

**THE INHERENT RIGHT OF SELF-GOVERNMENT:
EMERGING DIRECTIONS FOR LEGAL RESEARCH**

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THE INHERENT RIGHT OF SELF-GOVERNMENT

This research report seeks to identify some of the key legal issues that need to be addressed to give effect to the First Nations' inherent right of self-government.¹ The discussion that follows accepts that an inherent right of self-government has already been recognized and affirmed as an Aboriginal and treaty right by section 35(1) of the *Constitution Act, 1982*. In my opinion, this has been amply demonstrated by the Royal Commission on Aboriginal Peoples.² It is also supported by the bulk of academic commentary.³ While the Supreme Court of Canada has not yet pronounced on the issue, in *R. v. Pamajewon*⁴ it assumed that section 35(1) rights include self-government claims. This has also been the position of the federal government, which bears primary constitutional

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¹ In this report, "First Nations" is used broadly as a collective term to refer to the "Indian" peoples, as that term is used in the *Constitution Act, 1982*, s.35(2): "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada." It is not restricted to "Indians" or "Indian bands", as those terms are defined in the *Indian Act*, R.S.C. 1985, c.I-5. While this report focuses on the inherent right of self-government of First Nations, this is not to suggest that the other Aboriginal peoples of Canada are any less entitled to this right.

² See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993); *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [RCAP Report], Vol. 2, *Restructuring the Relationship*, Pt. 1, 202-13.

³ E.g. see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), and "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 *Alta. L. Rev.* 465; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 *Osgoode Hall L.J.* 681, and "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can. Bar Rev.* 196 ["Making Sense"]; John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 *U.B.C. L. Rev.* 1, and "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999); Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). I have reached the same conclusion in my own work: see especially "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" and "Envisaging Constitutional Space for Aboriginal Governments", in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) [*Emerging Justice?*], 58 and 184.

⁴ [1996] 2 S.C.R. 821 [*Pamajewon*].

responsibility for First Nation matters,⁵ since at least 1995.⁶ Finally, in *Campbell v. British Columbia*⁷ Williamson J. of the British Columbia Supreme Court upheld the constitutionality of the governance provisions of the Nisga'a Treaty, in part because they are an expression of the Nisga'a Nation's inherent right of self-government. While this was only a trial decision, it was not appealed and so is now the law, at least in British Columbia. Moreover, if the constitutional validity of governance agreements that are within the scope of section 35(1) depends on the existence of an inherent right of self-government, I do not think higher courts or courts in other Canadian jurisdictions would decide that there is no such right because that would tend to sabotage self-government negotiations. As the Supreme Court of Canada has been encouraging the settlement of Aboriginal claims in general, and self-government claims in particular, by negotiation,⁸ I think the courts will do everything they can to facilitate the process. Deciding that an inherent right of self-government does not exist as a section 35(1) Aboriginal or treaty right clearly would not further this goal.

I am therefore of the view that the issue of the *existence* of the inherent right of self-government does not require further research at this time. Instead, I think attention should focus on the *extent* of the right. On this matter, we do have some legal guidance from the Supreme Court. In *Pamajewon*,⁹ the Court held in effect that the right of self-government amounts to whatever governmental authority First Nations are able to prove by means of

⁵ See Kent McNeil, "Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples", in *Emerging Justice?*, *supra* note 3, 309.

⁶ Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995). See also Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997) [*Gathering Strength*], 13. The inference of the right of self-government was also accepted by the Prime Minister, provincial premiers, and territorial leaders during the negotiations leading to the Charlottetown Accord in 1992: for discussion, see Kent McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments", in *Emerging Justice?*, *supra* note 3, 161.

⁷ [2000] 4 C.N.L.R. 1 (B.C.S.C.) [*Campbell*].

⁸ E.g. see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 186 (Lamer C.J.), 207 (La Forest J.) [*Delgamuukw*]. While the Court purported to avoid the self-government issue in *Delgamuukw*, Williamson J. in *Campbell*, *supra* note 7 at paras.134-38, thought such a right to be implicit nonetheless in the decision because Lamer C.J., at para. 115, said that Aboriginal peoples have decision-making authority (which Williamson J. took to be governmental in nature) over their communal rights.

⁹ *Supra* note 4.

the test laid down in *R. v. Van der Peet*¹⁰ for proof of Aboriginal rights generally (apart from Aboriginal title to land).¹¹ This test obliges a First Nation to prove that the claimed right arose from a practice, custom or tradition that was integral to its distinctive culture prior to contact with Europeans. In *Pamajewon*, the Court said that this test applies to self-government claims so that particular First Nations have to prove not only that the activity over which they claim a right of self-government was integral to their distinctive cultures at contact, but also that they regulated the activity at that time.

The *Van der Peet* test has been criticized for a number of reasons, including the frozen-rights approach implicit in the pre-contact timeframe and the distinction drawn between integral and incidental aspects of Aboriginal cultures.¹² Application of the test to self-government claims is even more problematic.¹³ Basically, it means that self-government rights exist only in relation to matters that were already integral to specific Aboriginal societies and regulated by them prior to being influenced by Europeans, which in some parts of Canada was 400 years ago.¹⁴ This might eliminate claims relating to many of the matters that have become the business of governments in more recent times, effectively hampering the capacity of First Nation governments to function effectively in the modern world. Moreover, if governmental authority has to be established by every First Nation in a piece-meal fashion by application of the *Van der Peet* test to every single matter over which self-government is claimed, the courts will be tied up for generations. And even if it were possible to resolve this issue of jurisdiction in court, the end result would be

¹⁰ [1996] 2 S.C.R. 507 [*Van der Peet*].

¹¹ In *Delgamuukw*, *supra* note 8, the Court set out a somewhat different test for proof of Aboriginal title.

¹² L'Heureux-Dube and McLachlin JJ. both raised these kinds of concerns in their dissenting opinions in *Van der Peet*, *supra* note 10. Commentators have also been critical: e.g. see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *American Indian L. Rev.* 37; Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 *McGill L.J.* 993; Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 *Can. Bar Rev.* 36 at 44-50.

¹³ For critical commentary, see Bell, *supra* note 12 at 53-55, 60-61, 63-66; Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 *McGill L.J.* 1011.

¹⁴ In *R. v. Adams*, [1996] 3 S.C.R. 101, the Court held that the time of contact to be used to determine the Aboriginal fishing rights of the Mohawks in Lake St. Francis in the St. Lawrence River system was 1603, when they encountered the French.

a hodge-podge of First Nation jurisdictions that would vary from one to another, depending on what each First Nation was able to prove had been integral to its distinctive culture and regulated by it. No wonder the Supreme Court in *Delgamuukw* ducked the self-government issue and urged the parties to negotiate!

So if legal research needs to be done on the extent of the inherent right of self-government, it should, I think, be directed towards developing arguments to convince the Supreme Court that application of the *Van der Peet* test to self-government claims is unworkably restrictive. The Court will also need to have an alternative that will provide it with room to retreat from *Pamajewon* without explicitly overruling it. Brian Slattery, for example, has argued that a distinction needs to be drawn between specific rights that vary from one First Nation to another, and generic rights that do not.¹⁵ Aboriginal title to land is one example of a generic right because, once established by proof of exclusive occupation at the time of Crown assertion of sovereignty, the incidents of it do not vary.¹⁶ Professor Slattery would classify self-government as a generic right. Regarding *Pamajewon*, he pointed out that the Court has been willing to modify its approach to Aboriginal rights in appropriate contexts.¹⁷ For example, while paying lip-service to the *Van der Peet* test in *Delgamuukw*, the Court in effect created of a new test for proof of Aboriginal title because it no doubt realized that the *Van der Peet* test would not work in that context. Similarly, in *R. v. Powley*¹⁸ the Court modified the timeframe for the application of the *Van der Peet* test to Métis hunting rights, in recognition of the fact that the pre-contact aspect of the test would effectively eliminate the possibility of Métis rights. So I think it would be worthwhile to build on the research Professor Slattery has already done by developing alternatives that would allow the Court to distinguish *Pamajewon*, perhaps by limiting it

¹⁵ See Brian Slattery, “Varieties of Aboriginal Rights” (1998) 6: 4, 5 & 6 *Canada Watch* 71, and “Making Sense”, *supra* note 3 at 211-15.

¹⁶ Note, however, that the inherent limit placed on Aboriginal title by the Court in *Delgamuukw*, *supra* note 8 at paras. 125-32 (Lamer C.J.), could (as Slattery admits) cause some variation in use rights, as Aboriginal titleholders cannot utilize their lands in ways that are irreconcilable with the uses relied upon to establish their title. For critical commentary on the inherent limit, see Kent McNeil, “The Post-*Delgamuukw* Nature and Content of Aboriginal Title”, in *Emerging Justice?*, *supra* note 3, 102 at 116-22 [“Post-*Delgamuukw*”].

¹⁷ “Making Sense”, *supra* note 3 at 213-14.

¹⁸ [2003] 2 S.C.R. 207.

either to the context of gaming or, more broadly, to criminal law matters, neither of which was likely evoke a sympathetic ruling from the Court in relation to self-government claims.¹⁹

Some indication that the Supreme Court might be open to reconsideration of the application of the *Van der Peet* test to self-government claims can be found in Binnie J.'s concurring judgment in *Mitchell v. M.N.R.*²⁰ In the principal judgment in that case, McLachlin C.J. held that an Aboriginal right to bring goods across the St. Lawrence River for the purposes of trade had not been established on the facts, making it unnecessary for her to decide whether such a right would be inconsistent with Crown sovereignty over Canada. However, Binnie J. (Major J. concurring) did address the sovereignty issue. He offered the opinion that, given that the St. Lawrence River forms the international boundary between Canada and the United States at the point where Mr. Mitchell claimed the right to cross into Canada without paying customs duties, the Aboriginal right claimed by him would be inconsistent with Canada's sovereign authority to control its borders and therefore could not have been recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. As this aspect of his judgment has evoked criticism, I think research on it would be useful to reveal the assumptions behind the Crown's claims to sovereignty and to develop alternative approaches. But Binnie J.'s judgment is significant as well because he took care to explain that his conclusion on the sovereignty issue should not be taken to exclude the possibility that First Nations have an internal right of self-government. In other words, self-government is not in principle incompatible with Canadian sovereignty, as long as it poses no threat to Canada's ability to maintain its sovereignty by, for example, controlling its borders.²¹ In reaching this conclusion, Binnie J. relied heavily on American law on the internal right of self-government of the Indian nations in the United States. This is

¹⁹ See Bell, *supra* note 12 at 55.

