**SPEAKING NOTES FOR THE CANADIAN BAR ASSOCIATION,
CONSTITUTIONAL LAW AND CIVIL LIBERTIES
QUEBEC BRANCH
THE ABORIGINAL RIGHT TO SELF-GOVERNMENT AND
THE CANADIAN CONSTITUTION:
INHERENT CONFLICT OR SYMBIOSIS**

Peter W. Hutchins

March 22, 1994

I- Introduction - The Living Constitution

After having proposed the title for this discussion, I rushed to the dictionaries. There we find for the definition of symbiosis in Webster's the following:

> The intimate living together of two dissimilar organisms in a mutually beneficial relationship;

and in Le Petit Robert the following:

> Association durable et réciproquement profitable entre deux organismes vivants.

Leaving aside the interesting difference between the two definitions, that being the absence in the french of the notion of "dissimilar", we find in both definitions an idea which I would consider particularly à propos for this discussion - the idea of "living" or "vivants". For the inquiry is whether Aboriginal inherent self-governance has survived the Constitution of Canada and is living, if not particularly well, in the Canada of the 1990's.

I would suggest that we can answer in the affirmative and that if indeed a constitution is, as it has been described, "a mere reflection to the national soul" (Cheffins and Tucker *The Constitutional Process in Canada* 1975 at 4) we should be grateful and proud that we can answer so. It is true and, I believe unfortunate, that our national body politic has strayed from the "path" from time to time, but fixing the body is a job for the politician. Constitutional lawyers tend to the soul!

We find an example of constitutional soul-searching in the recent landmark decision Mabo v. Queensland [1992] 107 A.L.R. 1 (H.C. Australia), where the Australian High

Court finally laid to rest the doctrine that epitomized the Euro-centrism of the colonial period (our Supreme Court had accomplished this task for Canadian law 20 years earlier in Calder). The High Court of Australia declared that the doctrine of *terrae nullius* whereby lands occupied by indigenous peoples were deemed to be lands belonging to n one, had no place in contemporary Australian law. Mr. Justice Brennan acknowledged at page 18:

> 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.

By the way this echoes what the Privy Council had to say in an early Canadian Appeal A.G. Ont. v. A.G. Can. [1912] 2 A.C. 571, a judgment used by the majority in Delgamuukw to support extinguishment of the inherent right of Aboriginal self-government. In a passage not referred to by the majority in Delgamuukw Earl Loreburn for the Privy Council remarked [at 112]:

> Earlier practice in bad times is of no weight....

Elsewhere in Mabo Mr. Justice Brennan states:

> The proposition that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein, invites critical examination.
>
> Surely we must all say "thank goodness for that". My thesis is that in asserting

that there is symbiosis, not conflict, between the Constitution of Canada and 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, the body of law back in touch with its soul.

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*. In other words that the relationship is inherently conflictual not symbiotic. We hear:

1. That sovereignty is absolute - there can only be one sovereign.

2. That there is no specific reference or acknowledgment to the right of self-government in the *Constitution Act, 1867 and 1982*. Even section 35 of the *Constitution Act* 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 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 defined to the Nth degree.

II. First Principles

The Starting Point/Original Occupation

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 and by Governments. (Calder, Sioui, Liberal program, B.C. Claims Task Force, 1991).

The 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 and Governments.

> 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.
>
> Calder v. A.G. B.C. [1973] S.C.R. 313, per Judson J. at 328
>
> This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson (The Papers of Sir William Johnson, 14 vol.), who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians.
>
> R. v. Sioui [1990] 1 S.C.R. 1025 at 1053; Report of the B.C. Claims Task Force at 5-6.

Appropriate Tests and Burden of Proof on those Alleging Change

In the establishment of aboriginal rights, the appropriate test is the establishment of a prima facie case by an Aboriginal people as to the location of their homeland at the time of European assertions of sovereignty. The burden should then shift to the Crown to establish any change or diminution of that Aboriginal nation's title to or jurisdiction over its homeland. The proper inquiry here is neither the "intention of the Crown" nor "the acts of the Crown" but rather whether there existed a legal foundation for such intention, for such acts.

