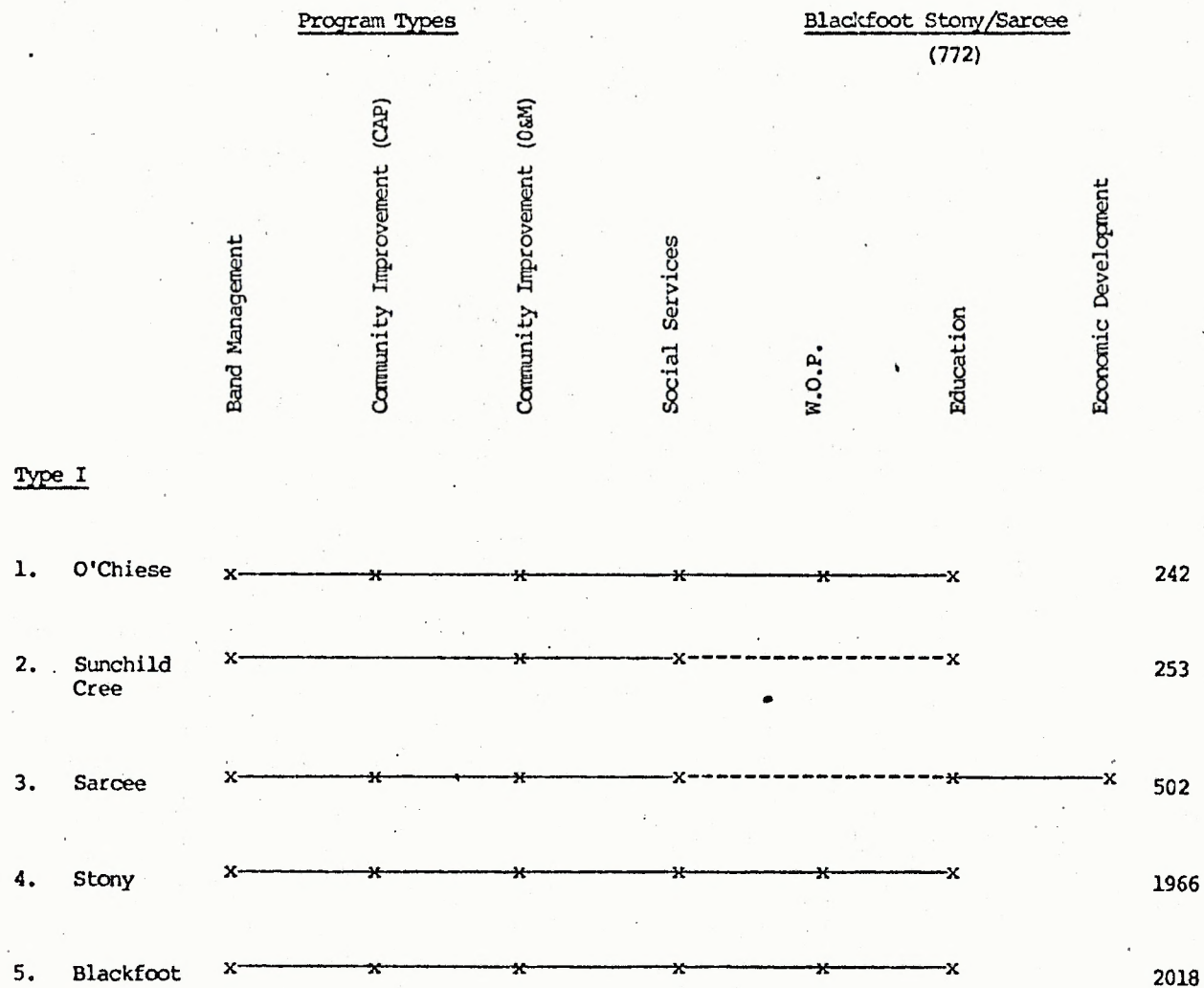
	Band Management	Community Improvement (CAP)	Community Improvement (OSM)	Social Services	W.O.P.	Education	Economic Development	
<u>Type I</u>								
1. Tallcree	x							129
2. Boyer River	x							217
3. Little Red River	x							961
4. Slaves of Upper Hay River	x							1115