²⁰ [2001] 1 S.C.R. 911 [*Mitchell*].

²¹ Similarly, in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 130, the Court said: "There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a 'people' to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity."

important because that right is not only inherent, but also generic in the sense that Professor Slattery has characterized the right of self-government in Canada. Starting with the seminal judgments of Chief Justice Marshall in *Johnson v. M'Intosh*,²² *Cherokee Nation v. Georgia*,²³ and *Worcester v. Georgia*,²⁴ the U.S. Supreme Court has consistently held that the Indian nations retained all governmental authority that was not inconsistent with American sovereignty and had not been taken away by treaties or Acts of Congress.²⁵ In other words, tribal self-government in the United States is residual: to determine its extent, one looks not at what can be established by piece-meal proof in the manner of *Van der Peet* and *Pamajewon*, but rather at what has been surrendered to or taken away by the United States. The onus therefore is not on the Indian tribes to prove the extent of their sovereignty, but on the United States to show the extent to which it has been reduced.

I think Binnie J.'s reliance on American law in his judgment in *Mitchell* can be used as a starting point for developing research on the inherent right of self-government in Canada. Prior to European colonization, the Indian tribes in what is now the United States were independent nations, as were the First Nations in what is now Canada.²⁶ But rather than starting with this undeniable fact, the matter of sovereignty is usually considered from the perspective of international law, as it existed at the time colonization was taking place.²⁷

²² 21 U.S. (8 Wheat.) 543 (1823).

²³ 30 U.S. (5 Pet.) 1 (1831).

²⁴ 31 U.S. (6 Pet.) 515 (1832).

²⁵ E.g. see See Rennard Strickland et al., eds., *Felix S. Cohen's Handbook of Federal Indian Law*, 1982 ed. (Charlottesville: Michie Bobbs-Merrill, 1982), at 228-57 [*Cohen's Handbook*]; William C. Canby, Jr., *American Indian Law*, 2nd ed. (St. Paul: West Publishing, 1988), at 71-72; Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995), at 50-56.

²⁶ See *Cohen's Handbook*, *supra* note 25 at 229-32; Kent McNeil, "Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims" (2000) 39:3 *Journal of the West* 10.

²⁷ E.g. see L.C. Green, "Claims to Territory in Colonial America", in L.C. Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), 1. For analyses that present Aboriginal understandings, see Howard R. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in Oren Lyons et al., *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* (Santa Fe: Clear Light Publishers, 1992), 125; S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), at 9-23; Michel Morin, *L'Usurpation de la souveraineté autochtone: Le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord*. (Montréal: Boréal, 1997).

Modern scholarship is revealing more and more, however, that international law (or the law of nations, as it was known historically) was anything but objective in the principal period of colonization of North America from the beginning of the 17th century to the end of the 19th century.²⁸ Instead, international law was itself developed and utilized as a legal vehicle for providing legitimacy to the colonial agenda and distributing overseas territories among the colonizing European powers.²⁹ This was done mainly by limiting the actors who could claim territorial sovereignty to “nation states”, as conceived by the European powers themselves.³⁰ As the Indigenous peoples of North America did not qualify as nation states by European standards, their territories were regarded as *terra nullius*, or conceptually vacant in so far as sovereignty was concerned, making them available for acquisition by European sovereigns by such means as discovery, occupation, and settlement.³¹ Shamefully, American and Canadian claims to territorial sovereignty still rest historically on the same Eurocentric notions.³²

²⁸ E.g. see R.P. Anand, *Confrontation or Cooperation? International Law and the Developing Countries* (Dordrecht: Martinus Nijhoff, 1987), at 2-17; Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).

²⁹ E.g. see Max Savelle, *Empires to Nations: Expansion in America, 1713-1824* (Minneapolis: University of Minnesota Press, 1974), 138-43; Antony Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5 *Social & Legal Studies* 321; Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 *Harvard Int’l L.J.* 1; Anaya, *supra* note 27 at 9-23.

³⁰ While the modern nation state probably emerged over a period of time following the decline of feudalism in western Europe, the Peace of Westphalia in 1648 is generally regarded as the seminal event in this process: e.g. see James A. Caporaso, “Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty” (2000) 2:2 *Int’l Studies Rev.* 1; Bruce Bueno de Mesquita, “Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty” (2000) 2:2 *Int’l Studies Rev.* 93.

³¹ These original means of territorial acquisition can be contrasted with derivative means such as conquest or cession, which were used to acquire territory from other sovereigns: see generally M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green and Co., 1926); Julius Goebel, Jr., *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History* (1927, reissued Port Washington, N.Y.: Kennikat Press, 1971), 47-119; Friedrich August Freiherr von der Heydte, “Discovery, Symbolic Annexation and Virtual Effectiveness in International Law” (1935) 29 *American J. Int’l L.* 448; R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963).

³² See Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*”. (1991) 29 *Alberta L. Rev.* 498; Michael Asch, “First Nations and the Derivation of Canada’s Underlying Title: Comparing Perspectives on Legal Ideology”, in Curtis Cook and Juan D. Lindau, eds., *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal & Kingston: McGill-Queen’s University Press, 2000), 148; Michael Asch, “From

While Chief Justice Marshall's judgments in *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* continue to be regarded as providing the doctrinal foundation for tribal sovereignty in the United States, they are less than satisfactory because their theoretical underpinnings are not clear. Moreover, the decisions contain internal contradictions, in part because they acknowledge the pre-existing sovereignty of the Indian nations and yet, at the same time, assert that their territories could be acquired by European sovereigns by discovery.³³ By employing this contradictory reasoning, Marshall C.J. seems to have managed to have his cake and eat it too: he apparently concluded that the European powers acquired sovereignty in North America by original rather than derivative means, but instead of basing this conclusion on a denial of Indian sovereignty he held that the effect of European acquisition of sovereignty by discovery was to diminish the inherent sovereignty of the Indian nations.³⁴

Because of these weaknesses in Marshall C.J.'s reasoning, I do not think one can simply rely on and apply his decisions in the Canadian context. Instead, explanations for European acquisition of sovereignty and retention of an inherent right of self-government by First Nations are needed that are conceptually consistent and do not rely on Eurocentric notions like discovery. In other words, even though I accept that an inherent right of self-government has already been recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, I think the theoretical foundations for that right need further elucidation through research, in part because this will help to clarify the extent of the right. This research could include a critique of the standard approach to European sovereignty that relies on

Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17 *Can. J. of Law & Society* 23.

³³ For critical assessments of Marshall C.J.'s doctrine of discovery, see Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations" (1984) 132 *U. of Pennsylvania L. Rev.* 195 at 207-16; Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985), 85-111; David E. Wilkins & K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001), 19-63.

³⁴ See especially *Johnson v. M'Intosh*, *supra* note 22 at 574, where he described the impact of European discovery on the Indian nations: "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."

international law,³⁵ and suggest alternative approaches that might be based, for example, on Aboriginal law. It would also involve a critical reassessment of Marshall C.J.'s judgments on Indian sovereignty and their application to Canada. In place of unsatisfactory international and American law, new conceptual frameworks could be developed that would acknowledge the pre-existing sovereignty of the First Nations and reject Eurocentric explanations for Crown sovereignty in Canada. This would provide a theoretical basis for First Nation/Crown relationships to be re-conceptualized in ways that do not rely on these unacceptable explanations.³⁶

In my opinion, a further advantage of re-conceptualizing these relationships would be to place treaty negotiations, including negotiations to implement existing treaties, on a firmer basis. I think these negotiations really involve territorial rights of First Nations as cultural, social, economic, and political entities.³⁷ Separating lands and resources from issues of governance and jurisdiction, as sometimes happens in negotiations, distorts the true nature of the rights, which include both entitlement to *and* political jurisdiction over the lands and resources in a First Nation's territory.³⁸ I therefore think it important to demonstrate that these kinds of territorial rights are not incompatible with Crown sovereignty, but as argued above I think a theoretical basis for this is required that rests on solid ground than Chief Justice Marshall's pronouncements.³⁹ This in turn will support

³⁵ Note that international law itself has moved away from the denial of sovereignty of Indigenous peoples that predominated during the period of colonization of North America: see *Western Sahara, Advisory Opinion*, 1975 I.C.J.R. 12, where the International Court of Justice concluded that territories occupied by socially and politically organized Indigenous peoples in North Africa were not *terra nullius*, and so could not be acquired in the 1880s by original means such as occupation.

³⁶ I am planning to do more research along these lines myself, and have applied for a Social Sciences and Humanities Research Council of Canada grant for this purpose.

³⁷ See Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty", in *Emerging Justice?*, *supra* note 3, 58 at 95-101.

³⁸ See "Post-*Delgamuukw*", *supra* note 16, especially at 122-34.

³⁹ In addition to the contradictions in Marshall C.J.'s judgments noted above (see text accompanying notes 33-34, *supra*), American constitutional theory seems not to be bothered by the notion that sovereignty can be divided among the federal government, states, and Indian nations. In contrast, Canada's British heritage has made it more difficult for us to embrace divided sovereignty, in spite of our federal system. See, for example, the judgments of Macfarlane and Wallace J.J.A. of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, at 515-20 and 589-93, respectively, where they concluded that an inherent right of self-government did not survive Crown acquisition of sovereignty and the division of powers by the *Constitution Act, 1867*. Although Williamson J. in *Campbell*, *supra* note 7 at para. 133, held

treaty negotiations aimed at acknowledging these more comprehensive territorial rights. It will also support a reassessment of the governance aspects of the historic treaties, a subject to which I now turn.

