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Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control Over Local Matters Now and Not Later

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INDIAN ACT BY-LAWS: A VIABLE MEANS FOR FIRST NATIONS TO (RE)ASSERT CONTROL OVER LOCAL MATTERS NOW AND NOT LATER

Naiomi Metallic*

I. INTRODUCTION

Although by-law powers giving First Nation band councils (“First Nation governments”) the power to pass laws on a variety of subjects relating to reserve land and band members have existed within the *Indian Act* since the late 1800s, such instruments have largely been seen by First Nation governments as being ineffective at giving them control over local matters affecting the day-to-day lives of their community members. This is primarily because the *Indian Act* gave the federal Minister of the Department of Indian and Northern Affairs (today called “Indigenous and Northern Affairs Canada” or “INAC” or “Department”) final say over whether such by-laws could take effect (known as the disallowance power). In addition, the Department adopted a narrow interpretation of the expanse of the *Indian Act* by-law provisions, taking the position that any by-laws touching on issues that overlapped with provincial powers would not receive Ministerial approval, thereby preventing First Nation governments from passing laws setting community norms relating child welfare, social assistance, education and a number of other areas. For these reasons, First Nations have not seen the *Indian Act* by-laws as giving them any real form of self-government.

However, some modest amendments to the *Indian Act* that recently came into effect with little notice or fanfare may have significantly changed this state of affairs. A private members’ bill, introduced by Rob Clarke, one of the few Aboriginal Members of Parliament in Stephen Harper’s Conservative government, called for the repeal of certain provisions in the *Indian Act* deemed to be antiquated or paternalistic. Among these provisions was the Ministerial disallowance power. The rest of the members of the Conservative party supported the bill and, in December 2014, the amendments came into effect.

The significance of the amendment is to now empower First Nation governments to pass by-laws as they see fit without any interference from INAC. Of course, the exercise of such powers will still be limited to passing laws over subject matters listed in the *Indian Act* (subject to review by the courts). However, despite the fact that INAC previously took a restrictive interpretation of these powers, modern interpretation and constitutional principles now support a broad, generous and adaptive reading of the *Indian Act* by-laws, empowering First Nation

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governments to legislate over a wide range of local matters affecting their communities. The by-law powers also make First Nation by-laws paramount over provincial laws and federal laws in a number of cases. For all of these reasons, this is an avenue for exercising self-government that First Nations governments should now seriously consider.

I acknowledge there are principled objections to reliance on the *Indian Act* by-laws as the source of self-government powers. Certainly, both the dark history of the *Indian Act* as tool for assimilation and the status of by-laws as a form of ‘delegated’ governance powers make the prospect of using the *Indian Act* to advance self-government somewhat unpalatable. While these are legitimate reservations, facing the present alternative, which is no self-government for the vast majority of First Nations with no prospect of self-government for years to come, and a desperate need for First Nations to take control of key programs in their communities, self-government via the *Indian Act* by-laws is, by far, the lesser of two evils.

II. THE URGENT NEED FOR FIRST NATIONS TO EXERCISE SELF-GOVERNMENT NOW

It is well documented that Indigenous peoples in Canada still experience greater poverty, poorer health outcomes, greater risks of addictions, lower educational attainment, lower annual income, over-incarceration, over-representation in the child welfare system, and greater risk of experiencing violence than non-Indigenous Canadians.¹ The dire social conditions that First Nations people in this country continue to face is tied to the colonial legacy of external domination and subjugation of First Nations peoples.² It is now widely acknowledge by numerous scholars and important reports, such as the Royal Commission on Aboriginal Peoples’ Report and the Truth and Reconciliation Commission’s Final Report, that self-government is an essential part of helping First Nations overcome this legacy.³ In particular, First

¹ Assembly of First Nations, “Fact Sheet – Quality of Life of First Nations June 2011”, online: <www.afn.ca/uploads/files/factsheets/quality_of_life_final_fe.pdf>; Indigenous and Northern Affairs Canada, “The Community Well-Being Index: Well-Being in First Nations Communities, 1981-2011,” (Ottawa: 2015); Daniel J K Beavon, Nicholas Spence & Jerry White, *Aboriginal Well-Being: Canada’s Continuing Challenge* (Toronto: Thompson Education Publishing: 2007).

² Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: 2015) at 1–23 [Truth and Reconciliation Commission].

³ See Keith Penner, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen’s Printer for Canada, 1983) [Penner]; Report of the Royal Commission of Aboriginal Peoples: *Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 131 [Aboriginal Peoples Report, vol 2]; Truth and Reconciliation Commission, *supra* note 2 at 133; John H Hylton, “The Case for Self-Government: A Social Policy Perspective” in John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed (Saskatoon: Purich Publishing Ltd, 1999) 78; John O’Neil, et al, “Community Healing and Aboriginal Self-Government” in John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed (Saskatoon: Purich Publishing Ltd, 1999) 130; Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children – Protection the Vulnerable Under International Law* (Burlington: Ashgate Publishing Company, 2012) at 11–12.

Nations need to be able to control matters affecting their day-to-day lives, including in the areas of education, social development, child welfare, health, housing, land-use, policing and emergency services, to name a few.

Currently, most First Nations in Canada are not self-governing. Instead, what is now in place in most First Nations is what is known as “program devolution.”⁴ Program devolution is the transfer of resources and responsibility for program delivery from INAC (and other federal departments that administer programs to First Nations, such as Health Canada) to First Nations and their institutions in accordance with terms and conditions set by the government.⁵ Although there are varying definitions and models of First Nation self-government, its core feature is real decision-making power resting in the hands of Indigenous peoples.⁶ On this basis, program devolution is not self-government simply because it is INAC (and other federal departments) that exercises control of the programs, policies and budgets of First Nations.⁷

While program devolution may have been a well-intended policy designed as a transitional tool to prepare First Nations to assume self-government, it is problematic for a number of reasons.⁸ First, there is no legal framework for program devolution; it operates purely on the basis of government policies, treasury board authorities and appropriations, and funding agreements between INAC and First Nations.⁹ This gives INAC staff extensive discretion and control over First Nations’ affairs and gives rise to potential for abuse, lack of oversight of departmental staff by Parliament, and lack of accountability to First Nations peoples.¹⁰ Second, it has created conditions allowing for the serious underfunding of First Nations programming, exacerbating the poverty already existing in many First Nations communities.¹¹ Finally, devolution does not encourage thoughtful, culturally

⁴ Judith Rae, “Program Delivery Devolution: A Stepping Stone of Quagmire for First Nations?” (2009) 7:2 *Indigenous LJ* 1 [Rae].

⁵ *Ibid* at 6-17; see also Stephen Cornell, Catherine Curtis & Miriam Jorgensen, “The Concept of Governance and its Implications for First Nations” (2004) *Joint Occasional Papers on Native Affairs*, No 2004-02, at 8–10 [Cornell, Curtis & Miriam].

⁶ Cornell, Curtis & Miriam, *supra* note 5 at 10–14.

⁷ Penner, *supra* note 3 at 20.

⁸ Rae, *supra* note 4 at 22–23; see also Constance MacIntosh, “Envisioning the Future of Aboriginal Health Under the Health Transfer Process” (2008) *Health LJ* (Special Edition) 67 [MacIntosh, “Envisioning the Future”].

⁹ Naiomi Metallic & Sébastien Grammond, “Ensuring Real Accountability on First Nations Reserves” (2016) *Caledon Institute of Social Policy*, online: <www.caledoninst.org/Publications/PDF/1087ENG%2Epdf> [Metallic & Grammond]; Constance MacIntosh, “Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves” (2008) 39:1 *Ottawa L Rev* 63

¹⁰ Metallic & Grammond, *supra* note 9.

