

**RECONCILING THE CONSTITUTIONAL ORDER**

**Positing a New Approach to the Development of  
Indigenous Self-Government and Indigenous Law**

By

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in conformity with the requirements for  
the degree of Master of Laws

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## Abstract

In light of the recognition of continuing Indigenous sovereignty by the Supreme Court of Canada and the requirement that that sovereignty and *de facto* Crown sovereignty be reconciled within a shared constitutional order, Canada needs a new approach to negotiating the exercise of Indigenous sovereignty. Any new approach must be built around a coherent understanding of the Constitution as a whole, most importantly the constitutional principle of reconciliation and the other unwritten principles articulated by the Supreme Court of Canada in the *Reference re. Secession of Quebec*.

The four unwritten principles which the Supreme Court of Canada identified in the *Quebec Secession Reference* do not represent a barrier to the exercise of Indigenous sovereignty, if interpreted in light of the reconciliation principle. Indeed, the principles of federalism and the protection of minorities support the protection of distinct Indigenous political and legal institutions. Because they are exercising a continuing sovereignty, rather than an aboriginal right as that term is currently understood under section 35, Indigenous peoples also need not return to traditional forms of governance in their entirety in a modern self-government regime; they may also adopt more or less of the Euro-Canadian forms with which they have become familiar as citizens of Canada, such that modern Indigenous institutions could be quite consistent with mainstream understandings of the four unwritten principles of the Constitutions.

As with other institutions of governance, Indigenous peoples have long traditions of dispute resolution that they could draw upon in the context of the modern exercise of their sovereignty. Nor do Indigenous peoples need to return to these traditional methods in their entirety, either; again, they could adopt elements of Euro-Canadian legal traditions. There are numerous precedents around the world for Indigenous legal institutions that combine

elements of Indigenous customs of dispute resolution and common-law judicial structures.

What is important is that Indigenous peoples have the right to design their own institutions for the interpretation, as well as the creation, of law and the resolution of disputes if they are to exercise their sovereignty within the Canadian constitutional and political system as a third order of government.

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**RECONCILING THE CONSTITUTIONAL ORDER: POSITING A NEW  
APPROACH TO THE DEVELOPMENT OF INDIGENOUS SELF-GOVERNMENT  
AND INDIGENOUS LAW**

**IAN PEACH**

**Table of Contents**

<b>Abstract .....</b>	<b>i</b>
<b>Acknowledgements.....</b>	<b>iii</b>
<b>Table of Contents .....</b>	<b>v</b>
<b>Chapter 1 – Introduction .....</b>	<b>1</b>
Is there an Aboriginal right to self-determination in Canada? .....	7
Canada’s failure to implement the inherent right effectively to date: a critical review of existing self-government agreements .....	24
Reconciliation and the task of establishing an Indigenous third order of government.	28
<b>Chapter 2 – Federalism, Legal Pluralism and the Development of a Body of Indigenous Law.....</b>	<b>35</b>
Federalism as a vehicle for the self-determination of peoples .....	35
Limits of federalism as a vehicle for self-determination: aggregation and subsidiarity .....	42
Federalism and legal pluralism.....	46
Indigenous legal traditions as a source for modern Indigenous law .....	48
Application of the principle of federalism to the development of a body of modern, self-determined Indigenous law .....	51
Non-territorial conceptions of federalism and the application of personal jurisdiction over Indigenous people: a conceptual challenge .....	56