2. SELF-GOVERNMENT AND THE TREATIES

Given that the historic treaties vary greatly in form and content (for example from the Two-Row Wampum Treaty entered into by the Haudenosaunee and the British Crown at Albany in 1664 to the numbered treaties culminating with Treaty 11 in 1921), it is not possible to provide any general assessment of the connection between the treaties and self-government. In my opinion, each treaty - and by this I mean the actual agreement, which was generally oral,⁴⁰ not just the terms as written by representatives of the Crown - would have to be examined separately in the historical context in which it was negotiated. There is obviously enormous scope for research here, given the number and variety of historic treaties. It would be particularly important to ascertain the understanding and intentions of the First Nation parties to any given treaty in relation to governance at the time the treaty was entered into. This would have to include research on the oral traditions of those parties.

However, I think there is also room for research on more general issues in relation to the treaties and self-government that could be of assistance to treaty First Nations who want to conduct research on their own treaties. In Canada, judges have often assumed that the treaties were entered into with First Nations that were already under the sovereignty of the Crown.⁴¹ To my knowledge, however, this matter has not been addressed recently by the Supreme Court in the numerous cases involving treaty rights that have come before it.

this not to be binding on him because the “fact that the Supreme Court of Canada ordered that the matter be returned to trial for a determination as to the extent of the right of self-government indicates that they disagreed with that conclusion”, research aimed at challenging the view that sovereignty in Canada is held exclusively by the Crown and cannot be shared with First Nations would nonetheless be worthwhile.

⁴⁰ See “Making Sense”, *supra* note 3 at 208; *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 52-55 (Cory J.) [*Badger*].

⁴¹ E.g. see *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, at 643-45 (Taschereau J.). For a trial decision that came to this conclusion explicitly, see *Canada (M.N.R.) v. Ochapowace Ski Resort Inc.*, [2002] 4 C.N.L.R. 76 (Sask. Prov. Ct.).

Moreover, implicit in the jurisprudence that does exist is a European conception of sovereignty that does not take into account Aboriginal concepts of sovereignty and the nation-to-nation relationships arising from the treaties.

In *Simon v. The Queen*, a case involving the 1752 Treaty of Peace and Friendship between the British Crown and the Mi'kmaq Nation in what is now Nova Scotia, Dickson C.J. for the Court said in relation to Indian treaties generally: “An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”⁴² While this seems to imply that the Indian nations did not have the status of nations in the international law sense at the time the treaties were entered into,⁴³ this does not necessarily mean they were under the sovereignty of the Crown.

In *R. v. Sioui*, involving a 1760 treaty between the British Crown and the Hurons of Lorette in the vicinity of Quebec City, Lamer J. for the Court relied on this passage from *Simon* to conclude that, “[a]t the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.”⁴⁴ For this reason, he did not think it necessary to decide whether the treaty would be valid in international law if the Crown did not have sovereignty there at the time it was entered into. Later in his judgment, Lamer J. made these general comments about the relations France and Great Britain had with the Indian nations:

... 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 these efforts met with success, they were incorporated into treaties of alliance or neutrality. This clearly indicates that the Indian

⁴² [1985] 2 S.C.R. 387, at 404 [*Simon*].

⁴³ As we have seen, this was probably due to the Eurocentric nature of international law, not to lack of factual independence by the Indian nations: see notes 27-32 and accompanying text, *supra*.

⁴⁴ [1990] 1 S.C.R. 1025, at 1038 [*Sioui*].

nations were regarded in their relations with the European nations which occupied North America as independent nations.⁴⁵

Lamer J. also distinguished between the situations of the Indian nations and the French in New France at the time. The French in New France, he said, had no authority to sign a treaty with the British Crown because

... 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.⁴⁶

This reveals that, while the French Crown may have claimed sovereignty over the Hurons and their territory, it did not represent them in the way it represented its own subjects and so could not prevent them from entering into a valid treaty with the British Crown, even before New France was formally ceded to Great Britain by the Treaty of Paris in 1763.

Just one week after *Sioui*, the Supreme Court handed down another unanimous decision in *R. v. Sparrow*,⁴⁷ this time in regard to an Aboriginal right to fish by the Musqueams, a non-treaty nation in British Columbia. Relying on *Johnson v. M’Intosh*⁴⁸ (which as we have seen tried to explain European colonization of North America on the questionable basis of the doctrine of discovery),⁴⁹ Dickson C.J. and La Forest J. said that

⁴⁵ *Ibid.* at 1052-53. See also *R. v. Marshall [No. 1]*, [1999] 3 S.C.R. 456, at para. 3, where Binnie J. acknowledged that the Mi’kmaq Nation had been “allies of the French king” prior to entering into treaties with the British.

⁴⁶ *Sioui*, *supra* note 44 at 1056. Significantly, one of the authorities referred to by Lamer J. in this context was *Worcester v. Georgia*, *supra* note 24 at 548-49, where Marshall C.J. stated, in a passage quoted and emphasized by Lamer J. at 1054, that Great Britain considered “the Indian nations inhabiting the territory from which she excluded all other Europeans ... as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged” [Lamer J.’s emphasis].

⁴⁷ [1990] 1 S.C.R. 1075 [*Sparrow*].

⁴⁸ *Supra* note 22.

⁴⁹ See notes 33-34 and accompanying text, *supra*.

“there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title [to the Aboriginal peoples’ traditional lands], vested in the Crown”.⁵⁰ Comparing this categorical statement with the much more nuanced approach to European sovereignty in *Sioui*, one has to wonder how the two decisions could have been produced by the same Court at virtually the same time. Did the fact that British Columbia was actually colonized in the 19th rather than the 17th and 18th centuries make a difference,⁵¹ or did the lack of British/French rivalry on the West Coast distinguish the situation from that of Eastern Canada?⁵² Whatever the explanation, the absence of a treaty with the Musqueam nation was not likely the distinguishing feature in so far as Crown sovereignty was concerned, as treaties had been signed on behalf of the Crown in the 1850s with some First Nations on Vancouver Island, just across the Strait of Georgia from the Musqueam territory.⁵³ In other words, the existence or non-existence of Indian treaties does not seem to have been a factor in the Court’s conclusion that sovereignty had vested in the Crown in what is now British Columbia, whenever and however that might have occurred.

While not considered in the context of treaties, the issue of Crown acquisition of sovereignty was an important issue in *Delgamuukw v. British Columbia*.⁵⁴ Because the Supreme Court decided that the time for proving exclusive occupation of land for the purpose of establishing Aboriginal title is the date of Crown assertion of sovereignty, it was vital to know how and when that occurred. But instead of providing guidance on this matter that might resolve some of the uncertainty arising from the Court’s earlier

⁵⁰ *Sparrow*, *supra* note 47 at 1103.

⁵¹ This explanation is not entirely in keeping with the doctrine of discovery, as English claims to British Columbia were based in part on “discoveries” by Alexander Mackenzie and Captains Cook and Vancouver in the latter part of the 18th century, and possibly went back as far as Francis Drake’s famous voyage around the world in 1577-80: see Travers Twiss, *The Oregon Territory, Its History and Discovery*. (New York: D. Appleton, 1846); Donald A. Rakestraw, *For Honor or Destiny: The Anglo-American Crisis over the Oregon Territory* (New York: Peter Lang, 1995).

⁵² In fact, there was European rivalry on the West Coast as well, but with different actors, viz. Britain, Russia, Spain, and later the United States: see references in note 51, *supra*.

⁵³ In *Sioui*, *supra* note 44 at 1035, Lamer J. had relied on the Court’s affirmation of the British Columbia Court of Appeal’s decision in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, affirmed (1965), 52 D.L.R. (2d) 481, involving one of these treaties.

⁵⁴ *Supra* note 8.

judgments, Lamer C.J.'s decision has only added to the confusion. In the first place, his use of the term "assertion" rather than "acquisition" of Crown sovereignty raised the issue of what is required in this context: Would a mere assertion of sovereignty that had no substantive support through actual exercise of jurisdiction on the ground be sufficient, or would effective occupation be required in accordance, for example, with international law standards that emerged in the 18th and 19th centuries for acquisition of territorial sovereignty apart from conquest or treaty?⁵⁵ Lamer C.J.'s decision not only left this question open, but muddied the waters further by accepting (because it was not disputed on appeal) the trial judge's conclusion "that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846."⁵⁶ How, one might ask, could a bilateral treaty between Great Britain and the United States, establishing the 49th parallel as the boundary between their mainland claims on the West Coast, conclusively establish British sovereignty over the whole of British Columbia, including the territories of the Wet'suwet'en and Gitksan nations located much further north in a region over which the Crown exercised scant, if any, control in 1846? Why are treaties with Aboriginal nations apparently unnecessary for the Crown to establish sovereignty over their territories and peoples? So while the issues of the manner and time of Crown acquisition of sovereignty in various parts of Canada are as important for Aboriginal title as for self-government and for our understanding of the treaties that were entered into with some Aboriginal nations,⁵⁷ to date we have very little indication from the Supreme Court on how to resolve these matters. These issues are therefore ripe for research.⁵⁸

⁵⁵ E.g. see Emmerich de Vattel, *The Law of Nations*, translation of the 1758 ed. by Charles G. Fenwick (Washington: Carnegie Institution, 1916), 85; Gérard de Rayneval, *Institutions de Droit de la Nature et des Gens* (originally published 1803, new edition of 1832 republished Paris: Auguste Durand, 1851), vol. 1, 293; Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, new ed. (Oxford: Clarendon Press, 1884), 196-211; L. Oppenheim, *International Law: A Treatise*, vol. 1, *Peace* (London: Longmans, Green, and Co., 1905), 275-80; T.J. Lawrence, *The Principles of International Law*, 4th ed. (London: Macmillan and Co., 1911), 148-61; William Edward Hall, *A Treatise on International Law*, 8th ed. by A. Pearce Higgins (Oxford: Clarendon Press, 1924), 123-39; Lindley, *supra* note 31 at 139-51; Jennings, *supra* note 31 at 20-35. Moreover, the standard of effective occupation has been applied by international tribunals to claims originating prior to the 17th century: see *Island of Palmas Case*, (1928) 2 R.I.A.A. 829; *Legal Status of Eastern Greenland Case*, (1933) 2 P.C.I.J., Series A/B, No. 43; *Minquiers and Ecrehos Case*, 1953 I.C.J.R. 47.