Maitland puts the Crown, its intention and its acts into perspective. In discussing the Royal Prerogative, Maitland wrote in 1887-1888:

> There is one term against which I wish to warn you, and that term is "the crown". You will certainly read that the crown does this

> and the crown does that. As a matter of fact we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers. No, the crown is a convenient cover for ignorance: it saves us from asking difficult questions, questions which can only be answered by study of the statue book. ...If you are told that the crown has this power or that power, do not be content until you know who legally has the power - is it the king, is it one of this secretaries: is this power a prerogative power or is it the outcome of statute? (emphasis added)
>
> Maitland (1907) Constitutional History of England at 418

No Double Standard

No double standard should be applied in findings as to characterization of interests, as to effective occupation, as to acquisition of title and sovereignty or as to institutions.

Constraints on the Crown

The law of Nations and the common law impose important constraints upon the Crown.

Our constitutional history is a history of shared or co-existing sovereignty. Consider the early struggle between the Crown and British Parliament, European - First Nation relations and treaty-making in the colonial period, the formation of our federal state in 1867.

Within a federal state, the notion of limited, relative legal sovereignty has been known since the middle of the 18th century.

> At the beginnings of the federal union of the United States, the idea of a sovereignty divided between the *federal government* and the states was developed, most prominently in The Federalist (1787-88), in Alexis de Tocqueville's *Democracy in America* (1835) and in the early opinions of the Supreme Court. The idea was substantially aided by the prevalent notion of popular, limited,

> relative, legal sovereignty, and the corresponding rejection of an unlimited, absolute, political sovereignty in the hands of the government. At the same time, the theory of a divided sovereignty correctly emphasized the innovative and unique character of the American experiment in living democracy and limited government.
>
> L. Wildhaber, "Sovereignty and International Law" (1983) at 432

The "American experiment" of course included establishing a system of tenure and jurisdiction in concert with First Nations throughout North America. Relations between the Europeans and the Aboriginal nations are at the very foundation of the international and constitutional legal history of North America.

> 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.
> B. Slattery, "Aboriginal Sovereignty and Imperial Claims" at 21; see also M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow"

In Worcester, the Supreme Court of the United States extended its analysis of coexisting sovereignty 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.
>
> Worcester v. Georgia at 591 (per M'Lean J.)

In Johnson v. M'Intosh, Marshall C.J., while analyzing the interplay of Europeans and First Nations, adopted the concepts of "coexisting sovereignties" and "degree of sovereignty".

Marshall C.J. held that the Indian Nations' sovereignty continued, but in a diminished form:

> their rights to complete sovereignty, as independent nations, were necessarily diminished....
>
> Johnson v. M'Intosh at 574 (emphasis added)

Of the "Europeans" or United States, the Chief Justice spoke of a less than absolute sovereignty, a degree of sovereignty appropriate to the circumstances.

> They [the United States] maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
> Johnson v. M'Intosh at 587 (emphasis added)

In Johnson v. McIntosh 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. 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.

Johnson v. M'Intosh at 593

b) External and Internal Sovereignty

The Law of Nations recognizes the existence of arrangements by which nations, while retaining full internal sovereignty, may transfer their external sovereignty. 97).

C.H. Alexandrowicz, The European -African Confrontations: A Study in Treaty-making (1973)

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".

Worcester at 552; Cherokee Nation v. Georgia at 17.

Yet Marshall emphasized that the fact of being domestic dependent nations did not involve a "surrender of their national character".

Protection does not imply the destruction of the protected.

Worcester at 552

Protection arrangements were common to most treaties concluded between Great Britain and the Native Rulers of Africa during the nineteenth century. Under Protection arrangements external sovereignty is exercised by the Protector while leaving intact the Protectorate's rights of internal sovereignty.

Alexandrowicz supra

No inherent conflict is to found in the doctrine of sovereignty as it has been understood in our constitutional past or as it is understood in our constitutional present.

I draw two conclusions:

1) There exists no necessary presumption in favour of the Crown as sole or absolute sovereign.

2) Our constitutional system knows and can accommodate shared or co-existing sovereignties.

III. Constitutional Silence

True it is that in 1992 an attempt was made to be somewhat specific as to what constituted the *Constitution of Canada*. Section 52 of the *Constitution Act, 1982* addresses this point but as the Supreme Court of Canada recently said in New Brunswick Broadcasting Co. v. Nova Scotia [1993] 1 S.C.R. 319 the definition in section 52 (2) is not exhaustive, finding in that case that the unwritten doctrine of parliamentary privilege should be included in the definition, although section 52 (2) makes no mention of parliamentary privilege. The inclusion of parliamentary privilege, said the Court, was to be implied by the reference in the preamble of the *Constitution Act, 1867* to "a constitution similar in principle to that of the United Kingdom".

