

Aboriginal Representation in Government: A Comparative Examination

By Jennifer Schmidt

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ABSTRACT

This paper briefly summarizes three options that have been recommended in Canada to improve Aboriginal representation at the federal level: the creation of exclusively Aboriginal electoral districts, the creation of an advisory third House at the federal level, composed of representatives from each First Nation, and the creation of a new province that would initially be composed of existing reservation land. The paper also examines the experiences in other jurisdictions that have attempted to address issues of Aboriginal representation, specifically New Zealand, Finland, Sweden, Norway and the state of Maine. These examples demonstrate the advantages and disadvantages of the proposed options, and offer important lessons for the Canadian context. Based on these comparisons, the paper concludes that the most realistic proposals for Canada are the creation of Aboriginal electoral districts or a separate Aboriginal parliament. Although neither of these options will completely eliminate the problem of Aboriginal under-representation in government, both possess significant potential to create change. A separate parliament for Aboriginals would allow a significant measure of representation, while recognizing the heterogeneity on the Aboriginal population. Likewise, Aboriginal electoral districts would guarantee an immediate increase in the number of Aboriginal representatives in the House of Commons. The implementation of either of these approaches, coupled with extensive consultation of Aboriginal groups, would send an important message to the Aboriginal peoples of Canada that the federal government is prepared to implement changes to deal with their ongoing concerns.

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1. INTRODUCTION

As numerous authors have pointed out, Canadian Aboriginals and their interests are underrepresented in the federal government generally, and in the House of Commons in particular. Some scholars and many Aboriginal groups see self-government as a solution to this problem. However, moving self-government from the realm of theory to reality will require the resolution of a number of complex issues. Negotiations in British Columbia, which have been in progress for years, demonstrate that this resolution may be a long time in coming. In the meantime, governments need to take steps to ensure that the interests of Aboriginals are better represented in the current federal structure. As Ovide Mercredi, former Vice-Chief of the Assembly of First Nations, has pointed out, “there is no inconsistency in Canada recognizing our collective rights of self-government and us still getting involved and maintaining our involvement in the political life of the state, which means getting involved in federal elections.”¹

This paper will briefly summarize three specific options that have been recommended in Canada to improve Aboriginal representation at the federal level. These are: the creation of exclusively Aboriginal electoral districts, the creation of an advisory third House at the federal level, composed of representatives from each First Nation, and the creation of a new province that would initially be composed of existing reservation land.

Other jurisdictions have experienced challenges similar to those Canada is currently facing with respect to increasing indigenous representation in government. New Zealand opted for Aboriginal electoral districts, and three Scandinavian countries chose to create separate Houses for their indigenous peoples. The U.S. state of Maine guarantees seats in its legislature for representatives of its two largest First Nations. The real-life experiences of these jurisdictions are an important resource to Canada in its consideration of the best approach to

¹ Statement by Ovide Mercredi at the Winnipeg public hearing of the Royal Commission on Electoral Reform and Party Financing on Aboriginal participation in Canadian political processes (19 April 1990) in Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 1 (Ottawa: Canada Communication Group, 1991) (Chair: Pierre Lortie) [“The Lortie Commission”] at 177.

take. They demonstrate the advantages and disadvantages of each option; they are a living lesson that must be taken into consideration when creating a “Made in Canada” solution.

2. RECOMMENDATIONS FOR CANADA

2.1. Aboriginal Electoral Districts

Since the late 1980s, a number of committees, commissions and academics have recommended the creation of Aboriginal electoral districts (AEDs) as a means of improving Aboriginal representation in the current federal structure.² This solution is somewhat similar to the systems used in New Zealand and Maine, which will be discussed later in the paper.

The most well known proponent of AEDs is the Royal Commission on Electoral Reform and Party Financing, better known as the Lortie Commission. After extensive consultation with both academics and Aboriginal groups, the Commission made a number of recommendations on the creation and implementation of AEDs. These recommendations were echoed in the writings of a number of committees and scholars. Each proponent suggested a general model for Canadian AEDs that included some or all of the following features:

- ❖ In no circumstances should the creation of an AED derogate from the right to self-government or any other Aboriginal right.
- ❖ The process for creating AEDs should be guaranteed, rather than the AED seats themselves. This would allow for flexibility as the Aboriginal population increases or decreases.
- ❖ AEDs would geographically overlap general electoral districts (GEDs), but would not span provincial boundaries.
- ❖ MPs elected to AEDs would have the same rights, powers and privileges as MPs elected to GEDs.