¹¹ Rae, *supra* note 4 at 25–30; Canada, Indigenous and Northern Affairs, Departmental Audit and Evaluation Branch, *Evaluation of the Alternative Funding Arrangement (AFA) and Flexible Transfer Payment (FTP) Funding Authorities*, (Ottawa, 2005); MacIntosh, “Envisioning the Future,” *supra* note 8; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada* (for

appropriate, policy-making sensitive to the particular needs and circumstance of First Nations people.¹² This is because INAC's primary program delivery standard for virtually all essential services, formulated in the mid-1960s with a view to assimilating First Nations, which still persists today, requires First Nations to follow provincial program standards (known as the provincial 'comparability' standard).¹³ In brief, instead of preparing or leading First Nations toward self-government, program devolution seems to be worsening the plight of First Nations communities.¹⁴ In a 2011 Report, the Auditor General went so far as to state that the current system on reserve "severely limit[s] the delivery of public services to First Nations communities and hinder[s] improvements in living conditions on reserves."¹⁵

Paired with this problem is the fact that the existing process for First Nations to achieve self-government takes several years to conclude.¹⁶ To date, such negotiations have only resulted in about a dozen concluded agreements.¹⁷ Moreover, these negotiations were virtually stalled in the last decade under the Conservative government of Stephen Harper.¹⁸ There was the aborted attempt by Canada in 2002-03 to pass the *First Nations Governance Act*, which included recognition of First Nations law-making powers over local and internal matters,¹⁹ but

the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 (CanLII) [*First Nations Child and Family Caring Society*].

¹² See Steve Jacob & Geoffroy Desautels, "Evaluation of Aboriginal Programs: What Place is Given to Participation and Cultural Sensitivity" (2013) 4:2 Int J Indigenous Policy J 1.

¹³ Hugh Shewell & Annabella Spagnut, "The First Nations of Canada: social welfare and the quest for self-government" in John E Dixon & Robert P Scheurell, eds, *Social Welfare with Indigenous Peoples* (London: Routledge, 1995) 1 at 3-6 and 13 [Shewell & Spagnut]; Martin Papillon, "Playing Catch-up with Ghosts: Income Assistance for First Nations on Reserve" in Daniel Béland & Pierre-Marc Daigneault, eds, *Welfare Reform in Canada: Provincial Social Assistance in Comparative Perspective* (Toronto: University of Toronto Press, 2014).

¹⁴ See Rae, *supra* note 4; see also Cindy Blackstock, "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice must lose," (2010) 33:1 Children and Youth Services Review 187.

¹⁵ Canada, Office of the Auditor General, *2011 June Status Report of the Auditor General of Canada to the House of Commons*, Chapter 4, "Programs for First Nations on Reserves" at 5, online: <www.oag-bvg.gc.ca/internet/docs/parl_oag_201106_04_e.pdf>.

¹⁶ See Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev Leg & Soc Issues 29.

¹⁷ See Naomi Metallic, "Les droits linguistiques des peuples autochtones" in Michel Bastarache & Michel Doucet, eds, *Les droits linguistiques au Canada*, 3e ed (Montréal: Éditions Yvon Blais, 2013) at 935-937.

¹⁸ See Andrew Stobo Sniderman & Justin Ferbey, "Yukon first nation worried self-government will collapse without funding" *The Globe and Mail* (19 September 2012), online: <www.theglobeandmail.com/news/politics/yukon-first-nation-worried-self-government-will-collapse-without-funding/article4553822/>; Jorge Barrera, "PM Harper failing to fulfill Mulroney's Oka promise on modern treaties" *Aboriginal Peoples Television Network* (8 April 2015), online: <aptn.ca/news/2015/04/08/pm-harper-failing-fulfill-mulroneys-oka-promise-modern-treaties/>.

¹⁹ Bill C-7, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amends to other Act*, 2nd sess, 37th Parl, 2002; see also Mary C Hurley, "Bill C-7: the First Nations Governance Act" (Ottawa: Library of Parliament Legislative Summaries, 2002-2003),

the federal government has yet to make any further attempts to revisit the concept of Canada-wide legislation enabling self-government, despite the fact that some scholars have suggested it is high time it do so.²⁰

Taking these two problems together, First Nations governments in Canada currently appear to be stuck between the proverbial “rock and a hard place” when it comes to having a means to exercise effective control over programs and services affecting their community members. It is possible that positive changes in this direction may occur with the recent election of Justin Trudeau’s Liberal government, which campaigned on improving Canada’s relationship with Indigenous peoples. However, the process of reform—especially within government departments—can be long and arduous and the need for change is urgent. With concluded self-government agreements a long way off for many First Nations, and the prospect of reform of the system of program devolution uncertain, a viable interim solution is necessary because the *status quo* is unacceptable.

III. IN SEARCH OF AN INTERIM SOLUTION—REVISITING THE *INDIAN ACT* BY-LAW POWERS

A. Introduction to the *Indian Act* by-law powers

The *Indian Act* by-law powers are provisions delegating a number of legislative powers to Band Councils, the governing bodies of each First Nation band under the *Indian Act*.²¹ These powers, in some regards, resemble powers appearing in municipal statutes. This has led some courts to make direct comparisons between First Nations and municipal governments,²² although more recent cases have suggested that Bands Councils / First Nation governments, having both inherent and

online: <www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C7&Mode=1&Parl=37&Ses=2&source=library_prb>; Frank Cassidy, “The First Nations Governance Act: A Legacy of Loss”, online: (2003) Policy Options <policyoptions.irpp.org/magazines/big-ideas/the-first-nations-governance-act-a-legacy-of-loss/>; and John Provart, “Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada” (2003) 2 *Indigenous LJ* 177 [Provart].

²⁰ John Borrows, “Legislation and Indigenous Self-Determination in Canada and the United States” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition To Reconciliation: Essays On The Constitutional Entrenchment Of Aboriginal And Treaty Rights* (Toronto: University of Toronto Press, 2016) 474; Peter S Vicaire, “Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context” (2013) 58 *McGill LJ* 607.

²¹ *Indian Act*, RSC 1985 c I-5, s 2(3). There are also other provisions in the *Act* and related legislation that give legislative control to First Nation governments. The *Indian Act* allows Bands to assume control over membership rules (s 10), as well as election and governance rules (s 2(1) and s 74). The recent *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20, ss 7–11, authorizes First Nations to pass their own matrimonial property laws.

²² See *R v Rice*, 1980 CarswellQue 346, [1981] 1 CNLR 71 (CA).

delegated-municipal powers, are more than merely a delegated government, but are instead a *sui generis* form of government.²³

Some form of by-law powers have appeared in successive versions of the *Indian Act* and its predecessor statute dating back to 1869. *An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act* contained seven subjects over which the Chief of a band could pass “rules and regulations,” subject to confirmation by the Governor in Council.²⁴ These seven subjects find their corollary in today’s version of the *Indian Act*, and additional provisions were added incrementally over time.²⁵

Currently, there are three types of by-law making powers in the *Indian Act*, each having its own different procedural requirements for enactment.²⁶ First there are the ‘general’ by-law powers, set out in s 81(1). Section 81(1) sets out 22 subject areas that cover a range of topics including health, traffic, law and order, trespassing on reserve, public games, animal control, public works, land allotment, zoning and building standards, agriculture, wildlife management, commercial activities on reserve, and residency and trespass on reserve. Finally, there is clause empowering the passing of by-laws with respect to any matter arising out of or ancillary to the exercise of power under s 81(1).²⁷

Until as recently as December 2014, pursuant to s 82, copies of every band by-law enacted pursuant to s 81(1) had to be forwarded to the federal Minister of Aboriginal Affairs, who had the power to disallow the by-law.²⁸ By-law infractions can be punished on summary conviction by a fine not exceeding \$1,000 or

²³ *Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FCR 325, 176 DLR (4th) 35 at paras 29 and 44 (CanLII) [*Canadian Pacific*]; *R v Ward* (1988), 93 NBR (2d) 370, 45 CCC (3d) 280 at para 9 (QL) (NB CA) [*Ward*]; and see also Jack Woodward, *Native Law* (Toronto: Thomson Reuters, 1994) at 7§665–7§700 [Woodward].