<b>Chapter 3 – Constitutional Limits on Indigenous Self-Determination and Indigenous Law .....</b>	<b>63</b>
Democratic legitimacy of governance.....	63
Constitutionalism and the rule of law.....	69
Protection of minorities and the application of the Canadian Charter of Rights and Freedoms to Indigenous governments.....	77
<b>Chapter 4 – Comparing Indigenous and Common-Law Dispute Resolution .....</b>	<b>90</b>
Can the Canadian judiciary legitimately play the role of interpreting Indigenous law and resolving disputes under Indigenous law or between Indigenous law and the Canadian constitutional order? .....	90
Judicial independence and the judicial function in the common-law legal tradition.....	95
Indigenous traditions of dispute resolution.....	101
<b>Chapter 5 – Indigenous Self-Government, Indigenous Law and Their Implications for the Creation of an Indigenous Judiciary .....</b>	<b>110</b>
Melding Indigenous and common-law traditions: an Indigenous judicial branch as part of Indigenous self-government .....	110
Application of Canadian constitutional law to Indigenous governments – the importance of Indigenous jurisdiction.....	145
Managing conflicts of laws and the risk of “forum-shopping” .....	148
One or two final courts of appeal for Canada?.....	153
<b>Chapter 6 – Conclusion.....</b>	<b>159</b>
Self-determination, Indigenous law and the reconciliation of competing sovereignties: a constitutional imperative .....	159
Challenges in getting from here to there .....	160
Imagining a new approach to Indigenous self-determination as a challenge of federal governance: a reason to hope for future progress.....	165
<b>Bibliography .....</b>	<b>168</b>



## Chapter 1 – Introduction

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

Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.<sup>3</sup>

As can be seen 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. If we are to take seriously the third of the above statements, from the Supreme Court of Canada's decision in the *Haida Nation* case, that it is pre-existing Indigenous sovereignty, in particular, that is to be reconciled with assumed Crown sovereignty, as well as the statement in that same paragraph that "This promise is to be realized and sovereignty claims reconciled through the process of honourable negotiation,"<sup>4</sup> then we must conclude that Canada needs a new approach to negotiating the recognition of Indigenous sovereignty and its exercise, secure from interference by the settler-state governments that constitute the Crown in Canada.

Any such new approach must be built around an understanding of the Constitution as a whole and, in particular, the constitutional commitments created by the history of Crown-

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<sup>1</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 in achieving reconciliation.

<sup>2</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>3</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [2004] 3 S.C.R. 511 [*Haida Nation*], at para. 20.

<sup>4</sup> *Ibid.*

Indigenous relations in Canada, rather than focussing solely on the interpretation of section 35 of the *Constitution Act, 1982*. If, however, the exercise of this Aboriginal right to self-determination is to be protected by the Constitution of Canada, it must be consistent with the fundamental tenets of the Canadian constitutional order, so that it is possible to reconcile Indigenous sovereignty with the *de facto* sovereignty of the Crown. This would be possible, though, because reconciliation itself is a fundamental tenet of the constitutional order.

The Royal Commission on Aboriginal Peoples recommended the negotiation of self-government agreements with Indigenous nations as a key element in its reform agenda in 1996<sup>5</sup> and the federal government has had a policy recognizing the inherent right of self-government and guiding the negotiation of its operation since 1995.<sup>6</sup> Canadian governments have expressed a willingness to negotiate Indigenous self-government, and have been negotiating, for a number of years. Yet Indigenous peoples have secured remarkably few self-government agreements and those that have been negotiated bear more resemblance to agreements for the self-administration of a Euro-Canadian governance regime than they do agreements for the full integration of Indigenous sovereignty, and Indigenous forms of governance and law, into the Canadian constitutional order. The unwillingness of settler-state governments to accept a more genuine form of Indigenous self-determination and ensure that Indigenous nations have a place in our federal structure is particularly perplexing, and cause for concern, when one considers that, for centuries, Canada's constitutional order

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<sup>5</sup> See Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Queen's Printer for Canada, 1996), especially Vol. 2, *Restructuring the Relationship*, chapter 3.

<sup>6</sup> Canada, Indian and Northern Affairs Canada, *The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Queen's Printer for Canada, 1995), online: Indian and Northern Affairs Canada, <http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp>, accessed September 7, 2009.

has been built on political and legal pluralism in an effort to accommodate the national minority of Quebec.