⁵⁶ *Delgamuukw*, *supra* note 8 at para. 145.

⁵⁷ But as argued above, I think Aboriginal title and self-government should be encompassed within a broader right to territory, rather than being considered separately: see text accompanying notes 37-38, *supra*.

This issue of acquisition of Crown sovereignty is vital to our understanding of the historic treaties because it goes to the heart of the treaty relationship. I seriously doubt that the Crown had sovereignty over Aboriginal nations and their territories at the time treaties were negotiated. If this is correct, it means that those agreements would have been as much about sovereignty as about lands and resources, and would probably have established continuing nation-to-nation relationships. To properly understand these nation-to-nation treaty relationships, one would have to understand the Aboriginal law that would have governed and informed the Aboriginal participants in the treaty process. Moreover, the extent of the Crown's jurisdiction, if any, in relation to particular Aboriginal nations and their territories would depend on the terms of the treaties they entered into, and could vary from one treaty nation to another. For example, the negotiated treaty relationship may have resulted in shared sovereignty,⁵⁹ or a form of what Sákéj Henderson has called "treaty federalism".⁶⁰ I therefore think it would be very fruitful for further research to be done that would support a reconceptualization of the treaty relationship that is in accordance with Aboriginal law and Aboriginal understandings of the treaty relationship. This work could be used in turn by particular First Nations who wish to conduct research on their own treaty relationships with the Crown.

⁵⁸ Note that the issue of the date of Crown sovereignty in New Brunswick and Nova Scotia was touched upon recently in the decisions of the Courts of Appeal of those provinces in *R. v. Bernard*, [2003] 3 C.N.L.R. 48, and *R. v. Marshall*, [2004] 1 C.N.L.R. 211, respectively. As leave to appeal those decisions was accepted by the Supreme Court of Canada on April 29, 2004, [2004] 2 C.N.L.R. iv, there is a possibility that the Court will shed some light on this matter.

⁵⁹ It needs to be acknowledged that the Crown has generally not respected this aspect of the treaty relationship, especially after the creation of the Dominion of Canada in 1867. The imposition of the band council system of government through the *Indian Act*, S.C. 1876 (39 Vict.), c.18, for example, probably violated the right of treaty First Nations to govern themselves in accordance with their own traditions. See *RCAP Report, supra* note 2, Vol. 2, Pt. 1, at 18; Kent McNeil, "Challenging Legislative Infringements of the Inherent Right of Self-Government", forthcoming, *Windsor Yearbook of Access to Justice* ["Challenging Legislative Infringements"].

⁶⁰ James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Sask. L. Rev.* 241. See also John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997), 155; Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan* (Calgary: University of Calgary Press, 2000). Compare Grand Chief Michael Mitchell, Mohawk Council of Akwesasne, "An Unbroken Assertion of Sovereignty", in Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press and the Assembly of First Nations, 1989), 107.

3. EXERCISING THE INHERENT RIGHT OF SELF-GOVERNMENT

As noted earlier, the Supreme Court has been encouraging First Nations and the Crown to settle self-government claims through negotiation rather than litigation. Judges are obviously reluctant to take on this matter, especially as it involves complex issues of political authority and jurisdiction. So while court decisions might establish some general principles and provide some broad guidelines for resolving these claims, I think the details will ultimately have to be worked out at the negotiating table. Nonetheless, research can be as useful in the context of negotiations as in litigation.

In the first two parts of this report, I attempted to identify some potential areas for research in relation to the inherent right of self-government and the historic treaties. I think work of this sort would assist First Nations by providing a solid theoretical and conceptual basis for the inherent right of self-government and its affirmation in the treaties that would clarify its extent. However, non-Aboriginal governments also need to be convinced that self-government will work in practice. It is therefore important to develop models for self-government that address the complexities of implementation. One of the difficulties here is to produce models that take account of the cultural diversity and very different circumstances of First Nations across Canada. As Stephen Cornell and Joseph Kalt have demonstrated in their research on tribal governments in the United States, one key ingredient in effective governance is cultural “match” between the traditions of the Indian nation and form of government adopted by it.⁶¹

In this part of the report, I will discuss what I see as some of the most important issues to be considered in the context of the exercise of the inherent right of self-government. This is not to suggest that these are the only issues that deserve attention, as I am sure other commentators would be able to identify other issues for research that are as important as those I am about to examine briefly.

⁶¹ E.g. see Stephen Cornell and Joseph P. Kalt, “Sovereignty and Nation-Building: The Development Challenge in Indian Country Today” (1998) 22:3 *American Culture & Research J.* 187, especially at 201-5. More generally, see Frank Cassidy and Robert L. Bish, *Indian Government: Its Meaning in Practice* (Lantzville, B.C.: Oolichan Books, 1989); Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993).

(a) Identifying the Groups That Have the Right of Self-Government

The Royal Commission on Aboriginal Peoples distinguished between Aboriginal nations and local communities in the portion of its Report dealing with governance. It defined “Aboriginal nation” as “a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories.”⁶² “Local communities”, on the other hand, are smaller groupings of Aboriginal people that are not themselves nations but are part of larger Aboriginal nations.⁶³ The Royal Commission thought there are probably between 50 and 80 Aboriginal nations in Canada, and approximately 1000 local communities.⁶⁴ Regarding the entities that currently hold the inherent right of self-government, the Commission said this:

In our view, the inherent right of self-government is vested in the entire people making up the Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not vest in local communities as such, considered apart from the nations of which they are part. In effect, for an Aboriginal people to exercise the inherent governmental powers at their disposal, they will have to draw up a national constitution that establishes an overall structure of government. In many cases this structure will include not only national but also local institutions. Within such multi-level structures, each level of government can be viewed as exercising its own powers, powers that are appropriate to its particular sphere of authority and that spring in each case from the people concerned.⁶⁵

As there is scant case law on the inherent right of self-government, the courts have provided little guidance on identification of the Aboriginal groups that hold the inherent right of self-government. In *Campbell*,⁶⁶ Williamson J. seems to have accepted without question that it was the Nisga’a people as a whole that held the inherent right of self-

⁶² *RCAP Report*, supra note 2, Vol. 2, Pt. 1, at 178.

⁶³ *Ibid.* at 179.

⁶⁴ *Ibid.* at 181.

⁶⁵ *Ibid.* at 234.

⁶⁶ *Supra* note 7.

government and so could enter into a treaty for its implementation.⁶⁷ In *Pamajewon*,⁶⁸ on the other hand, a right of self-government was claimed by two Ojibwa (Anishnabe) First Nations that, according to the distinction drawn by the Royal Commission on Aboriginal Peoples, would appear to be local communities rather than Aboriginal nations. Nonetheless, the Supreme Court appears to have been willing to accept that these First Nations could have such a right if they were able to prove in accordance with the *Van der Peet* test that the gambling activity over which the right was claimed had been integral to their distinctive Ojibwa culture and regulated by them.⁶⁹ There is also a body of Federal Court jurisprudence holding that Indian bands, as defined by the *Indian Act*,⁷⁰ not only have an inherent right to choose their own leaders in accordance with their own customs, but can also create new customs for this purpose.⁷¹

No attempt can be made here to resolve this complex, and potentially controversial, issue of identification of the groups holding the inherent right of self-government.⁷² I nonetheless think it is an important topic that could be illuminated by further research. While the *RCAP Report's* treatment of the issue could serve as a useful starting point, I think more attention has to be paid to the effect of Canadian policy and law on the social and political organization of the Aboriginal peoples.⁷³ The reserve system and band

⁶⁷ This is consistent with the Royal Commission's view that only Aboriginal nations can negotiate treaties for the implementation of the inherent right of self-government: *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 235.

⁶⁸ *Supra* note 4.

⁶⁹ See text accompanying notes 9-11, *supra*.

⁷⁰ R.S.C. 1985, c.I-5, s.2(1).

⁷¹ See *Bone v. Sioux Valley Indian Band No. 290 Council*, [1996] 3 C.N.L.R. 54 (F.C.T.D.), at 65; *Jock v. Canada (Minister of Indian and Northern Affairs)*, [1992] 1 C.N.L.R. 103 (F.C.T.D.); *Sparvier v. Cowessess Indian Band #73*, [1994] 1 C.N.L.R. 182 (F.C.T.D.); *Crow v. Blood Indian Band Council*, [1997] 3 C.N.L.R. 76 (F.C.T.D.).

⁷² For further discussion, see Kent McNeil, "Section 91(24) Powers, the Inherent Right of Self-Government, and Canada's Fiduciary Obligations", a research report prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations, August, 2002, reproduced in *Canadian Aboriginal Law 2002*, Conference Materials, Ottawa, 5-6 December 2002 (Vancouver: Pacific Business & Law Institute, 2002).

⁷³ See Wayne Warry, *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government* (Toronto: University of Toronto Press, 1998), especially at 51-61.

council form of government that has been in place since the 1870s have fragmented many Aboriginal nations and had a profound impact on their affiliations and the ways some of them govern themselves. Some divisions have also been created in Aboriginal nations whose “local communities” became parties to different treaties.⁷⁴ Provincial and territorial boundaries have also had an impact. I think these are all factors that need to be taken into account in the context of identification of the groups that currently hold the inherent right of self-government.

(b) Jurisdictional Issues

Simply put, jurisdiction means governmental authority or political power. It is usually regarded as having two dimensions, one territorial and one personal.⁷⁵ The territorial dimension empowers the government in which the jurisdiction is vested to exercise authority over a specific geographical area. The personal dimension involves authority over persons, who are usually either citizens of the “nation” in question or residents of the territory over which the government has jurisdiction.⁷⁶ In my opinion, the inherent right of self-government, understood as residual governmental authority over all aspects of Aboriginal life,⁷⁷ has both territorial and personal dimensions.⁷⁸ The territorial dimension would provide the Aboriginal government in question with authority over the territory of the Aboriginal nation in which the right of self-government is vested.⁷⁹ This

⁷⁴ The Cree and Anishnabe, for example, are parties to a number of treaties.