² The Lortie Commission, *ibid*; Canada, Committee for Aboriginal Electoral Reform, *The Path to Electoral Equality* (Ottawa: Committee for Aboriginal Electoral Reform, 1989) (Chair: Senator Leonard Marchand); Roger Gibbins, “Electoral Reform and Canada’s Aboriginal Population” in Robert Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada* (Ottawa: Canada Communication Group, 1991) 153; Augie Fleras, “Aboriginal Electoral Districts for Canada: Lessons from New Zealand” in Robert Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada* (Ottawa: Canada Communication Group, 1991) 67; Leonard Marchand, *Aboriginal Electoral Reform: A Discussion Paper* (N.p., [1993?]); Leonard Marchand, “Proportional Representation for Native Peoples” (1990) 13:3 *Canadian Parliamentary Review* 9; Trevor Knight, “Electoral Justice for Aboriginal People in Canada” (2001) 46 *McGill L.J.* 1063; Tim Schouls, “Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation versus Voter Equality” (1996) 29 *Canadian Journal of Political Science* 729.

- ❖ The total number of AEDs created should be roughly proportional to the number of Aboriginals in Canada *who register to vote in an AED*.
- ❖ Boundaries of AEDs should reflect realities of Aboriginal tribal organization. In other words, AEDs should be allowed to geographically overlap with each other, as well as with GEDs.
- ❖ AED boundaries must be drawn in close consultation with Aboriginal groups.
- ❖ AEDs would not add to the total number of MPs in the House of Commons; that number would remain constant. Therefore, the number of GEDs would be reduced.
- ❖ Only Aboriginal electors would be eligible to vote in an AED. Likewise, only an Aboriginal person could seek election in an AED.
- ❖ Aboriginal voters could register to vote in an AED or a GED, but not both.
- ❖ Status as an Aboriginal person for the purposes of voting in an AED should be based on self-identification as an Aboriginal and community acceptance. Community acceptance means that an Aboriginal community accepts the person's claim to Aboriginal status.
- ❖ Where a person or group challenges a prospective Aboriginal elector's eligibility to vote in an AED, the burden of proof should lie with the challenger.
- ❖ Aboriginal voters should be permitted to register for AEDs using local shelters, band offices, etc. as their home addresses. This would allow persons without a fixed address to vote.
- ❖ The number of AEDs should be reassessed every ten years in order to ensure that proportionality is maintained (every other census).

Arguably, the single largest obstacle to the model described above is that the Constitution does not allow for inter-provincial electoral districts, as it assigns seats to the provinces themselves.³ The Lortie Commission suggested that, in order to avoid the necessity of a constitutional amendment, AEDs should be created only within provincial boundaries.⁴ However, this is problematic because the Aboriginal population in the Atlantic Provinces is both scattered and small. No Atlantic province alone possesses a large enough number of

³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict. C. 3, s. 37, reprinted in R.S.C. 1985, App. II, No. 5.

⁴ Lortie Commission, *supra* note 1 at 176.

Aboriginal people to warrant its own AED, if population is taken as the primary factor in determining the appropriate number of AEDs for a province.⁵

The Committee for Aboriginal Electoral Reform, chaired by then-Senator Leonard Marchand, proposed that the Constitution should be amended in order to allow for AEDs that span more than one province. This would allow for the creation of a single Atlantic AED, which would improve the representation of Atlantic Aboriginals.⁶ As the Committee itself noted, however, this would not take account of the differences between Aboriginal groups in the region. A solution that was suggested to the Committee during its consultations with Aboriginal communities was that the Atlantic region should have more than one AED, even though this would not be warranted based on population.

