

# MORE THAN A SECTION 35 RIGHT: INDIGENOUS SELF-GOVERNMENT AS INHERENT IN CANADA'S CONSTITUTIONAL STRUCTURE

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## Introduction

[O]ne of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive [A]boriginal societies with the assertion of Crown sovereignty.<sup>2</sup>

The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.<sup>3</sup>

Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty ... .<sup>4</sup>

As one can see from these three quotations from the Supreme Court of Canada, reconciliation lies at the heart of the law of Aboriginal and treaty rights in Canada. This direction from the courts, especially the statement from *Haida Nation* that it is pre-existing Indigenous sovereignty that is to be reconciled with assumed Crown sovereignty and that “This promise is to be realized and sovereignty claims reconciled through the process of honourable negotiation,”<sup>5</sup> should bring significant changes in the approach of non-Indigenous governments to negotiating self-government in Canada. Of course, it is not just the approach to self-government that would change if non-Indigenous governments took the direction of the Supreme Court of Canada seriously; this change would, in turn, have an impact on the form and substance of self-government agreements.

If the recognition of pre-existing Indigenous sovereignty and the reconciliation of the *de facto* sovereignty of the Crown with Indigenous sovereignty were accepted as the foundations for undertaking self-government negotiations, the negotiating mandates of non-Indigenous governments would have to be more flexible and open to Indigenous approaches to governance and law. As Patrick Macklem has said,

the federal Crown, when participating in a treaty process, is legally obligated to explore all reasonable options available to the Aboriginal nation. This duty includes exploring

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<sup>2</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], at para. 49; see also para. 50 on the importance of taking account of the Aboriginal perspective if reconciliation is to be achieved.

<sup>3</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 [*Taku River Tlingit*], at para. 42.

<sup>4</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [2004] 3 S.C.R. 511 [*Haida Nation*], at para. 20.

<sup>5</sup> *Ibid.*

options other than those preferred by provincial authorities and attempting to reach an agreement that impairs the Aboriginal nation's rights as minimally as possible.<sup>6</sup>

Such an approach, in turn, would result in agreements that provide Indigenous nations with powers related to their needs as distinct communities, which could include control over economic, social, cultural, and linguistic matters, as well as internal political autonomy.<sup>7</sup> It would also provide them with the scope to implement approaches to law and governance that reflected Indigenous traditions and the aspirations of modern Indigenous communities. A pluralist society, of which Canada is often held up as being a prime example, is marked by its commitment to leaving to groups the power to decide their own internal affairs; groups must not be denied the capacity to develop according to their own terms.<sup>8</sup> A key to justice from a pluralist point of view, therefore, is that Indigenous communities possess the right to develop and give expression to any element of their communal identity, whether culturally distinct or not, and that they are equal partners in a political discourse with Canadian governments that is marked by reciprocity and consent.<sup>9</sup>

A key to recasting the approach of non-Indigenous governments to Indigenous self-government is understanding the source of Indigenous self-determination in Canadian law and why it continues to be part of the Canadian constitutional order; these are not easy questions but they are critical to establishing a more just approach to negotiating Indigenous self-government. The Supreme Court of Canada has implied the existence of a right to self-government, for example by acknowledging in *Delgamuukw v. British Columbia* that Aboriginal title is held communally, a state of affairs that would require some form of self-government to regulate the community's use of its lands.<sup>10</sup> Supreme Court Justices have also recognized the existence of some degree of Indigenous sovereignty not only in the *Haida Nation* and *Taku River Tlingit* cases,<sup>11</sup> but in *Mitchell v. Minister of National Revenue*.<sup>12</sup> Despite Binnie J.'s reliance on the concept of "sovereign incompatibility" to deny the Mohawks international sovereignty, he also stated that he did not want to be taken as endorsing or foreclosing any argument on the compatibility of *internal* Indigenous self-government rights with Crown sovereignty.<sup>13</sup> The

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<sup>6</sup> Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [*Indigenous Difference*], at 275.

<sup>7</sup> Michael J. Bryant, "Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law" (1992) 56 Sask. L. Rev. 267, at 293-4.

<sup>8</sup> Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003), at 35.

<sup>9</sup> *Ibid.* at 120, 124.

<sup>10</sup> [1997] 3 S.C.R. 1010 [*Delgamuukw*], at para 115. See also Jennifer E. Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21 C.J.L.S. 11, at 20.

<sup>11</sup> *Haida Nation* and *Taku River Tlingit*, *supra* notes 4, 3.

<sup>12</sup> 2001 SCC 33, [2001] 1 S.C.R. 911 [*Mitchell*].

<sup>13</sup> *Ibid.* at 34.