Perhaps in considering what may be included in or tolerated by the Constitution of Canada we may start with the opening words of *Constitution Act, 1867*. The preamble opens as follows:

> 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**.

What does this mean? To what may it refer?

Peter Hogg refers to the legal effect of the preambluar statement as follows: (Constitutional Law (1992) at I-3)

> The B.N.A. Act did not follow the model of the Constitution of the United States in codifying all of the new nation's constitutional rules. On the contrary, the B.N.A. Act did no more than was necessary to accomplish confederation. The reason was stated in the preamble to the Act: the new nation was to have "a Constitution similar in principle to that of the United Kingdom". 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.

Professor Brian Slattery has written a good deal on the role of First Nation - European relations and the instruments resulting therefrom (the treaties) in forming what he refers to as "imperial constitutional law". In his article "Aboriginal Sovereignty and Imperial Claims" published in [1991] 29 Osgoode Hall Law Journal Professor Slattery expresses the idea as follows:

> 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 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.

Perhaps this is one of the constituent elements to which the preamble of the *Constitution Act, 1867* refers.

Then there are 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. Let me take one example, the *Royal Proclamation of October 7, 1763*. The *Royal Proclamation of 1763* which, as perhaps you know, 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 rights to continue in the possession of their territories until ceded or purchased through a formal treaty process.

The Proclamation reads in part:

> 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 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 Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

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.

During the constitutional patriation process in the early 1980's, 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 Bill of Rights in England eighty years before.

This perhaps gives us further insight into the first preambluar statement in the *Constitution Act, 1867*.

It is worth mentioning the case of Connolly v. Woolrich decided by the Quebec Superior Court in the very year of Confederation and confirmed by Quebec Queen's Bench two years after Confederation in 1869.

The Quebec Courts in Connolly v. Woolrich asserted in strong terms that the introduction of French law and subsequently British Common Law into the Northwest Territories 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 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.

The Supreme Court in the recent case of R. v. Sioui [1991] S.C.R. 1025 has 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 writing for a unanimous Court had the following to say [at 1052-1053]:

> 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.
>
> ...
>
> [at 1055]
>
> 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.

It is perhaps in this context that not only the preamble to the *Constitution Act, 1867* should be read but also provisions of the statute 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 *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? Well treaty-making, it seems to me, implies an arm's length relationship, mutual recognition of a degree of autonomy, the need to agree upon, not impose, a relationship and the confidence that the other high contracting party possesses a sufficient degree of self-governance and self-determination to decide upon the treaty terms, mandate the execution of a treaty and ensure its respect and implementation.

As the Prime Minister Trudeau reminded us in 1969 the Crown does not sign treaties with its subjects:

> It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must be all equal under the laws and we must not sign treaties amongst ourselves...

In R. v. Sioui, the Supreme Court in disposing of the Crown's argument that the treaty with the Hurons was a capitulation not a treaty of peace, distinguished between the capacity of the French military and Canadian militia, on the one hand, and the Indian Nations, on the other. The Court stated [at 1056]:

> 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.

> 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 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.

The problem perhaps is not so much that the constitution is silent, but rather than some of us just are not listening!

IV. Constitutional Exhaustion

> The second argument 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 where he stated:

> 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.
>
> Even if this view is inaccurate, a continuing aboriginal legislative power is inconsistent with the division of powers found in the *Constitution Act, 1867* and introduced into British Columbia in

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

Mr. Justice Macfarlane cites Bank of Toronto v. Lambe (1887) 12 A.C. 575 and A.G. Ont. v. A.G. Canada [1912] A.C. 571 as authority.

Macfarlane J.A. relies upon the following passage from A.G. Ontario v. A.G. Canada [1912] 2 A.C. 89 at 104:

> 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 are 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. [my emphasis]

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 states [at 108]:

> 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. [my emphasis]

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, in granting or bestowing internal self-government powers to the Dominion and the provinces, did not withhold any such powers. This begs the question of inherent powers of aboriginal self-government with a source not deriving from the British Parliament but external to and in fact pre-dating it. An inherent right to Aboriginal self-government external to and independent of the *British North America Act* is

expressed three times in the latter passage from Lord Loreburn's judgment through the phrases:

> "Extraneous to the statute itself"; "otherwise is clearly repugnant to its sense" and "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 would apply. The British Parliament certainly could not bestow upon the Dominion or the provinces that which it did not have to bestow.