Political scientist Roger Gibbins also noted the difficulty inherent in adequately representing Aboriginal groups with disparate interests. In a research report prepared for the Lortie Commission, Gibbins noted that there are far more “Indians” than Métis and Inuit in Canada. He argued that there should be separate AEDs for each of these constitutionally entrenched groups, in order to prevent the interests of the Métis and Inuit peoples from being “swamped.”⁷ While the Lortie Commission acknowledged the diversity of the three groups, it nevertheless argued that “it is a fundamental objective of democracy to reconcile, as much as possible, differences among communities within constituencies and to represent the interests and concerns of communities within each constituency.”⁸ It therefore did not recommend Gibbins’ proposal in its Final Report to Parliament.

Another idea presented to but not adopted by the Lortie Commission was that Aboriginals should be permitted to vote in both AEDs and GEDs. Although Augie Fleras agreed that this would be double representation, he argued it was nevertheless justified: “Attainment of

⁵ *Ibid.*

⁶ Committee for Aboriginal Electoral Reform, *supra* note 2 at 37.

⁷ Gibbins, *supra* note 2 at 164.

⁸ Lortie Commission, *supra* note 1 at 186.

true equality may entail special considerations that redefine the grounds for entitlement.⁹ The Supreme Court of Canada has acknowledged that equal treatment does not necessarily mean equality.¹⁰ However, non-Aboriginal voters who felt their own equality rights had been violated would likely challenge the constitutionality of such a system.

Another variation from the general model was put forward by Senator Marchand. He proposed that the number of AEDs should be based on the number of Aboriginals in Canada, not the number of Aboriginals who register to vote in AEDs.¹¹ The reasoning behind this parallels Fleras' – equality for Aboriginals may necessitate treatment that is not simply equivalent to what non-Aboriginal voters receive.

2.2. A Separate Aboriginal Parliament

Another potential solution to the question of how to improve Aboriginal representation is the creation of a separate Aboriginal parliament similar to those in Fennoscandia, which will be discussed later in this paper. The Royal Commission on Aboriginal Peoples (“RCAP”) advocated this approach in its 1996 report, after arguing that AEDs were not the best solution:

[W]e are concerned that efforts to reform the Senate and the House of Commons may not be compatible with the foundations for a renewed relationship built upon the inherent right of Aboriginal self-government and nation-to-nation governmental relations. Three orders of government imply the existence of representative institutions that provide for some degree of majority control, *not minority or supplementary status*.¹² (emphasis added)

According to RCAP, the Aboriginal parliament, or “House of First Peoples,” should initially act as an advisory body. It would provide advice on anything that affects Aboriginal

⁹ Fleras, *supra* note 2 at 97.

¹⁰ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“Meiorin”).

¹¹ Marchand, “Proportional Representation”, *supra* note 2 at 10.

¹² Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 377 [RCAP].

interests, directly or indirectly, and could receive references from the House of Commons or Senate for investigations.¹³

RCAP argued that in order to have a real impact, the House of First Peoples would eventually need “real power.” This was defined as “the power to initiate legislation and to require a majority vote on matters critical to the lives of Aboriginal peoples.”¹⁴ Because the addition of a third House with such powers would require a constitutional amendment, RCAP recommended that the House of First Peoples initially be created by Parliament, in consultation with Aboriginal groups, as an advisory body only.

According to RCAP, members of the Aboriginal parliament (MAPs) should be elected by their nations or peoples. They recommend at least one MAP for each Aboriginal nation. They further suggest that larger groups like the Cree or Ojibwa First Nations might be entitled to more than one MAP. Enumeration of Aboriginal voters would take place at the same time as enumeration for federal elections. Likewise, elections for the House of First Peoples would take place at the same time as federal elections, in order to add legitimacy to the process.¹⁵

There are two major difficulties with the concept of an Aboriginal House. The first stems from the fact that it would initially be an advisory body. By their very nature, advisory bodies have the power only to make recommendations to the government. Governments are not generally bound to follow these recommendations. As is illustrated by experiences in Fennoscandia, which will be discussed in the next Part, the government may well choose to ignore recommendations made by the House of First Peoples.

Arguably, the easiest way to prevent the government from disregarding these recommendations would be to grant the “real power” mentioned above. Herein lies the second difficulty – this would require a significant constitutional amendment. It is reasonable to expect

¹³ *Ibid.* at 379-80.

