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**Aboriginal Nationhood and the Inherent Right
to Self-Government**

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Introduction: Strategizing Within Canadian Law

Canadian governments and courts recognize that pre-contact Aboriginal societies possessed their own legal and political systems, and that to this day these nations have not surrendered the powers they fully exercised before colonial policies undercut their authority¹. Unfortunately, however, the governments of Canada argue that it is not clear what this means – that is, what *contemporary* Aboriginal self-government rights look like. From 1983 to 1992 there were concerted efforts to constitutionally entrench Aboriginal rights to self-government². With the failure of these efforts considerable attention has turned to what courts might say about these rights³, and to how they might be achieved through negotiations⁴. As Aboriginal nations litigate and negotiate, pushing back against the history of colonial policies and practices, the challenge is to develop strategies to ensure that self-government rights develop within the Canadian state as fully as possible.

For better or worse, much of the success of the strategies developed will depend on what Canadian courts say about the inherent right of self-government. Canadian governments occasionally seem upset with ‘judicial activism’⁵ (when they imagine judges are ‘making new law’ in their decisions, which legislatures see as their exclusive responsibility). But the fact remains that on contentious issues these governments often take their cues from what the courts say. Even in the realm of Aboriginal law, where the government frequently seems to ignore court rulings that favour Aboriginal interests, there is no question that over time what the Supreme Court has said has had a major impact on what Canadian governments have adopted as policy. As a cautious starting point, then, we have to imagine that Canadian governments will tend to head in the direction laid out for them by the courts⁶.

¹ See, for example, Federal policy (1995), available at http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html, *R. v. Van der Peet* [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*], and *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 [hereinafter *Mitchell*].

² Setting out the existence and nature of such rights was the aim of constitutional meetings in the mid-80’s, one of the shortcomings of the failed Meech Lake Accord, and a focus of the failed Charlottetown Accord. See, for example, Walkem and Bruce (ed.), *Box of Treasures or Empty Box: Twenty Years of Section 35* (Vancouver: Theytus Press, 2003).

³ See, for example, all of Part II of Kent McNeil’s text *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001), pages 161 – 355 [hereinafter *Emerging Justice?*].

⁴ See, for example, the Nisga’a Treaty (available at: http://www.ainc-inac.gc.ca/pr/agr/nsga/index_e.html) and other self-government agreements.

⁵ It often seems that ‘activism’ is what Canadian governments see when courts come down on the side of interests opposed to those these governments wish to see promoted.

⁶ That is, so long as what the judiciary says does not seriously impact in negative ways on interests Canadian governments are most interested in protecting.

Using what courts have said, however, must be done very carefully. As was just noted, in the context of Aboriginal law there is a strong tendency on the part of Canadian governments to ignore or downplay what courts have positively stated in respect to Aboriginal and treaty rights. Furthermore, courts have explicitly said very little about self-government rights. What they have said is both (a) fairly vague, and (b) seemingly inappropriate for true governance rights. In addition, this area is highly contentious, with powerful opposing interests at play, of the sort the governments of Canada are likely to want to protect⁷. Finally, there must be concern about how victories and defeats in the law play out. All too often while successful actions are restricted to the ‘victorious’ Aboriginal nation, all nations are exposed to the setbacks. Defeats become precedents, while victories are nearly always restricted to the particular situation⁸.

Nevertheless, developing strategies with an eye to Canadian law seems to be reasonable, for at least two general reasons. First, the fact remains that over time Canadian governments *do* tend toward positions originally pushed by courts, and second, there are few other tools Aboriginal peoples can use to make careful plans to push ahead the self-government agenda.

When thinking about using Canadian law as a tool to push the agenda around Aboriginal rights to self-government there are several key positive points to bear in mind. First, pushing the envelope in relation to the law around rights to self-government promises to open up a certain amount of space within which Aboriginal nations can hope to

⁷ Corporate interests are unlikely to want another level of government to worry about, the general public seems at best divided on the notion of Aboriginal governance, and Canadian governments themselves are unlikely to want to share the powers they currently enjoy.

⁸ In some sense this is an understandable problem, as the law around constitutionalized Aboriginal rights is still quite new. The developing case law lays down principles in major determinative cases dealing with individual First Nations. Other First Nations then find they have to fit their situations under the ‘new law’ as laid down. As Aboriginal nations strive to flesh out their rights to govern within Canada they are heedful of this uncomfortable fact. Indeed, *R. v. Pamajewon* ([1996] 2 S.C.R. 821, [hereinafter *Pamajewon*], a case wherein the communities of Shawanaga First Nation and Eagle Lake First Nation attempted to protect on-reserve gaming enterprises by asserting an inherent right to self-govern and a right to self-regulate economic activities), is one of the clearest examples of this phenomenon, as the loss in this case has reverberated across Canada since it was handed down.

Consider a more recent example. In the Platinex mining case in Ontario, as a favourable decision came down (July, 2006) for the Kitchenuhmaykoosib Inninuwug First Nation [*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON S.C.); <http://www.canlii.org/on/cas/onsc/2006/2006onsc15832.html>], the response from Rick Bartolucci, Ontario Minister of Northern Development and Mines, was that this “... decision not to grant the company’s injunction application was based on the specific facts of this case, and does not impact the legitimacy of other mining claims in Ontario.” [<http://www.mndm.gov.on.ca/MNDM/pub/newrel/NRView.asp?NRNUM=125&NRYear=2006&NRLAN=EN&NRID=4012>]

This sort of response calls into question the usefulness of judicial pronouncements in this area, as it may well be that even when vagueness and uncertainty subside, (a) governments will ignore what courts say about particular self-government matters when these pronouncements threaten other entrenched interests, and (b) they will use legal tools and maneuvers, such as the narrow construction of precedents, to accomplish their own limited goals.

maneuver. The more expansively Aboriginal nations can push the law around self-government rights, for example, the more leverage they will have to negotiate reasonable self-government agreements, and the more they can hope that in the future some of this opened up space can be filled with fully functioning Aboriginal governance structures within Canada. Second, it has to be borne in mind that the fact Canadian law in this area is unsettled creates opportunities around the creation of such new spaces, bounded by new horizons. Vagueness and inconsistency in the law have to be worked out, and Aboriginal leaders should try to play as active a part as possible.

This paper offers some thoughts about where energy could be spent in trying to push the law in certain directions, so that self-government rights develop as expansively as possible. Being simultaneously cautious and pro-active about the use of Canadian law must be part of this strategy, and this work must be part of a full-spectrum approach to the issue, with Aboriginal nations applying non-legal arguments and other strategies to bolster legal arguments they will be able to muster around self-government claims⁹.

Background: The Nature of ‘Self-Government’

In an upcoming section a few remarks will be made about the distinction between rights of self-government and rights of self-determination. At its simplest, rights of self-government exist *within and under* the sovereignty of a larger political body, while rights of self-determination in some ways exist *on par* with the sovereignty of other political bodies. The analysis in this work is directed toward rights of self-government, though the hope is that this does not impact on continuing struggles for self-determination. Indeed, one of the most powerful forces Aboriginal nations have behind their efforts at achieving self-government rights is the presence of strong arguments for a more powerful claim, to be free of the controlling influence of the Canadian state.