The argument of exhaustive distribution of powers through ss. 91 and 92 of the *Constitution Act, 1867* is being and 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.

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.

This is perhaps appropriate language for the state of Aboriginal jurisdiction in the pre-1982 era.

It is true that until 1982 there may have been little recourse against colonial or Canadian legislation frustrating 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. 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.

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.

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.)

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.
>
> ...
>
> The constitutional recognition afforded by the provision, therefore, gives a measure of control over government conduct and a strong check on legislative power.
>
> R. v. Sparrow, at 1109

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

> It [section 35(1)] also affords aboriginal peoples constitutional protection against provincial legislative power.
>
> R. v. Sparrow, at 1105

In Air Canada v. B.C. (A.G.) [1986] 2 S.C.R. 539 at 545 the Supreme Court, of course, directed that all executive powers, whether they derive from statute, common law or

prerogative, must be adapted to conform with constitutional imperatives.

> All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives.
>
> Air Canada v. B.C. (A.G.) [1986] 2 S.C.R. 539 at 545

These constitutional imperatives themselves are surely found in the common law or Prof. Slattery's colonial constitutional law as incorporated. In any event they now certainly are found in section 35 and section 52 *Constitution Act, 1982*.

In Delgamuukw, we argued that section 35 embodies two branches. The first branch relates to rights. The second branch relates to jurisdiction.

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 of the Constitution Act, 1867.

It should be acknowledged that the Courts across Canada have had less than 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 first arrived before the Supreme Court of Canada in November 1988 in R. v. Sparrow. The issue in that case was rights:

> This appeal requires this court to explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982* and to indicate its strength as a promise to the aboriginal peoples of Canada.

On March 10, 1994 the Supreme Court granted leave to appeal in Delgamuukw. Aboriginal jurisdiction and self-governance (the second branch of section 35) will for the first time be squarely before the Court.

There are in the meantime, however, 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 James Bay II.

> Canada (Attorney General) v. Coon Come [1991] R.J.Q. 922 (C.A.); [1991] 3 C.N.L.R. 40

Mr. Justice LeBel writing for a unanimous bench accepted, without criticism or reservation, 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.

> 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. (at 936-937)
> ...
>
> 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.

> 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. (p. 60)

Canada (A.G.) v. Coon Come, supra

Mr. Justice LeBel distinguished between the two branches of section 35: rights analogous to Charter rights on one hand, and jurisdiction on the other.

After reviewing what he referred to as contradictory currents of jurisprudence ("des courants contradictoires de jurisprudence") on the question of the effect of the Charter on the jurisdiction of the courts in constitutional adjudication, Mr. Justice LeBel 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.

> Moreover, although the Charter operates globally as a limit to legislative powers of governments and to certain forms of their action, this does not mean that all of its provisions have an impact on the distribution of powers between Parliament and the provincial legislatures. It restrains the powers of all. It does not alter, generally speaking, the distribution of powers between Parliament and the provincial legislatures essentially found in the *Constitution Act, 1867*.

Canada (A.G.) v. Coon Come at 59

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 did impact upon traditional division of powers. After reviewing the Supreme Court judgment in Sparrow, Mr. Justice LeBel concluded that Sparrow 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 account in the distribution of powers between the provincial legislatures and the Parliament of Canada.
>
> Canada (A.G.) v. Coon Come, at 59

The Court of Appeal of Quebec found that the proceedings brought by the James Bay Crees were properly before the Superior Court of the Province

> On the whole, this action for permanent injunction raises a series of constitutional problems. It will oblige the courts to examine the scope of the respective rights of the two orders of government and of the aboriginal communities, with respect to Hydro-Quebec's Projects, within the traditional lands. (p. 61)
>
> Canada (A.G.) v. Coon Come at 61

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.
>
> ...
>
> In this perspective, the Court agrees with the proposition that the Crees hold some sort of residual sovereignty as regards their local

governments.