¹⁴ *Ibid.* at 377-78. Like the above groups that recommended AED creation, RCAP was quite clear that the House of First Peoples should not be viewed as a substitute for Aboriginal self-government.

¹⁵ *Ibid.* at 381.

that a proposal to create a third House would be quite contentious. Much consultation with both the provinces and Aboriginal groups would be necessary before such a step could be taken.

2.3. A New Province

To increase Aboriginal representation outside of self-government, some scholars have suggested that a new province, called “First Peoples,” should be created.¹⁶ The new province would be a non-contiguous landmass, initially composed of all Indian reserves south of the 60th parallel. It would not include land from the territories, as the Aboriginal population in these areas is believed to have more effective representation – their MPs tend to be Aboriginals. The size of the new province would be subject to change as various land claims and treaty disputes are settled. The province would have political and electoral powers equal to those of other provinces, and both Aboriginal and non-Aboriginal people could live there.¹⁷

The most substantial obstacle to this proposal is the Constitution, which would have to be amended to allow for the creation of a new province.¹⁸ Constitutional amendments require the approval of 2/3 of the provinces, constituting at least 50% of the Canadian population. Since the federal government owns reserve lands, existing provinces would not have to cede land to the new province. However, in practical terms, reserves function as part of the provinces. It seems unlikely that the requisite number of provinces would agree to an amendment that would suddenly create geographic “holes” throughout them.

A further problem with a First Nations province would be the administrative difficulties it would create by virtue of its non-contiguous nature. Under section 92 of the *Constitution Act, 1867*, the provinces have a number of responsibilities, such as education, intra-provincial

¹⁶ David Elkins, “Aboriginals and the Future of Canada” in Douglas Brown, ed., *Aboriginal Governments and Power Sharing in Canada. Summary of the Proceedings of a Conference Organized by the Institute of Intergovernmental Relations Held February 17 – 18, 1992* (Kingston: Institute of Intergovernmental Relations, 1992), Thomas Courchene & Lisa Powell, *A First Nations Province* (Kingston: Institute of Intergovernmental Relations, 1992).

¹⁷ Elkins, *ibid.* at 53.

¹⁸ *Constitution Act, 1982*, s. 42(f) being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

transportation and health care. Several difficulties might arise when a province that is scattered across the country attempts to set up its own health care system. The extra expenses that would be associated with such an endeavour could be immense.

David Elkins, a primary supporter of this solution, has admitted that the proposal “might not be acceptable to many people.”¹⁹ Its merits were vigorously debated at a 1992 conference on Aboriginal governments and power sharing. Attendees attacked several aspects of the plan, including Elkins’ suggestion that this would be sufficient to satisfy Aboriginal demands for self-government. In spite of this, proponents of “First Peoples” argue that the potential difficulties are outweighed by the advantages that Canada’s Aboriginal peoples stand to gain in terms of effective representation.²⁰

3. THE EXPERIENCES OF OTHER JURISDICTIONS

3.1. Guaranteed Representation: Designated Aboriginal Seats in Legislative Bodies

3.1.1. New Zealand

The Māori are the indigenous people of New Zealand, comprising roughly 10% of the country’s population. Compared to Aboriginals in Canada, the Māori are relative newcomers to their land, having settled there an estimated 700-1100 years ago.²¹ Their early relationship with the pākehā, or white settlers, was very turbulent and eventually culminated in the “New Zealand Wars” (1843-1872).²² The fact that the Māori remained a physical threat to the settlers, even after their defeats in these battles for land, had an impact on their treatment by the New Zealand government. The passage of the *Māori Representation Act* in 1867 provided the Māori with four

¹⁹ Jill Wherrett, “Digest of Conference Discussion” in Douglas Brown, ed., *Aboriginal Governments and Power Sharing in Canada. Summary of the Proceedings of a Conference Organized by the Institute of Intergovernmental Relations Held February 17 – 18, 1992* (Kingston, ON: Institute of Intergovernmental Relations, 1992) 7 at 19.

²⁰ Elkins, *supra* note 16 at 65.