²⁴ 31st Victoria, Chapter 42, SC 1869 (32 & 33 Vict), c 6, s 12.

²⁵ A detailed legislative history is provided by Kent McNeil in “Challenging Legislative Infringement of the Inherent Aboriginal Right of Self-Government” (2003) 22 Winsor YB Access Just 329 at 333-339, 350-351 [McNeil, “Challenging Legislative Infringement”].

²⁶ Woodward, *supra* note 23 at 7§1250–7§1310.

²⁷ *Indian Act*, *supra* note 21, s 81(1)(q). The failed Bill C-7, *supra* note 19, proposed reorganizing the by-laws powers and adding to them. Section 16 was titled “Laws for Local Purposes” and included half of existing powers under s 81(1) and added “(d) the provision of services by or on behalf of the band” and “(i) residential tenancies, including powers of eviction.” Section 17 was titled “Laws for Band Purposes” and included the remaining s 81(1) powers, and added “the preservation of the culture and language of the band.” Section 18, titled “Laws re band governance” gave new powers for bands to pass by-laws over governance matters such as election process, meetings, conflicts of interests, etc. The Bill was the subject of criticism for a variety of reasons. On the by-laws changes, some critics argued the additions were not necessary, as the *Indian Act* already contained fairly broad by-law making powers and were underused mainly because bands lacked enforcement resources and do not recognize these powers as legitimate because of their delegated, municipal nature: see Provard, *supra* note 19 at 158.

²⁸ *Indian Act*, *supra* note 21, s 82, as repealed by *Indian Act Amendment and Replacement Act*, SC 2014, c 38, s 7.

imprisonment for up to 30 days, or both.²⁹ In addition, the *Act* also provides for the availability of injunctive relief to restrain a person from violating a by-law.³⁰

The second type of by-law power in the *Indian Act* is the power to enact ‘money by-laws’ or ‘taxation bylaws.’ These are set out at s 83 of the *Act* and provide powers for passing taxation, licensing, and certain miscellaneous spending by-laws.³¹ Such by-laws must have the approval of the Minister to come into effect, and may be repealed or restricted by regulation.³² The final type of by-laws provided for in the *Indian Act* are set out in s 85.1 and referred to as “intoxicant by-laws.” These by-laws allow Band Councils to prohibit the possession, consumption, sale, barter, supply or manufacture of intoxicants on reserve. Ministerial approval of these by-laws is not required; however, these by-laws are only valid if they were approved by a majority of electors of the band by vote at a special meeting.³³

Finally, the *Indian Act* contains its own rules on dealing with conflicts between Band by-laws and federal and provincial laws. As between a general s 81 by-law and federal law, the opening provisions of s 81(1) suggest that provisions of the *Indian Act* and regulations thereunder are paramount over band by-laws: “The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes...”³⁴ However, this has been interpreted as meaning that *Indian Act* by-laws will be paramount over other federal regulations, including regulations under the federal *Fisheries Act*.³⁵ This also implies that a by-law would be paramount over federal legislation, though the question has yet to be ruled on by the courts.³⁶

²⁹ *Indian Act*, *supra* note 21, s 81(1)(r).

³⁰ *Ibid*, s 81(2) and (3).

³¹ *Ibid*, s 83(1); see also Woodward, *supra* note 23 at para 7§1280. The Department has largely delegated its responsibility over s 83 by-laws to the First Nations Tax Commission. For more information, see <www.fntc.ca>.

³² *Indian Act*, *supra* note 21, s 83(2)–(6).

³³ *Ibid*, s 85.1(2).

³⁴ *Ibid*, s 81(1).

³⁵ *Ward*, *supra* note 23; *R v Jimmy* (1987), 15 BCLR (2d) 145, [1987] 5 WWR 755 (BC CA). In *R v Lewis*, [1996] 1 SCR 921, 133 DLR (4th) 700, the Supreme Court accepted (without deciding) the agreement of counsel that a fisheries by-law pursuant to *Indian Act*, *supra* note 21, s 81(1)(o) would supersede provisions of federal *Fisheries Act* regulations.

³⁶ Normally, subordinate federal legislation cannot conflict with other Acts of Parliament, but an exception exists where the enabling legislation so provides: see *Friends of Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 37, 88 DLR (4th) 1. The opening language of s 81(1) appears to provide such an exception; however, some cases have strongly hinted that in situations of conflict between *Indian Act* by-laws and the *Criminal Code*, the latter would prevail, although this analysis is not supported by the language used in the *Indian Act*: see *R v Stacey*, [1982] 3 CNLR 158, 63 CCC (2d) 61 at paras 27–30 (WLN Can) (QC CA); *R v Gladue*, [1987] 4 CNLR 92, 30 CCC (3d) 308 at para 29 (WLN Can) (Alta PC).

As between provincial laws and band by-laws, the language of s 88 provides that any Band by-laws made pursuant to the *Indian Act* would be paramount over conflicting provincial laws:

Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts...³⁷

Cases to date have confirmed that in the case of a direct conflict between *Indian Act* by-laws and provincial laws and regulations, the by-law supersedes conflicting provincial legislation as a matter of paramountcy.³⁸

Where the federal government might have concerns about an *Indian Act* by-law being paramount over a federal or provincial law, s 73(1) of the *Indian Act* gives the Governor in Council regulatory powers somewhat resembling the powers in s 81(1), in theory allowing the government to ‘fix’ at least some situations of conflict it finds unacceptable.³⁹ Of course, it also remains open to Parliament to amend the *Indian Act* by-law powers. Unilateral changes to the *Indian Act* by-law powers, whether by regulation or legislation, however, could potentially raise arguments of a violation of the Aboriginal right to self-government.⁴⁰

B. A means to exercise control over local matters?

It is the s 81(1) by-law powers that I believe hold the most promise of allowing First Nations governments to immediately take control over local matters affecting their communities, including in the pressing area of essential services on reserve, such as child welfare, social assistance and in education. First of all, there is precedent of the Department interpreting the s 81(1) by-law powers to permit a First Nation from British Columbia to pass its own by-law over child welfare.

In 1980, faced with the staggering statistic that, over the past two decades, at least 150 children had been removed from their small First Nation community by provincial child welfare authorities and placed into non-First Nations foster and adoptive homes, the members of the Spallumcheen First Nation in British Columbia

³⁷ *Indian Act*, *supra* note 21, s 88 [emphasis added]. This would also be the result of application of the constitutional principles of paramountcy: Peter Hogg, *Constitutional Law of Canada: 2014 Student Edition* (Toronto: Carswell, 2014) at 28-14.1 and 28-15.

³⁸ *R v Charles* (1997), 159 Sask R 126, [1998] 1 WWR 515 (Sask QB); *R v Meechance*, 2000 SKQB 156, 193 Sask R 109.

³⁹ *Indian Act*, *supra* note 21, s 73(1). An actual example of this is the by-law power over the regulation of traffic on reserve. Although a band can regulate traffic on reserve pursuant to s 81(1)(b), its cannot pass by-laws that are inconsistent with the provisions of the *Indian Reserve Traffic Regulations* CRC, c 959, which incorporate by reference provincial motor vehicle laws and regulations.

⁴⁰ See McNeil, “Challenging Legislative Infringement,” *supra* note 25.

were compelled to take action. They staged a massive demonstration involving hundreds of First Nations people marching in downtown Vancouver, decrying the frequency with which provincial child welfare officials removed first Nations children from their families and communities. This ultimately resulted in the provincial and federal governments' accepting the Spallumcheen First Nation's exercise of law-making jurisdiction over child welfare in the community through the passage of an *Indian Act* by-law.⁴¹

Passed in 1980, the *Spallumcheen Indian Band By-law #3 – A By-law of the Care of our Indian Children* cites both the inherent right of self-determination and the *Indian Act* by-law provisions as its enabling authority, namely s 81(1)(a), the power “to provide for the health of residents on the reserve,” s 81(1)(c), the power over “the observance of law and order,” and s 81(1)(d), the power over “the prevention of disorderly conduct and nuisances.”⁴² The by-law also stipulates that it was approved by a unanimous vote of the band members at a general meeting, as well as a unanimous vote of the Band Council. The preamble of the by-law sets out the urgency and need for the Band to assume control over child welfare:

The Spallumcheen Indian Band finds:

- (a) that there is no resource that is more vital to the continued existence and integrity of the Indian Band than our children.
- (b) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-band agencies.
- (c) that the removal of our children by non-band agencies and the treatment of the children while under the authority of non-band agencies has too often hurt our children emotionally and serves to fracture the strength of our community, thereby contributing to social breakdown and disorder within our reserve.