Court has also hinted in other cases at an openness to finding a right of self-government within section 35 of the *Constitution Act, 1982*, but it has yet to clearly pronounce on the question and, instead, continually encourages governments to negotiate a resolution to the self-government claims of Indigenous peoples.<sup>14</sup>

It may be better to abandon the effort to ground Indigenous authority to govern themselves in the notion of section 35 “rights” and, instead, approach Indigenous self-government as part of the complex constitutional structure, grounded in the early recognition of co-ordinate Indigenous and Crown sovereignty, that has evolved to govern the Canadian state. Understood in this way, several sources could be relied on to ground the authority of Indigenous peoples to be self-governing. This paper will seek to address three of these sources that have particular potential to recast our understanding of Indigenous self-determination in a way that could more effectively contribute to the fundamental task of achieving reconciliation.

### **Sources of Authority for Indigenous Self-Determination**

#### *1) Lex Loci and the Doctrine of Continuity in the Common Law*

In some ways the most intriguing source of authority for Indigenous societies to make and enforce their own laws (which is the essence of self-government) arises out of the legal pluralism inherent in the English common law itself. Russel Barsh goes so far as to describe legal pluralism as a core principle of the imperial legal system.<sup>15</sup> For centuries, the English common law, in its “imperial” aspect, has recognized the local laws of colonized territories as having continuing force as the applicable law within those territories. Indeed, Tully describes the convention of the continuity of a people’s customary ways and forms of government within new forms of constitutional associations with others as the oldest convention in Western jurisprudence.<sup>16</sup> The respect for local laws, or *lex loci*, was reasonable and expedient because it would take time to establish English institutions in a new territory and, in the meantime, local authorities would unavoidably continue to legislate and regulate their local affairs.<sup>17</sup> Indeed, the securing of imperial hegemony often depended on this sort of legal pluralism, so distinct nations, national institutions, laws and practices always flourished within the British Empire.<sup>18</sup>

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<sup>14</sup> See, for example *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [*Pamajewon*]. Likely the strongest case law on the existence of an aboriginal right to self-government is the decision of the British Columbia Supreme Court in *Campbell v. British Columbia (Attorney General)*, 2001 BCSC 1400, (2000), 189 D.L.R. (4<sup>th</sup>) 333 (B.C.S.C.) [*Campbell*], though this case was never appealed to a higher court.

<sup>15</sup> Russel Lawrence Barsh, “Indigenous Rights and the *Lex Loci* of British Imperial Law” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004), at 92.

<sup>16</sup> James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995), at 125.

<sup>17</sup> Barsh, *supra* note 15, at 97.

<sup>18</sup> Mark Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*” (1999) 44 McGill L.J. 711.

Within Canada, as in other colonies, the governance and legal powers of Indigenous nations were not surrendered to the Crown upon the assertion of Crown sovereignty; rather, the Indigenous nations continued to exercise their powers. Indigenous customary laws of marriage were recognized in *Connolly v. Woolrich*, for example.<sup>19</sup> In this case, Justice Monk declared that laws and usages of Indigenous peoples were left in full force and were not modified in the slightest when European powers began to trade with Indigenous nations.<sup>20</sup> While Europeans in the Northwest brought their own laws with them as a matter of birthright, those laws did not automatically abrogate existing Indigenous laws when the two groups began to trade together.<sup>21</sup>

Elsewhere in Canada, Indigenous nations with unsundered lands remained outside the settler legal system even after their territory was annexed to Quebec in 1774; after the province was separated into Upper and Lower Canada in 1791 and English laws and institutions were introduced, Indigenous law and government still continued to govern the internal affairs of Indigenous nations.<sup>22</sup> Even in the 1820s, customary Indigenous law and government continued to regulate Indigenous communities.<sup>23</sup> It was felt to be unfair to subject Indigenous peoples to laws of which they knew nothing; equally, colonial administrators were ignorant of Indigenous laws so that they would have been incapable of administering them.<sup>24</sup> Indeed, as late as 1982, in the *Indian Association of Alberta* case, Lord Denning noted that it was of first importance to pay great respect to Indigenous laws and customs and never to interfere with them except when necessary in the interests of peace and good order.<sup>25</sup>

More recent Canadian case law also supports this proposition. In *R. v. Sioui*, Lamer J. noted that the Royal Proclamation recognized the authority of Indigenous nations to continue to exercise autonomy over their internal affairs.<sup>26</sup> As well, in *Delgamuukw v. British Columbia*, the Supreme Court of Canada affirmed that the assertion of British sovereignty over Indigenous lands did not displace the pre-existing Indigenous legal orders, but protected them.<sup>27</sup> McLachlin

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<sup>19</sup> (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Quebec S.C.).