²¹ David Pond, *Guaranteed Aboriginal Seats in Legislatures*, Current Issue Paper #127 (Toronto: Legislative Research Service, 1992) at 4.

²² A brief overview of these conflicts can be found online: Danny Keenan, *The New Zealand Wars* <<http://www.newzealandwars.co.nz/>>.

guaranteed seats in the House of Representatives.²³ These seats were originally intended as a temporary measure, designed to pacify the Māori and prevent further conflict.²⁴ However, in 1893 they were made permanent.²⁵

Although the original system for electing Māori representatives to the House was complex and problematic, it was retained almost unchanged for more than 125 years. After New Zealand's binding referendum on electoral reform in 1993, the government revised the electoral system with the *Electoral Act*. This revision changed New Zealand's electoral system from a first past the post system (FPP) to a mixed-member proportional system (MMP). It also had a significant effect on the designated Māori seats. Where the number of Māori seats had previously been frozen at four, the new legislation provided that the number of Māori seats would be increased to proportionally represent the number of electors on the Māori rolls. Initially, this translated to five seats. At present, there are seven guaranteed Māori seats in New Zealand's House of Representatives.²⁶

Every five years, immediately following each national census, Māori voters have the opportunity to choose which electoral roll they wish to be listed on. This choice cannot be altered until the next census. If voters choose to be listed on the general electoral roll, they vote for a candidate in a general riding. If they choose to be listed on the Māori electoral roll, they vote for a candidate in a Māori riding. In order to take part in this "Māori Electoral Option," a voter must have indicated on his or her census questionnaire that he or she is of Māori descent.²⁷ Once the electoral rolls are updated, the Representation Commission determines

²³ Peter Niemczak, *Aboriginal Political Representation: A Review of Several Jurisdictions* (Ottawa: Library of Parliament, Research Branch, 1994) at 5.

²⁴ *Ibid.*

²⁵ Fleras, *supra* note 2 at 71.

²⁶ Elections New Zealand, "Māori and the Vote," online: A History of the Vote in New Zealand <<http://www.elections.org.nz/elections/pandr/vote/maori-seats.html>> Voters registering for the first time can also participate in the Māori Electoral Option, even if they register between censuses.

²⁷ Elections New Zealand, "The Māori Electoral Option," online: New Zealand's Electoral System <<http://www.elections.org.nz/elections/esyst/mroll.html>>.

the appropriate number of Māori and general seats and re-draws electorate boundaries accordingly. It does this in consultation with Māori groups.²⁸

Like voters on the general electoral roll, voters on the Māori roll have two votes under the MMP system. In each case, the first vote is used to elect a representative for the voter's riding. The second vote is used to indicate which party the voter would most like to see in the House of Representatives. Every voter chooses among the same parties on the party vote regardless of whether he or she is enrolled on the general roll or on the Māori roll.²⁹ It is therefore possible that a Māori roll voter might choose to cast her second vote for the National Party, which traditionally represents pākehā interests, while a general roll voter might cast his party vote for the Mana Motuhake Party, which is a Māori interest party.

Representatives for the Māori seats are elected during general elections. Beyond the fact that only voters listed on the Māori roll may vote for candidates in Māori ridings, the mechanics of the election are identical to those of the general ridings. As with general ridings, candidates in Māori ridings have the option of running as independents or as part of a registered political party. At present, all Māori members of parliament are part of a registered party.

The role of "guaranteed seat" representatives in Parliament is identical to that of regular representatives. There are no special privileges or restrictions that attach to the Māori ridings, other than those already noted.

There is some debate as to whether this method of representation is effective. Barker, *et al.* note that Māori representation under New Zealand's MMP system is fair in the sense that the number of Māori MPs is proportionate to the number of Māori in the general population.³⁰ However, they argue that in terms of "effective representation", which refers to the ability of a

²⁸ Elections New Zealand, "How Electoral Boundaries are Drawn," online: New Zealand's Electoral System <http://www.elections.org.nz/elections/esyst/boundaries_drawn.html>.

²⁹ Elections New Zealand, "How Parliament is Elected," online: New Zealand's Electoral System <http://www.elections.org.nz/elections/esyst/govt_elect.html>.