Is it possible to establish a principled basis for the negotiation of Indigenous self-government arrangements that would provide space for Indigenous governments to be a genuinely self-determining third order of government exercising their pre-existing sovereignty within the Canadian constitutional order? This thesis will demonstrate that, if one were to look beyond the law of Aboriginal rights in Canada to broader Canadian constitutional jurisprudence, as well as legal theory and the experimentation going on elsewhere with Indigenous institutions of political and legal decision-making, establishing a principled framework for integrating Indigenous nations into the Canadian constitutional order as a full third order of government is by no means unimaginable and may, indeed, be a requirement of our constitutional order.

In order to demonstrate the possibility of recognizing Indigenous sovereignty within the Canadian constitutional order, this first chapter will address a number of preliminary issues. It will review, in particular, reasons for concluding that Indigenous self-determination is an existing Aboriginal right in Canada, the ways in which Aboriginal self-government agreements concluded in Canada to date fall short of the potential for the full realization of the Aboriginal right to self-determination, and why Canadian constitutional law and theory has the potential to rectify this situation by allowing for the reconciliation of the sovereignties of Indigenous peoples and the Crown in Canada. The second chapter will then explore how federalism, and particularly the distinctive form of federalism that has been created in Canada through the Confederation of 1867, can support this project by providing the constitutional underpinning for the self-determination of peoples and legal pluralism. It will also identify practical limitations on self-government within a federal model and how federalism could be

adapted to allow for the exercise of personal, rather than territorial, jurisdiction by Indigenous governments. The third chapter will look at the limits that other principles of Canada's unwritten constitutional order place on the governmental authority provided for by federalism, specifically the requirements of democracy, constitutionalism and the rule of law, and the protection of minorities, as well as how these principles could be re-interpreted in light of the requirement of reconciliation and thus integrated in practice into Indigenous models of governance without undermining the ability of Indigenous peoples to be a self-determining third order of government.

The fourth and fifth chapters of this thesis will then consider the implications of Indigenous self-determination within the Canadian constitutional order for the adjudication of Indigenous law and the interpretation of Canadian constitutional law in its application to Indigenous governments. Indigenous control over the interpretation of the laws that govern Indigenous people, as well as the capacity to make law, is at the heart of Indigenous self-determination, as law's meaning is inherently a matter of interpretation. The fourth chapter will ask the fundamental question of whether the Canadian judiciary can legitimately play the role of interpreting Indigenous law and resolving disputes under Indigenous law or between Indigenous law and the Canadian constitutional order. It will also compare the fundamental aspects of dispute resolution within the legal traditions of Indigenous peoples and the common law to explore both the differences and the similarities of the two traditions. The fifth chapter will then explore how these two different legal traditions could be blended to create a "judicial" branch of Indigenous government appropriate to a modern Indigenous society and consistent with the fundamental requirements of the Canadian constitutional order. The chapter will also address whether the jurisdiction of an Indigenous judicial branch should extend to interpretation of the Constitution of Canada in its application to Indigenous

nations, identify the problems of conflicts of laws and “forum-shopping” in a plural juridical system and how they may be resolved, and discuss whether the Supreme Court of Canada could be reformed to exercise jurisdiction over all Canadian law, including the laws of Indigenous peoples, or whether a separate Supreme Court of Indigenous Peoples would be a necessary element of a third order of government approach to Indigenous self-government. Finally, the sixth chapter will provide a conclusion, by reviewing and drawing together these threads of analysis to demonstrate that, indeed, a framework for integrating Indigenous peoples into the Canadian constitutional order as a full third order of government is possible, legally sound and politically practicable.