<sup>20</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [*Recovering Canada*], at 6.

<sup>21</sup> John Borrows and Leonard I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference” (1997) 36 Alta. L. Rev. 9, at 10.

<sup>22</sup> Mark Walters, “‘According to the old customs of our nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847” (1998) 30 Ottawa L.R. 1 [“‘According to the old customs of our nation’”], at 15.

<sup>23</sup> *Ibid.*, 20. See also Mark Walters, “The Extension of Colonial Criminal Jurisdiction Over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case” (1996) 46 U.T.L.J. 273 [“The Extension of Colonial Criminal Jurisdiction”], at 294, in which Walters notes that, in 1822, the Lieutenant Governor observed that there was no precedent for the application of British law to criminal offences by Indians against Indians.

<sup>24</sup> Walters, “The Extension of Colonial Criminal Jurisdiction”, *ibid.* at 302-3.

<sup>25</sup> *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 1 QB 892 (CA), at 910, [1982] 2 W.L.R. 641, at 645.

<sup>26</sup> [1990] 1 S.C.R. 1025 [*Sioui*], at 1052-3.

<sup>27</sup> *Delgamuukw*, *supra* note 10, at para. 145.

J. also wrote, in *Mitchell*, that English law accepted that Indigenous peoples possessed pre-existing laws and interests, which were presumed to survive the assertion of Crown sovereignty and were absorbed into the common law as rights.<sup>28</sup> The British Columbia Court of Appeal came to a similar conclusion in *Casimel v. Insurance Corporation of British Columbia*, a case in which the legal status of an Indigenous customary adoption was in issue.<sup>29</sup> Lambert J. A., for the Court of Appeal, decided that a customary adoption created the status of parent and child for the purposes of the application of British Columbia law; reviewing the recognition of customary laws of adoption in Canadian law, he concluded that,

there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption...<sup>30</sup>

While the recognition of the continuity of Indigenous law articulated in these cases has proven less important in the Canadian jurisprudence on Indigenous rights than the analysis of whether a practice is integral to a distinctive Indigenous culture, these comments do demonstrate some continuing judicial recognition that the doctrine of continuity has a role to play in understanding the place of Indigenous peoples in the Canadian constitutional order. In a modern context, then, the role of the common law should be to clear a path for the contemporary exercise of Indigenous legal traditions, including the authority not only to follow but also to develop Indigenous law.<sup>31</sup>

## 2) *International Law*

International law provides further justification for Indigenous self-government by its treatment of the right of peoples to self-determination. International law has long been an important interpretive lens through which Canadian judges read the written Constitution,<sup>32</sup> the common law, and statutes.<sup>33</sup> Thus, it is appropriate for the courts to consider the international law on Indigenous rights and the right to self-determination of peoples in addressing the question of whether Indigenous peoples in Canada have the legal authority to be self-governing.<sup>34</sup> The recognition within the law of nations of the right of Indigenous peoples to self-determination

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<sup>28</sup> *Mitchell*, *supra* note 12, at para. 9.

<sup>29</sup> (1993), 82 B.C.L.R. (2d) 387 (C.A.).

<sup>30</sup> *Ibid.* at para 42.

<sup>31</sup> Borrows and Rotman, *supra* note 21, at 32; Walters, “The ‘Golden Thread’ of Continuity”, *supra* note 18, at 732.

<sup>32</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1056-7.

<sup>33</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>34</sup> As the Supreme Court of Canada has explicitly considered the international law right to self-determination in the *Reference re. Secession of Quebec*, [1998] 2 S.C.R. 217 [*Quebec Secession Reference*], this area of international law is clearly open for judicial consideration in addressing the question of whether Indigenous peoples in Canada have a right to self-determination.

began with the 16<sup>th</sup> century theological and legal scholars Bartolomé de Las Casas and Francisco de Vitoria<sup>35</sup> and has continued to develop up to today, most notably with the signing of the United Nations Declaration of the Rights of Indigenous Peoples in 2007. Article 3 of that Declaration, adopted on September 13, 2007, states that, “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” while Article 4 states that, “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs,…” and Article 5 states that, “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”<sup>36</sup>

The Supreme Court of Canada extensively reviewed the international law on the more general right of self-determination of peoples in its judgment in the *Reference re. Secession of Quebec*.<sup>37</sup> As their review indicates, peoples have the right to self-determination, and the term “people” may include a group that constitutes only a portion of the population of a state.<sup>38</sup> Not all peoples, however, have the right to statehood. The right to self-determination for sub-state national minorities, or peoples within an existing state, is normally fulfilled by *internal* self-determination, meaning within the existing state of which they are a part, through the full and equal participation in the decision-making structures of the state.<sup>39</sup> Colonial peoples, on the other hand, have a right to full external self-determination, through the creation of a separate state, as may those peoples within a state who are excluded from exercising their right to self-determination internally, for example through exclusion from or discrimination within the structures by which political decisions are made within the state.<sup>40</sup>