Rights of self-government are exercised by Aboriginal nations within the Canadian federal state. There are four matters to consider about self-government rights:

- (1) The types of powers that may be achievable,
- (2) The extent to which these powers will cover different kinds of people,
- (3) The extent to which they will cover territory, and
- (4) The relations between these powers and those of other Canadian governments.

To cover as much ground as possible let me introduce three hypothetical scenarios, which together for the most part illustrate these matters and their interrelationships. Note that

⁹ This would include, for example, political lobbying, mass education, alliance building, direct forms of activism, and the preparation of economic and political arguments (along the lines, for example, of those developed within the Harvard project on economic development). Extensive documentation concerning the Harvard Project on American Indian Economic Development is available at their website: <http://www.ksg.harvard.edu/hpaied/index.htm>. In the overview the researchers explain that “[t]hrough applied research and service, the Harvard Project aims to understand and foster the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations.” The researchers summarize their three keys findings as ‘sovereignty matters’, ‘institutions matter’, and ‘culture matters’.

we are imagining scenarios that could (*perhaps*) exist in the not-too-distant future, were Aboriginal nations successful in establishing and exercising self-government rights. These scenarios set up possible successful outcomes, allowing us (a) to raise questions about how likely it would be to get to these situations, and (b) to consider difficulties that might arise even if Aboriginal nations are able to exercise the sorts of powers envisioned.

1. Imagine AB First Nation, interested in extending its self-government powers out over those members who leave its reserve, and its traditional territory. Many members of this First Nation are living in various urban centers, hundreds of kilometers away from the reserve, and outside even the boundaries of its traditional territory. After the *Corbiere* decision¹⁰ it became necessary to accord these members certain voting rights, and likely other rights belong to these individuals. But AB First Nation would like to (a) establish two sorts of band membership, one for on-reserve citizens and one for off-reserve citizens, and (b) tie rights of off-reserve members to certain responsibilities. For example, off-reserve members would not have the same harvest rights as on-reserve members, and conditions would be imposed on the voting rights of off-reserve members, so that if they wished to vote in band elections they would have to demonstrate an effective interest in, and attachment to, the reserve situation. Some off-reserve individuals from this nation, however, object to these attempts at creating what they see as a two-tier system of membership, and are opposed to conditions being imposed on their political participation in reserve governance. They argue, for example, that these measures are discriminatory¹¹.
2. Imagine CD First Nation, concerned about a proposed pipeline that will cut across their traditional territory (on land that lies outside their reserve lands, and over which they have not been able to prove Aboriginal title). Over the last few years this nation has been busy drafting its own set of laws regulating environmental management of projects carried out over its traditional territories, laws that create an onerous set of requirements on any party wishing to construct any structure on their territories. At the heart of its set of regulations is a principle of caution, a principle that requires that any party wishing to engage in construction establish beyond a reasonable doubt that its actions will cause minimal environmental degradation. The company that negotiated with the province to obtain leases necessary to build this pipeline, however, argues that the laws passed by this First Nation do not bind them. They argue that they have satisfied the environmental assessment regime established and run by the province. The province, meanwhile, argues that while it *may be* that this First Nation has the right to regulate environmental matters over its traditional territories, it must do so in general agreement with the standards and protocols put in place by the province.

¹⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203.

¹¹ Some of these individuals argue that since a significant portion of the operating budget of AB First Nation comes from the federal government, they should be able to appeal to Charter rights, as well as human rights, in their arguments.

3. Imagine EF First Nation, struggling with a drug-dealing problem on its reserve. Several drug-dealers have recently been apprehended by its community police officers. While some of these individuals are Aboriginal and some are non-Aboriginal, none are actually citizens of this First Nation. This nation has already developed its own institutions overseeing the administration of justice – its own court system, court officers, judges, and remedial institutions – and wishes to exercise criminal jurisdiction over this matter. It aims to control all matters on its territory relating to drug and alcohol abuse, and has in place a fairly strict set of laws and remedial measures relating to the offence of drug dealing. The federal government, however, claims jurisdiction over law-making in relation to drug offences (which it says falls into the category of ‘serious crimes’), the provincial government claims jurisdiction over the administration of justice, and the alleged criminals, all of them non-citizens of this First Nation, argue that they could not possibly be under the jurisdiction of this First Nation’s justice system.

We see in these scenarios the sorts of matters listed above: questions about what sorts of powers an Aboriginal Nation might be able to enjoy, about whether an Aboriginal Nation’s powers might extend off territory, about whether an Aboriginal Nation can regulate activities engaged in by non-citizens both on and off its traditional and reserve lands, and about how its visions of how it wants to regulate matters might interact with the powers and institutions of federal and provincial governments.

Legal Analysis

For many decades the general presumption in dominant society was that Canada is a federation with two general heads of power – the federal and provincial governments. The rest of this work looks at current Canadian law, so that suggestions can be made about strategies to maximize the powers that Aboriginal nations might be able to exercise within a re-ordered federal regime, where we might imagine three heads of power – federal, provincial and Aboriginal.

There are several levels to this analysis. Aboriginal nations must worry not only about what sorts of rights to govern they should pursue, but also about how to pursue these rights. I suggest a two-pronged approach. First, every effort should be made to develop *legal arguments* that have the potential to push an expansive understanding of self-government rights (as far as possible under the law as it has developed so far)¹². Second, Aboriginal nations should *exercise* self-government rights that both (a) more or less fit under the law as it is already understood, and (b) push the law in the right direction.

- **The *Inherent* Right to Self-Government**

Section 35 of the *Constitution Act, 1982*, recognizes and affirms the existing Aboriginal

¹² This would include developing new legal arguments that would push ambiguities and inconsistencies away in favour of clear and consistent law that furthers expansive self-government rights.

and treaty rights of Aboriginal peoples of Canada¹³. In *R. v. Van der Peet*¹⁴ the Supreme Court developed tests for identifying rights that are protected under section 35. In *R. v. Pamajewon*¹⁵ the Court held that these tests would be applied to any claims for self-government rights made directly under section 35.

However Section 35 also recognizes a certain class of Aboriginal rights that relate specifically and directly to land – Aboriginal title. In *Delgamuukw v. British Columbia*¹⁶ the Supreme Court stated that this form of title is a property interest held by an Aboriginal nation – a property right which includes the right to make decisions about how title lands are used¹⁷. Showing Aboriginal title over territory leads to power in the hands of the title-holders to make collective decisions about how those lands are used, a power that seems governance-oriented in character¹⁸.

It is arguable that self-government rights have been recognized by Canadian authorities as being inherent – as arising from and belonging essentially to Aboriginal nations – since at least 1973. In *Calder v. British Columbia*¹⁹, the Supreme Court found that Aboriginal title rests upon the *pre-existence* in Canada of *organized Aboriginal societies*. In the first major case dealing with Aboriginal rights after the patriation of the *Constitution*, *R. v. Sparrow*²⁰, the Court indicated that rights under section 35 arise from the same fact.

¹³ Section 35 (1) of the *Constitution Act, 1982* states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

¹⁴ *Van der Peet*, *supra* note 1.

¹⁵ *Pamajewon*, *supra* note 8. This case concerned an attempt by the Shawanaga and Eagle Lake First Nations to protect on-reserve gaming operations.