⁷⁵ See Peter W. Hogg and Mary Ellen Turpel, “Implementing Self-Government: Constitutional and Jurisdictional Issues”, in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995), 375 at 391-94 (republished (1995) 74 *Can. Bar Rev.* 187).

⁷⁶ An example of the exercise of personal jurisdiction by the Canadian government can be found in the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1, which taxes residents of Canada on their general income, whether earned in Canada or elsewhere.

⁷⁷ See text following note 25, *supra*.

⁷⁸ This is consistent with American law on tribal sovereignty. See *United States v. Mazurie*, 419 U.S. 544 at 557 (1975): “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.” See also *Cohen’s Handbook*, *supra* note 25 at 246.

⁷⁹ Hereinafter, I will use the term “Aboriginal nation” for convenience to refer to the entity in which the inherent right is vested. However, this is not meant to endorse the position of the Royal Commission on

would allow it, for example, to make and enforce laws in relation to such matters as land use and environmental protection.⁸⁰ In addition, where an Aboriginal nation has Aboriginal or treaty rights (such as hunting and fishing rights, or entitlement to other resources) that extend beyond its territory, jurisdiction in relation to those rights should be part of its right of self-government.⁸¹ The personal dimension would involve authority over the citizens of that nation, even when physically outside the territory of the nation. Instances of this could include jurisdiction over family law matters, such as marriage and adoption,⁸² and possibly over matters like education and cultural heritage.

If Aboriginal jurisdiction is understood as including governmental authority in relation to all matters over which First Nations have retained political power, it will be important to critically examine American law in this regard. Starting in 1978 with *Oliphant v. Squamish Tribe*,⁸³ for 25 years the U.S. Supreme Court steadily eroded the territorial jurisdiction of the Indian nations in relation to persons who are not tribal members (citizens).⁸⁴ Fortunately for the Indian nations, this erosion appears to have ended with the recent decision of the Court in *United States v. Lara*.⁸⁵ In that case, the majority of the

Aboriginal peoples or any other view on the matter of the identity of the Aboriginal groups that have the inherent right today.

⁸⁰ In *Delgamuikw*, *supra* note 8 at paras. 158 (Lamer C.J.), 196 (La Forest J.), the Supreme Court envisaged joint Aboriginal title where two or more Aboriginal nations share title to the same lands. In relation to self-government, this raises interesting questions about the extent of the jurisdiction of each nation in relation to the shared territory.

⁸¹ See *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 146-48.

⁸² Canadian courts have already implicitly acknowledged that Aboriginal peoples have retained jurisdiction in this area in a series of cases recognizing the validity of marriages and adoptions under current customary law: see *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), affirmed *sub nom. Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266 (Que. Q.B.); *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 (N.W.T.S.C.); *R. v. Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.S.C.); *R. v. Williams* (1921), 30 B.C.R. 303 (B.C.S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T.T.C.); *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T.T.C.); *Re Deborah* (1972), 5 W.W.R. 203 (N.W.T.C.A.); *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.); *Deer v. Okpik*, [1980] 4 C.N.L.R. 93 (Que. S.C.); *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.); *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C.C.A.); *B.C. Birth Registration No. 1994-09-040399 (Re)*, [1998] 4 C.N.L.R. 7 (B.C.S.C.).

⁸³ 435 U.S. 191, 98 S.Ct. 1011 (1978).

⁸⁴ See also *Montana v. United States*, 450 U.S. 544 (1981); *Duro v. Reina*, 495 U.S. 676 (1990); *Strate v. A-I Contracting*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).

⁸⁵ U.S.S.C. No. 03-107, 19 April 2004.

Court decided that a Congressional Act, removing a limitation on tribal sovereignty that prevented Indian nations from prosecuting non-member Indians in tribal courts, restored the nations' inherent jurisdiction in this regard.⁸⁶ This decision is especially significant for Canada because it reveals that, in the opinion of the U.S. Supreme Court, limitations on tribal sovereignty were what we would call “infringements” of the inherent right of self-government, rather than “extinguishments” of specific aspects of it. Given that Aboriginal and treaty rights, including the right of self-government, are constitutionally protected in Canada by section 35(1) of the *Constitution Act, 1982* (unlike in the United States, where Congress is said to have plenary power over the Indian nations),⁸⁷ this means that prior limitations on this right, such as those imposed on First Nations by the *Indian Act*, would only be valid today as infringements of the right if they could be justified in accordance with the test first articulated by the Supreme Court in *Sparrow*.⁸⁸

The inherent jurisdiction of the Indian nations in the United States depends in part on the history of Indian/federal relations and constitutional arrangements unique to that country. Nonetheless, I think it would be worthwhile to investigate American law on this topic, at least to shed light on the range of questions to be considered if not to provide answers to them.⁸⁹ I think this is especially important because Binnie J.'s reliance on American law in his concurring judgment in *Mitchell* may be an indication of the Supreme Court's understanding of the relevance of this law in Canada.⁹⁰ First Nations accordingly need to appreciate both the advantages and disadvantages of federal Indian law in the United States, in relation to jurisdiction as well as in relation to other matters mentioned earlier, such as the doctrine of discovery.

⁸⁶ This meant the accused could be tried twice, once in a tribal court and once in the courts of the United States, without offending the constitutional prohibition against double jeopardy, because tribal courts are established and function under the separate sovereignty of the Indian nations.

⁸⁷ The plenary power doctrine, affirmed in *United States v. Lara*, *supra* note 85, has often been criticized: e.g. see Newton, *supra* note 33 at 207-28; Deloria, *supra* note 33 at 141-61; Wilkins & Lomawaima, *supra* note 33 at 98-116.

⁸⁸ *Supra* note 47. See “Challenging Legislative Infringements”, *supra* note 59.

⁸⁹ For critical discussion of *Oliphant v. Squamish Tribe*, *supra* note 83, and *Duro v. Reina*, *supra* note 84, for example, and a caution respecting their relevance to Canada, see Russell, *supra* note 3 at 124-27.

⁹⁰ See discussion of Binnie J.'s judgment in *Mitchell*, *supra* note 20, in text accompanying notes 20-25.

In addition to the distinction between territorial and personal jurisdiction, one can differentiate between internal and external aspects of an Aboriginal nation's inherent right of self-government. By "internal" I mean aspects of jurisdiction relating to the internal affairs of the nation, e.g. the form of government it chooses, citizenship rules, laws relating to natural resources and land use within its territory, family law matters, education, social services, and so on. In relation to these matters, it can be argued that Aboriginal jurisdiction should be exclusive, though to do so one has to disregard Supreme Court jurisprudence that envisages that any Aboriginal or treaty right (including, no doubt, the inherent right of self-government) can be infringed by or pursuant to valid legislation as long as the *Sparrow* test for justification has been met.⁹¹ A more moderate position would therefore be that Aboriginal jurisdiction is exclusive in relation to these internal matters in the absence of exceptional circumstances where the intrusion of federal or provincial legislation can be justified. However, neither of these positions was supported by the Royal Commission on Aboriginal Peoples. Instead, the Commissioners regarded Aboriginal jurisdiction to be concurrent with federal jurisdiction under section 91(24) of the *Constitution Act, 1867*, but introduced a paramountcy rule whereby Aboriginal laws would prevail over federal laws in the event of conflict unless the federal laws were shown to be justifiable infringements of the inherent right of self-government.⁹² Obviously, these issues of exclusivity and paramountcy are of vital importance, meriting further research.⁹³

By comparison, "external" jurisdiction involves relations with other governments (federal, provincial, territorial, municipal, and other Aboriginal governments), otherwise known as intergovernmental affairs. While Aboriginal nations have the authority to enter

⁹¹ *Sparrow*, *supra* note 47. For example, in *Delgamuukw*, *supra* note 8 at paras. 165 (Lamer C.J.), 202 (La Forest J.), the Court envisaged intrusion of both federal and provincial laws into Aboriginal territories in ways that would infringe Aboriginal title for such legislative objectives as "the development of agriculture, forestry, mining, and hydroelectric power" (para. 165). For criticism of this aspect of the decision, see Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada", forthcoming, *Osgoode Hall L.J.*

⁹² *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 216. The Commission also differentiated between core and peripheral areas of Aboriginal jurisdiction. Core areas include "all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern. The periphery makes up the remainder of the sphere of inherent Aboriginal jurisdiction." *Ibid.* at 215 [bullets removed]. In the Commission's view, Aboriginal governments can exercise jurisdiction in the core on their own initiative, but not in the periphery without concluding agreements with the federal and provincial governments: *ibid.*

⁹³ See Hogg & Turpel, *supra* note 75 at 395-402.

into these relations as an aspect of their right of self-government,⁹⁴ obviously the relationships themselves are generally governed by agreements with other governments. For smaller Aboriginal nations for whom it is impractical to provide some of the services and infrastructure of government due to economies of scale, intergovernmental agreements are particularly important.⁹⁵ In some cases, these agreements may involve arrangements with other Aboriginal nations or with regional, provincial or national Aboriginal organizations. I think research on the kinds of agreements of this sort that might be beneficial to Aboriginal nations and the forms these agreements might take could be of great practical value.⁹⁶

(c) Citizenship Issues

The Canadian government's intrusion into First Nation internal affairs through the *Indian Act's* definition of "Indian" and control over Indian band membership has always been a controversial and divisive aspect of federal policy. While the 1985 amendments to the *Indian Act* brought about by Bill C-31 were intended to deal with the gender discrimination that had been part of this policy and give Indian bands the authority to create their own membership codes, not all the problems have been resolved.⁹⁷ The distinction the amendments created between Indian status and band membership, for example, has created additional problems in relation to funding for health and education, exemptions from taxation, and other matters. In any case, the issue today is not so much the problems *with*, but the existence *of*, a statutory definition of "Indian", as it is generally acknowledged that

⁹⁴ The Nisga'a Treaty, initialed on August 4, 1998, is an example: see *Campbell*, *supra* note 7.

⁹⁵ See Warry, *supra* note 73 at 51-61.

⁹⁶ See Hogg & Turpel, *supra* note 75 at 396-97.