This last circumstance for the establishment of a right to external self-determination would seem to create a significant incentive for Canadian governments to respond in a serious way to the desire of Indigenous peoples to secure self-government authority within Canada, especially given the history, if not the current practice, of legally excluding Indigenous people from participation in the decision-making structures of the Canadian state. Indigenous peoples unquestionably constitute “peoples” for the purpose of determining their right to self-

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<sup>35</sup> See Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas & McIntyre, 2006), 24-6 for a discussion of Las Casas’ views on Indigenous sovereignty and his argument before the Council of Valladolid and James Brown Scott, *The Catholic Conception of International Law* (Clark, New Jersey: The Lawbook Exchange, 2007), 10 for a discussion of Vitoria’s denial that the doctrine of discovery applied to give Spain title over America because ownership is granted to the first occupant, in this case the Indigenous peoples.

<sup>36</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by General Assembly Resolution 61/295 on 13 September 2007; available at <http://www.un.org/esa/socdev/unpfii/en/drip.html>, accessed July 27, 2009.

<sup>37</sup> *Reference re. Secession of Quebec*, [1998] 2 S.C.R. 217 [*Quebec Secession Reference*].

<sup>38</sup> *Ibid.* at paras. 123-4.

<sup>39</sup> *Ibid.* at para 126.

<sup>40</sup> *Ibid.* at paras. 132-4.

determination; this is confirmed by the history of Crown-Indigenous relations in Canada.<sup>41</sup> They have clearly been subjugated by the state and more recent Canadian constitutional provisions do not, by themselves, rectify this.<sup>42</sup> As well, Canadian Indigenous peoples are not self-governing because their customary institutions have not been recognized and, in the case of *Indian Act* band councils (which are not institutions of Indigenous design), extensive authority to review and intervene in the decisions of their institutions remains vested in the Minister of Indian Affairs.<sup>43</sup> Indigenous peoples can also argue that they have historically occupied definable lands, thus meeting the fourth criterion identified by the Supreme Court of Canada for having a right of self-determination under international law.<sup>44</sup> Thus, the conclusion of the Supreme Court of Canada that the desire of one component community within the federation to alter our constitutional arrangements creates an obligation on the part of the other governments of the federation to respond to this clearly expressed desire should also create a duty on the part of federal, provincial, and territorial governments to negotiate meaningful self-government arrangements with Indigenous peoples.<sup>45</sup>

### ***3) Treaty-Making and the Recognition of Indigenous Sovereignty***

Probably the strongest source for the authority of Indigenous peoples to exercise self-determination in the Canadian constitutional order, however, is in the confirmation and recognition by the Crown of the pre-existing and continuing sovereignty of the Indigenous peoples of Canada through the negotiation of treaties. As John Borrows comments, one of the best examples of the governance powers of Indigenous peoples is their power to make treaties with the Crown, over 350 of which were made prior to Confederation.<sup>46</sup> The legitimacy of Indigenous government in Canada is based not simply on the prior occupancy of the territory by Indigenous peoples, but on their prior sovereignty; as Patrick Macklem describes it, this sovereignty and Crown sovereignty were distributed, or shared, through a series of acts of mutual recognition, in the form of treaty-making.<sup>47</sup> The treaties manifestly considered Indigenous nations as distinct political communities with territorial boundaries within which their authority was exclusive, so that they and European settler nations were recognized one another as equal and co-existing nations, each with their own forms of government, traditions, and ways of living, and agreed to cooperate in various ways.<sup>48</sup> Once this form of mutual recognition was worked

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<sup>41</sup> Bryant, *supra* note 7, at 285-6.

<sup>42</sup> *Ibid.* at 289-90

<sup>43</sup> *Ibid.* at 291.

<sup>44</sup> *Ibid.* at 292.

<sup>45</sup> See *Quebec Secession Reference*, *supra* note 37, at para. 88 for the Court's articulation of this principle.

<sup>46</sup> John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 U.B.C. L. Rev. 285, at 296.

<sup>47</sup> Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311 ["Distributing Sovereignty"], at 1333.