¹⁶ *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

¹⁷ Kent McNeil has argued that this shows how powers of self-government are found not only directly under section 35 but also indirectly under Aboriginal title (McNeil, “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty”, in *Emerging Justice?*, *supra* note 3, 58 - 101).

¹⁸ Some have distinguished the form of self-government that might emerge out of Aboriginal title from that which would fall more directly out of section 35, calling only the latter sorts of rights ‘inherent’. For example, Crown lawyers in *Pamajewon* advanced this argument. This seems inappropriate, however, for while land governance rights falling under Aboriginal title would in some sense be an indirect product of section 35, under a broad and reasonable understanding of the term ‘inherent’ it would make sense to say that both forms of self-government rights are inherent. Both forms of making decisions about the lands and interests of Aboriginal peoples do not emerge out of any sort of grant or interest created by the Crown – they both emerge out of recognition of the fact that Aboriginal nations predate the arrival of the Crown.

¹⁹ *Calder v. British Columbia* [1973] S.C.R. 313.

²⁰ *R. v. Sparrow* [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

The implication for Aboriginal peoples is clear: irrespective of what the Crown might think or say, Aboriginal peoples hold these rights – rights that are part and parcel of who they are, and where they have come from. The power of this fundamental fact must be appreciated. Aboriginal nations are not asking the Crown for a ‘gift’, or some other kind of grant. Rather, Aboriginal nations are requesting that the Crown recognize something they already possess – that they have always possessed – the exercise of which has been blocked by the Crown for many generations. Aboriginal nation AB would be arguing, for example, that it always had the right to control membership or citizenship matters in relation to its people, CD that it always had the right to regulate what sorts of activities take place on its territory, and EF that it always had the right to regulate harmful activity engaged in either by its people or on its lands.

It is essentially important to note the *nature* of the *source* of this inherent right – the inherent right comes out of the fact that Aboriginal nations were historically self-regulating political bodies, controlling their own collective lives and lands. This fact *must* go into the way self-government rights come to be understood in Canadian law, for otherwise their very heart will not be put into them. We will see in an upcoming section on establishing rights, for example, that the Supreme Court has developed a way of generally understanding Aboriginal rights that seems inappropriate for self-government rights. A tremendous amount of energy *must* go into ensuring that self-government rights come to be appropriately understood in Canadian law, for this is the fundamental battle to be waged. Only if they are seen as essentially rights that capture the inherent power that Aboriginal nations exercise over their collective lives and lands will they emerge as the sorts of tools that can begin to draw an end to the colonial era of Canadian history.

Before we get to this fundamental battle, however, we need to work our way through other preliminary discussions – about the impact of treaties and the assertion of Crown sovereignty, and about the threat of extinguishment of Aboriginal and treaty rights.

- **Surrender**

In some circumstances the Crown may argue that whatever inherent self-government rights might have been held historically by some particular Aboriginal nation, that nation chose to surrender those rights in a treaty. Indeed, in one form or other this has been a dominant position historically adopted by the Crown, as it has either argued or assumed that historic treaties removed Aboriginal powers of self-government from vast swathes of the Canadian landscape²¹.

²¹ If pressed, the Crown could (as it has done in the past) bolster this position by appealing to a particular reading of the *Royal Proclamation of 1763*, [*Royal Proclamation of 7 October, 1763*, R.S.C. 1985, App. II, No. 1] which states in part:

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve *under our Sovereignty, Protection, and Dominion*, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the

There are several arguments that can be made in reply by treaty nations interested in pursuing self-government rights²². The most radical would entail directly challenging the treaty in question. For example, under legal principles dealing with the formation of agreements²³ all parties to an agreement must come to a ‘meeting of the minds’, a process that requires that all parties understand (a) the matters under negotiation, and (b) the full implications of the agreement(s) they are about to enter into. It is certainly open to any treaty nation to argue that there was a failure to arrive at a meeting of the minds. A similar tactic would use the principle that calls into question agreements reached when one party exerts undue influence or power during the process of negotiations – if an agreement is reached under undue influence it may be a mistake to say the parties freely entered into the agreement²⁴.

Many treaty nations, however, do not wish to directly challenge the treaties they share with the Crown. For these nations arguments would revolve around careful readings of the treaties themselves – generally speaking, historical treaties do not contain language that suggests the absolute surrender of powers of self-governance²⁵. For those nations that wish treaties to stand as they are, the Crown must accept that these sacred agreements do not signal a transfer of complete powers of governance. *At best* the Crown might be able to argue that on some readings of the treaties a degree of authority was transferred, leaving certain core or essential powers in the hands of the Aboriginal treaty nations.

The implication is clear – even over areas covered by historic treaties, rights of governance remain. Arguments for recognition of these rights can either take a radical form (calling into question the treaties themselves) or a moderate form (working out what these rights might be through a careful examination into particular treaties in question). If the former route is taken, arguments about rights to self-government will then inevitably

Sea from the West and North West as aforesaid. (*Emphasis added*)

²² One other problem has to do with the onus of proof – clearly it should be the Crown that has to show that treaties removed the degree of Aboriginal nationhood it claims was surrendered.

²³ These are principles, for example, that are fundamental to the law of contracts, and also present within the law of international treaties. For example, Articles 48 to 52 of the *Vienna Convention on the Law of Treaties, 1969* (entered into force January 27, 1980) detail the effects of error, deceit and coercion on treaty making (and ending). See: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²⁴ One could plausibly suggest that the principles of treaty interpretation developed in Canadian jurisprudence over the last 40 years or so rest on recognition of just this sort of problem (though the principles do not, in fact, directly address this difficulty, which would only be fully addressed if the treaties themselves were called into question).

²⁵ See, for example, a complete discussion of matters around the interpretation of Treaty 7 in Treaty 7 Elders and Tribal Council (with Hildebrandt, W., Carter, S., and First Rider, D.), *True Spirit and Original Intent of Treaty 7* (Montreal: McGill University Press, 1996).

fall back on arguments about Aboriginal rights (if an Aboriginal nation were to successfully challenge the treaty it purportedly falls under, it would find itself in the same position within Canadian law as an Aboriginal nation on non-treatied lands). If, on the other hand, an Aboriginal nation were to continue a call for proper recognition of the treaty they historically signed, the governance rights they would be arguing about would either be those spelled out in the treaty, or those left untouched by the spirit and intent of the treaty. Since most treaties in Canada do not contain much language that touches on governance rights, the second kinds of rights would be those up for discussion – rights to governance that the historic treaties did not touch. These, once again, would be seen in Canadian law as Aboriginal rights – the same sorts of governance rights in the hands of those Aboriginal nations that did not sign treaties.

Finally, for those living outside territories covered by historic treaties it is hard to see how the issue of surrender could seriously arise.

- **Compatibility with Crown Sovereignty**

Before we begin looking at tests and principles for defining and establishing Aboriginal rights, we need to consider the time when the Crown first asserted authority over Aboriginal nations (which varies from place to place across Canada), as the Supreme Court has suggested that at that point a process took place that removed from the scene certain Aboriginal powers of governance.