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

In the decision of the British Columbia Court of Appeal in Delgamuukw, the court split (3 to 2) on the issue of extinguishment of the right to self-government. The majority concluded for unexplained reasons, and using a different test than that applied to title and other Aboriginal rights, that the right to self-government had been extinguished through the operation of British sovereignty and the division of powers in the Constitution Acts. The minority concluded that the right to self-government, or "self-regulation", had not been extinguished.

Mr. Justice Lambert summarized his detailed and most interesting analysis of Gitksan Wet'suwet'en self-governance as follows:

> **I propose to summarize. The Gitksan and Wet'suwet'en** peoples had rights of self-government and self-regulation in 1846, at the time of sovereignty. Those rights rested on the customs, traditions and practices of those peoples to the extent that they formed an integral part of their distinctive cultures. The assertion of British Sovereignty only took away such rights as were inconsistent with the concept of British Sovereignty. The introduction of English Law into British Columbia was only an introduction of such laws as were not from local circumstances inapplicable. The existence of a body of Gitksan and Wet'suwet'en customary law would be expected to render much of the newly introduced English Law inapplicable to the Gitksan and Wet'suwet'en peoples, particularly since none of the institutions of English Law were available to them in their territory, so that their local circumstances would tend to have required the continuation of their own laws. The division of powers brought about when British Columbia entered confederation in 1871 would not, in my opinion, have made any difference to Gitksan and Wet'suwet'en customary laws. Since 1871, Provincial laws of general application would apply to the Gitksan and Wet'suwet'en people,

> and Federal laws, particularly the **Indian Act**, would also have applied to them. **But to the extent that Gitksan and Wet'suwet'en customary law lay at the core of their Indianness, that law would not be abrogated by Provincial laws of general application nor by Federal laws, unless those Federal laws demonstrated a clear and plain intention of the Sovereign power in Parliament to abrogate the Gitksan or Wet'suwet'en customary laws. Subject to those over-riding considerations, Gitksan and Wet'suwet'en customary laws of self-government and self-regulation have continued to the present day and are now constitutionally protected by s.35 of the Constitution Act, 1982.**

Only time will tell whether the Supreme Court sides with the majority or the minority of the British Columbia Court of Appeal.

V. 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 defined to the Nth degree.
>
> 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.
>
> Speech of the Honourable Kim Campbell at the University of Ottawa, November 1, 1991.

A characteristically eloquent answer to this conundrum was given by Mr. Justice Lambert in his dissenting reasons in Delgamuukw. Lambert J.A. stated:

> The fact that the questions are difficult to answer does not mean that the aboriginal right to self-government does not exist. All it means is that this world contains many questions that are difficult to answer.

Mr. Justice Lambert then puts 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.

Mr. Justice Lambert raises an issue that we put before the Court of Appeal in Delgamuukw as well as the Supreme Court in the Bear Island appeal on behalf of the Assembly of First Nations. The issue is the application of a double standard in interpreting rights, including rights of jurisdiction 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 Britains 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 Gitskan, 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" (Reasons, p. 373).

Intervenor NIB/AFN suggested that "survival instincts" are common to all humanity at all times in history. They certainly governed the actions of the Europeans during their tentative and precarious explorations and settlement in North America during the 17th, 18th and early 19th centuries.

The issue surely is not when and how the Sovereign unilaterally extinguished rights, but rather whether the Sovereign could extinguish those rights. The law when clearly and comprehensively stated provides the answer: the Sovereign could not.

The Constitutional Remedy

In his Reasons in Delgamuukw Mr. Justice Lambert suggests a solution or remedy, one that was put to the court by Intervenor AFN and taken up by the parties. It involves not insisting immediately upon all the answers to all the difficult questions as a *sine qua non* for accepting the inherent right to Aboriginal self-government as part of the Constitution of Canada. *A terrorum* 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.

The fact is that within the dichotomy of the division of powers effected by sections 91 and 92 of the *Constitution Act*, section 91(24) Indians and Land 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".

Could it be 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 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.

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 through a treaty process, as in fact has occurred since 1867 and continues to occur in Canada's north, British Columbia and Southern Quebec.

In the meantime, to the strick constructionists, the doubters and the naysayers who speak of conflict rather than symbiosis, I say, paraphrasing Hamlet, Prince of Denmark - don't be so sure, "there are more things in Heaven and on Earth than are dreamt of in your philosophy!

Thank you!

Speech\causerie.cba