<sup>48</sup> *Ibid.* at 124. There are numerous examples of treaties between European nations and Indigenous peoples in North America that used Indigenous legal forms. These were part of a larger set of intersocietal encounters through with

out, the only way the Crown could acquire land and establish sovereignty in North America was to gain the consent of the Indigenous nations, consistent with what Tully describes as the most fundamental constitutional convention, that of consent of the people.<sup>49</sup> Unfortunately, as J.R. Miller notes, few non-Indigenous Canadians today appreciate that the treaties, through which this mutual recognition and consent were worked out, are an important part of the foundation of the Canadian state.<sup>50</sup>

Crown-Indigenous treaties were regarded by both sides as constitutive of normative arrangements, a conclusion confirmed by the customary practice of renewing past commitments and redefining acceptable political conduct, for example through the annual practice of “brightening” the covenant chain in nation-to-nation councils.<sup>51</sup> As Mark Walters comments, the British officials involved knew perfectly well how Indigenous peoples interpreted British conduct in brightening the covenant chain, so there can be no question about whether or not there was a shared understanding or “meeting of minds”.<sup>52</sup> Indeed, Francis Jennings described the covenant chain as a mode of political accommodation with sufficient structure to be called a “constitution”, as an institution that effectively structured intercultural activity.<sup>53</sup>

The Treaty of Niagara of 1764, which confirmed and extended a nation-to-nation relationship between the Crown and Indigenous peoples and affirmed the covenant chain relationship, is a prime example of the British understanding of the meaning of Indigenous forms.<sup>54</sup> This, the first legal act that the Crown undertook after the Royal Proclamation, expressed their mutual aspiration to live together, but also to respect one another’s autonomy.<sup>55</sup> The gathering at Niagara to make this treaty has been described as the most widely representative gathering of North American Indigenous peoples ever assembled, with 2,000 Chiefs, representing 24 nations from Nova Scotia to the Mississippi to Hudson Bay, and possibly

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Indigenous and non-Indigenous participants generated norms of conduct and recognition that structured their ongoing relationships. Throughout, the Indigenous understandings of the treaties were relatively uniform, as a means by which Indigenous nations sought to retain their traditional authority over their territories and govern their communities in the face of colonial expansion. See John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash. U. J. L. & Pol’y 167, at 179 [“Indigenous Legal Traditions in Canada”] and Patrick Macklem, *Indigenous Difference*, *supra* note 6, at 137, 152-3 for a discussion of these matters.

<sup>49</sup> Tully, *supra* note 16, at 122.

<sup>50</sup> J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), at 3.

<sup>51</sup> Mark Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After *Marshall*” (2001) 24 Dalhousie L.J. 75, at 129.

<sup>52</sup> *Ibid.* at 130.

<sup>53</sup> *Ibid.* at 133.

<sup>54</sup> John Borrows, “Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28 U.B.C. L. Rev. 1 [“Constitutional Law From a First Nation Perspective”], at 20.

<sup>55</sup> John Borrows, “Creating an Indigenous Legal Community” (2005) 50 McGill L.J. 153, at 163.



even Cree and Lakota, in attendance.<sup>56</sup> At this event, presents were exchanged and covenant chains and wampum belts were presented to the British to establish a treaty of alliance and peace.<sup>57</sup> One of the belts exchanged here, the two-row wampum belt, was used by Indigenous nations to reflect their understanding of the Royal Proclamation and the Treaty as one of peace, friendship, respect, and non-interference in one another's internal affairs.<sup>58</sup> A second belt exchanged represented an offer of mutual support and assistance, but also respected the independence of each party.<sup>59</sup>

As Barsh and Henderson describe it, the treaty process produced a consensual distribution of constitutional power and established a compact between the treaty parties, thus securing to the treaties the status of constitutional documents.<sup>60</sup> The acceptance of a shared normative meaning for the treaties from what both sides said and did results in the conclusion that Indigenous sovereignty and Crown sovereignty really were linked together in a genuine sense. Over time, the linkages were implicitly increased and strengthened with each present-giving ceremony until, on the eve of Confederation, it was understood that Indigenous nations enjoyed an inherent right of self-government, at least as a matter of internal sovereignty, under the protective umbrella of Crown sovereignty, in a manner consistent with Binnie J.'s conception in *Mitchell*.<sup>61</sup> Tully refers to this as "treaty constitutionalism", in which Indigenous peoples

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<sup>56</sup> Borrows, "Constitutional Law From a First Nation Perspective", *supra* note 54, at 22.

<sup>57</sup> *Ibid.* at 23.

<sup>58</sup> *Ibid.* at 24. Interestingly, the contemporary British records of the Treaty of Niagara make no reference to the two-row wampum belt and some historians are now wondering whether the two-row wampum might have been a 19<sup>th</sup> century form, rather than an 18<sup>th</sup> century one, though the ideas captured by the two-row wampum were ancient and were earlier reflected in the Covenant Chain belts which were exchanged in the 18<sup>th</sup> century; see, for example, Kathryn Muller, "The Two 'Mystery' Belts of Grand River: A Biography of the Two Row Wampum and the Friendship Belt" 31 *American Indian Quarterly* 129, 131. Others, however, such as Borrows, clearly assert that a two-row wampum belt was exchanged as part of the Treaty of Niagara.