The by-law consists of 23 provisions and its key features include giving the Band exclusive jurisdiction over any child custody proceeding involving an Indian child who is a member of the Band, making the Chief and Council the legal guardians of any such children taken into care, imposing a principle of rebuilding families whenever possible, and instituting a hierarchy of child placement options which give clear priority to placement on reserve and with other First Nations

⁴¹ Patrick Johnson, *Native Children and the Child Welfare System* (Canadian Council on Social Development in association with James Lorimer & Company: Toronto, 1983), at 107–108.

⁴² The entire text of the by-law is appended to the decision of *Alexander v Maxime* (1995), 4 BCLR (3d) 294, 56 BCAC 97 (BC CA).

people.⁴³ The by-law provides that “only as a last resort shall the child be placed in the home of a non-Indian living off the reserve.”⁴⁴

As noted, the Department in essence ‘approved’ this by-law by not disallowing it. However, after the Spallumcheen by-law, for reasons unknown, the Department was unwilling to permit any other similar by-laws. A manual on by-laws produced by the Department in 1996 adopted a narrow interpretation of the by-law powers. In relation to the by-law power respecting “the health of residents on reserve” in s 81(1)(a), the Department took the position that “[p]aragraph (a) does not provide Band Councils with the authority to make by-laws regarding social services. The *Constitution Act, 1867* gives provincial governments’ exclusive jurisdiction over social services.”⁴⁵

The powers that the manual suggested could be exercised in this regard were insignificant, such as pest and animal control, garbage disposal and health hazards. With respect to the power over “law and order” in s 81(1)(c), the manual limited this power to such things as regulating curfews and public meetings. The Department apparently took the view that Band by-laws could not overlap with subjects legislated on by provincial governments. While one author encouraged First Nations to challenge INAC’s position in this regard through judicial review, this does not appear to have occurred.⁴⁶

Although the position taken by the Department in its manual was inconsistent with its approval of the Spallumcheen by-law, the Department never subsequently moved to disallow the Spallumcheen by-law and it remains valid today.⁴⁷ Nor has the by-law been declared *ultra vires* in the courts, although the British Columbia Court of Appeal, in a 1995 case, suggested without deciding that it was a possible intrusion into the powers of the provinces under s 92 of the

⁴³ Spallumcheen Indian Band, by-law No 3, *A By-law of the Care of our Indian Children*, (1980), ss 3(a), 5, and 10.

⁴⁴ *Ibid*, s 10(7).

⁴⁵ Department of Indian and Northern Affairs Canada, “Band Governance By-Law Manual” (1996) ch 3 at 2 (emphasis in original).

⁴⁶ John W Gailus, “Utilizing *Indian Act* By-Laws as a Tool of Self-Government” (Paper presented at the Native Courtworkers and Counselling Association of British Columbia’s “Aboriginal People and the Law Programme, 11 April 2011), online: <http://www.dgwlaw.ca/wp-content/uploads/2014/12/Bylaws_Paper.pdf>.

⁴⁷ Although there was no specific provision within the *Indian Act*, the Department took the position that it had the power to revoke a by-law even after it had come into effect: see Woodward, *supra* note 23 at 7§1420.

Constitution, Act, 1867.⁴⁸ However, in subsequent cases, the validity of the by-law has been taken for granted.⁴⁹

If the specific by-law provisions referenced as the enabling authority for the Spallumcheen by-law, namely the powers over “health of residents on reserve,” “observance of law and order” and “prevention of disorderly conduct and nuisances” are capable of authorizing jurisdiction over child welfare, then it would seem that such provisions are equally capable of authorizing jurisdiction over most, if not all, of the other subjects we commonly recognize as being essential services, such as public health, social welfare, education, child care, policing, and emergency services.⁵⁰ If such is the case, owing to the conflict rules discussed above, this would permit *Indian Act* by-laws in areas such as child welfare, social assistance, child care and other areas to be paramount over provincial laws in cases of conflict. This holds significant promise for addressing First Nations communities’ need to be able to take effective control over local matters, in particular essential services on reserve. This is especially so now, since the repeal of the s 82 Ministerial disallowance power in December 2014.

The repeal was part of a Private Members’ bill, *Bill C-428, An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement*, was introduced by Manitoba Conservative Member of Parliament Rob Clarke in 2012 and received Royal Assent on December 16, 2014.⁵¹ The bill provided for the removal of outdated or antiquated clauses in the *Indian Act*.⁵² With respect to the by-law powers, the bill repealed the disallowance power and changed the publication requirement for by-laws.⁵³ The remaining by-law provisions were left intact.⁵⁴ On

⁴⁸ *Alexander v Maxime*, *supra* note 42 at para 11 (WLN Can). Note there is one article from the early 1980s that suggests the by-law is invalid: see John A MacDonald, “The Spallumcheen Indian Band By-Law and Its Potential Implications for Children Welfare Policy in British Columbia” (1983) 4:1 Can J Fam L 75. The conclusions of the author, an associate professor in social work, are questionable as very little legal analysis informs the conclusion, except s 88 of the *Indian Act*.

⁴⁹ See *S (EG) v Spallumcheen Band Council*, [1999] 2 CNLR 306.

⁵⁰ Apart from cases on the Spallumcheen by-law, *Ross v Mohawk Council of Kanesatke*, 2003 FCT 531, [2003] 3 CNLR 313 suggests that the *Indian Act* by-law powers provided jurisdiction over policing on reserve.

⁵¹ *An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement*, SC 2014, c 38, ss 7–9.

⁵² For a description of the changes, see Indigenous and Northern Affairs Canada, “Overview of Bill C-428 Amendments to the *Indian Act*,” online <www.aadnc-aandc.gc.ca/eng/1422387592930/1422387686680> [Indigenous and Northern Affairs Canada, “Overview”].

⁵³ Whereas the previous provisions only required providing copies of the by-law to the Department, the amendments require Band Councils to publish by-laws on their website or in local newspaper of general circulation.

⁵⁴ It is interesting to note that requirement for Ministerial approval of s 83 by-laws was not repealed by the recent amendments. This may be because the subjects listed in s 83 are discrete and tend to be used for the very specific purpose of passing by-laws to tax non-Indian land interests on reserve, such utility and rail easements and right-of ways, and there is a particular regime in place for this that involves working with the First Nations Tax Commission. This regime was created relatively recently, in 1988, and is

first reading, Mr. Clarke introduced the proposed repeal of the disallowance power as “return[ing] control of the publication of bylaws to first nations’ governance bodies.”⁵⁵ On second reading, the Parliamentary Secretary to INAC described the object of the changes as “plac[ing] responsibility for these bylaw-making powers squarely back in the hands of the first nation, where it belongs...”⁵⁶ INAC’s website now states, “[a]s a result [of the repeal], First Nations will have autonomy over the enactment and coming into force of by-laws and the day-to-day governance of their communities.”⁵⁷

It would therefore seem that the intent behind the repeal was to give a broad power of control over local affairs (back) to the First Nations, as the reference to “autonomy over ... day-to-day governance” by the Department suggests. Certainly, First Nations Band Councils are now free to attempt pass all manner of by-laws arguably authorized by s 81(1). However, as was the case before the repeal of the disallowance power, the ultimate determination of the validity of *Indian Act* by-laws will fall to the courts. The remainder of this paper will consider, in particular, whether the courts would give a broad interpretation to the s 81(1) by-law powers and uphold *Indian Act* by-laws in the areas of essential services.⁵⁸

C. Are s 81 by-laws on essential services valid?

1. General principles

Although the validity of the Spallumcheen by-law was questioned by the British Columbia Court of Appeal in 1995, the issue has never been decided. Further, the cases that have considered the validity of the *Indian Act* by-law powers to date, most stemming from the 1980s and 1990s and mostly about gambling by-laws, are likely of little assistance in deciding this issue.⁵⁹ Moreover, there is a strong argument that

described at length in *Canadian Pacific*, *supra* note 23. In any event, to the extent there is some overlap between s 81 and s 83, s 81 will supersede s 83 given the language in s 83(1) that it operates, “without prejudice to the powers conferred by s 81.”