I undertake this task from the perspective of a non-Indigenous student of Canadian constitutional law and constitutional theory. My understanding of constitutional law has grown primarily out of the liberal democratic tradition that has been dominant in Western European legal and political thought for several centuries, but it has also been strongly influenced by scholarship that articulates the importance of community identity and collective rights for the achievement of individual self-determination, as well as scholarship that provides rationales for the justice of Indigenous self-determination more specifically. Thus, this paper will seek to define a principled, just arrangement for sharing the physical and legal space of Canada and demonstrate that the accommodation of Indigenous political and legal distinctiveness does not require the abandonment of the deeply held values of our constitutional order; indeed, it is reasonable to suggest that our constitutional order, fully understood as a coherent order made up of both written and unwritten elements established through a series of commitments made throughout our history, actually requires such an accommodation. I accept the logic of the arguments of other scholars of Indigenous law and politics, many of whom I hold in the highest esteem, that lead them to conclude that

Indigenous peoples today remain fully sovereign and that the relationship between Indigenous peoples and the Crown in Canada is international in nature, as between sovereign states, rather than domestic, as between different national communities under a single constitutional order, even if that order is a pluralist one.<sup>7</sup> However, as Doug Moodie has said, as intellectually and morally persuasive as the arguments of the Indigenous sovereigntists might be, political reality has kept their arguments from gaining much of a toehold and this situation is likely to continue indefinitely.<sup>8</sup> Thus, I consider my task to be to propose an arrangement that not only will maximize Indigenous sovereignty in a principled way but that is also practical and capable of receiving the protection of Canadian constitutional law.

As a former self-government negotiator who has experienced the frustrations of attempting to come to a just and innovative settlement with Indigenous peoples within the limited negotiating mandates of settler-state governments in Canada, I consider my task to be to develop a framework for Indigenous self-determination, and a rationale for that framework, that has a chance of resonating with both Indigenous and non-Indigenous scholars, courts, governments and people while providing Indigenous peoples with greater scope for self-determination than the current, limited approach to Indigenous self-government allows. I recognize the strength of James Tully's critique of justifying constitutional recognition of culturally diverse communities within the language of the dominant legal

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<sup>7</sup> Sakej Henderson and Leroy Little Bear, among others, have written on the international nature of the relationship between Indigenous peoples in Canada and the Crown.

<sup>8</sup> Doug Moodie, "Thinking Outside the 20<sup>th</sup> Century Box: Revisiting 'Mitchell' – Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government" (2003) 35 *Ottawa L. Rev.* 2, at 39.

traditions of Western European societies,<sup>9</sup> as well as Taiaiake Alfred's opposition to attempting to define Indigenous systems in Western European terms, to the point of criticizing the very term "sovereignty" as a European, rather than an Indigenous, concept.<sup>10</sup> I also take seriously, however, Will Kymlicka's statement that, "for better or for worse, it is predominantly non-Aboriginal judges and politicians who have the ultimate power to protect and enforce Aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand."<sup>11</sup> Dale Turner may have defined a middle ground that can guide my construction of an approach to constituting Indigenous governments when he stated that "if Aboriginal peoples are to gain recognition of their rights in their most robust form, we must generate explanations that make sense to people who possess power to enforce them, but we must do so guided by our own intellectual traditions."<sup>12</sup> I hope to provide an explanation that will make sense to those who possess power, and those to whom they are accountable, but I will endeavour to do so in a way that provides Indigenous scholars with the space to develop conceptions of self-government that are guided by their own intellectual traditions, rather than merely parroting settler-state traditions.

### ***Is there an Aboriginal right to self-determination in Canada?***

The obvious question that arises prior to the question of how to implement Indigenous self-government is whether there actually is an Aboriginal right to self-

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<sup>9</sup> James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995), at 17.

<sup>10</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 2<sup>nd</sup> edition (Toronto: Oxford University Press, 2009), at 11.

<sup>11</sup> Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989), at 154.

