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THE ABORIGINAL RIGHT TO SELF-GOVERNMENT AND THE CANADIAN CONSTITUTION: THE GHOST IN THE MACHINE

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ABSTRACT

The First Nations existed as both historical and legal entities long before Canada existed. Their inherent right to Aboriginal self-government is both the ground in which Canadian constitutional law took root and a part of that living tree, which grows and changes with it.

The inherent right to self-government exists independently of the Constitution.

Aboriginal peoples had, through their First Nations, *de facto* title to their lands at the time of first contact and were self-governing. French law acknowledged that mere political pretensions did not suffice to establish sovereignty, while British law clearly recognized Aboriginal title. This historical fact is now recognized by the courts and by governments.

Under the Law of Nations, one nation may make arrangements by which it retains full internal sovereignty and yet transfers its external sovereignty to another. This principle, among others, explains why at the time of Confederation, Canadian courts were prepared to acknowledge that British common law had not displaced contemporary Aboriginal law.

International law recognizes the right of all peoples to self-determination, not as a new right but as one that is inherent and permanent, one which no State can unilaterally extinguish. For peoples within an established State, self-determination means the power to take the necessary measures to ensure one's political as well as economic, social and cultural future, including self-government.

The inherent right to self-government is also part of the Constitution of Canada.

Contrary to theories of constitutional absolutism, our history is one of shared or co-existing sovereignty.

Even if it contains no specific reference, the Constitution is not silent on the inherent right to self-government. The encounter between Aboriginal nations and the European powers in North America created a custom between those peoples, in the British case sometimes referred to as "imperial constitutional law." This body of law forms one of the elements which the preamble of the Constitution Act, 1867 must include when it refers to "a Constitution similar in Principle to that of the United Kingdom."

The Royal Proclamation of 1763 which is specifically referred to in section 25 of the Canadian Charter of Rights and Freedoms, recognized First Nation nationhood, the political alliances with the First Nations and their right to continue in the possession of their territories until ceded or purchased through a formal treaty process. The Royal Proclamation and the state practice it mandated and reflected is surely an additional constituent element to which the preamble of the Constitution Act, 1867 refers.

The reference in section 35 of the Constitution Act, 1982 to treaties and treaty rights demonstrates the constitutional significance of the treaty process. Treaty-making implies a relationship based on mutual recognition of autonomy and sufficient self-governance and self-determination to decide upon the treaty terms, mandate their execution and ensure they are respected and implemented.

Canadian law, including the Constitution, is to be interpreted so that it is compatible with Canada's obligations under international law. In addition, customary international law forms part of the law of Canada.

Contemporary legal instruments recognize the right of Aboriginal peoples to self-government, not as a new right but as an inherent right, which has always existed even if it has not been exercised for some time. The standard which emerged from the conduct and the *opinio juris* of the European powers in the eighteenth century is now being acknowledged as a universal norm of international law.

The existence of an inherent right to self-government is not excluded by the distribution of powers through sections 91 and 92 of the Constitution Act, 1867. The argument that they exhaustively distribute legislative power in Canada is no longer possible: the Supreme Court in Sparrow set out the foundation for a right to self-government when it held that contemporary Aboriginal rights are not defined by past government regulation of how they were exercised.

Aboriginal rights, the Court held, are rights held by a collective and are in keeping with the culture and existence of that group. If the right is exercised as part of a collectivity, then by definition it is that group which delineates the right, determining who will do what, where, when and how. This is a form of legislation which is constitutionally protected.

A number of recent cases have also found that right of self-government was given explicit constitutional recognition through section 35, independent of the Parliament of Canada and beyond its legislative reach, a manifestation of a residual sovereignty.

The decision of the British Columbia Court of Appeal in Delgamuukw should not be taken as authority that internal self-government of the Gitksan and Wet'suwet'en has been extinguished. The Court has confirmed this interpretation in a subsequent judgment.

The various Indian Acts have not effected extinguishment. Indeed, the right to self-government should not be considered capable of extinguishment. Its exercise can be frustrated and even denied, but the right vests permanently in a people and its exercise can be revived.

The complexity of defining the right is not a reason to deny the right. The right will be exercised subject to the conditions of existing universal norms of human rights law. Within the Canadian constitutional framework, the exercise of that right must also be construed so as to be compatible with the rights and freedoms the Constitution guarantees.

The details of coexistence of collectivities and legal orders can be worked out. The internal consistency of our constitutional law can be maintained. In the process its principles will not be fractured, rather a new shape and a new dynamism will be given to the body of Canadian law.

> And the fact that the questions are difficult to answer does not mean that the aboriginal right of self-government does not exist. All it means is that this world contains many questions that are difficult to answer.
>
> Mr. Justice Lambert,
> Delgamuukw v. British Columbia
> (1993) 104 D.L.R. (4th) 470 (B.C.C.A.) at 717

I. Introduction[1]

If indeed a constitution is, as it has been described, "a mere reflection to the national soul"[2] perhaps an understanding of the inherent right to Aboriginal self-government within the Canadian context requires not only constitutional parsing but some collective soul-searching about the past roots and the contemporary branches of the living tree that is our constitution.[3]

We find an example of judicial soul-searching in the recent landmark decision Mabo v. Queensland,[4] where the Australian High Court finally laid to rest the doctrine that epitomized the Euro-centrism of the colonial period.

The High Court of Australia declared that the doctrine of *terrae nullius* -- that lands occupied by indigenous peoples were deemed to be lands belonging to no one -- had no place in contemporary Australian law (our Supreme Court had accomplished this task for Canadian law 20 years earlier in Calder[5]). Mr. Justice Brennan acknowledged:

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[1] This paper is the product of the work and reflection over a number of years of members of my firm Hutchins, Soroka & Dionne. In addition to Carol Hilling, Diane Soroka and David Schulze who collaborated substantially in the research and writing of the paper, I would like to acknowledge and thank Anjali Choksi for her review and comments and David Kalmakoff for his research and editorial assistance. I assume entire responsibility for any errors or omissions. I disclose, as well, that I have acted as counsel for the First Nations parties in a number of the legal proceedings referred to in this paper.

[2] Ronald I. Cheffins and R.N. Tucker, The Constitutional Process in Canada (Toronto: McGraw-Hill Ryerson, 1976) at 4.

[3] W.R. Lederman expressed a similar view about the division of powers in his article, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 C.B.R. 597 at 600:

> ...It is a mistake to think that the task of interpretation is grammatical and syntactical only, treating the constitution document in isolation from the economic, social and cultural facts of life of the society to which the constitutional document relates, both historically and currently. Yet this has frequently been done in Canada.

[4] [1992] 107 A.L.R. 1 (H.C.).

[5] Calder v. A.G. B.C. [1973] S.C.R. 313.

> In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England.

Having pronounced this caveat, he nevertheless went on to state:

> Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.[6]

It is the contention of this paper that in asserting the inherent right to Aboriginal self-government, we do not risk fracturing "the skeleton of principle which gives the body of our law its shape and internal consistency". On the contrary, we bring the skeleton of principle and its body of law back in touch with its soul.

The discussion, however, must start elsewhere and transcend the domestic Constitution of Canada.

An inherent Aboriginal right is by definition a right whose source lies outside the Constitution, and predates it. It cannot, therefore, be viewed exclusively through the lens of the Constitution or indeed of the common law. It may in some of its aspects have been adopted by the Constitution and the common law but it was and remains genetically distinct. So let us first examine aboriginality and inherency before we move on to constitutionality.

II. The Inherent Right, Independent of the Constitution

1. The Starting Point: Original Occupation by Self-Governing Peoples

[6] Mabo supra at 18.

Aboriginal peoples through their First Nations had, at the time of first contact, *de facto* title to their lands and were self-governing. This historical fact is now recognized by the courts, by governments and by Commissions charged with studying the matter.[7]

The manner in which European Sovereigns acquired territory during the colonial period was determined by the Law of Nations.[8] From first contact into the nineteenth century, Indian Nations were recognized by international law as independent of the European powers claiming sovereignty over portions of North America and elsewhere.[9]

In 1973 the Supreme Court of Canada in Calder expunged the *terrae nullius* theory from the law of Canada and recognized Aboriginal title as forming part of the common law applicable in Canada. During the course of his Reasons, Mr. Justice Judson referred to the Indians of British Columbia at the time of contact as being "organized in societies":

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.[10]

Discovery, when consummated by possession, gave rights as against other competing European nations, but not as against Aboriginal peoples.[11] D.P. O'Connell is unequivocal that in the view of the French, British and Americans, North America was not *terrae nullius*. He explains: "To equate, as so many have done, therefore, occupation of uninhabited lands with the growth of colonial dominion over America and Africa, is to misunderstand the process at work."[12] Sovereignty had to be acquired or perfected through conquest or cession.

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[7] Calder v. A.G. B.C. supra, per Judson J. at 328; R. v. Sioui [1990] 1 S.C.R. 1025 at 1053; Report of the British Columbia Claims Task Force (Vancouver, 1991) at 5-6; Manitoba, Report of the Aboriginal Justice Inquiry (Queen's Printer: Winnipeg, 1991) vol. 1 at 143-44; Canada, Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples and the Constitution (Ottawa: Minister of Supply and Services, 1993).

[8] Johnson v. M'Intosh (1823) 8 Wheaton 543; O.W. Holmes, ed., Kent's Commentaries on American Law (Boston: Little Brown, 1873) at 379-380; D.P. O'Connell, International Law (London: Stevens & Sons, 1965) at 465-468.

[9] Sioui supra at 1051-1055.

[10] Calder supra, per Judson J. at 328.

[11] Johnson v. M'Intosh supra; Kent's Commentaries on American Law supra; Worcester v. The State of Georgia (1832) 31 U.S. 350, 6 Pet 515.

[12] D.P. O'Connell supra at 469. See also: Worcester v. The State of Georgia supra.

2. External and Internal Sovereignty

a) The Law of Nations and John Marshall

International law recognizes arrangements by which nations, while retaining full internal sovereignty, may transfer their external sovereignty.[13]

Once alliances had been formed and treaties entered into, the relationship between the Aboriginal peoples and the Colonial Power were conditioned by treaty arrangements. This process did not, however, entail a loss of all sovereignty by the Aboriginal nations.

In Worcester, Marshall elaborated the law pertaining to the characteristics of the sovereignty possessed by the Indians of North America after they had ceded their territory. They were considered to be limited in their external sovereignty but maintained their internal sovereignty. Marshall characterized the Indian Nations as "dependent allies" or as "domestic dependent nations".[14]

Yet Marshall emphasized that the fact of being domestic dependent nations did not involve a "surrender of their national character." He explained: "Protection does not imply the destruction of the protected."[15]

Protection arrangements were common to most treaties concluded between Great Britain and Native Rulers during the nineteenth century. Under protection arrangements external sovereignty is exercised by the protector while leaving intact the protected state's rights of internal sovereignty.[16] Britain was very much aware of the state of the Law of Nations on this issue, as evidenced by its conduct in 1860: at the same time that it recognized the sovereignty of Nicaragua over Mosquitia, a former British protectorate, it insisted upon the protection of the

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[13] C.H. Alexandrowicz, The European -African Confrontations: A Study in Treaty-making (Leiden: Sijthoff, 1973).

[14] Worcester supra at 552. See also: Cherokee Nation v. Georgia 30 U.S. 1 (1831) at 17.

[15] Ibid. at 552.

[16] Alexandrowicz supra.

Miskitos' right to self-government.[17] It is in this context that sovereignty and legislative power vested in the Crown must be understood.

b) The Law of Nations, Reality and the French Regime

There has been for some time in Quebec, an historical and legal debate over the effect of French claims to sovereignty over New France on the Aboriginal rights of indigenous peoples of that Territory. The issue, in fact, is before the Supreme Court of Canada in two appeals yet to be argued.[18]

The Attorney General of Quebec argues that Aboriginal rights and title could not have survived the French regime in Canada by reason of the operation and nature of French law. This position is grounded on dated and discredited writings, an inflated idea of French presence and influence in North America and a misunderstanding or misstatement of the Law of Nations.

In fact the French colony was a fragile and tenuous enterprise. As W.B. Munro states:

> From the year 1608, when Champlain began his task of establishing a Bourbon empire in the New World, down to the time when Canada passed into the hands of her conquerors, the colony had one great and perpetual problem. This was the problem of self-preservation.[19]

Even after a century of operation in New France, the seigneurial system had not succeeded in establishing anything amounting to extensive settlement. One analysis estimated that "as late as 1700 not more than 4 or 5 per cent of all the seigneurial land granted in Canada had been cleared." Even by the end of the French regime, the seigneuries really represented only "two ribbons of settlement", extending along the shores of the St. Lawrence River between Quebec City and Montréal.[20]

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[17] Treaty between Great Britain and Nicaragua relative to the Mosquito Indians and the Rights and Claims of British Subjects, 28 January 1860, 121 Consolidated Treaty Series 317.