⁹⁷ E.g. the amendments provide in part that children who received status through mothers who had lost it because they married non-status men prior to the amendments can only pass it on to their children if the other parent of the children also has status: *Indian Act*, R.S.C. 1985, c.I-5 (as amended), ss. 6(1)(f) and 6(2). This is generally known as the "second generation cut-off" rule: see Anne Skarsgard, *Indian Status and Band Membership: Update 1986*, Legal Information Service Report No. 23 (Saskatoon: University of Saskatchewan Native Law Centre, 1986), at 6-7. See also *RCAP Report*, *supra* note 2, Vol. 4, at 38-43. The constitutionality of this rule is currently being challenged in court: see *Perron v. Canada (Attorney General)*, [2003] 3 C.N.L.R. 198 (Ont. S.C.).

authority of Aboriginal nations to determine their own citizenship in accordance with their own rules is an essential element of their inherent right of self-government.⁹⁸

The Royal Commission on Aboriginal Peoples has pointed out that, to the extent that the inherent right of self-government is an Aboriginal and treaty right within section 35(1) of the *Constitution Act, 1982*, it is subject to section 35(4) which guarantees the rights in subsection (1) “equally to male and female persons.” As a result, Aboriginal nations are barred by the Canadian Constitution from discriminating on the basis of gender in their citizenship rules and processes.⁹⁹ More controversially, the Commission also argued that, while ancestry can be used as one way to determine citizenship, it cannot be a general prerequisite because that would make citizenship depend on race rather than on affiliation with an Aboriginal nation as a political and cultural entity.¹⁰⁰ Without explicitly saying so, the Commission may have based this opinion on its conclusion that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal nations in the exercise of their right of self-government,¹⁰¹ a matter to be discussed below. But while I am personally in agreement with the Commission that citizenship codes should not be based on race, I regard this as an ethical and political issue rather than a constitutional requirement. This is due to my disagreement with the Commission over the application of the *Charter*.

In terms of research, the most useful work would probably be the development of model codes that could serve as examples for Aboriginal nations that want to create their own citizenship rules. Also of interest would be research on the dual nature of the citizenship of Aboriginal persons, as citizens of their own nations and as citizens of Canada, and the implications of this for the inherent right of self-government.¹⁰²

⁹⁸ See Richard H. Bartlett, *The Indian Act of Canada*, 2nd ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988), at 16; *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 237.

⁹⁹ *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 237.

¹⁰⁰ *Ibid.* at 237-39. For discussion of how one community has dealt with this matter, see E.J. Dickson-Gilmore, “‘More Mohawk than My Blood’: Citizenship, Membership and the Struggle over Identity in Kahnawake”, in Michael Behiels, ed., *Aboriginal Peoples in Canada: Futures and Identities* (Montréal: Association for Canadian Studies, 1999), 44.

¹⁰¹ *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 226-34.

¹⁰² For discussions of this, see John Borrows, “Uncertain Citizens: The Supreme Court and Aboriginal Peoples” (2001) 80 *Can. Bar. Rev.* 15, and “‘Landed’ Citizenship: An Indigenous Declaration of Independence”, in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto:

(d) The Canadian Charter of Rights and Freedoms

The application of the *Charter* to Aboriginal governments is still a controversial, unresolved issue, with divisions appearing along gender lines as well as on political and constitutional grounds.¹⁰³ I have argued that the *Charter* does not apply as a matter of law to Aboriginal governments that are exercising their inherent right of self-government.¹⁰⁴ As mentioned above, the Royal Commission on Aboriginal Peoples has taken the opposite position, as have some leading academic commentators, most of whom tend to rely on section 25 to mitigate the potentially negative impact of the *Charter* on Aboriginal traditions and cultures.¹⁰⁵ As the issue of the *Charter's* application in this context will

University of Toronto Press, 2002), 138; Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).

¹⁰³ E.g. see Menno Boldt and J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms", in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 165; Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986), at 365-97; Mary Ellen Turpel/Aki-Kwe, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" (1989) 10 *Can. Woman Studies* 49; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 *Can. Human Rights Yearbook* 3 [Turpel, "Interpretive Monopolies"]; Native Women's Association of Canada, *Statement on the "Canada Package"* (Ottawa: Native Women's Association of Canada, 1992); Thomas Isaac and Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Self-Government" (1992) 21 *Manitoba L.J.* 453; Teressa Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter", in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System* (Ottawa: Minister of Supply and Services Canada, 1993), 359; J. Anthony Long and Katherine Beaty Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" (1994) 18 *American Indian Culture & Research J.* 91; Sharon D. McIvor, "Self-Government and Aboriginal Women", in Margaret A. Jackson and N.K. Banks, eds., *Ten Years Later: The Charter and Equality for Women* (Vancouver: Simon Fraser University, 1996), 77; Monture-Angus, *supra* note 3 at 135-57.

¹⁰⁴ Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 *Osgoode Hall L.J.* 61, republished in *Emerging Justice?*, *supra* note 3, 215. For further support for this position, see Kerry Wilkins, "... But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49 *U. of T. L.J.* 53. See also A.C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991), Vol. 1, at 333-34 [*Aboriginal Justice Inquiry*].

¹⁰⁵ See *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 226-34; Peter W. Hogg and Mary Ellen Turpel, *supra* note 75 at 414-19; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 *Can. Bar Rev.* 261, at 286-87; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), at 194-233. For skeptical appraisals of the protective potential of section 25, see Kent McNeil, "Aboriginal Governments and the Charter: Lessons from the United States" (2002) 17:2 *Can. J. of Law & Society* 73, at 100-1; Wilkins, *supra* note 104 at 108-18. Section 25 of the *Charter* provides: "The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to

probably end up being resolved by Canadian courts, further work on the meaning and effect of section 25 in particular would be worthwhile. However, I think the more interesting question is a normative rather than strictly legal one, viz. *should* the *Charter* apply to Aboriginal governments? Moreover, the answer to this question might well have an influence on judicial determination of whether the *Charter* does apply as a matter of constitutional interpretation.

On whether the *Charter* should apply, after 30 pages of thoughtful discussion Kerry Wilkins concluded as follows:

The hope was that the Charter would ensure the courts of ways of protecting vulnerable individuals living within [inherent-right] communities, and that its application would assure an essential consistency to the notion of Canadian citizenship. Applied full strength to inherent-right communities, however, the Charter stands to endanger the traditional foundations of order and authority on which their own sense of integrity depends; in doing so, it most probably would disrupt their traditional ways of protecting the vulnerable and frustrate and discourage their own traditional notions of citizenship. None of the Charter's own mechanisms for mitigating these effects is especially satisfactory.¹⁰⁶

Dan Russell, in his book *A People's Dream: Aboriginal Self-Government in Canada*,¹⁰⁷ was equally critical of the view that the *Charter* can be applied without significant negative impact on Aboriginal cultures and traditions. He looked at specific provisions of the *Charter* and discussed their potential effect on Aboriginal ways of governing themselves.¹⁰⁸ More of this kind of work would be very helpful, especially in relation to specific Aboriginal cultures and traditions. As Russell pointed out, Aboriginal people are concerned about the protection of individual rights, but at the same time they “hope that the

abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreement or may be so acquired.”

¹⁰⁶ Wilkins, *supra* note 104 at 119 [footnote omitted].

¹⁰⁷ *Supra* note 3.

¹⁰⁸ *Ibid.*, especially at 103-13.

non-Aboriginal community will understand that there are other values to be cherished and protected if Aboriginal cultures are to survive.”¹⁰⁹

Wilkins and Russell both expressed the view that the American experience in relation to their Bill of Rights and tribal governments could assist us in coming up with a more creative approach than that suggested by the Royal Commission on Aboriginal Peoples. In a recent article, I investigated this matter in some detail.¹¹⁰ For me, five things stand out in the American experience. First, the U.S. Supreme Court has held since the 1890s that the Bill of Rights does not apply to the Indian nations because they have inherent sovereignty that is not subject to the American Constitution.¹¹¹ Second, when Congress decided in the 1960s that tribal governments should be subject to some civil rights guarantees, it did so only after extensive investigation and hearings on the potential impact that might have on the Indian nations. Third, when Congress enacted the *Indian Civil Rights Act (ICRA)* in 1968,¹¹² it modified certain aspects of the Bill of Rights in so far as they were applied to tribal governments in order to protect aspects of Indian cultures and traditions. Fourth, when the Supreme Court dealt with the *ICRA* in *Santa Clara Pueblo v. Martinez*,¹¹³ it decided that the courts of the United States had jurisdiction to enforce it only on an application for *habeas corpus*. Any other applications for violation of the Act had to be brought in tribal courts, with no appeal to American courts. In delivering the opinion of the Court, Marshall J. gave the following policy reason for the decision: “efforts by the federal judiciary to apply the statutory prohibitions of [the *ICRA*] in a civil context may substantially interfere with a tribe’s ability to maintain itself as a culturally and politically distinct entity.”¹¹⁴ Finally, recent empirical studies have shown that tribal courts have not only been doing a good job enforcing the provisions of the *ICRA*, but are probably more effective than federal courts (whose jurisdiction is limited to *habeas corpus* applications) in

¹⁰⁹ *Ibid.* at 127.

¹¹⁰ McNeil, *supra* note 105.

¹¹¹ *Talton v. Mayes*, 163 U.S. 376 (1896).

¹¹² Pub. L. 90-284, 82 Stat. 77, §§ 1302-1303.

¹¹³ 436 U.S. 49 (1978).