<sup>12</sup> As quoted in John Borrows, "A Separate Peace: Strengthening Shared Justice" in Catherine Bell and David Kahane, eds. *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) ["A Separate Peace"], at 360.

determination within Canada's constitutional order and, if so, what grounds this right. The question of whether self-determination, or self-government, is an existing right is not an easy one. The Supreme Court of Canada has implied the existence of a right to self government, for example by acknowledging in *Delgamuukw* 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>13</sup> Supreme Court Justices have also recognized the existence of Indigenous sovereignty not only in the *Haida Nation* and *Taku River Tlingit* cases,<sup>14</sup> but in *Mitchell v. Minister of National Revenue*.<sup>15</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>16</sup> The 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 Indigenous peoples' self-government claims.<sup>17</sup>

There are, nonetheless, various bases in both international and domestic Canadian law to ground an Aboriginal right to self-determination and, in particular, a right of

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<sup>13</sup> 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>14</sup> *Haida Nation* and *Taku River Tlingit*, *supra*, notes 2, 3.

<sup>15</sup> 2001 SCC 33, [2001] 1 S.C.R. 911 [*Mitchell*].

<sup>16</sup> *Ibid*, 34.

<sup>17</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.



Indigenous peoples to make and administer their own laws. Three arguments provide a particularly strong case for the existence of an Aboriginal right to self-determination. The first, and in some ways most interesting, source of an Aboriginal right 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. Russell Barsh goes so far as to describe legal pluralism as a core principle of the Imperial legal system.<sup>18</sup> For centuries, the English common law, in its “imperial” aspect, has recognized the local laws of colonized territories as applicable law within those territories. Indeed, Tully describes the convention of the continuity of a people’s customary ways and forms of government into new forms of constitutional associations with others as the oldest convention in Western jurisprudence.<sup>19</sup> In inhabited territories acquired by conquest or cession, Britain could alter the local laws but, until it did so, the local laws, customs, and institutions continued and local law became incorporated into the imperial law as a municipal common law of the locality, through a rule of recognition.<sup>20</sup> 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>21</sup> Generally, British law was applied to Europeans and to Indigenous people in conflict with Europeans, but conflicts between Indigenous people were to be settled by customary law.<sup>22</sup> This was true in India, Africa, New Zealand, and, in some cases,

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<sup>18</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) [“Indigenous Rights”], at 92.

<sup>19</sup> Tully, *supra* note 9 at 125.

<sup>20</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 [“The ‘Golden Thread’ of Continuity”], at 715-6.

<sup>21</sup> *Ibid.* at 714.

<sup>22</sup> Peter Sutton, “Customs Not in Common: Cultural Relativism and Customary Law Recognition in Australia” (2006) 6 MacQuarrie L.J. 161, at 163.

Australia.<sup>23</sup> Where the Crown intended to constitute an “imperium” or governance over the natives of a particular region, it said so, as in the Rhode Island and Providence plantations, St. Christopher, Nevis, Barbados, and Montserrat.<sup>24</sup> The respect for local laws, or *lex loci*, was reasonable and appropriate, 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>25</sup> So powerful was the common-law presumption of continuity, in fact, that occasionally legislative measures to introduce English law without specifically abrogating local law, such as with the introduction of English law in Quebec through the Royal Proclamation, were considered insufficient to abrogate the local law.<sup>26</sup>

Within Canada, too, the governance and legal powers of Indigenous nations were not surrendered to the Crown upon the assertion of Crown sovereignty; rather, they continued to exercise their powers. Indigenous customary laws of marriage were recognized in *Connolly v. Woolrich*, for example.<sup>27</sup> In this case, Justice Monk declared that laws and usages of

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<sup>23</sup> See Shaunnagh Dorsett, “‘Since Time Immemorial’: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry” (2006) 26 *Melbourne U. L. Rev.* 32, at 50-1 for a discussion of the 1829 case of *Ballard* in Australia, P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 81, 85, 130 for a discussion of the relationship between the common law and customary law in India, and Barsh, “Indigenous Rights”, *supra* note 18, at 103, Thomas J. Mullelly, “Juvenile Delinquency and its Treatment Under the Customary and Common Laws in English Speaking Africa” (1988) 2 *Temp. Int’l & Comp. L.J.* 243, at 244, and T.W. Bennett, “Conflict of Laws – The Application of Customary Law and the Common Law in Zimbabwe” (1981) 30 *Int’l & Comp. L. Q.* 59, at 109 for a discussion of the status of customary laws in Africa. See also Walters, “The ‘Golden Thread’ of Continuity”, *supra* note 20, at 720, which makes the point that, because customary law secures its legitimacy from a prior legal order generated by the community to which it applies, it is arguable that it can be altered by those communities even after colonization, as suggested by *Hineiti Rirerire Arani v. Public Trustee of New Zealand* (1919) [1920] A.C. 198, [1840-1932] N.Z.P.C.C. 1.