[18] R. v. Adams [1993] 3 C.N.L.R. 98 (Que. C.A.); Côté c. R. [1993] R.J.Q. 1350 (C.A.).

[19] W.B. Munro, "The Seigneurial System and the Colony" in Arthur G. Doughty, ed. Canada and its Provinces vol. 2, New France (Toronto: Publishers' Association of Canada, 1913) at 534.

[20] Richard Colebrook Harris, The Seigneurial System in Canada: A Geographical Study (Madison: University of Wisconsin Press, 1968) at 3, 100, 195.

At the same time French law acknowledged that mere political pretensions did not suffice to establish sovereignty. What was required was physical possession, permanent settlement, as stated by an early historian of Canadian law:

> Story, dans ses commentaires sur la constitution américaine, suppose que toutes les nations considérèrent la simple découverte comme titre suffisant. L'Espagne et l'Angleterre s'apppuyèrent, il est vrai, sur ce principe, mais il est douteux que la France l'ait jamais fait. Les jurisconsultes français demandent une occupation effective. "Il faut," dit Royneval [Institution du droit de la nature et des gens at 154], "une possession réelle, physique, avec l'intention au moins présumée de conserver, pour établir le droit de propriété. Ainsi la simple plantation d'une croix, d'une colonne, d'une inscription, une trace quelconque d'une prise de possession momentanée et passagère, ne sauraient être considérées comme des actes possessoires; il faut de plus des établissements sédentaires et permanents; il faut, en un mot, occuper par la culture le terrain qu'on prétend s'approprier; tout ce qui se fait au delà est désavoué par la saine raison et ne peut se soutenir que par la force."[21]

For the purposes of the present paper, we will restrict ourselves to the issue of Aboriginal self-governance. Our firm's archival research has revealed that French colonial authorities understood only too well that they were not in a position to impose French law on the Aboriginal peoples, let alone assume that Aboriginal institutions and customary law somehow evaporated in the face of French pretensions to sovereignty.

In 1664, one Robert Hache, an Indian occupying the post of lay clergymen and resident in the colony was accused of rape. The *Conseil Supérieur du Québec* felt it necessary to seek the consent of Chiefs representing the First Nations living in or in proximity to the colony for the imposition of penalties under French law. In the resulting Arrêt, the Conseil Supérieur noted that by consent of the Chiefs the penalties for murder and rape prescribed by the *Lois et Ordonnances de France* would henceforth apply to the Indians:

> ... du consentement des dits Tok8orimat, Kactmaguechi, Maucouche, Gahyk8an, Nauch8apo8ith et Pipouikch, ordonné et ordonne que les dits Sauvages subiront les peines portées par les Loix et Ordonnances de France pour raison du meurtre et du rapt....[22]

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[21] Edmond Lareau, Histoire du Droit Canadien depuis les origines de la colonie jusqu'à nos jours (Montreal: A. Périard, Libraire-Editeur, 1888) at 4-5.

[22] Arrêt Qui soumet les Sauvages à la peine portée par les Loix et Ordonnances de France pour raison de meurtre et de viol (21 août 1664) Ordonnances des Intendants et Arrêts et Réglements du Conseil Supérieur de Québec, tome 2 (Québec: P.E. Desbarats, 1806) at 123.

Thus, even in the case of what have been referred to as "domiciled Indians", French law was applied only with consent of the Chiefs and only for limited, defined capital offenses.

Approximately 60 years later in 1720, only 40 years before the end of French colonial pretensions in the St.Lawrence Valley, there is further archival evidence of application of French criminal law to domiciled Indians only with consent of the First Nations themselves.[23] These matters were tried in the military courts, illustrating further that even the "domiciled Indians" were treated as allies, not subjects.

A recent study of the Indians who lived near Montréal at Sault St-Louis and at the Lake of Two Mountains during the French regime has concluded that they never used the European judicial system for civil disputes and that the criminal law did not apply to them:

> Recognizing the need for a long-term arrangement, the native and white societies created an unwritten "code of conduct" observed by both sides. When conflicts arose that might disrupt the peaceful coexistence of the two groups in Montréal, the Indians allowed their intoxicated compatriots to be imprisoned by the French. At the same time the latter, pledged not to prosecute Indian suspects, unless native councils approved.
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> ...
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> In the eighteenth century, the *domiciliés* were given official permission to carry on the trade considered as "smuggling" for the other inhabitants of New France.[24]

To say the least, it would be farfetched to maintain that the Aboriginal right to self-government of First nations living in proximity to the small and precarious French colony on the shores of the St.Lawrence had been extinguished by operation of a French law that the French were unable to impose and, at least in so far as the civil law side was concerned, were not interested in imposing.

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[23] National Archives of Canada, France, Archives des Colonies, Manuscript Group 1, Series C11A. For instance, the letter from Vaudreuil to the Conseil de Marine and the délibération du Conseil concerning the murder of a woman in the seigneury of Châteauguay by a *domicilié* from Sault-Saint-Louis. The criminal was arrested and executed and the elders proved "fort contents de la justice" rendered, but "le Conseil croit qu'en pareil cas il doit en user de même si les Sauvages veulent bien s'y soumettre, mais qu'en cas de refus de leur part il ne doit point pousser les choses à bout": Vol. 42, fol. 178-181v (microfilm reel no. F-42); Vol. 42, p. 145-147 (microfilm reel no. C-2386), Québec, 7 novembre 1720. After Vaudreuil reported to the *Conseil de Marine*, the *régent* approved his conduct but warned him to do nothing in similar cases in the future, "que du consentement des Sauvages": MG 1, Series C11A, Vol. 44, fol. 151-155v (microfilm reel no. F-44), Québec, 6 octobre 1721.

[24] Jan Grabowski, The Common Ground: Settled Natives and French in Montréal, 1667-1760 (Ph.D. thesis, forthcoming, Université de Montréal) at 313-314.

c) British Sovereignty, the Common Law and the Gitksan and Wet'suwet'en

The effect of British assertions to sovereignty on Aboriginal jurisdiction or self-government were clearly before the Court of Appeal of British Columbia in Delgamuukw. It is interesting to note, however, that there was a difference of opinion on the Panel as to what precisely appellants claim entailed.[25]

The members of the Panel appeared to disagree as to whether plaintiffs' claim was for general legislative powers over their traditional territories and all persons in those territories or whether it was restricted to internal self-government or self-regulation of and by the Gitksan and Wet'suwet'en.

Mr. Justice Macfarlane concluded that it was the former:

> In any event, the declaration of jurisdiction/self-government sought by the plaintiffs is of a sort quite different from the self-regulation I have described above (internal self-regulation in accordance with Aboriginal traditions, if the people affected are in agreement). In my view, the plaintiffs' claim for jurisdiction, relating to both people and to the territory, is for broader powers of government.[26]

Mr. Justice Taggart concurred with Mr. Justice Macfarlane.

Mr. Justice Wallace characterized the claim as follows:

> This claim is explicit and leaves little latitude for interpretation. Paragraph 4 clearly contemplates absolute aboriginal jurisdiction over all aspects of the native and non-native occupation and use of the claimed territory, as well as jurisdiction over the members of the native society within the territory.[27]

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[25] As Mr. Justice Macfarlane stated: "Members of this court also had some difficulty in understanding the claim." See: Delgamuukw v. British Columbia (1993) 104 D.L.R. (4th) 470 (B.C.C.A.) at 516.

[26] Ibid. at 518.

[27] Delgamuukw supra at 590.

While acknowledging that the plaintiffs had qualified the claim to some extent in a revised order submitted during the Appeal, Mr. Justice Wallace relied upon the declarations that were before the trial judge and upon which he was required to rule.

The two dissenting members of the Panel had a different perspective on plaintiffs' claim. Mr. Justice Lambert understood plaintiffs' claim in the following terms:

> In my opinion, this claim is not about governing the land or the territory or the "wilderness" in the sense that such a form of government would apply to all people when they entered the land. The claim is about the right of self-government and self-regulation of a community of people through their own institutions in order to regulate their own conduct towards each other and their conduct towards others, particularly as related to the existence of their aboriginal title and aboriginal sustenance rights, but also in relation to their social organization. I do not think that this claim can properly relate to regulating the conduct of others towards them, which must be regulated by the general common law.
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> In short, the Gitksan and Wet'suwet'en plaintiffs are not asserting a claim to Sovereignty over the territory, and they are not asserting a claim to govern everyone within the geographical boundaries of the territory. They are claiming the right to manage and control the exercise of the community rights of possession, occupation, use and enjoyment of the land and its resources which constitutes their aboriginal title; and they are claiming the right to organize their social system on those matters that are an integral part of their distinctive culture in accordance with their own customs, traditions, and practices, which define their culture.[28]

Mr. Justice Hutcheon, also in dissent, stated his understanding as follows:

> For my part, I think the phrase "right to self-government" refers, in the main, to the traditions of an aboriginal society considered by its members to be binding on them. I would avoid reference to "aboriginal laws" because the word "laws" carries with it the notion that the traditions were enforceable by some state authority. For the same reason I have used "self-regulation" in preference to self-government.[29]

It was with these respective understandings of the plea before them that the five appeal court justices addressed the impact of European assertions of sovereignty on the Gitksan and

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[28] Delgamuukw supra at 716-717.

[29] Ibid. at 761.

Wet'suwet'en claim to self-government. The results were interesting and have perhaps not been fully understood.

First, Mr. Justice Macfarlane concluded that the broader claim for Aboriginal law-making competence was superseded by assertions of British sovereignty:

> It was on the date that the legislative power of the Sovereign was imposed that any vestige of aboriginal law-making competence was superseded. This likely occurred when the mainland colony was founded and became a territory under the jurisdiction of the Imperial Parliament in 1858.[30]

He appears to be less categorical however, on the extinguishment of a self-government claim as understood by Lambert and Hutcheon J.J.A.. On this question he stated:

> No declaration by this court is required to permit internal self-regulation in accordance with aboriginal traditions, if the people affected are in agreement. But if any conflict between the exercise of such aboriginal traditions and any law of the Province or Canada should arise the question can be litigated. No such specific issue is presented on this appeal.[31]

Once again Taggart J.A. concurred.

Mr. Justice Wallace appears to have found that even internal Gitksan and Wet'suwet'en self-government would have been subsumed by the common law upon assertion of British sovereignty:

> Jurisdiction, or self-government, includes both the power to pass laws which will be recognized by the community in question, and the ability to enforce such laws. Prior to the acquisition of sovereignty over British Columbia, the Indians exercised jurisdiction in the territory to the extent made possible by their social organization. However, once sovereignty was asserted, the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants.
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> A claim of self-government of the nature which the plaintiffs advance; namely, a right to govern the territory, themselves and the members of their Houses in accordance with Gitksan and Wet'suwet'en laws, and a declaration that the

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[30] Ibid. at 519.

[31] Delgamuukw supra at 518.

> Province's jurisdiction is subject to the plaintiffs' jurisdiction, is a claim which is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846.[32]

Mr. Justice Lambert held that the Gitksan and Wet'suwet'en rights to self-government, as he understood the claim, survived assertions of British sovereignty and continued side by side with the common law. This is how he described the characteristics of Gitksan and Wet'suwet'en internal and external sovereignty:

> So, after the assertion of Sovereignty, Gitksan and Wet'suwet'en customary laws survived and may relate to general British Columbia law in any number of ways. Sometimes general British Columbia laws will apply to the Gitksan and Wet'suwet'en people without interfering with the operation of Gitksan and Wet'suwet'en customary laws. An example of such a law would be the regulation of highway traffic: Francis v. The Queen, [1988] 1 S.C.R. 1025. Sometimes, the two laws might operate concurrently.
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> ...
>
> From this I conclude that Gitksan and Wet'suwet'en customs in relation to internal matters survived subject to any overriding change; that English law might apply to fill any gaps in affairs internal to Gitksan or Wet'suwet'en people; and that upon the assertion of Sovereignty the laws and customs of the Gitksan and Wet'suwet'en in relation to affairs external to the Gitksan and Wet'suwet'en peoples were abrogated.
>
> Subject to any such overriding change, Gitksan and Wet'suwet'en customs, traditions and practices, forming an integral part of their distinctive culture, would continue as a part of the common law, and be protected by the common law, up until the present time. Those customs, traditions and practices, so protected, may undergo modifications. They were not frozen in 1846. Those modified forms will receive the same common law protection as the forms which the customs, practices and traditions received in 1846.[33]

Finally, Mr. Justice Hutcheon, again on the basis of a right to internal self-governance found that mere assertions sovereignty by the British could not extinguish the right.

> When was the right to practice these traditions lost? Certainly not before 1871 because the evidence is clear that the penetration by the European society had barely commenced.[34]

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[32] Ibid. at 591, 592.

[33] Delgamuukw supra at 656-57.

[34] Delgamuukw supra at 761.