⁵⁵ *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 133 (4 June 2012) (Rob Clarke).

⁵⁶ *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 187 (28 November 2012) (Greg Rickford).

⁵⁷ Indigenous and Northern Affairs Canada, “Overview,” *supra* note 52.

⁵⁸ The s 81(1) by-law powers also arguably permit Band Councils to legislate in areas of federal jurisdiction, some of the more contentious of these being in areas of criminal law such as gaming and gambling and controlled substances. It is beyond the scope of this paper to analyze whether modern interpretative and constitutional principles support the validity of such by-laws. I would only say that, although earlier court decisions were unfavourable to First Nation by-laws in these areas (see *St Mary’s Indian Band v Canada (Minister of Indian Affairs & Northern Development)*, [1995] 3 FC 461, 127 DLR (4th) 686; *R v Gottfriedson*, [1995] BCJ No 1791 (QL)) the conclusions in these cases may deserve re-examination in light of the significant evolution in interpretation and constitutional principles discussed below.

⁵⁹ *Ibid.*

those cases are outdated as they were decided prior to what appears to have been a real shift in the Supreme Court's jurisprudence around governance powers. In *Reference re Secession of Quebec*, the Supreme Court recognized that "our constitutional history demonstrates that that our governing institutions have adapted and changed to reflect changing social and political values."⁶⁰ The Court's jurisprudence since then has been a testament to this and key in this regard has been the Court's development of the constitutional principle of federalism.

First, the principle has facilitated greater recognition by the Court of the concurrent exercise of power over the same subject matter. In fact, in *Canadian Western Bank v Alberta*, the Court observed that federalism recognizes "that overlapping powers are unavoidable" and our constitutional law has developed various flexible techniques to accommodate such overlap, which was preferred over an approach that reserves power to one government exclusively (i.e., the doctrine of interjurisdictional immunity).⁶¹ In the companion case, *British Columbia (AG) v Lafarge Canada Inc*, where application of the doctrine of interjurisdictional immunity would have resulted in no regulation (as the federal government had not regulated), Binnie J, for the majority of the Court commented, "federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum."⁶²

Second, the principle of federalism promotes diversity in governance.⁶³ In the *Secession Reference* the Court recognize that the concepts of political and cultural diversity underpinned our constitutional structure:

Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. ... The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments.⁶⁴

This notion of diversity underlying federalism was expanded on in the *Secession Reference* to inform a further independent constitutional principle of respect for minorities. The Court observed that the protection of minority rights was clearly an essential consideration in the constitutional structure at the time of Confederation, and that principle was further reflected in a number of provisions in both the *Constitution Act, 1867* and the *Constitution Act, 1982*, including in the explicit recognition for existing Aboriginal and Treaty rights in s 35.⁶⁵

⁶⁰ *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 33 (QL) [*Reference re Secession of Quebec*].

⁶¹ *Canadian Western Bank v Alberta*, 2007 SCC 22, at para 54, [2007] 2 SCR 3.

⁶² *British Columbia (AG) v Lafarge Canada Inc*, 2007 SCC 23, at para 3, [2007] 2 SCR 86 [*Lafarge*].

⁶³ *Reference re Secession of Quebec*, *supra* note 60 at para 58.

⁶⁴ *Ibid* at para 43.

⁶⁵ *Ibid* at paras 80–82.

Finally, the principle of federalism, through promoting diversity in governance, spawned yet another principle, that of subsidiarity. This principle first emerged (though unnamed) in the *Secession Reference* when the Court noted that “the federal structure of our country facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.”⁶⁶ Later in *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, the Court named this principle the “principle of subsidiarity” and set out its contours more specifically: “[t]his is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.”⁶⁷

In *Spraytech*, the principle of subsidiarity was used first, to inform a broad interpretation of the by-law powers of a municipal government;⁶⁸ second, to clarify that “the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter[;]”⁶⁹ and third, to clarify that the “operational conflict” test applied in cases of provincial-municipal conflicts.⁷⁰

Overall, the development of the principle of federalism and the related principles of subsidiarity, diversity in governance and respect for minorities appears to have created more room for delegated governments, such as municipalities, both in terms of scope of their powers and the ability of their laws to co-exist alongside similar laws passed by other levels of government. These principles are just as applicable and beneficial to First Nation governments as they are to municipalities,⁷¹ if not more so given the status of First Nations governments as more than merely a delegated government, but as a *sui generis* form of government.⁷²

⁶⁶ *Ibid* at para 58.

⁶⁷ *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para 3 [*Spraytech*].

⁶⁸ *Ibid* at paras 18–32.

⁶⁹ *Ibid* at paras 39.

⁷⁰ *Ibid* at paras 36–37. Although in both *Quebec (AG) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 [*Lacombe*], and *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457, there was some debate between the members of the Court about the expanse of the principle of subsidiarity, specifically whether the principle could preclude federal regulation where a matter may be regulated by the provinces, this does not seem to have diminished the articulation of the principle in *Spraytech* as it relates municipal governments. See also Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74 Sask L Rev 21.

⁷¹ Note that *Spraytech* was applied in one Band by-law case to date, where the Ontario Court of Appeal held that a Band by-law on migratory board hunting could co-exist with the federal *Migratory Birds Convention Act* and its regulations, with any conflicts addressed through the “operational conflict” doctrine: see *R v Blackbird* (2005) 74 OR (3d) 241, 248 DLR (4th) 201 (Ont CA).

⁷² *Spraytech*, *supra* note 67 at paras 18–32.

2. Validity of Indian Act By-Laws

The question of whether *Indian Act* by-laws on essential services would be valid in essence requires two inquiries: one based on administrative law, that is, whether such by-laws are authorized under their enabling legislation, and another based on constitutional law, that is, whether such by-laws are constitutionally valid. The administrative law question is largely a matter of statutory interpretation, though the constitutional principles cited above inform this analysis as well.

i. Administrative validity

The cases interpreting the *Indian Act* by-law powers to-date appear to have taken an ‘original meaning’ interpretation.⁷³ This is the approach that takes the meaning of a statutory provision to be what the original drafters of the statute would have understood the language to permit the day after it was passed.⁷⁴ This approach presents significant challenges for interpreting *Indian Act* by-laws as authorizing by-laws on essential services. This is because the “health of residents on reserve” and “law and order” by-law powers appeared in the earliest incarnation of the *Indian Act* in 1869, well before the creation of the modern welfare state following the Second World War and the proliferation of contemporary essential services legislation. It is therefore highly unlikely that Parliament, in 1869, had in mind that Chiefs or Band Councils would exercise such legislative powers.

There are several reasons why the original meaning rule should not inform the interpretation of the *Indian Act* by-law powers. First, the rule has been the subject of criticism, notably that it prevents interpretations that allow meaning to adapt to social change.⁷⁵ It also appears inconsistent with the interpretive principle codified in s 10 of the federal *Interpretation Act*, that provides that “[t]he law shall be considered as always speaking,”⁷⁶ which is intended to indicate to courts that adapting legislation to change is a normal and necessary part of interpretation.⁷⁷

Further, in the context of *Indian Act* by-laws, the original meaning rule also clashes with a number of other interpretative rules. One of these is the rule that legislation relating to Aboriginal peoples should receive a large, liberal and purposive interpretation and doubts and ambiguities should be resolved in favour of Aboriginal peoples, often called the “*Nowegijick* principle.”⁷⁸ The *Nowegijick*

⁷³ For example, in *St. Mary’s Indian Band*, *supra* note 58, the Federal Court held that by-laws pursuant to s 81(1)(m) were *ultra vires* Band Councils as Parliament dealt conclusively with these matters in the *Criminal Code* and it would have been intention of the drafters that a power over “games” would include gambling.