<sup>59</sup> Borrows, *Recovering Canada*, *supra* note 20, at 127. This view is supported by the British reaction to the Bradstreet Treaty made at Detroit in 1764. This treaty, which referred to the Indigenous peoples as "subjects" rather than "allies", was later repudiated by Sir William Johnson, Superintendent of the British Indian Department, because of its assertion of sovereignty over the First Nations; see Walters, "'According to the old customs of our nation'", *supra*, note 22, at 14-5. From the outset, the Haudenosaunee also considered the Haldimand Proclamation of 1784 – which secured for them lands north of Lake Ontario to replace lands south of the Lake that had been lost during the American Revolution – as tantamount to the full recognition of their sovereign status, an interpretation which was confirmed by John Graves Simcoe, the lieutenant governor of Upper Canada; see Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 *U.T. Fac. L. Rev.* 1, at 14.

<sup>60</sup> Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley and Los Angeles: University of California Press, 1980) at 270-1; see also Macklem, *Indigenous Difference*, *supra* note 6, at 154.

<sup>61</sup> *Ibid.* at 137-8. Much has been written about the treaty relationship between the British Crown and the Haudenosaunee Confederacy, for example. When the Europeans arrived, the Confederacy was dominant over other First Nations and both the French and the British recognized that they held the balance of power in North America. Famously, the Haudenosaunee perception of their alliance with the British was captured in the two-row wampum belt, the first of which was delivered to the British in 1664 to initiate formal relations. The history of both French and British relations with the Haudenosaunee is discussed at *ibid.* at pages 137-8, Macklem, *Indigenous Difference*, *supra* note 6, at 136, and Johnston, *supra* note 59, at 10-1.

participate in the creation of constitutional norms to govern their relationship with the Crown, thereby taking an active role in the production of the basic legal norms governing the distribution of authority in North America.<sup>62</sup>

While the British Select Committee on Aborigines recommended, in 1837, against concluding treaties with Indigenous nations that the British claimed were already under British sovereignty, as these treaties admitted to the sovereignty of these nations, the advice came too late for Upper Canada, where treaty relations, established through treaty-making and the periodic renewal of the treaty relationship, had become too well established as a practice to cease completely.<sup>63</sup> As Paul McHugh comments, however,

once-independent Canadian tribes somehow came under Crown sovereignty during the early nineteenth century, moving from ally to subject of the Crown. Not only were they regarded as being subjects of the Crown by the end of the 1820's, but their forms of political organization and representation were denied juridical standing before the courts of Upper Canada.<sup>64</sup>

It is interesting that McHugh, a highly respected legal historian, cannot offer a legally and normatively acceptable explanation for how this change in the relationship came about, only being able to state that Canadian First Nations “somehow” came under Crown sovereignty. This raises the question of whether the assertion of Crown sovereignty over Indigenous peoples was legal at all.

The normative significance of a claim by Indigenous peoples to exercise self-determination in Canada today, grounded in their pre-existing sovereignty and the history of treaty-making, lies in respect for the principle of consent and mutual recognition by the treaty parties of their respective political authorities.<sup>65</sup> There are a number of cases that suggest that the courts may increasingly be open to recognizing that the relationship established between Indigenous nations and the Crown is an intersocietal one, captured by the treaties, that forms an integral part of the Canadian constitutional order. The Supreme Court of Canada has spoken frequently of Aboriginal rights being an “intersocietal” law, in decisions such as *Van der Peet* and *Delgamuukw*,<sup>66</sup> with their source in the interaction of pre-existing Indigenous legal systems

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<sup>62</sup> Tully, *supra* note 16, at 117.

<sup>63</sup> P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004). In the Victorian treaties, too, Chiefs and Headmen accepted a continuing responsibility to maintain peace and order in the ceded territory and exercise certain governmental and legal powers; by the English text of these treaties, the Imperial Crown formally acknowledged that the authority of Indigenous Chiefs emanated directly from Indigenous customs as was, thus, independent of the Imperial Crown. Treaty-making in Canada under the model of the Victorian treaties continued into the early years of the 20<sup>th</sup> century. See James [Sakéj] Youngblood Henderson, “Interpreting *Sui Generis* Treaties” (1997) 36 *Alta. L. Rev.* 46, at 82 and McHugh, at 181.

<sup>64</sup> McHugh, *ibid.* at 156.