The results of a careful canvassing of the Panel's Reasons leads me to conclude that four members out of the five (Macfarlane, Taggart, Lambert and Hutcheon J.J.A.) decided that assertions of British sovereignty did not have the effect of extinguishing or subsuming Gitksan and Wet'suwet'en rights to internal self-government. While this right did not include exclusive or paramount legislative authority over people not members of the Aboriginal First Nation, the Court made a number of comments which would lead one to believe that the larger question remains open.

Mr. Justice Macfarlane, for example, seemed to conclude that the Court either was not seized with a claim precise enough to pronounce upon or that the claims to jurisdiction made were beyond the authority of the court.

> In this action, any form of aboriginal self-regulation that was not superseded in 1871, or before, was not precisely stated or claimed. Such precision is required for a proper determination of whether it can qualify as an aboriginal right. The claims to jurisdiction that were made amounted to powers of government which are beyond the authority of this court to award.[35]

All of the justices concluded that the precise manner in which the right should be exercised was a matter for negotiations between the parties. Mr. Justice Lambert referred to the effect of section 35 of the Constitution Act, 1982 and the modern expression of that right:

> ...To the extent that those customs, traditions and practices formed an integral part of their distinctive culture, [they] became rights recognized, affirmed, and protected by the common law in 1846 and have been carried forward to 1982 when they received constitutional protection under s. 35 of the Constitution Act, 1982. Those rights now exist in modern form, based on their 1846 form, but expressed in modern terms and with modern usages.[36]

No inherent conflict is to be found between the doctrine of sovereignty as it has been understood in our constitutional past and some form of Aboriginal right of self-government in the constitutional present. Crown assertions of sovereignty in and of themselves did not and do not eliminate the internal sovereignty of Indian Nations. I would contend that this has been

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[35] Ibid. at 545-46.

[36] Delgamuukw supra at 730.

confirmed by four of the five justices in the most recent and highest court pronouncement on the matter.

It appears that Mr. Justice Lambert might be prepared to go further. Writing for himself as well as for Mr. Justice Hutcheon and Mr. Justice Hinds, in a subsequent case, Lambert J.A. has observed:

> I think that the conclusion which should be drawn from the decision of the Court in Delgamuukw v. British Columbia is that none of the five judges decided that aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishment and that particular rights must be examined in each case to determine the scope and content of the specific right in the aboriginal society, and the relationship between that right with that scope and content and the workings of the general law of British Columbia.[37]

We know that the law of nations allows one nation to entrust its external sovereignty to another, while maintaining full internal jurisdiction. It seems clear that an analogy may be drawn with the position of the First Nations in Canada. European claims to sovereignty and to the institution of the common law should be seen to coexist with the initial fact and continuing right of Aboriginal self-government.

3. Aboriginal Customary Law

At the time of Confederation, the courts acknowledged that British common law had not displaced Aboriginal customary law.

The Quebec courts in Connolly v. Woolrich asserted in strong terms that the introduction of French law and subsequently British Common Law into the Hudson's Bay Company trading area did not abrogate Aboriginal customary law. Mr. Justice Monk of the Quebec Superior Court stated as follows:

> Now, as I said before, even admitting, for the sake of argument, the existence, prior to the Charter of Charles, of the common law of France and that of England, at these two trading posts or establishments respectively, yet, will it be contended that the territorial rights, political organization, such as it was, or the laws and

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[37] Casimel v. Insurance Corp. of British Columbia (1993) 106 D.L.R. (4th) 720 (B.C.C.A.) at 728.

> usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants. In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives.[38]

One objection to Aboriginal self-government is that the reception of European law has completely displaced the customary law of the First Nations.

Mr. Justice Wallace held in Delgamuukw that it was so "fundamental [a] premise" of British Columbia's legal system that settlers had brought the common law with them, that it ruled out the possibility of an "Aboriginal right to an exclusive social and legal system." He went on to reject the possibility of "the common law affording protection to a system which is both outside and independent of the common law and, at the same time, extend[ing] to the Aboriginal community the benefits and protection afforded by the common law to all residents of the province."[39]

In the face of a possible duality of legal systems on the same territory, applying differently to different populations, Wallace J.A. preferred the effect which he ascribed to settlement, that of subsuming local custom under the common law.

Yet Connolly v. Woolrich credited settlement with a great deal less effect on custom, while openly allowing for the coexistence of Aboriginal and European legal systems.

> It is easy to conceive, in the case of joint occupation of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately; it did not abrogate the Indian laws and usages.[40]

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[38] Connolly v. Woolrich and Johnson et al. (1867), 17 R.J.R.Q. 75 at 84, 1 C.N.L.C. 70 at 78.

[39] Delgamuukw supra at 569-70. We will have occasion to revisit this dichotomy of rights external to the common law enjoying its protections.

[40] Connolly v. Woolrich and Johnson et al. supra at 90 (emphasis in the original). The Quebec Court of Queen's Bench subsequently upheld the decision in Johnson et al. v. Connolly (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151.

British colonial practice was to allow both English and local laws to coexist and to apply both in colonies such as Sierra Leone, deemed to have been settled, as well as the conquered territory of India.[41]

Connolly v. Woolrich allowed it was possible that two different systems of law could apply "in the case of joint occupation of extensive countries by Europeans and native nations" in Canada (an occupation which was argued to amount to settlement). The Court also upheld the consequences of this duality when it found that a customary Cree marriage was valid.[42]

Lambert J.A. in Delgamuukw dealt with result of joint occupation by Europeans and Aboriginal nations on the co-existence of different systems of law. As we have seen, Mr. Justice Lambert concluded that, notwithstanding assertion of British sovereignty in 1846, Gitksan and Wet'suwet'en rights to internal self-government survived.

There are a number of judicial authorities on the survival of and enforceability of Aboriginal custom. These were conveniently and concisely canvassed recently by Mr. Justice Lambert in Casimel v. Insurance Corp. of British Columbia.[43]

The issue in Casimel was whether the plaintiffs were dependent parents of their son by virtue of a customary adoption and thus entitled to receive no fault death benefits under the Insurance (Motor Vehicle) Act of British Columbia. But as Lambert J.A. remarked:

> The resolution of that issue requires a consideration of the interaction between aboriginal rights arising from aboriginal customary law, on the one hand, and the general statute law of British Columbia, on the other.[44]

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[41] Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989) at 117-18, 129.

[42] The Quebec Court of Queen's Bench were not the last judges to uphold customary law when they saw the inequity of imposing European law without justification. See: Jack Sissons, Judge of the Far North (Toronto: McClelland & Stewart, 1968).

[43] Supra at 723. Lambert J.A. stated that he was much assisted by Norman Zlotkin's useful article "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 C.N.L.R. 1.

[44] Casimel supra 723.

After reviewing the authorities Lambert J.A. noted that there was a well-established body of authority in Canada recognizing customary adoption. He continued:

> That body of authority is entirely consistent with all of the reasons for judgment of the members of this court in Delgamuukw v. British Columbia as those reasons discuss the jurisprudential foundation for aboriginal rights in British Columbia.[45]

He concluded that the customary adoption "was an integral part of the distinctive culture of the Stellaquo Band of the Carrier People, and as such, gave rise to Aboriginal status rights that became recognized, affirmed and protected by the common law and under s. 35 of the *Constitution Act, 1982*."[46]

4. Aboriginal Self-Government: An Inherent and Permanent Right under International Law

a) The Right

Although international courts of the twentieth century did not recognize Aboriginal nations any international personality, they did not deny their existence and their capacity to enter into agreements.[47] As we have seen, international law allowed for a nation to retain the internal attributes of sovereignty even when it relinquished the external attributes in favour of a stronger state. Under international law, sovereignty and self-government are two distinct notions and although sovereignty does not exist without self-government, the contrary is possible.

International law recognizes the right of all peoples to self-determination,[48] not as a new right but as one that is inherent and permanent, one which no state can unilaterally extinguish.

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[45] Ibid. at 731.

[46] Ibid. at 733.

[47] Western Sahara Case, [1975] I.C.J. Rep. 1975 1 at 39; Island of Palmas Case, (1928) 2 R.I.A.A. 831.

[48] Article 1 of both the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, 1976 R.T. Can. no 46.

Self-determination is not a "one-time political happening."[49] It was not conceived as such when it began to be expressly recognized in international legal instruments to address the claims of colonized countries and territories. In fact, self-determination was described by the United Nations Special Rapporteur as a permanent right: "...it is not extinguished because it has initially been exercised to achieve political self-determination and it applies, naturally, in all areas including economic, social and cultural matters."[50]

Thus, self-determination takes on its real meaning through a continuing process which gives effect to the body of rights recognized under international law. This opinion was shared by the Human Rights Committee of the United Nations. In 1981, in its general observations addressed to all states party to the International Covenant on Civil and Political Rights, the Human Rights Committee deplored the fact that in their periodic reports pursuant to Article 40 of the Covenant, many states failed to give a detailed account of the implementation of Article 1 which asserts the right of all peoples to self-determination. States usually limited their information to their electoral legislation, forgetting that the right to self-determination has economic, social and cultural aspects along with the political ones.

According to the Committee, one important element of the right to self-determination is the right to dispose of one's natural resources "without prejudice to any obligation arising out of international economic co-operation, based upon the principle of mutual benefit, and international law."[51] In addition, the Covenant states that: "In no case may a people be deprived of its own means of subsistence."[52] The Committee remarked that these provisions imposed obligations on states not only in respect of the peoples of non self-governing or trusteeship territories but also toward the states' own peoples. Consequently, states were asked to report on the constitutional and political measures taken to ensure the effective application of all aspects of the right to self-determination within the state.[53] Clearly, the Human Rights

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[49] R. Stavenhagen, "Self-determination: Right or Demon" (Martin Ennals Symposium on Self-Determination, University of Saskatchewan, March 1993).

[50] Sous-commission de la lutte contre les mesures discriminatoires et la protection des minorités, Le droit à l'autodétermination. Application des résolutions de l'Organisation des Nations Unies, étude établie par H. Gros Espiell, rapporteur spécial, UN Doc E/CN.4/Sub.2/405/rev. 1 (1979) at 8 (our translation).

[51] Article 1(2), International Covenant on Civil and Political Rights.

[52] Ibid., *in fine*.

[53] General observations of the United Nations Human Rights Committee, English version adopted at the 21st Session, April 12, 1984; CCPR/C/21/Add.3.

Committee saw the right to self-determination as a permanent right which applied not only to colonial peoples and peoples under foreign domination but also to peoples within sovereign states.

The international instruments which acknowledged peoples' right to self determination did not distinguish between "external" and "internal" self-determination. The very content given to the right clearly shows that it has external as well as internal elements.

From the outset, the exercise of the right to self-determination was subject to the territorial integrity and the national unity of the state.[54] In other words, it did not include a right to secession for peoples within an established state, unless "the national unity and territorial integrity were nothing more than legal fictions invoked to conceal what amounts to a colonial and foreign domination resulting from the denial of the right to self-determination."[55] It follows that only secession as a means of exercising the right to self-determination has been restricted to colonial peoples, not the right itself. For peoples within an established state, self-determination meant the power to take the necessary measures to ensure their political as well as economic, social and cultural future. This included self-government.

Demonstrations of the fact that the British Crown felt bound to respect the Aboriginal nations' inherent right to self-government are found in Britain's conduct with the Aboriginal nations in the Americas as well as in India and Africa, the Royal Proclamation of 1763, the treaty process, the jurisprudence of the Privy Council[56] and in the coexistence of British and Aboriginal laws.

Great Britain was not the only European power to recognize the Aboriginal right to self-government. Recently, the Inter-American Commission on Human Rights appeared before the Inter-American Court and cited a treaty of 1762 between the Netherlands and the Saramacas in

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[54] For instance, par. 6 of Declaration on the Granting of Independence to Colonial countries and Peoples, GA Res. 15/1514, UN GAOR, 15th Sess., 1960 as well as Friendly Relations Among States, GA Res. 25/2625, UN GAOR, 25th Sess., 1970. See also: I. Brownlie, Principles of Public International Law, (Oxford: Clarendon Press, 1979, at 594-595.

[55] Sous-commission de la lutte contre les mesures discriminatoires et la protection des minorités, *supra* at 14 (our translation).

[56] See, for example, cases concerning the gradual introduction of British common law for the benefit of the English settlers: Cooper v. Stuart (1889) 14 A.C. 286; Calvin's Case (1609) 77 E.R. 377; Dutton v. Howell (1693) 1 E.R. 17; Re Southern Rhodesia, (1919) A.C. 211 at 234.

what is now known as Surinam.[57] It is particularly interesting to note that the Saramacas are not natives of Surinam and could not claim ancestral rights to their lands. They are the descendants of African slaves who managed to escape their Dutch owners and settle in communities governed according to their tribal laws and customs. Their right to self-government was acknowledged by the Netherlands.