⁷⁴ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at 143 and 146 [Sullivan].

⁷⁵ *Ibid* at 145.

⁷⁶ *Interpretation Act*, RSC 1985, c I-21, s 10.

⁷⁷ Sullivan, *supra* note 74 at 145.

⁷⁸ *Ibid* at 509–510, citing *R v Nowegijick*, [1983] 1 SCR 29, 144 DLR (3d) 193.

principle supports a liberal interpretation of the *Indian Act* by-laws; however, it is not the strongest argument in favour of a broad reading of the s 81 by-laws powers. This is because, although the Supreme Court often cites this principle, it often underplays its application in practice. For example, in *R v Lewis*, a case about a band fishing by-law, Lamer J cited the principle but emphasized that the *Indian Act* must nonetheless be interpreted with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question.⁷⁹ The *Nowegijick* principle therefore appears to be subordinate to the rule giving effect to the intention of Parliament at the time of enacting the provision.

A more compelling argument that these by-laws are authorized under the enabling statute is that the *Indian Act* by-law provisions can be characterized as “quasi-constitutional” in nature.⁸⁰ Characterizing legislation as “quasi-constitutional” has several implications, one of these being that, in addition to attracting a liberal and purposive interpretation, general terms in the statute will be read as being adaptive to changing social conditions.⁸¹ The designation of “quasi-constitutional” has been applied to legislation touching on subjects deemed by the courts to be ‘fundamental’ to human existence, development and dignity, such as human rights, privacy and official languages legislation.⁸² The designation has also been used for legislation constituting municipal governments.⁸³ In *Old St Boniface Residents Assn v Winnipeg (City)*, La Forest J suggested that a planning by-law of the city of Winnipeg was a quasi-constitutional instrument given that it served as a framework or foundation for the city’s zoning and planning.⁸⁴ It would seem, therefore, that a statute can be characterized as “quasi-constitutional” if its subject matter involves fundamental human or civil rights (i.e., it is reminiscent of provisions in the *Constitution Act, 1982*), or is foundational to the exercise of governance powers (i.e., it is reminiscent of the division of powers in the *Constitution Act, 1867*).

Being about the autonomy of Band Councils to pass self-governing by-laws, the *Indian Act* by-law powers (considered apart from the rest of the *Indian Act*) fit into both categories. The right to self-government, as part of the larger right of self-determination, is recognized as a fundamental collective human right of Indigenous

⁷⁹ *R v Lewis*, *supra* note 35 at para 66. With this in mind, Iacobucci J focused mainly on the usage of the word “reserve” in the *Indian Act* to conclude that Parliament intended that to restrict the scope of by-laws to the limits of the reserve.

⁸⁰ Given its history as a tool of assimilation and its continued contentious existence, I am not suggesting that other provisions in the *Indian Act* could be characterized similarly.

⁸¹ Sullivan, *supra* note 74 at 497.

⁸² See *ibid* and *British Columbia (Public Services Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 at paras 43–44 (WLN Can); and *Re Language Rights Under the Manitoba Act, 1870*, [1985] 1 SCR 721, 19 DLR (4th) 1 at para 19 (QL).

⁸³ Sullivan, *supra* note 74 at 497.

⁸⁴ *Old St Boniface Residents Assn v Winnipeg*, [1990] 3 SCR 1170, 75 DLR (4th) 385.

peoples under international law.⁸⁵ The by-law powers also set out foundational governance powers of Band Councils, similar to legislation constituting municipal governments. For these reasons, the *Indian Act* by-law powers ought to be read as being adaptable to changing social conditions, including the important need for First Nations to take greater control of local matters, such as key essential services in their communities.

Further compelling interpretative arguments arise from the *Spraytech* decision. The case involved a municipality that adopted a by-law restricting the use of pesticides pursuant to its power to make by-laws to “secure peace, order, good government, health and general welfare in the territory of the municipality” under s 410(1) of the province’s municipal legislation.⁸⁶ Local landscaping and lawn care companies challenged the validity of the legislation, alleging the pesticide by-law was in conflict with both provincial and federal legislation.⁸⁷ The Supreme Court upheld the validity of the by-laws. The majority’s decision was informed by the principle of subsidiarity. In this regard, the majority found the open-ended or “omnibus” language of s 410(1) to confer on municipalities the ability to address new challenges, without requiring amendment of the provincial enabling legislation.⁸⁸ By acting to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants, the by-law fell squarely within the “health” component of s 410(1).⁸⁹ A significant factor in this determination was the fact that the town’s pesticides by-law arose in response to many residents’ concerns about the use of pesticides and requests of the city to take action.⁹⁰ What this demonstrates, without the Court specifically saying so, was the majority taking an adaptive approach to the interpretation of the by-law powers, allowing the interpretation of s 410(1) to adapt to changing social conditions.

In the context of *Indian Act* by-laws, taken cumulatively, s 81(1)(a), (c) and (d) have similar language to that found in the “omnibus” clause in *Spraytech*, save for the specific reference to “general welfare” in the *Indian Act* by-law powers. Arguably, there is little distinction between “health of residence on the reserve” and “general welfare” if the former is interpreted generously. In addition, the Spallumcheen by-law is precedent that “health of residents on reserve” can be interpreted to include jurisdiction over child welfare services.

Another relevant interpretative principle in *Spraytech* was the majority’s finding that international human rights law informed the interpretation of by-law

⁸⁵ Brenda L. Gunn, “Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination” (2016) 38 Dal LJ 237.

⁸⁶ *Cities and Towns Act*, RSQ, c C-19, s 410(1).

⁸⁷ *Pesticides Act*, RSQ, c P-9.3; *Pest Control Products Act*, RSC 1985, c P-9.

⁸⁸ *Spraytech*, *supra* note 67 at para 19.

⁸⁹ *Ibid* at para 23.

⁹⁰ *Ibid* at para 6.

powers.⁹¹ This principle also finds support in a number of cases that have relied on the *United Nations Declaration on the Rights of Indigenous Peoples* to interpret domestic law.⁹² As it relates to powers of Band Councils to pass by-laws over essential services on reserve, the UNDRIP recognizes that Indigenous people have the right to self-determination,⁹³ and Article 4 provides: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”⁹⁴ Numerous other provisions in the UNDRIP further support Indigenous control over areas of essential services affecting them.⁹⁵

Finally, in addition to international law principles, our own domestic constitutional principles promoting federalism in the form of diversity of governance and respect of minorities, discussed above, further bolster an interpretation of the *Indian Act* by-law powers as authorizing Band Councils’ power to legislate over local matters affecting them.

ii. Constitutional validity

Assuming a Band by-law on essential services would be authorized pursuant to the *Indian Act*, there remains the question whether, as a delegated form of federal law, it unconstitutionally intrudes on provincial powers. Provinces clearly have authority over the provision of essential services within the province under the power over “Property and Civil Rights in the Province.”⁹⁶

On a pith and substance analysis, the first question would be whether the federal government could legislate on essential services in relation to “Indians and Lands reserved for the Indians.”⁹⁷ Although the federal government has largely

⁹¹ *Ibid* at para 30.

⁹² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess (2007) [UNDRIP]. See *Mitchell v Minister of National Revenue*, 2001 SCC 33 at paras 80–83, [2001] 1 SCR 911; *Adoption – 09201*, 2009 QCCA 1583 at fn 24; and *R v Powley* (2000), 47 OR (3d) 30, [2000] 2 CNLR 233 at para 58; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 351–354, [2012] 3 CNLR 79, aff’d 2013 FCA 75, 444 NR 120.