In *Mitchell v. M.N.R.*,²⁶ Justice Binnie (not speaking for the majority of the Court²⁷) held that certain Aboriginal rights, those that are in conflict with the exercise of Crown sovereignty, did not survive this move to a landscape dominated by Crown authority. So, for example, with the assertion of Crown sovereignty the inherent Aboriginal right to form a military force – to protect one’s nation from external threat – would have been lost to the Crown. Once Canada exerted its sovereign power over the territory of an Aboriginal nation that nation would have lost such rights as the power to unilaterally develop forces to protect itself from outside threats. Since that time, presumably, Aboriginal nations might raise a military (or quasi-military) force, but only if authorized within the larger umbrella of the Canadian state.

The emergence of the doctrine of sovereign incompatibility in Canada has serious

²⁶ *Mitchell*, *supra* note 1.

²⁷ *Mitchell* dealt with cross-border trade and travel, as Grand Chief Mitchell attempted to assert the right of the Mohawk nation to travel within its territory (straddling the U.S.-Canadian border), carrying goods for trade and gift-giving (without paying duties and customs to the Canadian government). While the majority of the Court dealt with this matter by applying the test for establishing an Aboriginal right (and finding that no such right to trade along a north-south axis existed), the majority did not disagree with Justice Binnie’s thoughts on the matter.

This strongly suggests that the doctrine of sovereignty incompatibility is a matter to be seriously considered by any Aboriginal nation thinking about asserting any rights to self-government that might run into conflict with a power of the Crown.

implications for Aboriginal nations working toward self-governance. Self-determination is a term often used in international law, signifying the right and ability of a politically defined group to control their own destiny, for the most part removed from concerns about external forces²⁸. Nation-states have long been recognized as holding such rights, and unquestionably Aboriginal nations were self-determining prior to contact with Europeans, and in many instances for a long period of time past contact. On the other hand, the language of self-government is usually used in the domestic arena, and is typically given a more restrictive sense, referring to the right and ability of a sub-population within a larger state to control certain ‘internal’ aspects of their collective lives – most definitely such matters as education and health, and potentially such things as justice, taxation and resource management²⁹.

Canadian courts seem to imagine that when the Crown asserted sovereignty over Aboriginal nations Aboriginal rights of self-determination left the scene and rights of self-government were the only residual rights remaining. While Aboriginal nations were self-determining before the assertion of Crown sovereignty, with the doctrine of sovereign incompatibility the Supreme Court is suggesting that the assertion of Crown sovereignty removed the underlying Aboriginal rights of self-determination. If ‘self-determining’ means that an Aboriginal nation would have had the power to determine its own destiny, largely free of external influence, then the courts in Canada have suggested that the assertion of Crown sovereignty brought an end to this, as the Crown became an external power enjoying authority over a wide range of essential matters that have a significant effect on whether Aboriginal nations could control their own futures. The Court also seems to be suggesting that in exerting its control over Aboriginal nations the Crown removed the ability of these nations to *ever again* assert a right to regain this power of self-determination³⁰. The Supreme Court is suggesting that at the moment that

²⁸ An instructive text is the 1960 UN *Declaration on the Granting of Independence to Colonial Countries and Peoples* [adopted by the UN General Assembly, Resolution 1514 (XV), 14 December 1960]. Article 2 states that: “All 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 this lays out the scope of the right of self-determination at international law in relation to ‘external colonies’ and ‘peoples’, interestingly Article 6 states: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”

²⁹ See, for example, the *Report of the Royal Commission on Aboriginal Peoples* (1996), available online at: http://www.ainc-inac.gc.ca/ch/rcap/sg/sghmm_e.html CAP; and the Federal policy on Aboriginal self-government, *supra* note 1.

³⁰ It has to be appreciated that these are arguments either asserted or assumed by Canadian courts and governments. The same arguments that suggest that Quebec has a right of self-determination apply, perhaps with more force, to Aboriginal nations. One might even suggest that one strategy lying behind the interest governments of Canada have shown in working toward self-government agreements is the deflection of interest away from matters of self-determination, as efforts put toward self-government direct energies away from – and can blunt – other larger struggles for self-determination.

While there are certainly some Aboriginal nations in Canada, and core elements within some other Aboriginal nations, that continue to assert and protect their rights to self-determination, the focus in this work is on self-government rights. Nothing in this work is meant to prejudice issues – work toward achieving self-government should not prevent concurrent work toward self-determination. Still, it should

the Crown asserted sovereignty the only sorts of jurisdictional powers an Aboriginal nation could continue to enjoy would be ‘internal’, limited to matters that were directly related to (a) what remained of their lands, and to (b) their own people.

As troubling as this may be to Aboriginal nations seeking rights of self-determination, this also suggests a large range of problems to be worked out *even if* the focus is entirely on self-government rights. Consider again Aboriginal nation EF, which wants to deal with criminal elements on its territory, even though these individuals are not citizens of this nation. Would this be an ‘internal’ matter, since it happens within the boundaries of this nation, or would the fact the deeds were done by non-citizens mean it is an ‘external’ matter, one properly handled by Canadian governments? Should it matter whether the acts themselves were of a particularly serious nature (drug-dealing) rather than something more mundane (for example, driving through the nation’s lands without functioning turn-signals)? Consider again Aboriginal nation CD, which wants to have a say in industrial developments on its traditional territories. If these are not reserve lands, or lands it has been able to establish title over, will the Crown argue that this is not an ‘internal’ matter?

This suggests strategies at two levels. First, it should be clear that it would be advantageous to frame any particular claim to a self-government right as internal. For example, EF First Nation would do well to argue that both legislating in relation to criminal matters and operating the institutions of justice are essentially internal affairs. One way to accomplish this, for example, would be by arguing successfully that the term ‘internal’ should be understood as including all matters that take place within the borders of the nation’s lands. Of course this sort of argument could do damage to CD, as they are trying to exercise some control over non-reserve traditional territory over which they have not been able to show title.

This points to the need to focus on a deeper level, the most important – the battle over how the term ‘internal’ generally comes to be understood. Debates over whether jurisdiction over serious criminal matters or environmental regulation on traditional territories are ‘internal’ will actually be decided at this deeper level, for here the struggle is all encompassing, here is where the real struggle over self-government rights will be waged.

Earlier we noted that the heart of the battle over self-government rights will be about the struggle to have these rights understood as those that are essential to capturing the inherent power that Aboriginal nations exercise over their collective lives and lands. That struggle connects to this point, for here what we are imagining is a coordinated effort on the part of Aboriginal nations to have the term ‘internal’ defined so that it refers to all matters of governance that are essential to the preservation of the identity and autonomy of Aboriginal nations. The argument must be made (and forcefully made) that self-government rights are *truly inherent*, that their very nature comes from the preexistence of organized societies. If this argument succeeds, then when the distinction

be appreciated that expending energy in the fight for powers of self-government might make it more difficult to make progress in the direction of self-determination.

is made between ‘internal’ and ‘external’ the focus will be on defining what is internal in terms of what is essential to the identity and autonomy of Aboriginal nations – to maintaining themselves and their relationships to their lands.

AB nation could argue that exercising control over membership and citizenship is essential to the preservation of themselves as a people, and that imposing conditions on off-reserve rights is a key part of this, as it gives them a means to ensure that a sense of communal responsibility pervades their nation³¹. Similarly, CD nation could argue that its relationship to its lands is vital to its identity, such that control over activities on these lands is an essentially ‘internal’ matter, while EF could argue that control over activities of people on its core lands is essential to the maintenance of its sense of identity and autonomy.