Population (on reserve)

Type II



Graph #7



Type II

Graph #8

Program Types

Lesser Slave Lake District  
(777)

	Band Management	Community Improvement (CAP)	Community Improvement (O&M)	Social Services	W.O.P.	Education	Economic Development	
<u>Type I</u>								
1. Lubicon Lake	x							-
2. Grouard								18
3. Sawridge	x	-----x						35
4. Duncan's	x							37
5. Horse Lakes	x							77
6. Swan River	x							95
7. Sucker Creek	x							284
8. Driftpile	x	-----x						351
9. Whitefish Lake	x							382
10. Sturgeon Lake	x	x-----x	x-----x	x				468
11. Wabasca (Bigstone)	x	-----x						674

Population (on reserve)

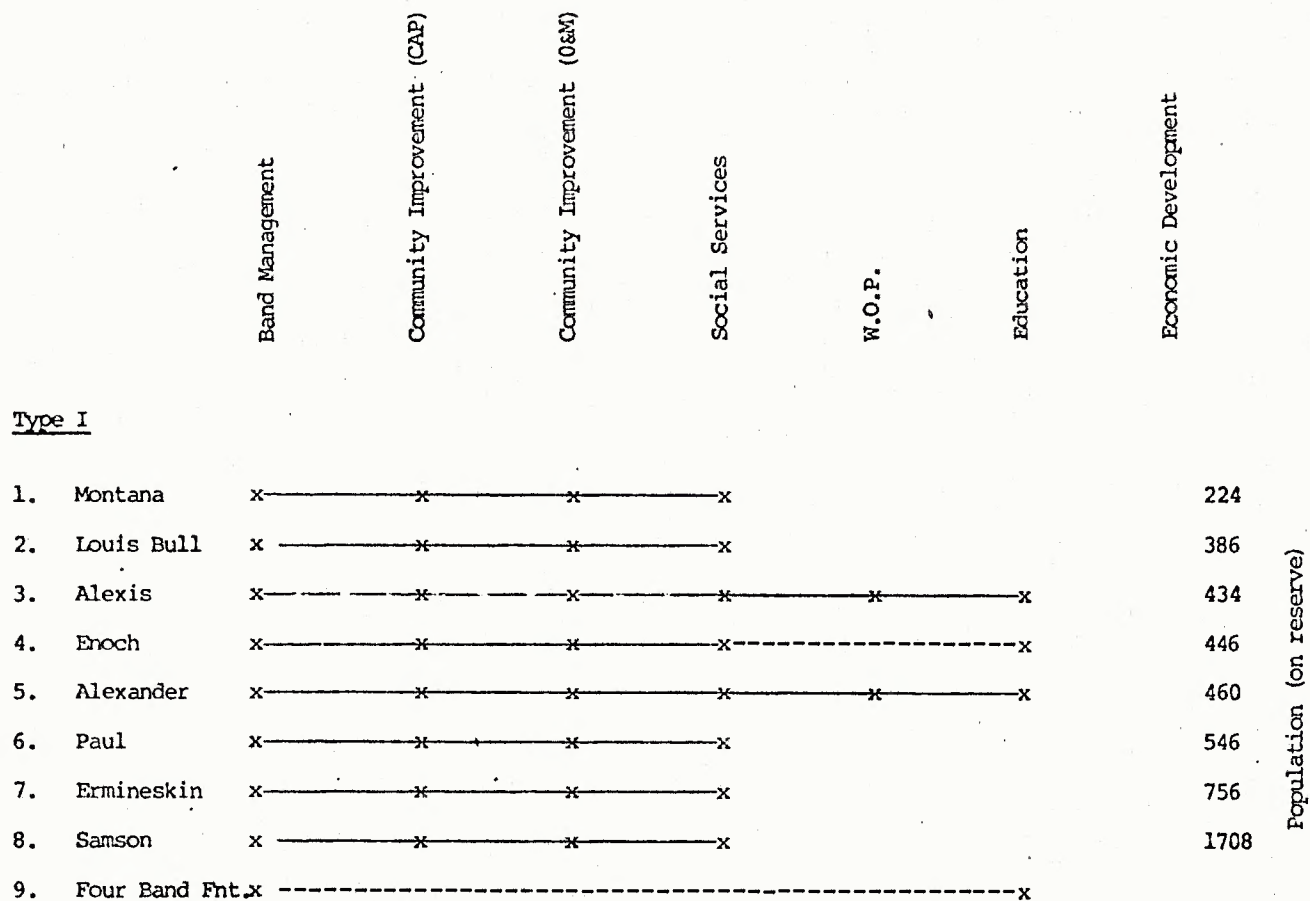
Type II

Graph #9

Program Types

Edmonton/Hobbema

(774)