France also recognizes the right of Aboriginal nations to govern themselves. In the contemporary French legal system, this is illustrated, for example, by the distinction between overseas "territories" (TOM) and "departments" (DOM) which recognizes the inhabitants of the territories as having a larger degree of autonomy and self-government. This legal regime has applied to the French colonies since 1854 and included in the French Constitution since 1946, provides that the "territories" have a special status which recognizes the customary laws and jurisdictions of their Aboriginal inhabitants, contrary to the departments where ordinary French legislation applies.[58]

b) The Exercise of the Right

To say that the Aboriginal right to self-government is an inherent and permanent right, recognized under international law, does not mean that its exercise is unlimited. Without going into a detailed analysis of the exercise of Aboriginal self-government, it is clear that international law of human rights imposes a number of constraints on the exercise of self-government, whether it be Aboriginal or non-Aboriginal.

Internal self-government, as opposed to independence, is exercised within the borders of a sovereign state bound by conventional as well as customary standards of human rights protection. International law is not concerned with the manner in which legislative powers may be shared by several entities within one sovereign state. In the Canadian context this means, for example, that Canada is responsible for the implementation of the International Covenant on Civil and Political Rights even over areas of the country which are not under its exclusive jurisdiction, since the Covenant specifically states that it "shall extend to all parts of federal

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[57] Aloeboeote et al. Case, Judgment of 10 September 1993, Inter-American Court of Human Rights.

[58] J.-P. Martres and J. Larrieu, Coutumes et droit en Guyane; Actes du colloque de Cayenne (Paris: Economica, 1992) at 152.

States without any limitations or exceptions."[59] Furthermore, the Covenant imposes obligations toward every human being within the boundaries of the state, without regard to their relationship with the state (citizens and aliens alike are all protected under the Covenant).[60]

Among the provisions of particular significance for Aboriginal nations is Article 27, which would limit an Aboriginal government's power to establish membership rules. In the Lovelace Case,[61] the United Nations Human Rights Committee found provisions of the Indian Act incompatible with article 27 in that they deprived some Aboriginal women and their children of the right to share in the life of their community. Canada will continue, under the Covenant, to have the same obligation toward Aboriginal women, whether or not Aboriginal laws and customs replace the Indian Act. Restrictions on band membership in order to exclude Aboriginal women married to non-Aboriginal men, for example, would violate Canada's obligations under the Covenant.

The international law of human rights does not preclude the recognition of distinctiveness and acknowledges the necessity for differential treatment in order to achieve effective equality,[62] this principle can never serve to justify the negation of any human right. Any differential treatment must be based on "reasonable and objective criteria."[63]

III. The Inherent Right as Part of the Constitution

A number of arguments are made to refute the contention that the Aboriginal inherent right to self-government is currently part of the Constitution of Canada, contemplated by the Constitution of Canada or indeed tolerated by the Constitution of Canada. We hear:

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[59] Art. 50, International Covenant on Civil and Political Rights.

[60] Art. 2(1) International Covenant on Civil and Political Rights.

[61] Report of the Human Rights Committee, 36 U.N. GAOR Supp. (No. 40) 166, U.N. Doc. A/36/40 (1981).

[62] M. Bossuyt, Guide to the "Travaux préparatoires" of the International Covenant on Civil and Political Rights, (Dordrecht: Martinus Nijhoff, 1987) at 482. This principle has been affirmed by the International Court of Justice: South West Africa Cases, I.C.J. Rep. 1996 4, at 293; Namibia Advisory Opinion, I.C.J. Rep. 1971 16, at 77. It was also confirmed in several cases heard by the United Nations' Human Rights Committee. See, for instance, Hendrika S. Vos v. The Netherlands, U.N. Doc. 35th Session, Supp. no 40 A/44/40 (1989) at 241; B. de B. et al. v. The Netherlands, U.N. Doc., 44th Session, Supp. no 40 A/44/40 (1989), at 298.

[63] Ibrahima Gueye et al v. France, U.N. Doc 35th Session, Supp. no 40 A/44/40 (1989) at 198 (U.N. Human Rights Committee).

1) That sovereignty is absolute - there can be but one sovereign;

2) That there is no specific reference to or acknowledgment of the right of self-government in the Constitution Acts. Even section 35 of the Constitution Act, 1982 which recognizes and affirms existing Aboriginal and treaty rights does not inform us as to exactly what is meant by Aboriginal or treaty rights;

3) That the Constitution of Canada through sections 91 and 92 of the Constitution Act, 1867 exhaustively distributes legislative power in Canada;

4) That the inherent Aboriginal right to self-government has been extinguished through colonial or post-Confederation legislation;

5) That the matter of inherent Aboriginal self-government is a complex and difficult one, far too complex and difficult to be accepted as part of the Constitution of Canada until it has been fully defined.

These arguments should attract our scrutiny.

1. Constitutional Absolutism

The early Law of Nations, contemporary international law and the common law imposed and continue to impose important constraints upon the Crown. Relations between the Europeans and the Aboriginal nations are at the very foundation of the legal history of North America. As Professor Slattery has written:

> Canada and the United States came into being, not simply through the activities of incoming European powers, but through a complex series of interactions among various settler groups and Aboriginal nations.[64]

Our constitutional history is one of shared or co-existing sovereignty. Consider, for instance, the early struggle between the Crown and British Parliament, European - First Nation

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[64] Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 1 at 21. See also: Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29 Alta. L. Rev. 498.

relations and treaty-making in the colonial period, the formation of our federal state in 1867, or the numbered treaties which were the pre-condition for European settlement of the West after Confederation.

In Worcester, the Supreme Court of the United States extended its analysis of coexisting sovereignty from relations between states and the Union, to include the status of Indian tribes:

> The residence of Indians, governed by their own laws, within the limits of a state, has never been deemed incompatible with state sovereignty, until recently. And yet, this has been the condition of many distinct tribes of Indians, since the foundation of the federal government.
>
> How is the question varied by the residence of the Indians in a territory of the United States? Are not the United States sovereign within their territories? And has it ever been conceived, by any one, that the Indian governments, which exist in the territories, are incompatible with the sovereignty of the Union?
>
> ...
>
> Is it incompatible with state sovereignty to grant exclusive jurisdiction to the federal government over a number of acres of land, for military purposes? Our forts and arsenals, though situated in the different states, are not within their jurisdiction.[65]

In Johnson v. M'Intosh the question before the Court was whether an individual title which derived from Chiefs of certain Indian tribes could be recognized in the Courts of the United States. Marshall C.J., while analyzing the interplay of Europeans and First Nations, adopted the concepts of "coexisting sovereignties" and "degree of sovereignty". He held that the Indian Nations' sovereignty continued, but in a diminished form.[66]

For the "Europeans" or the United States, the Chief Justice spoke of a less than absolute sovereignty, "a degree of sovereignty as the circumstances of the people would allow them to exercise."[67] In Johnson, the Supreme Court of the United States held that it had no jurisdiction to look behind the veil of First Nation law and land tenure.[68]

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[65] Worcester v. Georgia supra at 591 (per M'Lean J.).

[66] Johnson v. M'Intosh supra at 574.

[67] Ibid. at 587.

[68] Ibid. at 593.

Inherent in the scheme of the Constitution of Canada is the notion of restraint on government through the division of powers. Even leaving aside for the moment the integral role of the Aboriginal nations in the constitutional make-up of Canada, Canadian federalism was born of diversity and, for better or for worse, lives with it.

W.R. Lederman has referred to this as the unity and diversity in Canadian federalism. For Lederman the power-conferring phrases in the Constitution each had to be read in a context that included all the others to determine the scope that was to be given any one of them. In addition, Canada's constitution according to Lederman is characterized by flexibility accomplished through judicial interpretation as conditions in the country generally changed:

> ...The kind of a federal document that history gave us facilitated the development of a carefully balanced federalism that accommodated old and new diversities as well as ensuring essential unities. Unique flexibility for Canada comes from having *many* power-conferring phrases in competition with one another, and the equilibrium points established between them portray the critical detail of Canadian federalism. The power-conferring phrases themselves are given by the British North America Act, but the equilibrium points are not to be found there. They have necessarily been worked out painstakingly by judicial interpretation and precedent over many years. Furthermore, particular equilibrium points are not fixed for all time. As conditions in the country genuinely change and truly new statutory schemes are enacted, judicial interpretation can adjust and refine the equilibrium of the division of legislative powers to meet the new needs. So the high importance of sophisticated judicial interpretation as an ongoing process is obvious.[69]

Certainly a genuine change occurred in the Canadian constitutional framework in 1982. The notion of absolute sovereignty no longer suffices to explain the nature of Canadian law under the Charter of Rights and Freedoms and section 35 of the Constitution Act, 1982. The judicial struggle to reconcile fundamental rights of individuals and parliamentary sovereignty[70] was now supported by a clearer constitutional mandate through the Charter. The same juridical dilemma posed by the apparent vulnerability of Aboriginal and treaty rights in the face of incompatible provisions of statutes passed by Parliament was resolved through sections 35 and 52 of the Constitution Act, 1982.[71]

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[69] W.R. Lederman supra at 603-604.

[70] Roncarelli v. Duplessis [1959] S.C.R. 121.

[71] See the discussion in Sparrow supra at 1098-99.

The acute importance of sophisticated judicial interpretation referred to by Lederman may have been demonstrated by Mr. Justice Lambert in his Reasons in Delgamuukw when he stated:

> No doubt, once aboriginal rights of self-government and self-regulation were recognized, affirmed and guaranteed by s.35 of the Constitution Act, 1982 a process started towards a fuller and more widely understood appreciation of those rights, and the very questions that were asked of Mr. Sterritt will start to be resolved.[72]

Just as the Charter signalled that the legislative power of Parliament and the provincial legislatures would henceforth be restrained by the duty to respect the fundamental individual rights it set out, so too did section 35 of the Constitution Act, 1982 confirm that the Aboriginal rights held by First Nations and First Nations' citizens are a limit on legislative authority.[73]

So when we debate the existence of an inherent Aboriginal right to self-government within Canada, we are no longer debating whether our law has room for more than the Crown's single, supreme authority, for that question is now settled. Rather, we are discussing how and why the traditional and now antiquated role of Crown sovereignty
will be limited and constrained.

2. Constitution Silence

To those who assert that the Canadian Constitution is silent on the matter of Aboriginal self-government, I would ask: are you really listening?

a) Role of the Preamble

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[72] Delgamuukw supra at 717.

[73] "By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected": Sparrow supra at 1110.

An unsuccessful attempt to state the constituent elements of the Constitution of Canada was made in 1992. Section 52 of the Constitution Act, 1982 addresses this point but as the Supreme Court of Canada recently held, this definition is not exhaustive.

In New Brunswick Broadcasting Co. v. Nova Scotia,[74] the doctrine of parliamentary privilege was held to be included in the Constitution's definition, though section 52(2) makes no mention of it. It was implied, the Court said, by the reference in the preamble of the Constitution Act, 1867:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.

Beyond parliamentary privilege, what does this mean? To what might it refer?

Peter Hogg has described the intended legal effect of the preambular statement as follows:

> Apart from the changes needed to establish the new federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before. After 1867, therefore, much of Canada's constitutional law continued to be found in a variety of sources outside the B.N.A. Act.[75]

Professor Brian Slattery has written a good deal on the role of First Nation - European relations and the treaties which were the resulting instruments. These formed what he refers to as "imperial constitutional law":

> The extensive relations between Aboriginal nations and the English colonies on the Atlantic seaboard in the 17th and 18th centuries gave rise to a distinctive body of inter-societal custom, recognized as binding among the parties. This custom was neither entirely English nor entirely Aboriginal in character, but incorporated elements from the legal cultures of all participants. Some of this custom contributed to the development of international law. But other parts were too local and specific for universal application. Important elements of this body of custom were incorporated in the embryonic constitutional law governing Britain's overseas territories, sometimes called "colonial law" or "imperial constitutional

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[74] [1993] 1 S.C.R. 319.

[75] Constitutional Law (Scarborough: Carswell, 1992) at s. 1.2 (emphasis added).

> law". This law was inherited by the United States and Canada upon independence, although it assumed variant forms in the two countries due to differences in constitutional structure.[76]

This then is one of the elements to which the preamble of the Constitution Act, 1867 must refer. What are some of the others?

b) Royal Proclamation, 1763

There are also the specific actions of the British Crown in regard to European - First Nation relations that have been held by the Courts to be constitutional in nature.

One example is the Royal Proclamation of October 7, 1763, which is specifically referred to in section 25 of the Canadian Charter of Rights and Freedoms. It recognized First Nation nationhood, the political alliances by the British with the First Nations and their rights to continue in the possession of their territories until ceded or purchased through a formal treaty process.

The Royal Proclamation is now being analyzed not only for its role in the protection of Aboriginal territorial rights and its mandating of a treaty process but also as a recognition of the political rights of the Indian nations.[77]

Alain Lafontaine maintains that the elements of political independence of Aboriginal people recognized by the Proclamation can essentially be placed under three headings: the

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[76] "Aboriginal Sovereignty and Imperial Claims" supra at 22.

[77] In his interesting presentation to the Canadian Bar Association National Native Justice Section's CLE on fiduciary obligations earlier this year, Alain Lafontaine set out to reconcile the two concepts of fiduciary obligation and self-government flowing from the Royal Proclamation.