The notion of sovereign incompatibility, while only recently articulated by the Supreme Court in Canada, has a long history in the United States, as the U.S. Supreme Court very early on recognized sovereign authority resting in the hands of Native American tribes, but diminished as a result of these tribes finding themselves existing within a larger state³². The struggle of Aboriginal nations in Canada can borrow a bit from the American experience, for in the United States courts have held that the sovereignty that must remain in tribal hands even after American sovereignty is asserted is that which is essential to the maintenance of tribes as political entities³³. The danger with using

³¹ It is essential to note that this sort of system, one that would direct members of the community toward certain degree programs and require them to make use of their education in the community afterward, would not diminish the opportunities available to citizens. Those who wanted to pursue personal interests would be free to do so, but would have to recognize that since doing so would more likely not contribute to the collective well-being of the nation, they should not expect nation-funding.

³² This is one key element within the doctrine of ‘domestic dependent nationhood’, as constructed by Chief Justice Marshall of the United Supreme Court in the 1820’s and 1830’s, in a trilogy of groundbreaking cases [*Johnson v. M’Intosh*, 8 Wheat. 543 (U.S.S.C. 1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (U.S.S.C. 1831), and *Worcester v. State of Georgia*, 6 Pet. 515 (U.S.S.C. 1832)].

³³ For example, in *United States v. Wheeler* [1978] 435 U.S. 313, *ibid*, the U.S. Supreme Court said:

The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished." F. Cohen, *Handbook of Federal Indian Law* 122 (1945) Before the coming of the Europeans, the tribes were self-governing sovereign political [435 U.S. 313, 323] communities. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 . Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." *United States v. Kagama*, *supra*, at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . [They] are a good deal more than ‘private,

American jurisprudence, however, is that while this suggests an acceptable vision of self-government, it also comes from a country where the federal government enjoys ‘plenary’ or absolute power over tribes, and where the ‘domestic dependent nationhood’ model of tribal sovereignty severely limits what it means to say that some element of self-government is ‘essential’. What we are after here is just one small bit of the American experience – the notion that Aboriginal nationhood must be defined around those powers that are essential if any Aboriginal nation is to be able to maintain its identity, as a political and cultural entity.

Aboriginal nations must push the debate to where it should be. It cannot happen on a *physical* level (and this is where the danger lies, as undoubtedly some will try to emphasize a literal understanding of the term ‘internal’, restricting powers to what is physically internal to a nation). Rather, the debate *must* be on the level of autonomy and identity. Only then will it be possible that an appropriate form of self-government rights will be achieved within a re-ordered Canadian federal state. Aboriginal nations will be arguing that these rights must be defined as those that are essential to the preservation of Aboriginal peoples as peoples, to their abilities to continue to live as their ancestors lived, and to continue to be able to project forward into the future visions of how they must live to maintain their identities. We will see in a few sections that the law in Canada, however, is tending toward a different vision, one that will, if it becomes ‘the law’, make self-government rights hollow and lifeless.

- **Extinguishment (‘existing’ Rights)**

If the right asserted is compatible with Crown sovereignty, the next threat to its existence lies in the activities of the Crown through the period from the assertion of Crown sovereignty to the enactment of section 35 of the *Constitution Act, 1982*. The Supreme Court held in *Sparrow* that during this period the federal Crown enjoyed the power to extinguish Aboriginal and treaty rights. The test for whether the Crown succeeded in doing so, however, is fairly onerous – the Crown must show activities meant to extinguish the right(s) in question that show a clear and plain intent to do so. So, for example, it is questionable whether it would be enough for the Crown to show how it granted various forms of title, grants, licenses, and leases over asserted Aboriginal title land, as it is likely that these acts were not accompanied by a clear and plain intent to thereby extinguish Aboriginal title over these lands.³⁴

voluntary organizations.” *United States v. Mazurie*, 419 U.S. 544, 557 ; see also *Turner v. United States*, 248 U.S. 354, 354 -355; *Cherokee Nation v. Georgia*, *supra*, at 16-17. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. See *Oliphant v. Suquamish Indian Tribe*, ante, p. 191.

³⁴ Ironically, likely one of the primary reasons for a lack of evidence of such clear and plain intent in the historical record seems to be a long-standing assumption on the part of the governments of Canada that Aboriginal peoples did not have legally defined rights, of the sort that required directed and clear action for

Battles will undoubtedly be fought over the doctrine of extinguishment, when self-government rights are asserted that unsettle or disturb the governments of Canada. For example, in the second hypothetical example we imagined Aboriginal nation CD asserting a right to enact its own environmental law regime, complete with standards to be met by those seeking to erect structures on its territory. The Crown could wage a legal battle on the basis of the existence of all-encompassing federal and provincial legislation providing environmental oversight of industrial projects. It could argue – and likely would – that the existence of such regimes shows a clear intent on the part of the governments of Canada to exercise their sovereignty over such matters.

This argument would not be clearly conclusive (nation CD could argue, for example, (a) that the federal and provincial regimes demonstrate only that these governments acted to fill a legislative need, not to eliminate Aboriginal jurisdiction, and/or (b) that Aboriginal sovereignty could co-exist in this area with Crown sovereignty), but it would likely be for courts to decide such matters.

- **Defining a Right**

Should any particular self-government right be compatible with Crown sovereignty, and have survived extinguishment, the question of precise definition will arise. At some point the asserted right must be firmly fixed in the mind of the law, so that a domestic court may adjudicate upon its nature and its interaction with the Crown.

We are imagining two sorts of inherent rights of self-government – those that can be established directly under section 35, and those that connect to Aboriginal title – and so we have to consider two ways these rights can be defined. On the one hand, the rights may be asserted directly as Aboriginal rights, which would require that they be established under the tests laid out in *Van der Peet*, which requires that they be defined by the court. On the other hand, the rights may tie to the decision-making authority of Aboriginal title holders – once title over certain territory is established, the property right would carry with it the right of the Aboriginal nation to make decisions about how this land is to be used, a right which some have argued is jurisdictional in nature³⁵.

We will deal first, quickly, with the rights that might emerge out of showing title. An Aboriginal nation having Aboriginal title lands should be able to make collective decisions about how these lands will be used. Showing the existence of such rights should depend only on showing title (not a simple matter, of course, but a different matter from showing self-government rights that seem to flow from title). The difficulty at this point is in knowing what self-government rights might actually flow - what would be something tied to the holding of title that would constitute a ‘decision about how the lands are used’?

their removal.

³⁵ *McNeil*, *supra* note 3.

Presumably one could argue that any activity taking place on title lands ties into how these lands are being used, but most likely the Supreme Court would say it did not have in mind that sort of blanket authority over lands when it made these remarks about title. Defining what powers accompany the showing of title will likely be a complex and difficult matter, one difficult to settle at this early stage. At best we can conjecture that activities that involve the actual physical use of the land itself – that is, digging pits, building dams, laying out roads – would fall under the sorts of activities that holding title would give a nation some control over.