⁹³ UNDRIP, *supra* note 92 at art 3.

⁹⁴ *Ibid* at art 4.

⁹⁵ For example, art 5 recognizes the right of Indigenous people to maintain and strengthen their distinct political, legal, economic, social and cultural institutions; art 7(2) provides that Indigenous peoples ought not to have their children forcibly removed from the collective; art 14(1) provides that Indigenous peoples should have control over their education systems; and art 23 provides that Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

⁹⁶ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5.

⁹⁷ *Ibid*, s 91(24).

refrained from legislating on essential services on reserve,⁹⁸ I suggest that this is motivated more by lack of political will rather than a concern of lack of jurisdiction. Peter Hogg has opined that the courts likely would find the federal government has jurisdiction to pass laws relating to First Nations on subjects that would otherwise be viewed as coming under provincial jurisdiction:

What kinds of laws may be made in relation to Indians? The federal Parliament has taken the broad view that it may legislate for Indians on matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians. ...

If s. 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary. It seems likely, therefore, that the courts would uphold laws which could be rationally related to intelligible Indian policies, even if the laws would ordinarily be outside federal competence. This is not to deny Lysyk's caveat about the danger of assuming that a law which applies only to Indians is a law "in relation to" Indians. For example, a law which stipulated a special speed limit for Indians driving automobiles on public highways would be hard to sustain as an "Indian" law, because it does not seem to bear any relationship to any intelligible legislative policy in regard to Indians.⁹⁹

Hogg's suggestion for the test of when federal legislation (or a delegated by-law) overlapping provincial powers is valid—*when there exist intelligible policy reasons to justify special rules for Indians*—is helpful. In the case of Band by-laws on essential services, this would ensure the rules are culturally competent by meeting the particular needs and circumstances of First Nations peoples and their communities. This is an intelligible policy justification for having special rules for First Nations. Thus, there is a strong case for finding *Indian Act* by-laws on essential services to be, in pith and substance, in relation to s. 91(24) and any overlap with provincial jurisdiction would constitute merely incidental effects.¹⁰⁰ In addition, the fact that the constitutional doctrine known as 'singling out' operates to prevent provinces from legislating special rules for First Nations (whether for ameliorative or adverse purposes), bolsters the case.¹⁰¹

⁹⁸ The only exception I am aware of is Part II of the *Canada Assistance Plan*, 1966 SC c 45 (repealed SC 1995, c 17, ss 31–32), entitled "Indians", which was legislation permitting Canada and individual provinces to enter cost-sharing agreements over the delivery of provincial social programs on reserve. However, no province, except Ontario, has ever agreed to share responsibility with Canada over the provision of services on reserve.

⁹⁹ Hogg, *supra* note 37, 28-4 to 28-5 [emphasis added and references omitted]. It should further be noted that the succession provisions in the *Indian Act* were upheld as being within Parliament's s 91(24) jurisdiction in *Canada (AG) v Canard*, [1976] 1 SCR 170, 4 NR 91.

¹⁰⁰ *Lacombe*, *supra* note 70 at para 3.

¹⁰¹ See *R v Sutherland*, [1980] 2 SCR 451, 113 DLR (3d) 374; *Leighton v British Columbia*, [1989] 4 WWR 654, 57 DLR (4th) 657 (BC CA); and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 at para 179 (QL). The 'singling out' doctrine was somewhat attenuated, however, by the Court in *Kitkatla Band v British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31, [2002] 2 SCR 146, where it held that "[t]he mere mention of the word "[A]boriginal" in a statutory

Another compelling argument is that neither Parliament nor the provinces, for the most part, wish to legislate in the area of essential services on reserve. For more than 50 years, each has been saying the other is responsible for providing essential services to First Nations.¹⁰² If neither the federal nor provincial governments are willing to assume jurisdiction in relation to essential services on reserve, then the Courts should be reluctant to rule that First Nations lack jurisdiction. The observation made by Justices Binne and LeBel in *Lafarge* that “federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum” is apt.¹⁰³

Finally, the principle of subsidiary, that law making is “best achieved at a level of government that is not only effective, but also closest to the citizens affected”¹⁰⁴ and the promotion of diversity in governance and respect for minorities—here, the respect for First Nation governments which have the right to self-determination and self-governance recognized both in domestic and international law—clearly militate in favour of a finding of constitutional validity of essential services by-laws passed by First Nation governments.

IV. MOVING FORWARD WITH SELF-GOVERNMENT VIA *INDIAN ACT* BY-LAWS

Based on the above analysis, there is a credible basis to argue that, pursuant to adaptive reading of the s 81 power over “health of residents on reserve” and “law and order”, First Nations have the authority to pass by-laws over child welfare matters on reserve, provide for culturally-appropriate programming for social development, including eligibility criteria and rates relating to social assistance, and create programs related to child care, care of the elderly and those with a disability. It would also be reasonable to view these powers as extending to all matters of local and internal nature affecting the well-being of First Nations individuals, children families or the community as a whole, language preservation, education and culture, community health and safety and policing issues.

The exact end limits of these powers are difficult to define in the abstract, but there are tools available to assist in this effort. The rights set out in the UNDRIP are a helpful indication of the types of rights Indigenous communities ought to have

provision does not render it *ultra vires* the province” at para 66. Post-*Kitkatla*, it would still appear that provincial legislation giving special treatment *specifically* to Aboriginal people would be *ultra vires*. But see Jean Leclair, “The *Kitkatla* Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters” (2003) 21 SCLR (2d) 73. See also Kent McNeil, “Culturally Modified Trees, Indian Reserves and the Crown’s Fiduciary Obligations” (2003) 21 SCLR (2d) 105 at 111; *NIL/TU, O Child and Family Services Society v BC Government and Service Employees’ Union*, 2010 SCC 45 at para 41, [2010] 2 SCR 696.

¹⁰² Shewell & Spagnum, *supra* note 13 at 3–6; Constance MacIntosh, “Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health” in Colleen M Flood, ed, *Just Medicare: What’s In, What’s Out, How We Decide* (Toronto: University of Toronto Press, 2006) 193.

¹⁰³ *Lafarge*, *supra* note 62 at para 4.

¹⁰⁴ *Spraytech*, *supra* note 67 at para 3.

control over for the well-being of those communities. Indeed, this is precisely what Justice Binnie did in his concurring reasons in *Mitchell v MNR*, looking to the provisions of the UNDRIP to assist their determination on the outer-limits of a potential Aboriginal right to cross-border trade.¹⁰⁵ As well, the test proposed by Hogg for when a federal law for Indians may overlap provincial jurisdiction—*when there exists intelligible policy reasons to justify special rules for Indians*—will most certainly be useful in helping define the outer counters of such rights.

It should be noted that exercising self-government via *Indian Act* by-laws represents only half the solution to the problems presented by current system of program devolution. The problem of inadequate funding for First Nations services will still remain. Although some First Nations generate a significant amount of their own revenue, most First Nations (like other governments) require transfer payments from the federal government in order to finance program and service delivery. Currently, unlike the equalization, health and social transfer agreements between the federal government and the provinces, the fiscal agreements between Canada and First Nations are made under strict conditions, notably the requirement for First Nations to follow the programs terms and conditions set by the Canadian government (which, as noted earlier, requires First Nations to follow standards comparable to provincial standards).¹⁰⁶

There is therefore an obvious tension between First Nations asserting control over their programs through by-law powers and the terms of existing funding agreements. However, a recent landmark decision from the Canadian Human Rights Tribunal regarding funding for child welfare services on reserve may provide grounds to challenge the Department should its official insist on adherence to INAC terms and conditions in order for First Nations to receive funding.¹⁰⁷ This is because, in addition to finding that child welfare services on reserve were discriminatory due to the inadequate provision of funding, the Tribunal also held that the requirement that the funding standards mirror provincial standards was discriminatory, as it failed to reflect the needs and circumstances of First Nations children and families and was not culturally appropriate. The Tribunal stated:

[H]uman rights principles, both domestically and internationally, require [INAC] to consider the distinct needs and circumstances of First Nations children and families living on-reserve – including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of

¹⁰⁵ *Mitchell v MNR*, 2001 SCC 33 at paras 81–84, [2001] 1 SCR 911.