¹¹⁴ *Ibid.* at 72.

protecting Indian cultures and traditions.¹¹⁵ In 1991, the United States Commission on Civil Rights (a bipartisan agency established by Congress in 1957) reported that problems with enforcement of the *ICRA* in tribal courts were due mainly to inadequate federal funding of tribal judicial systems.¹¹⁶

I think we can learn from the American experience that simple imposition on Aboriginal governments of a bill of rights like that contained in our *Charter* is not the answer. While guarantees of individual rights are necessary, they have to be balanced against the need for Aboriginal nations to maintain their distinctive cultures, which traditionally have been at least as respectful of individual liberty as Anglo/French Canadian cultures.¹¹⁷ One way of addressing this would be through the development of model Aboriginal charter provisions that do take account of differences between Aboriginal cultures and the liberal values on which the *Charter* is based.¹¹⁸ While Canadian judges are bound to be concerned about the protection of individual rights in Aboriginal communities, they will be less likely to resort to the *Charter* if they are convinced that Aboriginal nations themselves have taken adequate steps to accomplish that goal.¹¹⁹ However, given the diversity of Aboriginal cultures in Canada, it would be difficult to draft a charter that would be appropriate for all Aboriginal nations.¹²⁰ Model provisions could, however, be

¹¹⁵ See Nell Jessup Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts" (1998) 22 *American Indian L. Rev.* 285; Robert J. McCarthy, "Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years" (1998) 34 *Idaho L. Rev.* 465; Mark D. Rosen, "Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act" (2000) 69 *Fordham L. Rev.* 479.

¹¹⁶ *The Indian Civil Rights Act*, A Report of the United States Commission on Civil Rights, June 1991, especially at 72: "The failure of the United States Government to provide proper funding for the operation of tribal judicial systems, particularly in light of the imposed requirements of the Indian Civil Rights Act of 1968, has continued for more than 20 years."

¹¹⁷ See John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics" (1994) 43 *U. of New Brunswick L.J.* 19.

¹¹⁸ On these differences, see Turpel, "Interpretive Monopolies", *supra* note 103.

¹¹⁹ See *Aboriginal Justice Inquiry*, *supra* note 104 at 335-36; Wilkins, *supra* note 104.

¹²⁰ See Hogg & Turpel, *supra* note 75 at 419.

developed as starting points for Aboriginal nations that want to produce their own charters.¹²¹

(e) Administration of Justice and Dispute Resolution in Aboriginal Communities

For the inherent right of self-government to be effectively exercised, Aboriginal governments need to have jurisdiction over the administration of justice within their territories that will enable them to reclaim Aboriginal traditions in relation to resolution of disputes within their communities.¹²² As recognized by the U.S. Supreme Court, this is essential for the cultural and political distinctiveness of Aboriginal nations to be maintained.¹²³ As yet, this is an area that has not received sufficient attention in Canada. While many First Nations provide their own policing services,¹²⁴ and some agreements provide for broader administration of justice by the Aboriginal parties,¹²⁵ in my opinion not enough thought has been given to Aboriginal dispute-resolution traditions and mechanisms.¹²⁶ As long as disputes arising in Aboriginal communities continue to be resolved in Canadian courts, I think real self-government will remain elusive.

Tribal courts have been in place as part of Indian government in the United States for many years. There is also a large literature on these courts and their performance.¹²⁷

¹²¹ American experience might be of assistance here as well because, even before the enactment of the *ICRA*, *supra* note 112, 117 Indian nations had constitutions containing provisions for the protection of individual civil rights: see Donald L. Burnett, Jr., “An Historical Analysis of the 1968 ‘Indian Civil Rights’ Act” (1972) 9 *Harvard J. on Legislation* 557, at 579.

¹²² Hogg & Turpel, *supra* note 75 at 402.

¹²³ See the quotation from *Santa Clara Pueblo v. Martinez* accompanying note 114, *supra*.

¹²⁴ See *Aboriginal Justice Inquiry*, *supra* note 104 at 614-16; Shin Imai, *Aboriginal Law Handbook*, 2nd ed. (Toronto: Carswell, 1999), at 371-72.

¹²⁵ For example, the self-government agreements entered into by Yukon First Nations under the Umbrella Final Agreement (Ottawa: Minister of Supply and Services Canada, 1993) provide for the administration of justice by those First Nations: see Hogg & Turpel, *supra* note 75 at 403-4.

¹²⁶ Note that the Nisga’a Final Agreement in chapter 12, “Administration of Justice”, paras. 30-51, provides for the creation of a Nisga’a Court.

¹²⁷ E.g. see the articles cited *supra* in note 115. For somewhat dated assessments of how the American experience might inform the design of Aboriginal justice systems in Canada, see *Aboriginal Justice Inquiry*,

As these courts exercise inherent jurisdiction as an element of the original sovereignty of the Indian nations,¹²⁸ their experience is especially relevant to the judicial functions of inherent-right governments in Canada. I would therefore recommend research on tribal courts in the United States, to see how they operate and how well they are able to perform the function of resolving disputes in culturally-appropriate ways. Research on other approaches to dispute resolution that have been used in the United States and elsewhere, as well as research on traditional Aboriginal forms of dispute resolution in Canada, would also be very helpful.

(f) Fiduciary Obligations and Capacity Building

The landmark decision of the Supreme Court of Canada in *Guerin v. The Queen*¹²⁹ established that the relationship between the Aboriginal peoples and the Crown is fiduciary, giving rise to fiduciary obligations in situations where the Crown has discretionary power that can affect their interests.¹³⁰ Fiduciary obligations also exist and have to be respected in contexts where Parliament or a provincial legislature infringes or authorizes the infringement of a constitutionally-protected Aboriginal or treaty right.¹³¹ Concerns have, however, been raised about the impact of self-government on the Crown's fiduciary obligations. Would, for example, these obligations be reduced or eliminated in contexts where Aboriginal nations are exercising inherent rights of self-government?

In my opinion, the relationship between the Crown and the Aboriginal peoples will continue to be fiduciary, irrespective of the implementation of self-government. However, the nature and extent of the Crown's fiduciary obligations are bound to change because those obligations are dependent in law on the presence of discretionary power in the

supra note 104 at 268-98; Bradford W. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon: University of Saskatchewan Native Law Centre, 1980).

¹²⁸ *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, *supra* note 85.

¹²⁹ [1984] 2 S.C.R. 335.

¹³⁰ For recent affirmation of this, see *Wewaykum Indian Band v. Canada*, [2002] 2 S.C.R. 245.

¹³¹ E.g. see *Sparrow*, *supra* note 47; *Badger*, *supra* note 40; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Côté*, [1996] 3 S.C.R. 139; *Delgamuukw*, *supra* note 8; *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 723.

Crown. To the extent, therefore, that this power is reduced (under current constitutional law, I do not think it can be eliminated¹³²), the Crown's fiduciary obligations will be altered. I nonetheless think a good argument can be made that the Crown, represented in this context by the federal government, has a fiduciary obligation to assist Aboriginal nations in implementing self-government.¹³³ The reason for this is that federal policy, in particular the replacement of traditional governments with *Indian Act* band councils and control of First Nations by the Department of Indian Affairs, has probably unjustifiably infringed their inherent right of self-government and caused them to depend on the federal government in the administration of their affairs.¹³⁴ I therefore think the federal government has a positive fiduciary obligation to provide Aboriginal nations with assistance to rebuild their capacity to govern themselves autonomously.¹³⁵ Included in this would be the financial assistance necessary to make self-government work. I think research would be helpful to develop legal arguments demonstrating the origins, nature, and extent of the Crown's obligations in this regard.

(g) Financing Aboriginal Governments

It is perfectly obvious that inherent-right governments will need adequate financial resources in order to function effectively. Moreover, to the extent that these governments depend on discretionary transfer payments from other governments, their autonomy will be

¹³² This is because the Supreme Court has held that Parliament and the provincial legislatures can infringe Aboriginal and treaty rights, as long as the infringement is justified: see the cases cited in the preceding note.

¹³³ See Kent McNeil, "Aboriginal Autonomy and the Crown's Fiduciary Obligations", a paper prepared for the Canadian Bar Association's 2004 Canadian Legal Conference and Expo, Winnipeg Manitoba, 15-17 August 2004. See also Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), especially at 258-60; Kent McNeil, "The Lands and Trust Services Initiative: Its Potential Impact on the Federal Government's Fiduciary Obligations", Part I (August, 1998), Part II (December, 1999), a research report prepared for the Assembly of First Nations, Ottawa.

¹³⁴ See "Challenging Legislative Infringements", *supra* note 59.

¹³⁵ See generally Law Commission of Canada, ed., *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin Law, 2002). On the kinds of capacity building that would assist in the transition to self-government, see *RCAP Report, supra* note 2, Vol. 2, Pt. 1, at 326-53. On the need for capacity building, see *RCAP Report, supra* note 2, Vol. 2, Pt. 1, at 326-53.

seriously hampered. Aboriginal governments therefore need independent, or at least constitutionally-protected, sources of revenue to support their structures and agendas.¹³⁶

The Royal Commission on Aboriginal Peoples identified the following independent sources of revenue for Aboriginal governments: taxation; resource rents and royalties; user fees, licences and fines; gaming; and Aboriginal and public corporation revenues.¹³⁷ The amount of revenue available from these sources would depend in turn on the land and resource base of the Aboriginal nation in question, and the potential for economic development.¹³⁸ While economic analysis obviously needs to play a large role in this context, there are also legal and constitutional issues to be addressed. The extent of the resource and land base of Aboriginal nations depends on interpretation of existing treaties and resolution of outstanding Aboriginal title claims. Although authority to raise revenues by taxation must be an element of the inherent jurisdiction of Aboriginal nations, distribution of tax revenues will probably have to be worked out through tax-sharing agreements with the federal and provincial governments.¹³⁹ The tax exemption in section 87 of the *Indian Act*, and the current limitation of that exemption to property on reserves, would need to be included in the analysis. So I think the area of taxation in particular would be fertile ground for further research, in part because tax authority and policy impact on economic development.¹⁴⁰

Regarding transfer payments, Peter Hogg and Mary Ellen Turpel have pointed out that the constitutional provision relating to transfer payments to the provinces contained in section 36(2) of the *Constitution Act, 1982* does not apply to Aboriginal governments.¹⁴¹ If

¹³⁶ E.g. see generally *ibid.* at 280-310; Hogg & Turpel, *supra* note 75 at 406-11; David C. Hawkes & Allan M. Maslow, "Fiscal Arrangements for Aboriginal Self-Government", in David C. Hawkes, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1991), 93; Allan M. Maslove & Carolyn Dittburner, "The Financing of Aboriginal Self-Government", in John H. Hylton, ed., *Aboriginal Self-Government: Current Trends and Issues* (Saskatoon: Purich Publishing, 1994), 145.