This invites another question – when we begin to get a sense of what sorts of activities fall under the authority of a title-holder, we will also need to begin to build up a sense of what authority actually gets vested in the Aboriginal title holder. For example, Aboriginal nation CD wants to exercise its authority over industrial activity on its traditional territory. Imagining for the moment that at least some of the activity in question falls on its title lands, what sort of power would that give to this nation? Would it be able to push aside federal and provincial regimes overseeing environmental assessment and regulation? Would it have to work out a coordinated system with these two other levels of Crown sovereignty?

With these difficult matters left aside, irresolvable at this early point in the jurisprudence around title, we turn to the establishment of rights to self-government directly under section 35. In *Van der Peet* the Supreme Court held that the process of definition of rights under section 35 takes into account at least three factors:

To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.³⁶

An Aboriginal nation asserting a right to self-government needs to make its claim in such a way that it can persuade the court to characterize the right so that it is more likely to meet the test for its existence (set out in the next section). For example, in the one case that has directly addressed the assertion of a self-government right, *Pamajewon*, the First Nations involved attempted to:

... characterize their claim as to "a broad right to manage the use of their reserve lands".³⁷

Shawanaga and Eagle Lake First Nations had to work within the framework set out by

³⁶ *Van der Peet*, *supra* note 1, at paragraph 53.

³⁷ *Pamajewon*, *supra* note 8, at paragraph 27.

*Van der Peet*³⁸, and so the first question is how to characterize the right given the three factors listed above. The first point the Supreme Court made was that the First Nations understood their right too broadly – under the *Van der Peet* test rights must be defined narrowly, to allow the three factors to be applied ‘sensibly’.

The Court narrowed matters down to a focus on the particular activity in question – ‘high stakes gambling’ – and its relationship to the customs, practices and traditions engaged in by these two nations prior to contact with Europeans (the basis on which they tried to establish the right), and the regulations these activities ran up against (section 207 of the *Criminal Code of Canada*, which effectively bans most gambling operations). With these three matters considered together the Court found that:

... the correct characterization of the appellants' claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation (sic)³⁹.

This shows that if the *Van der Peet* approach is to be applied to self-government rights, Aboriginal nations will have to carefully characterize their claims. The Court in *Pamajewon* wanted to see a definite and circumscribed right, one fairly closely tied to the particular activity in question. The result, which commentators have criticized as both conceptually problematic and practically unworkable⁴⁰, is that Aboriginal nations asserting self-government rights will apparently have to do so on an ad hoc and piecemeal basis. If their route is through the courts (and not government-to-government agreements, which could set out these matters more or less in their entirety), each Aboriginal nation will have to demonstrate an Aboriginal right to regulate health, another Aboriginal right to regulate education, and so on (realizing, of course, that the characterization required might even be narrower than these examples suggest, as the right is defined on the basis of the three factors listed above).

This will tie into remarks made in the next section, about the inappropriateness of using the *Van der Peet* approach to deal with self-government rights. Before getting into that critical discussion we can think about how Aboriginal nations might respond to this particular challenge. While on the one hand it is a clearly an unfortunate result of the *Pamajewon* case, with every challenge comes an opportunity. Here we see impetus to

³⁸ If *Pamajewon* had been decided after *Delgamuukw*, the two First Nations in that case could have attempted to argue differently. *Delgamuukw* might have had an impact, as Shawanaga and Eagle Lake First Nations were essentially arguing for the sort of inherent right of self-governance that would flow from holding title to their reserve lands.

³⁹ *Pamajewon*, *supra* note 8, at paragraph 26.

⁴⁰ *McNeil*, *supra* note 3, Russell Barsh and James Youngblood (Sakej) Henderson, “The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 *McGill L.J.* 994 (especially section II.E, ‘Is The *Van der Peet* Trilogy “Law”?’), and John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) (especially chapter 3, ‘Frozen Rights in Canada: Constitutional Interpretation and the Trickster’, pages 56 - 76).

make a move that was recommended in the *Report of the Royal Commission on Aboriginal Peoples*, a move that makes eminent sense. Communities that are currently termed Aboriginal ‘nations’ (essentially small band units created by the Federal government in its efforts to control Aboriginal peoples) can take this as a signal to begin or to strengthen the process of reforming into the larger political units they used to constitute.

For example, in northern Ontario the Nishnawbe-Aski Nation (‘NAN’) was originally formed as a collective representing the interests of the Treaty 9 nations, made up of the 49 smaller First Nations that historically together called this land their territory, and that signed Treaty 9 (and, along the Manitoba border, Treaty 5). This larger political organization has been involved in negotiations with the government of Canada around such matters as education and a framework around governance issues (matters such as leadership selection, membership, institution building, and so forth)⁴¹.

Aboriginal people across Canada, if they have not already begun this process, might consider the possibility of following this sort of model, having a larger natural political unit pursue self-government rights. This is workable within the jurisprudence around section 35, and at the same time addresses other concerns often raised about Aboriginal self-governance. Having larger political units addresses practical concerns, often emerging from problems around scale (about the ability of what are often communities with populations in the hundreds to run various matters in today’s complex bureaucratic and regulatory world), as well as the sort of concerns noted above, about having to work toward self-government rights in a piecemeal and ad hoc basis (once a larger unit established various self-governance rights, how these were put into practice within the larger body – ‘on the ground’ in the smaller units – could be worked out within the network of communities making up the larger unit, through dialogue).

- **Establishing a Right**

Once an appropriate characterization has been arrived at, the next question is about the current status of the right. The Court held in *Van der Peet* that the purpose behind the protection of Aboriginal and treaty rights under section 35 is the need for reconciliation between the pre-existence of organized Aboriginal societies and Crown sovereignty⁴². This purpose in turn informs the way Aboriginal rights are understood and established. These rights are held by Aboriginal peoples collectively, and are meant to protect integral aspects of Aboriginal peoples’ identities and ways of living.

The test for establishing an Aboriginal right, then, requires showing, at the point of contact with Europeans, a practice, tradition or custom that is integral to the identity of the Aboriginal nation in question. An Aboriginal nation asserting a particular self-

⁴¹ Much information about this process can be accessed at: <http://www.nan.on.ca/main.aspx>, and <http://selfgovernance.nan.on.ca/Linkspage.html>.

⁴² *Van der Peet*, *supra* note 1, at paragraphs 26 - 31.

government right must establish that at its point of contact with Europeans it possessed a corresponding practice, tradition or custom integral to its collective identity. Just as fishing for personal, social and ceremonial purposes was deemed in *Sparrow* to be a practice of the Musqueam integral to their identity at the time of contact with the British, a right to manage and regulate educational affairs for a particular First Nation (for example) would have to connect to a pre-contact practice, tradition or custom of managing and regulating educational affairs that was (and remains) integral to that nation.

This poses perhaps the most challenging hurdle for Aboriginal nations asserting self-government rights. Each Aboriginal nation asserting a right (such as a right to control and regulate education, a right to control and regulate health, and so on) will have to demonstrate that this right is tied down to a corresponding practice, custom or tradition integral to the identity of this nation at the time it encountered Europeans. When self-governing powers are examined in many separate and distinct boxes ('education', 'financing', 'health'...), isolated from each other, it becomes difficult to see how any nation could go about meeting the test set out in *Van der Peet*. For example, how could a nation show that it was integral to its identity that it controlled and regulated the provision of health related matters for its people (that this was one thing that made these people the people they were, and continue to be)?