<sup>65</sup> *Ibid.* at 194.

<sup>66</sup> See, for example, *Van der Peet*, *supra* note 2, at para. 42 and *Delgamuukw*, *supra* note 10, at para. 112.

with the common law system, and has recognized Indigenous nations as holding pre-existing sovereignty, in *Haida Nation*.<sup>67</sup> Even Binnie J.'s concurring judgment in *Mitchell*, while using the concept of "sovereign incompatibility" to deny the Mohawks of Akwasasne any international legal identity, acknowledged that Mohawk sovereignty is an inherent part of Canadian sovereignty.<sup>68</sup> As well, the British Columbia Supreme Court, in *Campbell v. British Columbia (Attorney General)*, decided that Indigenous self-government is an existing right and that Indigenous jurisdiction existed outside the division of powers between the federal and provincial governments in the *Constitution Act, 1867*.<sup>69</sup> These cases suggest that the courts may be returning to an earlier understanding of the relationship between the Crown and Indigenous peoples as being between self-governing co-creators of the Canadian constitutional order, rather than as sovereign and subject. The treaties provide evidence of the Crown's view of Indigenous nations as sufficiently independent and self-governing to warrant a treaty process, which implies a longstanding recognition of Indigenous authority to exercise self-government; these principles have never been entirely abrogated and they therefore continue to underpin Canada's legal structure.<sup>70</sup>

### **Conclusion – Finding a Way Forward**

What all three of these bases for the constitutional authority of Indigenous peoples to be self-governing have in common is that none of them requires the existence of section 35 of the *Constitution Act, 1982* to have legal and normative force; rather, each finds its authority in more general principles of law and the Canadian constitutional order. As Borrows has stated,

If reconciliation is the lens through which the courts interpret the parties' relationships, there are sound arguments that Aboriginal governance is compatible with the Crown's assertion of sovereignty, that it was not surrendered by treaties, and that it was not extinguished by clear and plain government legislation.<sup>71</sup>

An initial hurdle to achieving a recognition of Indigenous self-government as inherent in Canada's constitutional order, though, may actually be the very existence of section 35 of the *Constitution Act, 1982*, and the conceptual limitations of characterizing Indigenous self-government as an existing aboriginal right within section 35. The Supreme Court of Canada has defined aboriginal rights as protecting those practices that are internal to the community and integral to the culture of an Indigenous people and that have their roots in the pre-contact (or prior to effective European control, in the case of Métis rights) practices of the Indigenous

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<sup>67</sup> *Haida Nation*, *supra* note 4, at para. 20.

<sup>68</sup> *Mitchell*, *supra* note 12, at paras. 154, 129.

<sup>69</sup> *supra* note 14.

<sup>70</sup> Patrick Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government" (1995) 21 *Queen's L.J.* 173, at 197.

<sup>71</sup> Borrows, "Indigenous Legal Traditions in Canada", *supra* note 48, at 182.

peoples.<sup>72</sup> Thus, by defining self-determination as a section 35 aboriginal right, there is a risk that only those governance practices that existed before contact or control and were integral to the distinctive culture of the Indigenous nations would be protected.<sup>73</sup> These practices may no longer be legitimate in the eyes of modern Indigenous peoples, yet current aboriginal rights jurisprudence would not protect the right of those peoples to establish new, legitimate governments that draw from both Indigenous and Euro-Canadian governance traditions.

The Supreme Court of Canada may, however, have provided the way out of this conceptual box in its decision in *Haida Nation*, with its discussion of the need for reconciliation of Indigenous peoples and the Crown. The idea that the purpose of Indigenous law and aboriginal rights is reconciliation is not a new concept for the Court but in the cases prior to *Haida Nation*, the Court consistently referred to the need to reconcile Indigenous peoples, or the existence of Indigenous peoples, with the sovereignty of the Crown.<sup>74</sup> The Court broke with this characterization in *Haida Nation* by commenting there that the purpose of Indigenous law is to reconcile the pre-existing *sovereignty* of Indigenous peoples with the asserted sovereignty of the Crown.<sup>75</sup> It seems unlikely that this change in the characterization of the meaning of “reconciliation” would have been accidental. This recognition of Indigenous peoples as sovereign is significant, for if Indigenous peoples were sovereign, their sovereignty would continue to this day unless it was ceded to the Crown through the consent of the Indigenous peoples (and then only to the extent to which it was ceded) or lost through conquest (which it is widely accepted did not occur).