³⁰ Fiona Barker, *et al.* "An Initial Assessment of the Consequences of MMP in New Zealand," in Matthew Shugart & Martin Wattenberg, eds., *Mixed Member Electoral Systems* (New York: Oxford University Press, 2001) 297 at 318.

group to advance its interests, the New Zealand system still needs improvement. Echoing this sentiment, a comparative study conducted by Banducci, Donovan and Karp found that Māori tend to be more critical of Māori MPs, believing that they represent “big interests” rather than Māori interests.³¹ A survey conducted by the New Zealand Political Change Project in 2002 indicated that, in general, New Zealanders believe that the new system represents a positive change for representation of minority groups.³²

3.1.2. *Maine*

The state of Maine also uses a system of guaranteed representation for its Aboriginal population, which is comprised primarily of the Penobscot and Passamaquoddy tribes. Informal representation began as early as 1823, when the Penobscot tribe sent its first recorded delegate to the State Legislature.³³ The arrangement was formalized in 1866 for the Penobscot tribe and in 1927 for the Passamaquoddy.³⁴ Each tribe was granted a single representative in the State Legislature. These representatives are referred to as Tribal Government Representatives.

The role of these representatives evolved throughout the last century, with various rights and privileges being granted and revoked at different times. At present, the Tribal Government Representatives have the same rights and privileges as regular Representatives with three exceptions. First, Tribal Government Representatives cannot vote on legislation. Second, they are somewhat restricted in introducing legislation to the House of Representatives. Until 1999, Tribal Government Representatives could not introduce legislation at all. This changed with the amendment of Joint Rule 206(5), which allows the Tribal Government Representatives to jointly

³¹ Susan Banducci, Todd Donovan & Jeffrey A. Karp. “Minority Representation, Empowerment and Participation” *Journal of Politics* [forthcoming] at 17-18, online: <http://www.jkarp.com/pdf/jop_2003.pdf>. Banducci suggests that this sentiment is likely tied to the association of Māori MPs with the National Party after the first MMP election. The policies of the National Party, which typically represents right-wing interests, are widely regarded as incompatible with Māori interests.

³² New Zealand, Electoral Commission, “Survey on the Effects of MMP” (2003) 26 *Electoral Brief* 5 at 5.

³³ Niemczak, *supra* note 23 at 8.

³⁴ *Ibid.*

sponsor any bill.³⁵ Finally, the Tribal Government Representatives do not have official status as “Members” of the State Legislature. According to the Attorney General of Maine, they are “non-members who occupy the special status of being ‘Tribal Government Representatives.’”³⁶

Because of the limited power of the Tribal Government Representatives, members of the Penobscot and Passamaquoddy tribes are also entitled to vote in general elections for regular representatives. They have no special rights or privileges with respect to general elections.

There are no provisions in Maine’s law that allow for an increase or decrease in the number of Tribal Government Representatives. This is not a live issue at present, however, as the Aboriginal population in the state is quite small (approximately 4500 or 0.4%).³⁷ There is also very little critical commentary about Maine’s system of guaranteed representation.

There is a movement to grant the Tribal Government Representatives powers equal to those of regular members of the state legislature. In 1999, Maine struck a Joint Senate-House committee to examine this issue. In its final report, this committee recommended that Tribal Government Representatives be given equal powers. At the time of writing, this recommendation had not been addressed by the State of Maine.³⁸ Maine’s Attorney General has opined that because the elections of the Tribal Government Representatives are an internal tribal matter, not regulated by the State of Maine, and because the Tribal electorates are about ¼ of the size of general ridings, granting full powers to these representatives would be a violation of both the State and the federal constitutions.³⁹

³⁵ S. Glenn Starbird, Jr., “A Brief History of Indian Legislative Representation,” ed. by Donald Soctomah and Sue Wright (2003), online: Maine State Law and Legislative Reference Library <<http://www.state.me.us/legis/lawlib/indianreps.htm>>

³⁶ U.S., Office of the Attorney General (Maine), *Opinion of the Attorney General No. 99-1* (Me. Op. Atty. Gen. No. 99-1) (1999) at 10.