As commentators have noted, this underscores the problem in using the *Van der Peet* test in this arena⁴³. Self-government rights are not like other Aboriginal rights (as these have been defined by Canadian courts, as with, for example, hunting and fishing rights). While a right to engage in some sort of physical activity may make some minimal sense within the sort of framework established in *Sparrow*, *Delgamuukw* and *Van der Peet*, governance rights are simply not amenable to being viewed as rights to engage in physical activities, and treated as if each sub-right could represent a 'custom' or 'tradition'.

The only way to make any sense of a self-government right is as a right a politically defined people enjoys to direct its future – that is, as a right to make decisions about the direction this collective will travel. If governance rights were conceptualized in this manner, and placed at an appropriate level of generality, the *Van der Peet* test could be meaningfully applied. One would ask of a particular Aboriginal nation whether it was integral to its identity – as the people it was and continues to be – that it control decision-making over matters essential to ensuring its ability to maintain itself and its identity in a complex and changing world. Which Aboriginal nation (or for that matter, which politically defined collective anywhere in the world) would not be found to have rights of this nature? For any collective the reason for its existence – the reason it develops and maintains a form of collective autonomy – is to perpetuate a way of living. For each political community, its identity, ways of living, traditions, practices, customs and decision-making powers all converge on this point.

⁴³ See, for example, Morse, B., "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v. Pamajewon*" (1997) 42 *McGill L.J.* 1011.

Aboriginal nations are left, then, with two options – to argue for particularized ‘governance rights’ under the *Van der Peet* test (which is both difficult and clearly inappropriate), or to argue for necessary adjustments to the jurisprudence around section 35, to argue that the focus should be on powers of decision-making rightfully held by Aboriginal nations. That is, the jurisprudence should not be around the question of how to protect ‘Aboriginality’, but how to properly respect the dignity and autonomy of Aboriginal collectives. The aim would be to try to pull together why the Canadian system recognizes individual rights (to protect and promote the dignity and autonomy of individuals, seen as essentially free and decision-making entities⁴⁴) and why it should recognize Aboriginal (collective) rights (to protect and promote the dignity and autonomy of Aboriginal political units, seen as essentially free and decision-making entities).

The battle to have Aboriginal self-government rights understood this way is not a dead end for several reasons: first, the jurisprudence in this context is clearly inappropriate, both practically and conceptually; second, only a few direct remarks have been made about governance rights in existing jurisprudence (and one could persuasively argue that at the time the Court did not have an appropriate opportunity to carefully consider the matter), and; three, other instances of necessary adjustments to the jurisprudence do exist (with the adjustments for Métis rights – in *R. v. Powley*⁴⁵ in 2003 – being the most obvious example). This matter, however, goes beyond concern about whether the tactic is feasible, for clearly if self-government rights are simply treated like other Aboriginal rights under *Van der Peet*, they will not be self-government rights.

Earlier we noted the troubles a nation like CD could face with arguments around extinguishment. Federal and provincial governments are likely to argue that the creation of their own regulatory systems for environmental assessment over the traditional lands of CD removed the jurisdictional authority of this nation. Whether simply establishing instruments of regulation would be sufficiently clear to meet the test for extinguishment is a matter yet unresolved. What makes the sort of dispute set out in that hypothetical particularly challenging for Aboriginal nations, though, is the territoriality question – the challenge will be to successfully exercise rights to self-government over lands that are not either reserve lands or lands over which Aboriginal title has been demonstrated.

Many disputes will ultimately hinge on whether the asserted right to govern extends out over territory over which at most there are recognized rights to engage in certain activities (hunting, fishing, trapping, and so on), and not rights to land itself. Some of the battle will likely be around the duties to consult and accommodate, duties that arise no matter whether the asserted rights are Aboriginal rights or treaty rights.

⁴⁴ In this regard the recent case law around section 15 of the *Charter* (non-discrimination) is illustrative. A leading case is *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

⁴⁵ *R. v. Powley*, [2003] 2 S.C.R. 207.

For example, in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*⁴⁶ the Supreme Court held that the assertion of treaty rights over the lands in question led to duties on the Crown to consult with the treaty rights holders about Crown plans to build a winter access road through these lands. While it would be extremely challenging for treaty nations to successfully assert a form of ownership over these sorts of 'surrendered' treaty lands, the existence of treaty rights to hunt, fish and trap create obligations on the Crown to consult with, and possibly even accommodate, the interests of the treaty nations. This might even lead in some cases to an obligation on the Crown to negotiate around Crown plans to use or develop these lands. Arguably, this creates the sense that treaty nations may have in some situations a measure of governance rights over treaty lands (though the actual language the court uses in *Mikisew Cree* suggests that pulling governance rights out of duties to consult and accommodate will be a very difficult task⁴⁷).

By whatever means an Aboriginal nation manages to establish claims over land, the real challenge will be, however, in exercising rights to self-govern in the face of Crown claims to territoriality. The threat is that the 'internal' nature of rights to self-govern, understood narrowly, will emerge as the determinative factor, with Canadian courts saying that substantial rights to self-govern only exist over lands historically exclusively controlled (title lands). That is, a more physical interpretation of what is 'internal' could be relied upon by the Crown to restrict the exercise of these rights to lands held by the nation (and perhaps to the citizens of the nation), and no further.

The implication is clear for those struggling to maximize the possible extent of self-government rights. For a maximal extent to be achieved – for self-government rights to be life-giving and life-sustaining forces for Aboriginal nations – arguments will have to be made that jurisdictional power extends over traditional territories, and not just reserve lands and title lands. This will be the site of an enormous struggle, one that, frankly, does not promise a good outcome for Aboriginal nations. However, this is one location at which battle must be waged, regardless of how unlikely success might be, for here one

⁴⁶ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [hereinafter '*Mikisew Cree First Nation*'].

⁴⁷ At paragraph 57 the Court declares:

As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

No where in this do we find clear space for the exercise of decision-making power emanating from the treaty nation. The picture is of the Crown making decisions about land use, which – if they sufficiently impact on treaty rights to hunt, trap, fish, etc. – may require of the Crown to follow certain procedural paths dictated by its honour.

has to weigh against the risk of failure what may be lost if no battle is fought. Again, the basic parameters of this struggle are clearly visible – it will be a battle over how self-government is fundamentally understood, a battle that will most likely be about the meaning of ‘internal’ sovereignty. Only through arguing that matters that are essential to the preservation of identity and the promotion of autonomy are those that are properly labeled ‘internal’ can Aboriginal nations hope to avoid a narrow construction that would hollow out the realm of self-government rights.

- **Subsequent Concerns: Infringement**

In *Sparrow* the Supreme Court found that Aboriginal rights are not ‘absolute’, that they are subject to infringement by the Crown. The court went on to set out how Crown infringement could be ‘justified’. Since Aboriginal (and treaty) rights are constitutionally recognized and affirmed, the Crown cannot simply decide to engage in or authorize activity that interferes with Aboriginal or treaty rights. Rather, the Crown (a) can only act when its objective is ‘compelling and substantial’ (for example, it can only authorize such things as hunting conservation laws, as these are in the interests of all), and (b) when acting, it must be cognizant of its position as a fiduciary in relation to the interests of Aboriginal peoples (so that, for example, when allocating resources like fish, it must do so giving priority to Aboriginal peoples with fishing rights).