> It is through its duty of protection that the Crown first endorsed its fiduciary role towards aboriginal peoples. In the same way, the Royal Proclamation also recognized aboriginal political independence now claimed by aboriginal people as the right to self-government.

Alain Lafontaine, "Coexistence of the Fiduciary Obligation of the Crown and the Aboriginal Right to Self-Government" (Canadian Bar Association, Native Justice Section: UFO's - Unidentified Fiduciary Obligations, 28 May 1994) at 10.

exercise of independent decision-making, the power to sanction those decisions, the ability to use the territory freely as they wish.

On the first point, "the exercise of independent decision-making power", Lafontaine introduces the important dimension of self-government existing between strict internal self-governance or self-regulation on one hand and plenary legislative authority over territory on the other. That element is the relations of the nations towards other nations or collectivities.[78] These relations were in large part forged through treaty-making, an element of the Constitution that I will examine separately.

It is interesting to note that Mr. Justice Lambert referred to this element of external relations in Delgamuukw while characterizing the Gitksan and Wet'suwet'en claim, which he endorsed.

> The claim is about the right of self-government and self-regulation of a community of people through their own institutions in order to regulate their own conduct towards each other and their conduct towards others, particularly as related to the existence of their aboriginal title and aboriginal sustenance rights, but also in relation to their social organization.[79]

This power was exercised basically in two ways which are recognized by the Proclamation. The first is the power to decide whether or not to surrender a territory by way of treaty,[80] and the second is the power to engage in military alliance or to enter into peace agreements which would have the effect of making the Aboriginal nations neutral in conflicts between opposing European powers.

On the power to sanction decisions, the British considered their position to be vulnerable, they feared another Pontiac Rebellion and realized the fragility of their alliances with First

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[78] Ibid. at 10.

[79] Delgamuukw supra at 716.

[80] As to the surrender of lands, the Proclamation reads:

> ...but that if, at any Time, any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians to be held for that Purpose...

Nations.[81] The Supreme Court in Sioui clearly recognized this aspect of First Nations European relations.[82]

Lafontaine illustrates the third element of recognition in the Royal Proclamation -- the free use of territory -- with the following extract:

> ...the several Nations or Tribes of Indians with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominion and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[83]

In the landmark Aboriginal title decision of the Supreme Court of Canada Calder v. Attorney General of British Columbia in 1973, Mr. Justice Hall referred to the Proclamation in the following terms:

> This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne J. ... as the "Indian Bill of Rights". Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories....
>
> In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.[84]

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[81] Taken in this context, the following words of the Proclamation become even more meaningful:

> and whereas it is just and reasonable, and essential to Our Interest and the Security of Our colonies, that the several Nations or Tribes of Indians...

and also:

> And whereas great Frauds and Abuses have been committed in the purchasing lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians;... [emphasis added]

[82] R. v. Sioui supra at 1064.

[83] Lafontaine supra at 15-16 (emphasis added).

[84] Calder supra at 394-95.

During the constitutional patriation process in the early 1980s, the Aboriginal peoples of Canada went before the United Kingdom Court of Appeal in an attempt to block patriation and to obtain a declaration "that treaty or any other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in Right of her government in the United Kingdom". Among the instruments considered by the Court of Appeal was the Royal Proclamation of 1763. Of this instrument, Lord Denning stated:

> The Royal Proclamation of 1763 had great impact throughout Canada. It was regarded as of high constitutional importance. It was ranked by the Indian peoples as their Bill of Rights, equivalent to our own Bill of Rights in England eighty years before.[85]

The Royal Proclamation and the state practice it mandated and reflected is surely an additional constituent element to which the preamble of the Constitution Act, 1867 refers.

c) Treaties

The Supreme Court has recently instructed us further as to the elements of Professor Slattery's "imperial constitutional law". In analyzing First Nation - French - British relations during the Seven Years War and the critical role of First Nation alliances in the inter-European struggle for supremacy, Mr. Justice Lamer wrote the following for a unanimous Court in R. v. Sioui:

> I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.
>
> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When those efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.[86]
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> ...

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[85] The Queen v. Secretary of State [1981] 4 C.N.L.R. 86 (Eng. C.A.) at 91.

[86] Sioui supra at 1052-1053.

> This "generous" policy which the British chose to adopt also found expression in other areas. The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.[87]

It is perhaps in this context that not only the preamble to the Constitution Act, 1867 should be read but also its provisions relating to jurisdiction and ownership.

In fact, at least since 1982, the Constitution of Canada may well be said to include explicit recognition of inherent Aboriginal self-government. I refer to the reference in section 35 of the Constitution Act, 1982 to treaties and treaty rights.

What is the significance of the treaty process concerning the inherent right of Aboriginal self-government and the Constitution of Canada? Treaty-making, it seems to me, implies an arm's length relationship based on mutual recognition of a degree of autonomy and the need to agree upon -- not impose -- a future relationship. Each side must be confident that the other contracting party possesses a sufficient degree of self-governance and self-determination to decide upon the treaty terms, mandate their execution and ensure they are respected and implemented.

In R. v. Sioui, the Supreme Court disposed of the Crown's argument that the treaty with the Hurons was a capitulation not a treaty of peace, by distinguishing between the capacity of the French military and Canadian militia, on the one hand, and the Indian Nations, on the other. The Court stated:

> Whatever the similarities between a document recording the laying down of arms by French soldiers or Canadians and the document at issue, the analogy does not go so far as to preclude the conclusion that the document was nonetheless a treaty [with the Hurons].
>
> Such a document could not be regarded as a treaty so far as the French and the Canadians were concerned because under international law they had no authority to sign such a document: they were governed by a European nation which alone was able to represent them in dealings with other European nations for the signature of treaties affecting them. The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory. The *sui generis* situation in which the

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[87] Ibid. at 1055.

> Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law.[88]

The recognition of the unextinguished inherent right to self-government is reflected in the actions of the Canadian government concerning contemporary treaties with First Nations. The treaty process continues. As we have seen, this process itself is the manifestation of both the exercise of self-government by First Nations and the recognition of that right by the Crown.

The federal government has acknowledged that the Supreme Court judgment in Calder[89] was instrumental in rejuvenating the treaty process (in government parlance "the land claims process"). By 1975, the James Bay and Northern Quebec Agreement had been signed and shortly thereafter the Northeastern Quebec Agreement. Treaties have now been signed throughout Canada's north addressing virtually every aspect of political life.

A treaty process is underway in British Columbia and significant areas in Quebec south of the James Bay and Northern Quebec Agreement territory are under treaty negotiations.

All these instruments involving vast areas, significant natural resources, millions of dollars and substantial political reordering have been negotiated and concluded between the Crown and Aboriginal peoples exercising what must be one of the more important aspects of self-governance, the commitment to legal and political relationships with other peoples.

d) The Inherent and Permanent Right to Self-Determination as Part of the Law of Canada

International law enters the Constitution of Canada through at least two doors. First, customary international law forms part of the law of Canada.[90] Second, the law of Canada,

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[88] Sioui supra at 1056.

[89] Supra.

[90] Reference re Exemption of U.S. Forces [1943] S.C.R. 483.

including the Constitution, is to be interpreted so that it is compatible with Canada's international law obligations.[91]

At the time of the colonization of North America, very few standards of the Law of Nations had acquired a universal character, but regional standards were emerging. Treaty-making was very much a part of the relations of France, Great-Britain and the Netherlands with Aboriginal nations in the Americas. These treaties stand as evidence of the recognition by the European powers of the Aboriginal nations' capacity to enter into military and commercial alliances in their interest, cede rights and territories, all of which they would not have been able to do had they lacked the capacity to govern themselves.

These actions as well as the apparent belief on the part of the European powers that they had to act in that fashion are the required elements to establish the existence of a customary standard of international law[92] which does not have to be universal but can be regional or local.[93]

We know that the standard was still in force at the time of Confederation.[94] Customary standards of international law have long been held to be part of the British common law.[95] As a customary standard of law among the involved European Nations, Aboriginal self-government was part of the law of Canada in the nineteenth century.

Twentieth-century courts and publicists alike tended to deny Aboriginal rights and ignore Aboriginal self-government as the concept of "state sovereignty" became prominent in international as well as in domestic law. Only recently has international law rediscovered its

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[91] R. v. Big M. Drug Mart [1985[1 S.C.R. 259, at 309; National Corn Growers Association v. Canada (Import Tribunal) [1989] 2 F.C. 517 (C.A.); International Fund for Animal Welfare Inc. v. Canada [1987] 1 F.C. 244, at 259 (T.D.).

[92] North Sea Continental Shelf, [1984] I.C.J. Rep. 3 at para. 77.

[93] U.S. Nationals in Morocco [1952] I.C.J. Rep. at 199; Right of Passage over Indian Territory, [1960] I.C.J. Rep. 6 at 39.

[94] Connolly v. Woolrich supra is authority for this and the treaty process with First Nations and the specific treaty negotiations are illustrative. See: Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto: Belfords, Clarke & Co., 1880).

[95] Triquet v. Bath (1764) 3 Burr. 1478 at 1480, 97 E.R. 936 at 937. Chung Chi Cheung v. The King [1939] A.C. 160, (1939) W.W.R. 232, at 235.

original path with regard to Aboriginal peoples and Aboriginal rights, with the drafting of such instruments as the Draft U.N. Declaration of the Rights of Indigenous Peoples,[96] and the adoption of treaties such as the I.L.O. Convention 169,[97] as well as legal instruments pertaining to environmental protection.

All these contemporary legal instruments recognize the right of Aboriginal peoples to self-government, not as a new right but as an inherent right, which has always existed even if it has not been exercised for some time. The standard which emerged from the conduct and the *opinion juris* of the European powers in the eighteenth century is now being acknowledged as a universal norm of international law.

The Aboriginal right to self-determination, including self-government, was also recognized by the United Nations Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples, in 1991. The participants stated:

> The Meeting of Experts shares the view that indigenous peoples constitute distinct peoples and societies, with the right to self-determination, including the rights of autonomy, self-government, and self-identification.[98]

Among the participants were the representatives of seventeen states with indigenous populations. In their recommendations, they stated that "[a]utonomy and self-government can be built on treaties, constitutional recognition or statutory provisions recognizing indigenous rights. Further, it is necessary for the treaties, conventions and other constructive arrangements

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[96] United Nations Working Group on Indigenous Populations, Report on the 11th Session, UN DOC E/CN.4/sub.2/1993/29 (1993), Draft Declaration on the Rights of Indigenous Peoples, at 50. See Article 3: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 4: "Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State." Article 26: "Indigenous peoples have the right to own, develop, control and use the lands and territories... and other resources which they have traditionally owned or otherwise occupied or used. This includes the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources...."

[97] International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, (1989) 28 I.L.M. 1382. See, for example, Articles 7 to 10 concerning the recognition of Aboriginal customs.

[98] Commission on Human Rights, Report of the Meeting of Experts to Review the Experience of Countries in the Operation of Schemes of Internal Self-Government for Indigenous Peoples (24-28 September 1991, Nuuk, Greenland) U.N. Doc. E/CN.4/1992/42 (25 November 1991).

entered into in various historical circumstances to be honoured, in so far as such instruments establish and confirm the institutional and territorial basis for guaranteeing the right of indigenous peoples to autonomy and self-government."[99]

Last year, jurists who were called to hear a number of charges brought by the Kanaka Maoli people of Hawaii against the United States before an International Peoples' Tribunal stated:

> ...The inherent right to sovereignty and self-determination of the Kanaka Maoli people has not been extinguished by the illegal actions of the United States. The overthrow of 1893 and the purported annexation of 1898 merely changed the nature of the operative state but did not remove and could not remove the inherent right of the people to sovereignty and self-determination.[100]

Similarly, the assertion of British sovereignty over the territories which are now known as Canada did not and could not extinguish the Aboriginal peoples' inherent right to self-government.

3. Constitutional Exhaustion

a) A Limited Paramountcy

An argument against an inherent right to self-government has it that the Constitution of Canada through sections 91 and 92 of the Constitution Act, 1867 exhaustively distribute legislative power in Canada.

This view has recently been expressed by Mr. Justice Macfarlane for the majority of the British Columbia Court of Appeal in Delgamuukw when he stated:

> ...A continuing Aboriginal legislative power is inconsistent with the division of powers found in the Constitution Act, 1867 and introduced into British Columbia

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[99] Ibid. at 12, par. 8.

[100] Ka Ho'okolokolonui kanaka Maoli, Peoples' International Tribunal Hawaii 1993, Preliminary Verdict and Conclusions at 42.

> in 1871. Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada.[101]

Macfarlane J.A. relied upon the following passage from A.G. Ontario v. A.G. Canada as authority:

> Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.[102]

This passage, however, must be read in the context of the issues before the Court and the judgment in its entirety. For example, elsewhere in his judgment, Lord Loreburn stated:

> On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act.[103]

It seems to me that the thrust of this decision is that, as is explicitly stated in the passage quoted by Macfarlane J.A., the British Parliament did not withhold any powers in granting or bestowing internal self-government on the Dominion and the provinces. This does not address the question of whether there existed inherent powers of Aboriginal self-government which did not derive from the British Parliament, but were external to and in fact pre-dated it.