³⁷ Pond, *supra* note 21 at 14.

³⁸ U.S., *Report of the Committee to Address the Recognition of the Tribal Government Representatives of Maine’s Sovereign Nations in the Legislature* (2000), online: <<http://www.state.me.us/legis/opla/tribal.PDF>>.

³⁹ Office of the Attorney General (Maine), *supra* note 36 at 9.

3.2. *Separate Indigenous Parliaments: the Experiences of Fennoscandia*

3.2.1. *Finland*

Fennoscandia is comprised of Finland, Norway and Sweden. The Sámi, formerly known as “Lapps,” are the indigenous population in these countries.⁴⁰ Traditionally reindeer breeders and herders, the Sámi tend to live in the northern areas of Fennoscandia.⁴¹ Finland was the first Fennoscandian country to provide guaranteed representation to its Sámi population. A separate Sámi Parliament, the “Delegation for Sámi Affairs” was created in 1973.⁴² The parliament was renamed the Sameting in 1995, when the Finnish Parliament revised the structure and function of the Sámi Parliament.

There are 21 members of the Sameting, each of whom serves a four-year term. At least three representatives and one vice-representative must come from each of the four municipalities within the officially designated Sámi Homeland.⁴³ Eligibility to vote in Sameting elections is based on self-identification as a Sámi.⁴⁴

The mandate of the Sameting comes from the *Sámi Act 1995*:

...To the Saami Parliament belong the areas that relate to the Saami's language and culture and their position as indigenous people. In areas that belong to the Saami Parliament, it can take initiatives, make proposals and issue statements to the authorities. In relation to these areas, the Saami Parliament also has the right to make decisions as provided for in this or any other law.⁴⁵

In addition to this, the Sameting has a limited amount of authority over funds that the Finnish Parliament has allocated for Sámi related projects. Perhaps the most significant aspect

⁴⁰ Depending on the nationality of the author, “Sámi” may also be spelled Sami or Saami. Because the Sámi Parliaments themselves generally use this spelling, I have elected to use “Sámi” in this paper.

⁴¹ Robert Eronn, “The Sami, Indigenous People of the North,” trans. by Victor Kayfetz *Current Sweden* 397 (March 1993) 1 at 5.

⁴² Niemczak, *supra* note 23 at 3.

⁴³ Donna Craig & Steven Freeland, “Indigenous Governance by the Inuit of Greenland and the Sámi of Scandinavia,” (Discussion paper) (Sydney: University of New South Wales, 1998) at 48, online: Reconciliation and Social Justice Library <<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/dp8.html>>.

⁴⁴ Niemczak, *supra* note 23 at 3.

⁴⁵ *Sámi Act 1995*, s. 5, cited in Craig, *supra* note 43 at 48-49.

of the Sameting's powers stems from the Finnish government's obligation to negotiate with the Sámi Parliament to resolve disputes in "matters of concern and relevance to the Sámi."⁴⁶

For all the apparent power of the Sameting, some Finnish Sámi do not feel that it meets their needs. The Sameting has been largely unable to prevent the Finnish government from allowing commercial interests to access and develop land that is claimed by the Sámi for traditional use. "The Sami Parliament has neither power to determine matters that are of importance to the Sami, nor adequate resources to influence such decisions when they are being made."⁴⁷

3.2.2. Norway

The Sámediggi, Norway's separate Sámi Parliament, was created in 1987 with the passage of the *Sámi Act*.⁴⁸ Elections for the Sámediggi are held concurrently with elections for the Norwegian Parliament. Persons registered in the Sámi voting register may vote in both elections. Sámi voters elect 3 members for each of the 13 Sámi constituencies. Eligibility to vote for members of the Sámediggi is determined by self-identification. The voter must consider herself a Sámi, and must declare either that Sámi is her first language or that she has a parent or grandparent whose first language is Sámi.⁴⁹

The mandate of the Sámediggi is set out in article 2.1 of the Norwegian *Sámi Act*:

The business of the Sámediggi is any matter that, in the view of the Sámediggi, particularly concerns the Sami people. On its own initiative, the Sámediggi may raise, and pronounce upon, any matter coming within the scope of its business. It may also on its own initiative bring a matter before public authorities and private institutions. The Sámediggi has the power of decision when this follows from other provisions of the Sami Act, or is otherwise laid down.⁵⁰

⁴⁶ Craig, *ibid*. Note that this is an obligation to negotiate, not merely to consult.