<sup>24</sup> Dorsett, *ibid.* at 95.

<sup>25</sup> Barsh, “Indigenous Rights”, *supra* note 18, at 97.

<sup>26</sup> Walters, “The ‘Golden Thread’ of Continuity”, *supra* note 20, at 725-6.

<sup>27</sup> (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Quebec S.C.).

Indigenous peoples were left in full force and were not modified in the slightest when European powers began to trade with Indigenous nations.<sup>28</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>29</sup> Indian 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>30</sup> Even in the 1820s, customary Indigenous law and government continued to regulate Indigenous communities.<sup>31</sup> It was felt to be unfair to subject Indigenous peoples to laws of which they knew nothing and, equally, colonial administrators were ignorant of Indigenous laws so that they would have been incapable of administering them.<sup>32</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>33</sup>

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<sup>28</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [*Recovering Canada*], at 6.

<sup>29</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>30</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>31</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>32</sup> Walters, “The Extension of Colonial Criminal Jurisdiction”, *ibid.* at 302-3.

<sup>33</sup> Barsh, “Indigenous Rights”, *supra* note 18, at 110

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>34</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>35</sup> McLachlin 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>36</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>37</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; 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>38</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

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<sup>34</sup> [1990] 1 S.C.R. 1025, at 1052-3.

<sup>35</sup> [1997] 3 S.C.R. 1010, at para. 145.

<sup>36</sup> *Mitchell*, *supra* note 15, at para. 9.

<sup>37</sup> (1993), 82 B.C.L.R. (2d) 387 (C.A.).

<sup>38</sup> *Ibid.* at para 42.

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 Indigenous rights in Canada. 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 right not only to follow but also to develop Indigenous law, or a right to self-determination.<sup>39</sup>

International law provides further justification for Indigenous self-government in its treatment of the right of peoples to self-determination. International law has long been an important part of the interpretive lens through which Canadian judges read the written Constitution<sup>40</sup> and the common law and statute.<sup>41</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 there is an aboriginal right to self-government in Canada,<sup>42</sup> To some extent, the recognition within the law of nations of the right of Indigenous peoples to self-determination began with the 16<sup>th</sup> century theological and legal

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<sup>39</sup> Borrows and Rotman, *supra* note 29, at 32; Walters, “The ‘Golden Thread’ of Continuity”, *supra* note 20, at 732.

<sup>40</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1056-7.

<sup>41</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>42</sup> Canada’s refusal to become a part of the United Nations Declaration on the Rights of Indigenous Peoples may be considered by some to undermine this argument but, to the extent that the Declaration is a codification of customary international law on the rights of Indigenous peoples, Canada’s refusal to sign the Declaration would not prevent a domestic court from considering its content in a decision on the rights of Indigenous peoples in Canada. As well, 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, 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.

scholars Bartolomé de Las Casas and Francisco de Vitoria<sup>43</sup> and has continued to develop up to the signing of the United Nations Declaration of the Rights of Indigenous Peoples in 2007.

The Supreme Court of Canada reviewed the international law on the self-determination of peoples extensively in its judgment in the *Reference re. Secession of Quebec*.<sup>44</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>45</sup> In the case of Indigenous peoples specifically, this right has most recently been articulated in the United Nations Declaration on the Rights of Indigenous Peoples, adopted on September 13, 2007. Article 3 of the Declaration 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

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<sup>43</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>44</sup> [1998] 2 S.C.R. 217 [*Quebec Secession Reference*].