An inherent right to Aboriginal self-government external to and independent of the Constitution Act, 1867 may well be a manifestation of powers "extraneous to the statute itself" and not falling "within the limits of the British North America Act."

Furthermore, to the extent that so-called internal self-government powers were bestowed (Lord Loreburn's expression) by the British Parliament, the rule of *nemo dat qui non habet* would

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[101] Delgamuukw supra at 519.

[102] A.G. Ontario v. A.G. Canada, [1912] 2 A.C. 89 at 104 (emphasis added).

[103] Ibid. at 108 (emphasis added).

apply. The British Parliament certainly could not bestow upon the Dominion or the provinces the powers which belonged to First Nations alone.

The courts have now firmly established that in the period between Confederation and the coming into force of the Constitution Act, 1982, to the extent that extinguishment of Aboriginal right to title was possible, this could be accomplished only by the federal Crown acting with clear and plain intention to do so. Although he did not use this language, Mcfarlane J.A. in Delgamuukw perhaps considered the distribution of legislative powers by section 91 and 92 of the Constitution Act, 1867 as manifesting such clear and plain intention. For the reasons set out above, I do not share this view.

Neither did Mr. Justice Lambert or Mr. Justice Hutcheon in Delgamuukw. As Lambert J.A. stated:

> Whatever form of extinguishment of Aboriginal rights of self-government or self-regulation is being considered, the same principles apply. The intention to extinguish must be clear and plain; it must be the intention of the Sovereign Power; it must be legislatively brought about; and, if it is implicit, the implication must not simply be probable, it must be necessary.[104]

Of course, even the clear and plain intention legislatively brought about would only be effective in extinguishing the right within the context of the Constitution of Canada and the common law of Canada. To the extent that the right has an independent existence, is genetically distinct, "extinguishment" through the operation of Canadian domestic law would only mean that it was not cognizable for the purposes of Canadian domestic law.

In the meantime, the argument for exhaustive distribution of powers through sections 91 and 92 of the Constitution Act, 1867 will continue to be invoked in support of extinguishment of Aboriginal rights to self-governance -- extinguishment by exclusion or, in constitutional law vocabulary, extinguishment through occupation of the field.

But since when did the doctrine of federal paramountcy have the effect of irrevocably stripping provinces of heads of concurrent jurisdiction? The appropriate language is surely "suspend" or "render inoperative" not extinguish or obliterate.

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[104] Delgamuukw supra at 673.

b) The Effect of Section 35

It is true that until 1982 there was little recourse against colonial or Canadian legislation which frustrated the exercise of First Nations' jurisdiction. This would have been a situation analogous to that considered by the courts with respect to Aboriginal rights to fish and Aboriginal and treaty rights to hunt migratory birds in contravention of an international convention and Canadian law.[105] Rights were not extinguished but the exercise of rights was often frustrated or restricted, and there appeared to the Courts to be no recourse within the Canadian constitutional context with its doctrine of Parliamentary sovereignty.[106]

With the introduction of section 35 and section 52 of the Constitution Act, 1982, these rights were explicitly recognized and affirmed and explicit recourse against incompatible legislation or Crown action became available.[107]

From the vantage point of the constitutional recognition and affirmation provided by section 35 and the constitutional remedy provided by section 52 of the Constitution Act, 1982, I contend that the Courts now have a domestic law mandate to affirm and protect these rights which earlier Courts did not have or did not think they had.

Section 35 constitutes a check or limitation upon federal and provincial executive and legislative powers. Referring to section 35(1), the Supreme Court in Sparrow clearly directed that the rights there recognized and affirmed had the effect of restraining executive and legislative power.

> Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.
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> ...

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[105] R. v. Arcand [1989] 2 C.N.L.R. 110 (Alta Q.B.); R. v. Flett [1989] 4 C.N.L.R. 128 (Man. Q.B.), leave to appeal refused [1991] 1 C.N.L.R. (Man. C.A.).

[106] R. v. George, [1966] S.C.R. 267; R. v. Sikyea (1964) 43 D.L.R. (2d) 150 (N.W.T.C.A.) AFF'D [1964] S.C.R. 642; R. v. Derrikson (1976) 71 D.L.R. (3d) 159.

[107] Ibidem.

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power.[108]

With respect to provincial powers, in particular, the Court stated:

> It [section 35(1)] also affords Aboriginal peoples constitutional protection against provincial legislative power.[109]

c) The Meaning of Sparrow

The fact that little higher court authority yet exists on the specific matter of Aboriginal governance should be of no surprise. One need only recall the judicial hiatus in the years immediately following the enactment of Constitution Act, 1867. It was really only in the second decade following the Constitution Act, 1867 that the Privy Council began to flesh out the specific contents and scope of provincial and central government powers prescribed in sections 91 and 92.

It should be acknowledged that the Courts across Canada have had only a decade to come to grips with the extent of the recognition and affirmation contained in section 35 of the Constitution Act, 1982. In fact, section 35 only arrived before the Supreme Court of Canada in November 1988 in R. v. Sparrow as the Court acknowledged.[110]

Sparrow was primarily about the Aboriginal right to fish. However, in Sparrow the Court set out the foundation for a right to self-government when it rejected the suggestion that contemporary Aboriginal rights are defined by past government regulation of how they were exercised. This overruled the following contention by the British Columbia Court of Appeal:

> The right must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the Musqueam Band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia. [...] The "existing right" in 1982 was one which had long

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[108] Sparrow supra at 1109-1110.

[109] Ibid. at 1105.

[110] Sparrow supra at 1082.

> been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all.[111]

On the contrary, Chief Justice Dickson and Mr. Justice LaForest held:

> However, historical policy on the part of the Crown is not only incapable of extinguishing the existing Aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing Aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).[112]

The decision set out a stringent test for legislation which would justify interference with protected Aboriginal rights and established that, as a general rule, legislation should ensure the "recognition and affirmation" of Aboriginal rights.[113]

If the government cannot generally delineate Aboriginal rights by its legislation, we are left with the question: who does? In the absence of justified interference, is it possible that Aboriginal rights belong to individual members of First Nations and are theirs to exercise completely at will? This would seem completely inappropriate to a right which is theirs by virtue of membership in a defined and historic group, of being "organized in societies" to employ Judson J.'s language in Calder.

In Sparrow the Supreme Court did not describe an Aboriginal right to fish which would take place without reference to or concern for others. On the contrary, the decision made clear:

> Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group.[114]

If the right is exercised as part of a collectivity, then by definition it is that group or that group's customary law which delineates the right, determining who will do what, where, when and how.

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[111] R. v. Sparrow, (1987) 36 D.L.R. (4th) 246 (B.C.C.A.) at 272 (emphasis added).

[112] Sparrow (S.C.C.) supra at 1101 (emphasis in the original).

[113] Ibid. at 1110.

[114] Ibid. at 1112.

If this were not the case, the result would be to create a virtual legislative vacuum. Aboriginal rights are not subject to regulation by Parliament unless its legislation meets the justification test set out in Sparrow. Unless positive Aboriginal rights necessarily imply powers of self-government for the affected community, they would only be subject to regulation when the rights fell within the purposes for which the Indian Act allows Band councils to make by-laws.[115]

For Aboriginal rights to have meaning, they must be exercised "in keeping with the culture and existence of that group [which holds them]."[116] Whether the resulting code of conduct is expressed in regulations or in unwritten custom, the creation of these rules governing the exercise of Aboriginal rights must constitute customary law. At the very least, in as much as the rights being regulated are themselves constitutionally protected, whenever they are exercised, a constitutional right to self-government arises to determine how that process will occur.

d) Recent Case Law

There are very definite signs that the courts are developing and will continue to develop Aboriginal governance as a branch of section 35 of the Constitution Act, 1982.

Two examples come from the Quebec courts. Recently, the Quebec Court of Appeal has considered the matter of Aboriginal sovereignty or jurisdiction as recognized in section 35 of the Constitution Act, 1982. This was in the context of the current judicial imbroglio over further hydro-electric development in Northern Quebec.

Mr. Justice LeBel writing for a unanimous bench accepted that the proceedings brought by the James Bay Crees invoking, *inter alia*, their internal sovereignty over their traditional lands, involved a constitutional analysis going beyond questions of traditional federalism relating to division of powers between the federal Parliament and the legislature of Quebec.

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[115] Since the Act only allows by-laws for "the preservation, protection and management of fur-bearing animals, fish and other game on the reserve," there would be no power to regulate the off-reserve fishing right at issue in Sparrow. See: R.S.C. 1985, c. I-5, s. 81(1)(o).

[116] Sparrow supra at 1112.

> What emerges from the parties' arguments and especially from the submissions made by the plaintiffs, the Cree communities, is that this case not only apparently raises questions of traditional federalism, regarding the distribution of powers between Parliament and the Legislature of Quebec, but the action also introduces in the case a new dimension, that of the application of certain provisions of the ... Constitution Act, 1982 ... particularly of s. 35 ... and the rights flowing from it.[117]
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> ...
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> The first claim submitted by the Cree communities is precisely that of the recognition of their internal sovereignty on their traditional lands, sovereignty which they interpret in a manner to exclude the jurisdiction of the two levels of government except in cases where the communities consent to their intervention.
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> These first questions raise a problem of interpretation of s. 35 of the ... Constitution Act, 1982 and have definite consequences on the definition of the scope of federal and provincial powers.[118]

Mr. Justice LeBel distinguished between the two branches of section 35: rights analogous to Charter rights, on the one hand, and jurisdiction on the other. After reviewing what he referred to as contradictory currents of jurisprudence on the question of the effect of the Charter on the jurisdiction of the courts in constitutional adjudication, he concluded that Charter rights and protections act as a restraint on both federal and provincial powers and do not necessarily involve a reordering of the division of federal and provincial powers.[119]

In the light of the Cree allegations as to internal sovereignty and jurisdiction, however, Mr. Justice LeBel acknowledged that that aspect of section 35 of the Constitution Act, 1982 did affect the traditional division of powers. After reviewing the Supreme Court judgment in Sparrow, Mr. Justice LeBel concluded it was authority for the proposition that section 35 introduces a third element ("une troisième composante") into the functioning of Canadian federalism.

> In the conception that seems to come out of the Sparrow case, the constitutionalization of Aboriginal rights in s. 35 would introduce a third component in the operation of Canadian federalism which should be taken into

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[117] Canada (Attorney General) v. Coon Come [1991] R.J.Q. 922 (C.A.) at 936-937; [1991] 3 C.N.L.R. 40 at 37.

[118] [1991] R.J.Q. 922 (C.A.) at 939; [1991] 3 C.N.L.R. 40 at 60.

[119] Ibid. at 59.

> account in the distribution of powers between the provincial legislatures and the Parliament of Canada.[120]

In another case involving the rights of self-government of the James Bay Crees as recognized by the James Bay and Northern Quebec Agreement and given explicit constitutional recognition through section 35, the Quebec Court of Sessions of the Peace found that the Crees enjoyed a right to governance independent of the Parliament of Canada, untouchable by the Parliament of Canada, in fact a manifestation of a residual sovereignty.

> Consequently, subordination, which is one of the essential characteristics of regulatory power in our juridical system, does not apply to the case at bar. Band councils' regulatory power is not subjected to the will of the federal Parliament, because this power is included in the rights guaranteed by the Constitution. In the Court's opinion the right of a local administration to make by-laws is part of those guaranteed rights.
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> ...
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> In this perspective, the Court agrees with the proposition that the Crees hold some sort of residual sovereignty as regards their local governments.[121]

Earlier in this paper, we examined in some depth the decision of the British Columbia Court of Appeal in Delgamuukw. The majority in that case concluded that the right to Aboriginal jurisdiction or law making over a territory had been extinguished through the operation of British sovereignty and the constitutional division of powers. However, the majority did not give reasons and used a different test than that applying to title and to other Aboriginal rights. Four and perhaps all five of the justices were prepared to accept that a degree of Gitksan and Wet'suwet'en customary law and internal governance survived these events.

This is what Mr. Justice Lambert stated in Casimel was the meaning of Delgamuukw. On the facts and the law before them in Casimel, the British Columbia Court of Appeal concluded that the customs of the Stellaquo Band of the Carrier People were effective in establishing a parent-child relationship for the purposes of British Columbia legislation. These rules of the customary law or of the internal legal system of the Stellaquo Band of the Carrier

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[120] Ibidem.

[121] Eastmain v. Gilpin [1987] 3 C.N.L.R. 54 at 66-67.

People are, on the authority of Casimel, now recognized, affirmed and protected by the common law and under section 35 of the Constitution Act, 1982.[122]

On March 10, 1994 the Supreme Court granted leave to appeal in Delgamuukw, but proceedings have since been adjourned for a year at the request of both parties.[123] It remains to be seen when Aboriginal jurisdiction and self-governance (the second branch of section 35) will for the first time be squarely before the Court.