Type II

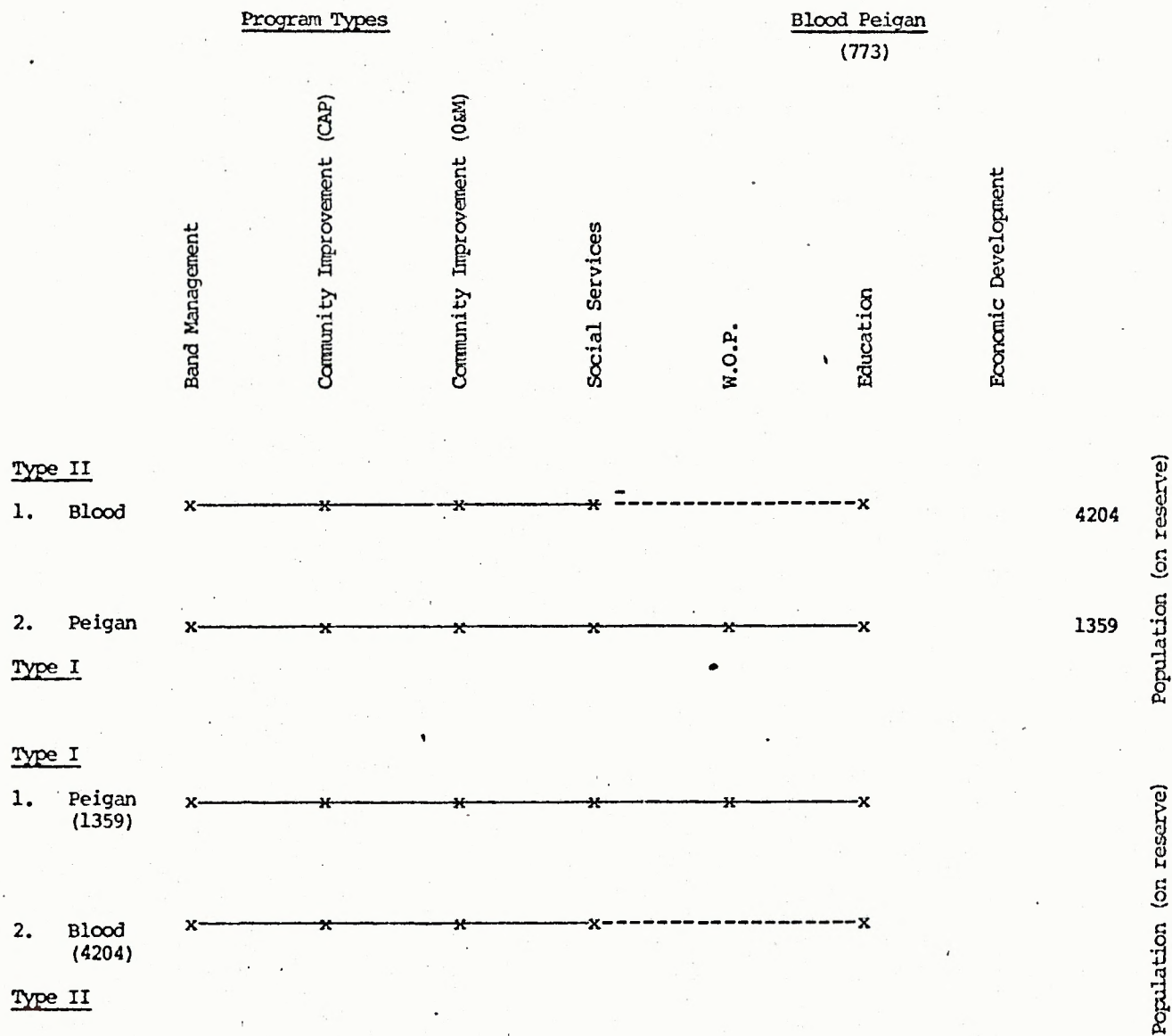
Graph #10

		<u>Program Types</u>				<u>Saddle Lake/Athabaska</u> (779)	
		Band Management	Community Improvement (CAP)	Community Improvement (O&M)	Social Services	W.O.P.	Education
							Economic Development
<u>Type I</u>							
1.	Fort McKay	x					-
2.	Fort McMurray	x					34
3.	Heart Lake	x	-----		x		52
4.	Beaver Lake	x	-----		x		132
5.	Janvier	x	-----		x		151
6.	Cree/ Chippewa	x	x		x	x	x
			-----				163
7.	Kehewin	x	-----		x	-----	x
							431
8.	Cold Lake	x	x	x	x	x	x
			-----				627
9.	Frog Lake	x	-----		x	-----	x
							636
10.	Saddle Lake	x	x	x	x	x	x
			-----				2354
<u>Type II</u>							

Population (on reserve)



Graph #11



Graph #12

Program Types

Lesser Slave Lake District  
(777)

	Band Management	Community Improvement (CAP)	Community Improvement (OSM)	Social Services	W.O.P.	Education	Economic Development	
<u>Type I</u>								
1. Lubicon Lake	x						-	
2. Grouard							18	
3. Duncan's	x						37	
4. Horse Lakes	x						77	
5. Swan River	x						95	
6. Sucker Creek	x						284	
7. Whitefish Lake	x						382	
8. Sawridge	x	x					35	
9. Driftpile	x		x				351	
10. Wabasca (Bigstone)	x		x				674	
11. Sturgeon Lake	x	x	x	x			468	

Type II

Population (on reserve)

*They have completed  
work on education  
- inaccurate*

Graph #13

Program Types

Edmonton/Hobbema  
(774)

	Band Management	Community Improvement (CAP)	Community Improvement (O&M)	Social Services	W.O.P.	Education	Economic Development	
<u>Type I</u>								
1. Montana	x	x	x	x				224
2. Louis Bull	x	x	x	x				386
3. Ermineskin	x	x	x	x				756
4. Samson	x	x	x	x				1708
5. Enoch	x	x	x	x		x		446
6. Paul	x	x	x	x		x		546
7. Four Band Fnt.	x					x		
8. Alexis	x	x	x	x	x	x		434
9. Alexander	x	x	x	x	x	x		460
<u>Type II</u>								

Population (on reserve)