The continuing sovereignty of Indigenous peoples seems the best source for Indigenous self-government, as sovereignty of necessity includes the ability to make decisions about how to govern one’s community and to change the community’s ways of governing itself if the community seeks to institute change. This is more consistent with the notion of self-determination than the Aboriginal rights approach that currently exists in Canadian law, in which only those practices that were integral to the distinctive culture of Indigenous nations and that existed prior to European contact would be protected. It would also be better than the strict application of the common law’s doctrine of continuity, in which only laws capable of being recognized under the common law at the time of the Crown’s assertion of sovereignty would be protected.

A just distribution of sovereignty within modern Canada requires constitutional recognition that Indigenous and European nations recognized one another as formal equals at the time of contact and that vesting greater authority to make and interpret laws in Indigenous nations will assist in ameliorating substantive inequalities confronting Indigenous peoples today.<sup>76</sup> The purpose, as Kerry Wilkins describes it, is to dedicate “sufficient constitutional

<sup>72</sup> See, for example, *Van der Peet*, *supra* note 2, at para. 46; *R. v. Powley*, 203 SCC 43 [2003] 2 S.C.R. 207, at para. 18.

<sup>73</sup> See *Pamejewan*, *supra* note 14, at paras. 24-5.

<sup>74</sup> See, for example, *Van der Peet*, *supra* note 2, at para. 31.

<sup>75</sup> *Haida Nation*, *supra* note 4, at para. 20.

<sup>76</sup> Macklem, *Indigenous Difference*, *supra* note 6, at 5.

space for Aboriginal peoples to be Aboriginal,” which entails respecting and protecting the power of Indigenous communities to address their own needs and imperatives in ways they consider effective and appropriate, even when their aims and ways differ substantially from what settler society might have done or preferred.<sup>77</sup> As Wilkins notes, for Indigenous communities, the acknowledgement that they have an enforceable right to govern themselves may be the minimum price the mainstream legal system must pay to earn a modicum of respect from them.<sup>78</sup>

Inevitably, there must be both an acceptance that some alteration to the character of both Indigenous and Crown sovereignty will be necessary to achieve reconciliation and a locus for this reconciliation to take place. The one potentially productive locus of reconciliation is the Canadian constitutional order, if the full scope of the Constitution of Canada is properly understood and all of its parts, both written and unwritten, are made coherent through a global and integrated approach to its interpretation. It is important, in undertaking this task, that one keep in mind that the Constitution is not simply the texts of the constitutional statutes listed in the Schedule to the *Constitution Act, 1982*. As the Supreme Court of Canada said in the *Quebec Secession Reference*,

Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference* [[1997] 3 S.C.R. 3]. Finally, as was said in the *Patriation Reference*, [[1981] 1 S.C.R. 753], at p. 874,

the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules...are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.<sup>79</sup>

The Court also stated that, “Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.”<sup>80</sup> Further, it noted that “The principles are not

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<sup>77</sup> Kerry Wilkins, “Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy” (2000) 27 Man. L.J. 241, at 251.

<sup>78</sup> *Ibid.* at 250.

<sup>79</sup> *Quebec Secession Reference*, *supra* note 37, at para. 32.

<sup>80</sup> *Ibid.* at para. 49.

merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”<sup>81</sup>

If one understands the reconciliation of the pre-existing sovereignty of Indigenous peoples and the *de facto* sovereignty of the Crown to be a fundamental principle of our constitutional order, the Constitution, both written and unwritten, must be interpreted in the context of the principle of reconciliation. This is so because, as the Supreme Court said in its *Quebec Secession Reference* judgment, “The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.”<sup>82</sup> By bringing this approach to understanding the Canadian Constitution together with the legal bases for recognizing Indigenous authority to be self-governing, it becomes possible to understand Indigenous self-government as a question of the just distribution of powers among sovereign entities within a shared, and co-created, constitutional order. This, in turn, allows for the articulation and establishment of an approach to Indigenous self-government that provides Indigenous nations significant space, within a shared set of constitutional norms, to create a modern body of self-determined Indigenous law and self-determined and culturally relevant institutions of government to regulate matters in which their cultural, political and legal context is distinct from those of the Canadian majority. This is a far more promising approach to Indigenous self-government for those who wish to see meaningful progress in the practical implementation of Indigenous peoples’ right to self-determination within Canada.

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<sup>81</sup> *Ibid.* at para. 54. The British Columbia Supreme Court used this concept of unwritten constitutional principles in the *Campbell* case. In deciding that challenge, by the former Leader of the Opposition in British Columbia (now the Premier), to the Nisga’a Treaty, the Supreme Court of British Columbia determined that “aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten ‘underlying values’ of the Constitution outside the powers distributed to Parliament and the legislatures in 1867.” See *Campbell*, *supra* note 14, at para. 81.

<sup>82</sup> *Quebec Secession Reference*, *supra* note 37, at para. 50.

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