4. Constitutional Extinguishment

In Delgamuukw, Mr. Justice Lambert examined the period between 1848 and 1982 searching for evidence in the case of clear and plain intention on the part of the competent Crown to extinguish Gitksan and Wet'suwet'en "rights of self-government" or "self-regulation". He noted the Court had not been referred to Proclamations or Ordinance of the Sovereign Power, nor to legislative enactments by the Parliament of Canada which extinguished these rights "by clear and plain intention." Lambert J.A. allowed it was possible that the application of the common law throughout British Columbia in 1858 may have extended to the Gitksan and Wet'suwet'en peoples rules previously inapplicable to them by virtue of local circumstances, but he added he did "not think it likely that such a change occurred."[124]

Mr. Justice Lambert found in the record of the case no instrument or event capable of meeting the current threshold test for extinguishment -- clear and plain intention -- despite 136 years of the exercise of sovereign authority by the Crown in British Columbia. This would appear to indicate that for Lambert J.A. the test is severe indeed. With respect, I would suggest that perhaps the test should be understood to be impossible if not inappropriate.

Certainly, Mr. Justice Lambert must be applauded for the integrity and open-mindedness of his analysis. I believe, however, that the right to self-government should not be considered

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[122] Casimel supra at 733.

[123] An Accord of Recognition and Respect Between Her Majesty the Queen in Right of British Columbia and the Hereditary Chiefs of the Gitksan and Wet'suwet'en Peoples (13 June 1994).

[124] Delgamuukw supra at 729.

"extinguishable". Its exercise can be frustrated, indeed denied, and that for centuries. But the right vests permanently in a people and its exercise can be revived.

Hutcheon J.A. also found that legislative prohibitions did not have the effect of extinguishing Gitksan and Wet'suwet'en customs and traditions. In so doing, he seems to support the view that the right to self-government is inextinguishable and vests in the people. The exercise of the right may be prohibited, even through clear and plain intention, but this does not result in extinguishment:

> The Feast is but one example of a tradition practised before 1846 and continued to the present day. Despite the legislative prohibition of the Feasts commencing in 1885 the Gitksan and Wet'suwet'en Feasts remained a significant feature of their culture. The evidence is that the ancestors for the appellants celebrated their Feasts in the face of the legal prohibition, sometimes strictly enforced by the authorities and sometimes ignored by them.
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> The legislative ban was lifted in 1951 and no one could argue thereafter that the tradition represented by the Feast had been extinguished. That applies to other traditions of these two societies.[125]

It may be suggested by some that the series of Indian Acts enacted prior to and subsequently to Confederation, culminating in the 1951 enactment, had the effect of extinguishing the inherent right to self-government to the extent that this legislation dealt with a form of Indian government.

But no such finding has been made by the courts. While in Delgamuukw the majority found that the division of powers in the Constitution Act, 1867 precluded the continuance of an Aboriginal self-government, Macfarlane J.A. examined the Indian Act and in particular section 88 for its impact on Aboriginal rights generally and found no clear and plain intention by Parliament to extinguish or to authorize extinguishment of Aboriginal rights by Provincial legislation.[126]

To the extent that the Indian Act is represented as a complete code for Indian governance inconsistent with the continued exercise of an inherent right to self-government -- which I

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[125] Delgamuukw supra at 762.

[126] Ibid. at 539.

certainly do not believe -- the argument would be answered by analogy to Sparrow. As Mr. Justice Lambert stated in his reasons in Delgamuukw:

> The actual decision in Sparrow was that the argument by the Federal Crown that the Fisheries Act and its Regulations contained a complete code inconsistent with the continued exercise of the aboriginal rights of Mr. Sparrow, a member of the Musqueam people, to fish in Ladner Reach and Canoe Passage was rejected. Inconsistency was not enough. Clear and plain intention was required.[127]

When dealing with the impact of section 88 of the Indian Act, Mr. Justice Lambert agreed with Macfarlane J.A. on the lack of clear and plain intention to extinguish:

> There was no clear and plain extinguishing intention under s. 88 when that section was enacted in 1951. In support of that conclusion it is not necessary to go behind the Indian Act itself and its 1951 amendments, in their context. But it is instructive to read what was said by the Honourable W.E. Harris, Minister of Citizenship and Immigration, and Minister Responsible for Indian Affairs, on second reading of the amending bill in 1951 [Canada, House of Commons, Debates at 1352 (1951)]:
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> > Heretofore we have thought of enfranchisement as being the ultimate role of Indian policy, and let us say frankly that we rather expected that the Indian would want to become enfranchised in order to be like one of us. Nothing can be further from the truth, Mr. Speaker. The Indian has no desire to become as one of us, and all his representations have said: I hope you are not going to take away from me the right to be an Indian. Of course there is no such intention. Except in rare cases the Indian has every intention to retain his connection with his reserve and with his band, and while he wants some of the advantages of our society he wants them on such terms that he can retain his old connections.
> >
> > I think, sir, that our policy should be to extend self-government to all the reserves as soon as possible. It might be argued that this would give to band councils on the reserves greater powers than are now held and exercised by municipal authorities in our form of government, but if that would be the result surely we can impose safeguards to see that a band council does not exercise authority greater than a municipal council unless

[127] Delgamuukw supra at 664.

> it is in the interests of the band. I think perhaps we can discuss that better in the committee stage.[128]

In addition to its rejection of the "complete code theory" of extinguishment, Sparrow may also be applied by analogy to this matter in another aspect.

The Court in Sparrow through Chief Justice Dickson and Mr. Justice LaForest stated:

> The evidence revels that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. (emphasis added)[129]

On the subject of prior regulation of an Aboriginal right, the Chief Justice and Justice LaForest stated the following:

> ...An aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.
>
> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.[130]

As Mr. Justice Lambert observed in his Reasons in Delgamuukw, these passages from Sparrow are significant for their reference to organized society, for holding that an Aboriginal right should "not be defined by incorporating ways that it been regulated in the past by the settling society" and for finding "that an Aboriginal right may be exercised in a contemporary manner."[131]

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[128] Ibid. at 683. Section 88 of the Indian Act provides that, subject to the terms of any treaties, the Act itself, or of any other federal legislation, all laws of general application apply to Indians (which has been held to contemplate provincial laws).

[129] Sparrow supra at 1094.

[130] Sparrow supra at 1099 (emphasis added).

[131] Delgamuukw supra at 635.

As a final analogy with Sparrow, the fact that Parliament has chosen to legislate on the subject of Indian government may be said only to confirm a recognition of special status for Indian nations.[132]

We have a first inkling as to how the Courts may receive a challenge to the Indian Act

[132] Sparrow supra at 1117.

as being unjustified regulation of the inherent right to self-government.[133]

5. Constitutional Complexity

There is a contention among some that the matter of inherent Aboriginal self-government is a complex and difficult one, far too complex and difficult to be accepted as part of the Constitution of Canada until it has been completely defined.[134]

A characteristically eloquent answer to this conundrum was given by Mr. Justice Lambert in his dissenting reasons in Delgamuukw when he pointed out that the mere fact that the question of an Aboriginal right to self-government is difficult, does not mean the right does not exist. He observed: "All it means is that this world contains many questions that are difficult to answer."

Mr. Justice Lambert then put the matter in perspective:

> The fact that it is difficult to answer some questions about the interaction of Federal and Provincial law does not mean that the rights of either Canada or British Columbia to make laws must be suspect.[135]

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[133] This issue is before the Federal Court in Twinn et al. v. The Queen, File No. T-66-86, in which the plaintiff bands claim that their Aboriginal right to determine membership was infringed when amendments to the Indian Act restored status to certain women, while the Crown's defense is that the Act extinguished the right, if it ever existed. The Federal Court Trial Division rendered judgment on July 6, 1995. Mr. Justice Muldoon in the course of lengthy Reasons (124 pages) stated at 48:

> The plaintiffs' asserted right to control their own membership of their "bands" (a wholly statutory term) was emphatically extinguished by the *Indian, 1876*. Complete control was taken by Parliament in the enactment of that statute and its predecessors.

[134] Kim Campbell, while Minister of Justice, admitted: "Throughout the debate, federal and provincial governments have argued that there was a need for further definition of the right of self-government before it could be constitutionally protected, but Aboriginal leaders maintained that the `inherent' nature of this right made this process unnecessary and unacceptable." See: Speech by the Honourable Kim Campbell, Minister of Justice, at the University of Ottawa, Faculty of Law, 1 November 1991.

[135] Delgamuukw supra at 717.

Mr. Justice Lambert raised an issue that was put before the British Columbia Court of Appeal in Delgamuukw and before the Supreme Court in Bear Island[136] on behalf of the Assembly of First Nations. The issue is the application of a double standard in interpreting rights, including rights of self-government, and in matters of burden of proof where Aboriginal people are involved.

There appears to be an assumption in certain quarters that legal principles, indeed rights, must be read differently when being applied with reference to Aboriginal peoples. "Possession" is no longer the enforceable right in land recognized by law. The "Goodwill of the Sovereign" implies that any due process requirement for the taking of title is suddenly inapplicable. Requirements for "effective occupation" to assert state sovereignty, so flexibly interpreted in instances such as France or Britain's colonial claims to North America or Canada's contemporary claims to the Arctic, become stringent tests of full and exclusive use and occupation.

The trial judge in Delgamuukw could not accept that the ancestors of the Gitksan and Wet'suwet'en "on the ground" behaved as they did because of "institutions". He found rather that they more likely acted as they did because of "survival instincts."[137] Surely "survival instincts" are common to all humanity at all times in history. As history shows, they certainly governed the actions of the Europeans during their tentative and precarious explorations and settlement in North America during the seventeenth, eighteenth and early nineteenth centuries.[138]

As we have seen, in Casimel, the British Columbia Court of Appeal concluded that none of the five judges in Delgamuukw had decided that Aboriginal social regulations had been displaced by any form of blanket extinguishment. The Court then went on to state that a particular right must be examined in each case to define its scope and content in the Aboriginal society, as well as to determine the relationship between that right as defined and the general law of British Columbia.[139]

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[136] Ontario (A.-G.) v. Bear Island Foundation [1991] 2 S.C.R. 570.

[137] (1991) 79 D.L.R. (4th) 185 (B.C.S.C.) at 373.

[138] See, for example, Munro, "The Seigneurial System and the Colony" supra.

[139] Casimel supra at 728.

If we are to inquire into form, scope or contours of the continuing right of Aboriginal self-government, the inquiry should focus on the appropriate and possible exercise of the right.

To use Dean Lederman's language, if section 35 of the Constitution Act, 1982 is the power-conferring provision of Canadian constitutional law for present purposes, the equilibrium points with federal and provincial powers, the common law and the constitutional restraints on government power will perhaps have to be worked out painstakingly through treaty negotiations or, failing that, by judicial interpretation.[140]

As we have seen, restraint on government power lies at the heart of our constitutional system. In 1867 constraints were imposed through the division of powers. In 1982 general constraints on powers exercised by Parliament and the Government of Canada, as well as the legislature and government of each province were explicitly stated in the Charter of Rights and Freedoms.[141] At the same time, section 35 again articulated the constraints on federal and provincial powers towards Aboriginal peoples of Canada and the exercise of their Aboriginal and treaty rights.[142] There remains the question of constraint upon the exercise of the inherent right to Aboriginal self-government.

It would appear to be the better view that the principle of constitutional restraints on government power, at least within the context of the Canadian Constitution, must be seen to apply to the exercise of the Aboriginal right of self-government.

This paper has dealt with the inherent right to Aboriginal self-government in two aspects: the inherent right, independent of the Constitution, being one aspect and the inherent right as part of the Constitution being another aspect. In effect, we are asking in the first instance what is the inherent right and in the second instance what form of exercise of the right is recognized and protected by the common law and the Constitution of Canada.

We have suggested that in regard to the existence of the right independent of the Constitution of Canada there exist universal norms of human rights law that should operate to

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[140] See Lederman supra at 603-604: "Judicial interpretation can adjust and refine the equilibrium of the division of legislative powers to meet the new needs."

[141] Constitution Act, 1982, s. 32.

[142] See Sparrow supra.

condition the exercise of the right. In this context, questions of judicial supervision and sanctions would have to be resolved outside the constitutional framework of Canada.

In regard to the second aspect of the question -- what is recognized and protected within the constitutional framework of Canada -- the matter of appropriate exercise, judicial review and sanctions should be answered within the Canadian constitutional framework. We have argued that the inherent right of Aboriginal self-government should be considered as part of this framework. Logically, the exercise of that right must also fall within the framework. While the right is not a creature of the common law or the Canadian Constitution, the right recognized must be construed as being compatible with that law.