¹³⁷ *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 289-94.

¹³⁸ For detailed discussion of these matters, see *ibid.*, Vol. 2, Pt. 2, at 421-996.

¹³⁹ See Hogg & Turpel, *supra* note 75 at 407-8.

¹⁴⁰ For example, what connection, if any, is there between the statutory exemptions from taxation contained in the *Indian Act*, R.S.C. 1985, c.I-5, s.87, and the inherent right of self-government?

¹⁴¹ Hogg & Turpel, *supra* note 75 at 409-10.

those governments are going to rely on transfer payments, they will need some form of constitutional guarantee of them to maintain their autonomy. This is another area that would be worth researching.

(h) Accountability

It is probably uncontroversial that Aboriginal governments, like all governments that exercise authority on behalf of the people they represent, need to be accountable. But accountable to whom and in what ways? And who has the authority to impose and enforce accountability?

By Bill C-7, the Canadian government proposed the imposition of accountability on First Nation governments through the *First Nations Governance Act*. That legislative initiative was vigorously opposed by many First Nation leaders, no doubt contributing to the decision of the government to withdraw the Bill after Paul Martin was chosen Prime Minister. The First Nation leaders who opposed the Bill generally supported the principle of accountability, but not accountability modeled on Canadian standards imposed on them by legislation without their consent. The political storm appears to have been exacerbated by the tension that exists between *Indian Act* band council governments that receive federal funding and exercise statutory powers, and inherent right governments that derive their authority from the existence of Aboriginal nations as political, social and cultural entities that have rights of self-determination and self-government.¹⁴² Many First Nation leaders regarded Bill C-7 as a continuation of the colonial legacy that has found partial expression in the *Indian Act* itself.¹⁴³

Research on accountability of Aboriginal governments should be a priority. Since the principle of accountability seems to enjoy general support, the research needs to focus on how accountability should function in First Nation communities. Political and financial accountability both need to be examined, within Aboriginal governments and in relation to

¹⁴² On this tension, see *RCAP Report, supra* note 2, Vol. 1 at 255-332, Vol. 2, Pt. 1, at 163-244.

¹⁴³ E.g. see Brian Laghi, "Natives Vow to Battle Bill", *Globe and Mail*, 15 June 2002, A7; Anthony J. Hall, "Making Sense of the New Indian Act", *Winnipeg Free Press*, 15 August 2002, A13.

the people on whose behalf those governments exercise authority and spend money. Given the variety of traditional forms of government among Aboriginal nations, accountability will not necessarily function in the same ways for all governments. As Stephen Cornell and Joseph Kalt have emphasized, cultural match between the form and operation of government (including its accountability to the people) and the traditions of the Aboriginal community is a vital element in successful self-government.¹⁴⁴ It is therefore important to understand how accountability functioned traditionally in particular Aboriginal nations so that culturally-appropriate mechanisms of accountability can be designed.¹⁴⁵

4. UTILIZING INTERNATIONAL LAW

The status and rights of Indigenous peoples in international law is a matter of much current interest and debate. While international law was used historically as a vehicle of colonialism,¹⁴⁶ there is growing awareness that international law can no longer disregard the claims of Indigenous peoples.¹⁴⁷ This is due in part to the efforts of the United Nations Working Group on Indigenous Populations, which in 1993 agreed on a Draft United Nations Declaration on the Rights of Indigenous Peoples.¹⁴⁸ James Anaya observes:

The Draft United Nations Declaration on the Rights of Indigenous Peoples – developed by the working group and adopted by the full body of independent experts who comprise the subcommission [on Prevention of Discrimination and Protection of Minorities] – stands in its own right as an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles; and it is also a manifestation of the movement in a corresponding consensual nexus of opinion on the subject

¹⁴⁴ Cornell and Kalt, *supra* note 61.

¹⁴⁵ E.g. for a description of how accountability functions in the government of the Haudenosaunee, see Tom Porter, “Traditions of the Constitution of the Six Nations”, in Leroy Little Bear, Menno Boldt, and J.A. Long, eds., *Pathways of Self-Determination* (Toronto: University of Toronto Press, 1984), 14.

¹⁴⁶ See the works cited in note 29, *supra*.

¹⁴⁷ See Anaya, *supra* note 27; Sharon Helen Venne, *Our Elders Understand Our rights: Evolving International Law Regarding Indigenous Rights* (Penticton: Theytus Books, 1998); Rüdiger Wolfrum, “The Protection of Indigenous Peoples in International Law” (1999) 59 *Heidelberg J. of International L.* 369.

¹⁴⁸ Annexed to U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994). Reproduced in Anaya, *supra* note 27 at 207, and Venne, *supra* note 147 at 205.

among relevant actors. The extensive deliberations leading to the draft declaration, in which indigenous peoples themselves played a leading role, enhance the authoritativeness and legitimacy of the draft.¹⁴⁹

Among other things, the Draft Declaration provides in Article 3:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

While the existence and extent of Indigenous peoples' right of self-determination remains controversial,¹⁵⁰ it is worth noting that the Royal Commission on Aboriginal Peoples accepted that the Aboriginal peoples of Canada have such a right, which they linked to the right of self-government.¹⁵¹ Moreover, the Supreme Court of Canada in *Reference Re Secession of Quebec* accepted as a general principle that an internal right of self-determination is not incompatible with the territorial integrity of Canada.¹⁵² I therefore think that it would be very worthwhile for further research to be done on the developing law on the rights of Indigenous peoples internationally and the application of this law to the Aboriginal peoples of Canada. The emerging Indigenous right of self-determination, for example, could be used to support and assist in defining the inherent right of self-government because the two are closely connected.

In addition to international law developments in relation to the Draft Declaration and self-determination, decisions of the International Court of Justice, the United Nations Human Rights Committee, and other international tribunals are relevant to the inherent right of self-government. The 1975 Advisory Opinion of the International Court of Justice

¹⁴⁹ Anaya, *supra* note 27 at 53.

¹⁵⁰ For discussion, see *ibid.* at 75-96; Erica-Irene Daes, "The Right of Indigenous Peoples to 'Self-Determination' in the Contemporary World Order", in Donald Clark & Robert Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996), 47; Pekka Aikio and Martin Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000); Robert Coulter, "Indigenous Peoples and the Law of Self-Determination: A Possible Consensus", Indian Law Resource Centre, Helena, Montana, 18 October 2002.

¹⁵¹ *RCAP Report*, *supra* note 2, Vol. 2, Pt. 1, at 165-80. See also Andrew J. Orkin and Joanna Birenbaum, "Aboriginal Self-Determination within Canada: Recent Developments in International Human Rights Law" (1999) 10:4 *Constitutional Forum* 112.

¹⁵² See the quotation in note 21, *supra*.

in the *Western Sahara Case*,¹⁵³ for example, revealed that Indigenous peoples in the latter part of the 19th century, at least, had sufficient status in international law for their territories not to be *terra nullius*. In 1977 the U.N. Human Rights Committee found in the Sandra Lovelace case¹⁵⁴ that a provision of the *Indian Act*,¹⁵⁵ causing Indian women who married non-status men to lose their Indian status, violated Ms Lovelace's rights under Article 27 of the Covenant on Civil and Political Rights because it prevented her from living on the Indian reserve of the Maliseet Nation and participating in her own culture with other members of that community.¹⁵⁶ This decision was both an embarrassment to Canada and a factor leading to amendment of this aspect of the *Indian Act* in 1985.¹⁵⁷

Canada takes prides in its perceived position as a conciliatory voice in international affairs and a champion of human rights. It is therefore particularly vulnerable to accusations that it is not respecting international standards in the treatment of Aboriginal peoples at home. It would therefore be advantageous to Aboriginal peoples in Canada to pay close attention to international developments, and to understand the ways in which emerging international norms can be utilized in Canada.¹⁵⁸

CONCLUDING REMARKS

¹⁵³ *Supra* note 35.

¹⁵⁴ *Lovelace v. Canada*, Communication No. R.6/24, *Report of the Human Rights Committee*, U.N. GOAR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 Annex 18 (1977). Reprinted in [1982] 1 C.N.L.R. 1.

¹⁵⁵ R.S.C. 1970, c.I-6, s.12(1)(b).

¹⁵⁶ Article 27 provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Canada became subject to the Covenant on August 19, 1976.

¹⁵⁷ See *supra* note 97. See also *RCAP Report*, *supra* note 2, Vol. 4, at 32-33; Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 *Queen's L.J.* 279.

¹⁵⁸ For an up-to-date assessment of the uses to which international law and tribunals can be put by Aboriginal peoples in Canada, see Joanna Harrington, "Canada's Obligations under International Law in Relation to Aboriginal Rights", in *New Directions: Canada's Responsibility for Aboriginal Peoples*, materials prepared for a conference held in Ottawa on April 28-29, 2004, by the Pacific Business & Law Institute, Vancouver, B.C.

This report has identified four main areas for research: (1) the inherent right of self-government; (2) self-government and the treaties; (3) exercising the inherent right of self-government; and (4) utilizing international law. This is not to say that these are the only areas for worthwhile research, or that the suggested topics within each of these areas are the only ones that should be investigated. In writing this report, I have no doubt been influenced by my own experience and research biases. I have also devoted more attention to the exercise of self-government than to the other three areas. This is not only because it raises more issues and challenges, but more importantly because I think First Nations need practical advice on how to make self-government work. While theoretical paradigms and constitutional arguments are necessary to support First Nation aspirations for new relationships with Canada, self-government will probably remain elusive if the practical problems of implementation are not dealt with. So although this research report focuses on emerging directions for *legal* research, I think a substantial part of that work should have a practical orientation. It is not enough, for example, to construct arguments that judicial functions are essential to inherent-right governments. People also need advice on how to create culturally-appropriate courts or other dispute-resolution mechanisms that will be accorded legitimacy and respect both within and beyond First Nation communities. To a large extent, therefore, I think the research agenda should be driven by First Nations persons themselves who are better placed than academics like myself to identify the practical issues that need to be addressed as they move forward to make self-government a living reality.