Graph #14

## Program Types

Saddle Lake/Athabaska

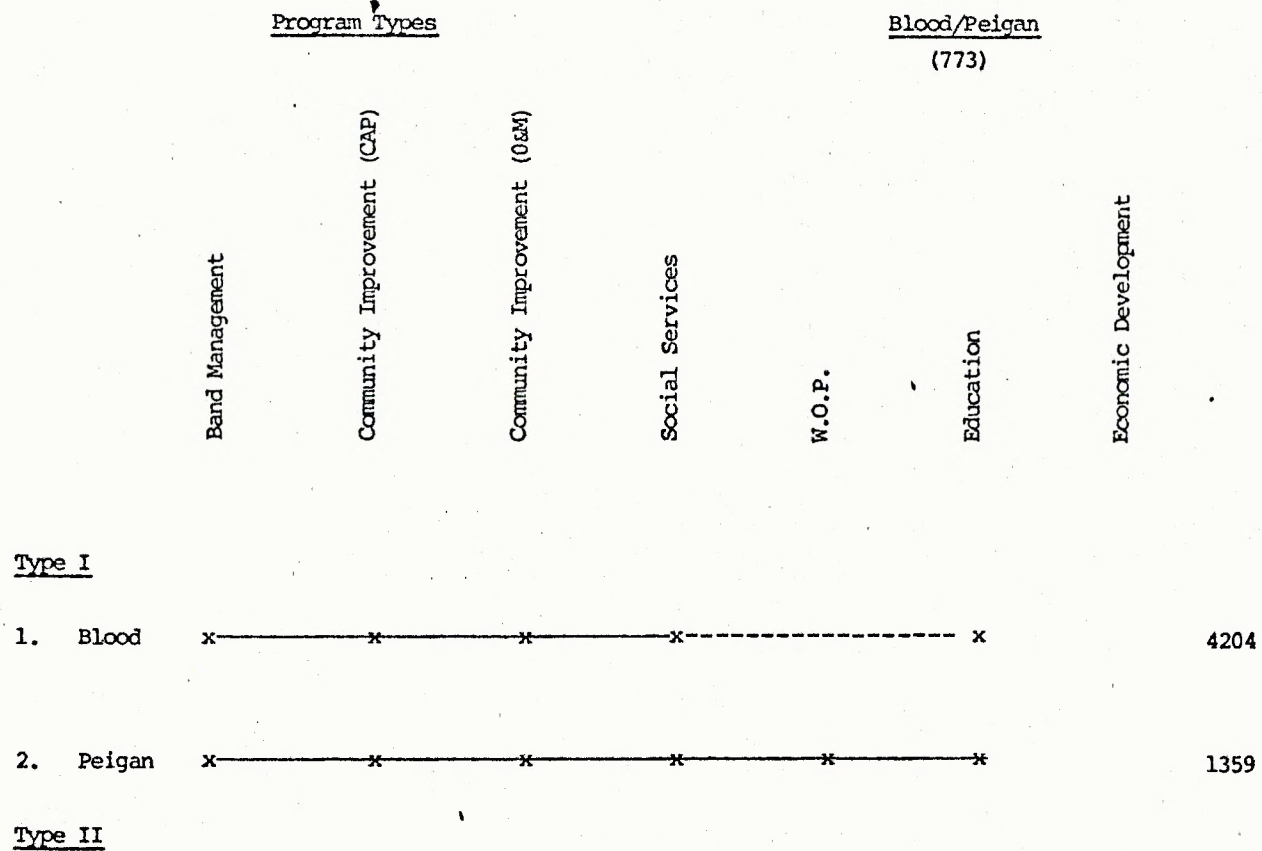
(779)

	Band Management	Community Improvement (CAP)	Community Improvement (O&M)	Social Services	W.O.P.	Education	Economic Development
<u>Type I</u>							
1. Fort McKay	x						-
2. Fort McMurray	x						34
3. Heart Lake	x-----x						52
4. Beaver Lake	x-----x						132
5. Janvier	x-----x						151
6. Kehewin	x-----x-----x						431
7. Frog Lake	x-----x-----x						636
8. Cree/ Chippewa	x-----x-----x-----x-----x						163
9. Cold Lake	x-----x-----x-----x-----x-----x						627
10. Saddle Lake	x-----x-----x-----x-----x-----x						2354

Type II



Graph #15



Graph #16

Program Types

Blackfoot Stony/Sarcee  
(772)

Band Management  
Community Improvement (CAP)  
Community Improvement (O&M)  
Social Services  
W.O.P.  
Education  
Economic Development

Type I

1. Sunchild Cree	x	-----	x	-----	x	-----	x	253
2. O'Chiese	x	-----	x	-----	x	-----	x	242
3. Stony	x	-----	x	-----	x	-----	x	1966
4. Blackfoot	x	-----	x	-----	x	-----	x	2018
5. Sarcee	x	-----	x	-----	x	-----	x	502

Population (on reserve)

Type II