It is entirely unclear at this point, however, how this framework could apply to self-government rights (if it should at all). Frankly, it would seem that the framework should not apply, and there are at least two reasons why this is so. First, consider what it means for a political entity to enjoy rights of governance. We have in Canada at present two spheres of Crown authority, provincial and federal. These two enjoy heads of power laid out mainly in sections 91 and 92 of the *Constitution Act, 1867*, and a complex body of jurisprudence has evolved to regulate interaction between these two instantiations of the Crown, in relation to their respective sets of powers (this is jurisprudence around what is known as ‘division of powers’). Outside emergency contexts, however, it would be inconceivable for it to be legally acceptable for one Crown (say, for example, the federal) to have the power to step into matters accorded to the other (the provincial), just so long as its objectives were compelling and it acted appropriately. It would certainly seem that allowing this power (for example, to the federal government) would simply undercut the ‘powers of governance’ of the other Crown (in this example, the provincial).

Similarly, what would it mean if an Aboriginal nation – say AB, enjoying control over membership matters – was subject to interference by a federal or provincial Crown at any time, so long as this other Crown could argue that it had a compelling and substantial objective in mind, and was acting in (what it perceived to be) the interests of AB? Would it be possible to even say that AB was exercising self-government rights?

The second reason for doubting that it would make sense to apply the *Sparrow* framework to self-government rights brings us back to how the Supreme Court has come to understand the relationship between the Crown and Aboriginal nations. It has built up a complex and unique body of jurisprudence around the notion that the Crown and

Aboriginal peoples are in a fiduciary relationship, that the Crown has undertaken to hold and protect certain vital interests that Aboriginal peoples have⁴⁸. In exercising control over these interests the Crown must act responsibly, for Aboriginal peoples are vulnerable to the power of the Crown, and have ‘reposed trust’ in the Crown that it will act appropriately.

Recently commentators have wondered about how this relationship might be dissipated. Modern treaties may dissolve some the reasons for finding such a relationship (as Aboriginal nations acquire by treaty more control over their own affairs), and other agreements weakening the impact of things like the *Indian Act* would also seem to go some way to doing the same. There can be, however, no better way to dissolve this relationship than to recognize the self-government rights of Aboriginal nations. The relationship arises because the Canadian state historically took up *control* over the lives and lands of Aboriginal peoples. As the Crown releases this control, the relationship begins to equalize: Aboriginal peoples become less like wards of the state, they regain control over their lives and lands, and a new form of federal state emerges.

This naturally, then, removes the sense in applying the framework from *Sparrow*. To the degree that Aboriginal nations retain control over ‘internal’ matters – over things that are essential to their lives and futures – they gain rights that, in relation to the federal and provincial governments, must be ‘absolute’. They will not be absolute from within their nations, but in relation to outside forces – the other two Crowns – they must be free from interference. If it were possible for a Crown to continue to have power over the exercise of Aboriginal rights of governance we would find ourselves back at the refrain that we made above – how could we even say that Aboriginal nations would be exercising rights of governance?

Conclusion

What emerges from this discussion is a sense that fundamental legal battles over self-government rights must be waged if the three sorts of scenarios imagined are to come to pass.

Control over membership and citizenship matters that reaches off community lands to urban centers, that attempts to create classes of citizenship and that imposes conditions on membership for non-reserve members, will likely run into problems around potential incompatibility with Crown sovereignty, over arguments that this power has been extinguished, and with problems in being established (if rights to self-government are treated as if they are simply a kind of Aboriginal right). Even if such rights could be established, the threat remains that the law might adopt the framework for justifying infringement, which would in essence deny that First Nation AB had any inherent rights to self-govern at all.

⁴⁸ See, for example, *Sparrow*, *supra* note 20, *R. v. Gladstone*, [1996] 2 S.C.R. 723, *Delgamuukw*, *supra* note 16, *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 51, *Taku River Tlingit v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation*, *supra* note 46.

Control over what takes place on non-reserve/non-title lands will also run into significant challenges: with potential incompatibility with Crown sovereignty, extinguishment, and establishment. Likewise as well, unless the *Sparrow* framework is removed as a threat, nations trying to exercise the sort of jurisdictional authority First Nation CD is attempting will find themselves in possession of hollow rights of self-government.

Finally, control over criminal jurisdiction and administration of justice will likewise be difficult to put into place in a meaningful way. The same sorts of challenges noted for the other two scenarios arise in this context, exacerbated by the fact that First Nation EF would be trying to exercise jurisdiction over non-citizens (a fact that would likely have the most impact when this nation faced arguments around incompatibility, and when it turned to trying to establish the existence of this particular sort of right).

The way forward, however, is made clear when these challenges are noted and appreciated. The general threat behind all these difficulties is the same – that self-government rights will be inappropriately envisioned, trapped in legal definitions and understandings that do not respect the fact that these rights are *inherent*, both in their temporal source in the pre-existence of Aboriginal societies and in their conceptual source, in the existence of organized societies, possessed of the inherent power to control how they collectively decide to live their lives and move their collective selves into the future.

We began by noting that this work is restricted to arguments that fit within the model of self-government, and not self-determination. We are operating under the assumption of Crown sovereignty, the question being how a newly ordered federal state can emerge, one that respects the existence of organized Aboriginal political units within the federal landscape. The struggle, then, is about the understanding attached to the notion of self-government in this context. The focus must be, then, on what it means to accept ‘internal’ sovereignty, a diminished form of sovereignty remaining in the possession of Aboriginal nations after the assertion of Crown sovereignty.

The way forward is two-pronged – argumentative and assertive. On the one hand, Aboriginal leaders must push for legal arguments that shift the jurisprudence down an acceptable path. An understanding must emerge that Aboriginal nations had – and continue to have a right to – the power to make fundamental decisions that maintain their identities and that respect their autonomy. Arguments that try to artificially and mistakenly pin down ‘internal’ to simple matters of geography or membership must be challenged, and the discussion must be placed in its proper arena, about dignity and autonomy. On the other hand, Aboriginal leaders must also be prepared to move forward on measures that simply and directly exercise the self-government rights that flow from this understanding of internal sovereignty.

While undoubtedly many of the assertions of sovereignty will be challenged by the federal and provincial crowns, this is necessary. It will force the debate out of an abstract arena and into courtrooms and negotiation sessions, where arguments about dignity and

autonomy can be mustered and presented. These arguments must focus on an appropriate identification and definition of Aboriginal self-government rights, not as tied to traditional practices and customs, but as tied to the power of Aboriginal nations to make fundamental decisions about collective lives and lands. These arguments also have to challenge notions of extinguishment and incompatibility, pushing the notion that rights to self-govern cannot be extinguished simply through Crown legislation and regulation, and the notion that Aboriginal rights to self-govern are – especially when tied to what is essential for the preservation and promotion of identity and autonomy – compatible with existing Crown powers. Finally, these arguments must challenge the very notion of justifiable Crown infringement – allowing for Crown interference with the exercise of Aboriginal self-government rights effectively undercuts these rights, turning them into shells that do not express the authority of Aboriginal nations to control their own collective destinies.