The First Nation - European treaty-making through which this country was and continues to be assembled, both in terms of its territory and its political institutions, involved accommodation. But the country is also the product of the co-existence of Aboriginal and European legal systems. The glue that ensures continued co-existence must be accommodation and consensus on fundamental human values, human rights and freedoms.

Speaking of the initial co-existence of Aboriginal self-government with the common law, Mr. Justice Lambert in Delgamuukw stated:

> Those rights which were so entirely repugnant to natural justice, equity, and good conscience that they could not, without modification, ever be a part of the common law would never have been absorbed by the common law or have been recognized and protected by it, at least not until such a modification occurred. (See Mabo v. Queensland at p. 44 and Inasa v. Oshodi at p. 105).[143]

While the equilibrium points between Aboriginal governmental power and the rights of individual Aboriginal persons may well have to be worked out painstakingly through treaty negotiations or judicial interpretation, it must be said that the context in which the particular equilibrium should be sought would be the human rights law prevailing at the end of the 20th century, expressed at the international level through the various U.N. covenants and other

[143] Delgamuukw supra at 728.

instruments[144] and incorporated into the Canadian constitutional context through the Canadian Charter of Rights and Freedoms or otherwise.

In addition to the international legal instruments expressing the prevailing standards of human rights protection which have been ratified by Canada such as the Convention on the Rights of the Child[145], contemporary law of human rights includes standards expressed in legal instruments that Canada may not have ratified but which nevertheless bind it as customary standards of international law. One such example is the International Labour Organization Convention 169 which states the right of Aboriginal peoples to the recognition of their customs or customary laws. Interestingly, this provision also expresses the constraints imposed by the international law of human rights on the exercise of this right:

> These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and internationally recognised human rights.[146]

The difficulty of arriving at the required equilibrium is demonstrated by the few decided cases which have dealt with these issues.

In Thomas v. Norris, the plaintiff successfully sued the men who had subjected him to the Coast Salish initiation rite of the Spirit Dance against his will. It is difficult to argue with the intent of judicial reasoning such as the following:

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[144] These international legal instruments include the Universal Declaration of Human Rights; American Declaration of the Rights and Duties of Man, reproduced at (1949) 43 A.J.I.L.; Convention on the Prevention and Punishment of the Crime of Genocide, United Nations Treaty Series, vol. 78 at 277; Convention on the Elimination of all Forms of Racial Discrimination, reproduced in I. Brownlie, Basic Documents of Human Rights (Oxford: Clarendon Press, 1971) at 237; the various U.N. and Organization of American States conventions on the civil and political rights of women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984) 23 I.L.M. 1027; Convention on all Forms of Discrimination Against Women (1980) 19 I.L.M. 33.

[145] Entered into force for Canada on January 12, 1992, reproduced at (1989) 28 I.L.M. 1448. Article 30 of the Convention reiterates the standard expressed in article 27 of the International Covenant on Civil and Political Rights:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority, or who is indigenous shall not be denied the right, in community with other members of his or her own group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

[146] Article 8 (emphasis added).

> It has never been the law of this province that any person, or group of persons, Indians or non-Indians, had the right to subject another person to assault, battery or false imprisonment, and violate that person's original rights, with impunity. This is so whether or not it is done under the umbrella of religion or some other tradition of long-standing or an Aboriginal right.[147]

The matter becomes more complex, however, when the question is posed in terms of which law should apply in order to preserve the individual from injury.

The difficult question raised in Thomas v. Norris is the extent to which a legal order may be imposed upon unwilling members of a community. Even here, there must be degrees of concern in regard to the measure of protection provided individuals of a society against that society's rules. Years before the arrival of the Charter, the Supreme Court was identifying and protecting the "original freedoms" of the individual as the primary conditions of their community life within a legal order against the abusive exercise of rights by other citizens and by governments.

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.[148]

The facts in Thomas v. Norris appear to be situated at one extreme of a spectrum, the protection of security of the person and the right to liberty. One may presume that the fact situation influenced the Judge.[149]

While he was clearly influenced by the issue of lack of consent by the Plaintiff to submit to the ceremony, Hood J. did not find that spirit dancing was not part of Coast Salish law. Consent of the individual was the issue of concern for the Court.

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[147] Thomas v. Norris [1992] 2 C.N.L.R. 139 (B.C.S.C.) at 160.

[148] Saumur v. City of Quebec [1953] 2 S.C.R. 299 at 329.

[149] "Nothing in the plaintiff's conduct would support a finding of consent or acquiescence. Nor can it be said that it is in the least bit equivocal. Further, the argument that their conduct did not injure the plaintiff mentally, as well as physically, simply is not open to the defendants. It is clear from the evidence that when he arrived at the hospital he was dehydrated, his peptic ulcer was activated, he was suffering from multiple contusions and he was frightened that "he would be dragged back there." at p. 150.

> I think it important to note that spirit dancing can be performed without infringement with consenting initiates, provided of course that the initiators in their exuberance do not exceed the consent given.

The very expression "Aboriginal self-government" surely reflects the idea of Aboriginal governance by and for Aboriginal peoples. As I understand it, the issue ultimately is good government for First Nations. Good government should mean government with the consent of the people -- the "self" in self-government.

While detailed examination of this aspect cannot be undertaken within the scope of the present paper, perhaps some basic principles may be proposed.

The Lovelace Case has instructed us that an individual has a right to live in community with her people. While living in community, an individual should be prepared to abide by the legal order while enjoying its benefits and protections.

The reverse must be true. The individual must have the right to quit the community - to no longer be required to respect the legal order or to enjoy its benefits and protections.

These must be fundamental rights or original freedoms.

Between the right to enter and the right to leave a community, lies the right to participate in the fashioning of the legal order. This would include the right to attempt to have the exercise of government power or fellow citizens' rights declared illegal or unjustified in virtue of the prevailing -- and one would hope an evolving -- legal order. In this, the individual must be buttressed by and should be able to rely upon prevailing human rights law. At this moment in history, this prevailing law is reflected in those international legal instruments expressing the prevailing standards of human rights protection which have been ratified by Canada, referred to above. At the same time, if communal rights or rights of the community are to be invoked in opposition to the rights of an individual, it must be clear that these communal rights are in fact being invoked by a community in the true sense of the word, not a coalition or cabal of elites.

In his article entitled *The Emerging Right to Democratic Governance* Professor Thomas Franck argues that democracy is on the way to becoming a global entitlement, one that

increasingly will be prompted and protected by collective international processes. States or governments may not be able to hide behind curtains of sovereignty or internal domestic affairs.

Professor Franck writes:

> This almost-complete triumph of the democratic notions of Hume, Locke, Jefferson and Madison - in Latin America, Africa, Eastern Europe and, to a lesser extent, Asia - may well prove to be the most profound event of the twentieth century and, in all likelihood, the fulcrum on which the future development of global society will turn. It is the unanswerable response to those who have said that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of western industrial states.
>
> The question is not whether democracy has swept the boards, but whether global society is ready for an era in which *only* democracy and the rule of law will be capable of validating governance.[150]

In addition to criticism that democratic institutions are the product of and perhaps only appropriate to western industrial states, reference to "civilized nations" in Article 38(1)c) of the International Court's Statute has been controversial. But as Professor Franck observes:

> The term "civilized" may still be tainted by association with Cecil Rhodes, but the notion that governments can be graded for deportment is not.[151]

There is an increasing focus on the rights of indigenous peoples in international law. Incredibly, we are only only beginning to explore this terrain. As Michael Reisman has written:

> The claims of indigenous peoples have implications, as yet only dimly appreciated, for many relatively settled sectors of modern international law.[152]

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[150] Thomas Franck "The Emerging Right to Democratic Governnance" 89 AJIL (1992) at 49

[151] Supra at 78

[152] Michael Reisman, *Protecting Indigenous Rights in International Adjudication* 89 AJIL (1995) at 350. See also James Crawford, Democracy in International Law, Inaugural Lecture delivered 5 March 1993, Cambridge University Press generally and at 5:

> That the will of the people is to be the basis of the authority of government is as good a summary as any of the basic democratic idea. But the idea of democracy reflected in the International Covenant, in the Universal Declaration and in other instruments is not a simple majoritarian one. It is a relfection, one might say a reflex, of the idea that every person, whether a member of a majority or a minority, has basic rights, including rights to

While increased light is being shed on the rights of indigenous peoples under international law, such will inevitably also be the case for the obligations of indigenous peoples and their governments under international law. In his discussion of how the International Court of Justice should respond to indigenous claims both procedurally and substantively, Reisman nevertheless observed:

> But this does not mean that indigenous claims should always prevail. The Court must also test the indigenous claims against peremptory norms of international law and, in particular, against those internationally protected human rights that have entered into contemporary international law. Some indigenous claims will surely fail that test and must be rejected.[153]

In regard to the second aspect of the question -- what is recognized and protected within the constitutional framework of Canada -- the matter of appropriate exercise, judicial review and sanctions should be answered within the Canadian constitutional framework.

In the struggle for an equilibrium between individual and communal rights, there are no guarantees for success, at least in the short term. Ultimately, therefore, as consent of the governed remains the basic principle, the disappointed or disillusioned citizen must have the right to seek voluntarily his or her community elsewhere.

IV. Conclusion: The Constitutional Remedy

In his Reasons in Delgamuukw, Mr. Justice Lambert suggests a solution or remedy, one that was put to the court by the intervenor Assembly of First Nations and taken up by the parties. It involves not insisting immediately upon all the answers to all the difficult questions

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> participate in public life. Thus the authority of a government, elected by a majority, to conduct for the time being the public affairs of the society is a *consequence* of the exercise of the rights of participation in public life of all citizens, whether they belong to the majority or the minority. The capacity of the government to limit or derogate from the rights of a minority is limited, even in times of public emergency.

[153] Reisman supra at 358-359. For a discussion of the important and sometimes forgotten role of human rights law in this area see Jeff J. Corntassel and Thomas Hopkins Primeau, *Indigenous "Sovereignty" and International Law: Revised Stategies for Pursuing "Self-Determination"* 17 Hum. Rts. Q. 343 (1995); S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims* 13 Hum. Rts. Q. 403 (1991)

as a *sine qua non* for accepting the inherent right to Aboriginal self-government as part of the Constitution of Canada. "Floodgates" arguments are not helpful, appropriate or justified.

> No doubt, once Aboriginal rights of self-government and self-regulation were recognized, affirmed and guaranteed by s. 35 of the Constitution Act, 1982 a process started towards a fuller and more widely understood appreciation of those rights, and the very questions that were asked of Mr. Sterritt will start to be resolved.[154]

The fact is that within the dichotomy of the division of powers effected by sections 91 and 92 of the Constitution Act, 1867 section 91(24) Indians and Lands reserved for the Indians has stood out as an anomaly to the constitutional division of powers over persons, property and civil rights. Section 109 on the matter of Crown property again appears to introduce some uncertainty in its caveat respecting any "Trust existing" or "any Interest other than of the Province".

Can it not be contended that the Constitution Act, 1867 contemplated, incorporated and foresaw an ongoing treaty process?

The fact that exclusive legislative authority in virtue of subsection 91(24) and the encumbrance on provincial title in virtue of the saving provisions of section 109 of the Constitution Act, 1867 appear to frustrate the exercise of jurisdiction of the Provinces, or their interests in lands and resources, is no reason to then dismiss the constitutional effect of these provisions.

It may not have been the intention at Confederation that exclusive federal legislative authority would prevail for long over all the lands of Provinces or that the Provinces' interests in those lands and resources would be permanently encumbered by the "other interests" referred to in section 109.

There was unfinished business in 1867. The Canada of 1867 was understood to be in evolution and expansion. The admission of other colonies including, of course, British Columbia, and Rupert's Land and the North-western Territory was foreseen through section 146

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[154] Delgamuukw supra at 717.

of the Constitution Act, 1867. Crown ownership and jurisdiction were conditioned by an uncompleted treaty process with Aboriginal peoples reflected in sections 91(24) and 109.

In fact, the idea of "an incomplete constitution" has been expressed by the Supreme Court of Canada in the 1981 Reference re: Resolution to Amend the Constitution, in which the majority observed:

> At least with regard to the amending formula the process in question here concerns not the amendment of a complete constitution but rather the completion of an incomplete constitution.[155]

Subsection 91(24) and section 109 are expressions of the principle of the coexistence of Aboriginal and Crown titles and jurisdiction, to be implemented through a treaty process. The concept at Confederation was that the modalities of sharing of titles and jurisdictions would be worked out and completed through a treaty process, as in fact has occurred since 1867 and continues to occur in Canada's north, British Columbia and Southern Quebec. Section 35, with its constraints on federal and provincial powers and its entrenchment of the treaty process, is contemporary constitutional confirmation.

Through the treaty process, the difficult questions are discussed. An equilibrium between governmental power and individual rights may be agreed upon. The details of coexistence of collectivities and legal orders may be worked out. In short, the internal consistency of our constitutional law is maintained; the skeleton of principle is not fractured, rather the body is given new and dynamic shape.

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[155] [1981] 1 S.C.R. 753 at 799.