¹⁰⁶ See Scott Serson, “Reconciliation: for First Nations this must include Fiscal Fairness” in Gregory Younging, Jonathan Dewar & Mike DeGagné, eds, *Response, Responsibility, and Renewal: Canada’s Truth and Reconciliation Journey* (Ottawa: Aboriginal Healing Foundation, 2009) 163 at 170.

¹⁰⁷ *First Nations Child and Family Caring Society*, *supra* note 11. The Canadian government will not appeal the decision: “Federal government won’t appeal ruling that found it discriminated against children on reserves” CBC News (22 February 2016), online: <<http://www.cbc.ca/news/politics/federal-government-not-appeal-children-reserves-1.3458969>>.

child and family services to First Nations children and families living on-reserve.¹⁰⁸

It follows that if funding formulas requiring provincial comparability are discriminatory for failing to account for First Nations needs and circumstances, so are program standards requiring provincial comparability. Thus, if Canada were to withhold funding to a First Nations because it wanted to follow its own community-based standards set out in its by-laws, Canada's insistence on First Nations' adherence to INAC's program standards would be vulnerable to challenge as discriminatory for clearly disregarding the First Nations' legitimate preference for community-based, culturally relevant standards.¹⁰⁹

The *Indian Act* by-law powers' status as a 'delegated' form of governance, as opposed to a recognition of an inherent right to self-government, is a principled objection that First Nations governments who explore such powers will have to be prepared to address. Although this argument is legitimate, as I have argued, given the *status quo* on reserve, pragmatism should prevail: it is better to have some form of effective control of local matters and programs and service now than none at all. As well, in the past, this objection appears to have been primarily related to the fact that by-laws were subject to Ministerial approval, which is no longer the case.¹¹⁰ Moreover, although there are many scholars and lower courts who have taken for granted that the legislative powers arising under self-government and modern-day treaties are a recognition of the inherent right of self-government, at least one appellate decision has characterized these treaties as delegations of provincial and federal powers.¹¹¹ In practice, there may be very little difference between exercising 'delegated' powers and exercising 'inherent' powers in terms of permitting effective control by First Nations. Furthermore, as was done in the Spallumcheen by-law, a First Nation could cite *both* the relevant *Indian Act* by-law powers as well as the inherent right to self-government as the source of its authority. It is also worth pointing out that, as compared to negotiated self-government where questions of paramouncy between laws remain to be negotiated and leaving question of the extent to which First Nations laws will be subordinate to conflicting provincial or federal laws uncertain, the *Indian Act* by-law powers provide relatively strong paramouncy rules in favour of First Nations' by-laws.

Obviously, as First Nation governments begin to contemplate the exercise of by-law powers over essential services, there will be many further issues to consider. Given that many First Nations face serious capacity issues (both in terms

¹⁰⁸ *First Nations Child and Family Caring Society*, *supra* note 11 at para 465.

¹⁰⁹ The author is currently developing a paper exploring this argument further.

¹¹⁰ See Nancy A Morgan, "Legal Mechanisms for Assumption of Jurisdiction and Control over Education by First Nations" (1998) First Nations Education Steering Committee, online: <http://www.fnesc.ca/wordpress/wp-content/uploads/2015/05/PUB-GOV-Legal_Legal_Mechanisms_Cpyrt1995.pdf>.

¹¹¹ See *Chief Mountain v British Columbia (Attorney General)*, 2011 BCSC 1394 at paras 203–288, aff'd 2013 BCCA 49, leave to appeal to the Supreme Court of Canada dismissed with costs.

of financial and human resources), it would likely be more effective for First Nations to work together in preparing draft by-laws. While by-laws are passed on a band-by-band basis, there is nothing preventing groupings of Bands, by Indigenous Nation or by region for example, from seeking to adopt identical by-laws simultaneously to provide for uniform law applying on all reserves in a geographic region.¹¹²

The by-law powers also give flexibility to Bands to proceed at their own pace in terms of law-making, allowing them to borrow from federal or provincial laws through incorporation by reference as deemed appropriate (so long as there are some differences in content to meet the test identified by Hogg for justifying special rules for Aboriginal peoples),¹¹³ and also to amend their laws to incorporate greater amounts of Indigenous laws, concepts and principles over time. Further, in the drafting process, subject matter experts ought to be consulted, especially those with familiarity of the short-comings with provincial laws which adversely impact First Nations peoples, as should lawyers with legislative drafting experience.

Although not technically required by the by-law provisions, a community vote evidencing significant support for a by-law would add to the by-law's political legitimacy, as was done in the case of the Spallumcheen by-law.¹¹⁴ As well, as in *Spraytech*, community support can inform the need for courts to interpret the by-law powers adaptively to encompass the social change sought by community members.

Finally, other issues that will need to be further analyzed is whether s 81(1) essential services by-laws can permissibly have any extra-territorial effect,¹¹⁵ how to ensure proper enforcement and publication of First Nation by-laws, and providing community-based, cultural appropriate dispute resolution mechanisms.

V. CONCLUSION

Although self-government has been recognized as an inherent right of First Nations people in this country, the preferred method to implement such rights, through

¹¹² An example of this is *R v Alfred*, [1993] 3 CNLR 88, [1993] BCJ No 2277 (QL).

¹¹³ An example of this is *R v Blackbird*, *supra* note 71.

¹¹⁴ In the context of First Nations custom election codes, the courts have stated that the validity of such laws is primarily one of political and not legal legitimacy. On that basis, a court should be hesitant to intervene, so long as the constitution is based on the broad consensus of those who are members of the Band: see *Bigstone v Big Eagle*, [1993] 1 CNLR 25, 52 FTR 109 (FC TD) and *Pahtayken v Oakes*, 2009 FC 134, 341 FTR 132, *aff'd* 2010 FCA 169.

¹¹⁵ Early cases on s 81(1)(o) fishing by-laws suggested extra-territorial application of by-laws off-reserve was not possible (e.g., *R v Lewis*, *supra* note 35). But see *Four B Manufacturing v United Garment Workers*, [1980] 1 SCR 1031, 102 DLR (3d) 385, where the Supreme Court suggested that the federal power to make laws in relation to Indians is the same whether Indians are on or off-reserve. By its language, the s 81(1)(a) power over "health of residents on reserve" appears limiting, however, there may be room to argue that extension of benefits, programs or protections to community members living off-reserve benefits the long-term "health of resident on reserve". The courts have also taken a more liberal interpretation to "on reserve" in dealing with s 83 powers: see *Osoyoos Indian v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746.

modern land claim and self-government negotiations, results in the implementation of these rights being decades away for many First Nations. This problem is particularly acute because there is a real need for culturally-appropriate legislation meeting the needs and circumstances of First Nations, in particular in the area of essential services on reserve. The current model of program devolution does not allow for this. For reasons of policy (it will produce community-based, culturally-appropriate laws), practicality (Band governments are closest to the citizens affected) and principle (First Nations have a recognized inherent right to self-government), these are areas over which First Nation governments ought to be able to exercise control.

In this paper I have argued that the *Indian Act* by-law powers, particularly those enumerated at s 81(1) of the *Act*, provide jurisdiction to First Nation governments to pass by-laws in relation to essential services, and there is at least one valid precedent that exists in this regard. Modern interpretive and constitutional principles support the conclusion that such by-laws would be both statutorily authorized and constitutionally valid. Further, the Ministerial power to disallow such by-laws was finally repealed in December 2014 and no longer stands as a barrier to passing these laws. Overall, the repeal of the disallowance power for s 81(1) presents an exciting opportunity which First Nations should certainly explore.