⁴⁷ Virtual Finland, "The Sami in Finland," online: <<http://virtual.finland.fi/finfo/english/saameng.html>>

⁴⁸ Niemczak, *supra* note 23 at 4.

⁴⁹ *Ibid*.

⁵⁰ *Sami Act*, article 2.1, as cited in Norway, Sámediggi, "The Samediggi Plenary," online: Sámediggi (Official Web Site of the Sámediggi), <<http://www.samediggi.no/default.asp?selNodeID=94&lang=no&docID=1423>>.

In other words, the Sámediggi is an advisory body only. Its lack of any real political power has hampered its ability to advance Sámi interests in Norway, as is evidenced by the recent conflict over the proposed *Finnmark Act*. In this bill, the Norwegian government disregarded all recommendations made by the Sámediggi with respect to conflict between Sámi and non-Sámi in Norway's Finnmark County, and instead proposed an alternative solution that would effectively remove any special protection that Sámi in the area currently enjoy.⁵¹ As a result, Norwegian Sámi do not feel that the Sámediggi is an adequate means of protecting their interests.⁵²

3.2.3. Sweden

Sweden's separate Sámi Parliament, or Sameting, was created in 1992. It is composed of 31 members who are elected every four years by the popular vote of Sámi voters across the country. Eligibility is based on the prospective voter self-identifying as a Sámi, or having a parent who is or was on the Sámi voters' list.⁵³

The Sameting is also an independent advisory body with power to make recommendations to national and local institutions. However, unlike its Norwegian cousin, it has other powers as well. These powers range from the appointment of Sámi school boards to participation in national physical planning.⁵⁴ Arguably the most important power of the Sameting is its ability to allocate money for public purposes. Some of this money comes from state grants; some comes from the "Sámi Fund," which is derived from sources that include the sale

⁵¹ Norway, Sámediggi, "Norway's New Land Right Management Legislation," online: Sámediggi (Official Web Site of the Sámediggi), <<http://www.samediggi.no/showdoc.asp?selNodeID=313&lang=no>>.

⁵² *Ibid.*

⁵³ Niemczak, *supra* note 23 at 4.

⁵⁴ Eronn, *supra* note 41 at 5.

of hunting or fishing rights.⁵⁵ Possibly for this reason, at the time of its creation, it was expected that the Sameting would have more influence than the Norwegian Sámediggi.⁵⁶

4. CONCLUSION

This paper has surveyed three possible approaches to the question of how to increase Aboriginal representation in Canadian government. The proposals that are most realistic, given Canada's unique characteristics, are the creation of Aboriginal electoral districts and the creation of a separate Aboriginal parliament. The experiences of other jurisdictions with these options illustrate that neither is perfect, and that they cannot address all the concerns of Aboriginal peoples. The experiences of the Sámi Parliaments show that it is easy for advisory bodies of this nature to be ignored. The experiences of New Zealand and Maine are based on relatively homogeneous Aboriginal populations, a feature that Canada does not share.

However, each approach also possesses strengths. A separate House for Canadian Aboriginals would allow some measure of representation, while taking the heterogeneity of the Aboriginal population into account. Aboriginal electoral districts would guarantee an immediate increase in Aboriginal representation in the House of Commons. The implementation of either of these approaches, in consultation with Aboriginal groups, would be a signal to the Aboriginal peoples of Canada that the federal government is at last ready to deal with some of their concerns.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* According to Sweden's Ministry of Justice, an independent report that examined this issue, "The Role of the Sameting in Swedish Democracy" (Swedish Government Reports 2002:77), was presented to the Swedish government in 2002. Unfortunately, no English translation or commentary was available at the time of writing. Sweden, Ministry of Justice, "The Swedish Human Rights National Action Plan" Fact sheet. (June 2003).

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