<sup>45</sup> *Ibid.* at paras. 123-4.

to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”<sup>46</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, 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>47</sup> Colonial peoples, those peoples who are subject to alien subjugation, domination and exploitation by the state outside the colonial context, and possibly those peoples within a state who are excluded from exercising their right to self-determination internally, for example through exclusion from or discrimination by the structures by which political decisions are made within the state, however, may have a right to full external self-determination, through the creation of a separate state.<sup>48</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 Indigenous peoples’ agenda for securing self-government rights within Canada, especially given the history, if not the current practice, of legally excluding Indigenous people from the centres of power within the Canadian state. Indigenous peoples unquestionably constitute “peoples” for the purpose of determining their right to self-

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<sup>46</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>47</sup> *Quebec Secession Reference*, *supra* note 44, at para 126.

<sup>48</sup> *Ibid.* at paras. 132-4.

determination; this is confirmed by the history of Crown-Indigenous relations in Canada.<sup>49</sup> They have clearly been subjugated by the state and Canadian constitutional provisions do not, by themselves, rectify this.<sup>50</sup> As well, Canadian Indigenous peoples are not self-governing because their institutions have not been recognized, or, in relation to Indian Act band councils, extensive powers over them are vested in the Minister of Indian Affairs.<sup>51</sup> Indigenous peoples can also argue that they have historically occupied definable lands, thus meeting the fourth criteria identified by the Supreme Court of Canada for having a right of self-determination under international law.<sup>52</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, for example by expressing a desire to separate from the Canadian state, creates an obligation on the part of the other governments of the federation to negotiate an alteration to the Constitution to respond to this clearly expressed desire should also create an incentive to negotiate meaningful self-government arrangements with Indigenous peoples.<sup>53</sup>

Probably the strongest source for an Aboriginal right of 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, the constitutional status of which were confirmed through the explicit constitutional recognition of the existing Aboriginal and treaty rights of the

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<sup>49</sup> Michael J. Bryant, “Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law” (1992) 56 Sask. L. Rev. 267, at 285-6.

<sup>50</sup> *Ibid.* at 289-90

<sup>51</sup> *Ibid.* at 291.

<sup>52</sup> *Ibid.* at 292.

<sup>53</sup> See *Quebec Secession Reference*, *supra* note 44, at para. 88 for the Court’s articulation of this principle.



Aboriginal peoples of Canada in section 35 of the *Constitution Act, 1982*. 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>54</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 and, as Patrick Macklem describes it, this sovereignty and Crown sovereignty was distributed, or shared, through a series of acts of mutual recognition, in the form of treaties.<sup>55</sup> Unfortunately, as J.R. Miller notes, few non-Indigenous Canadians today appreciate that the treaties are a valuable part of the foundation of the Canadian state.<sup>56</sup>

As Lamer J. noted in *Sioui*, the Crown treated Indian nations with generosity and respect out of fear that the safety and development of British colonies would otherwise be compromised.<sup>57</sup> Once this form of mutual recognition was worked 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>58</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

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<sup>54</sup> John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right” (2005) 38 U.B.C. L. Rev. 285 [“Tracking Trajectories”], at 296.

<sup>55</sup> Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45 Stanford L. Rev. 1311 [“Distributing Sovereignty”], at 1333.

<sup>56</sup> J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), at 3.

<sup>57</sup> Brian Slattery, “The Generative Structure of Aboriginal Rights” in John D. Whyte, ed. *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008), at 26.

<sup>58</sup> Tully, *supra* note 9, at 122.

nations were mutually recognized as equal and co-existing nations, each with their own forms of government, traditions and ways of living but agreeing to cooperate in various ways.<sup>59</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>60</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>61</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>62</sup> The acceptance of a shared normative meaning for the treaties from what both sides said and did will likely result in the conclusion that Indigenous sovereignty and Crown sovereignty really were linked together in a genuine sense and that, 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

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<sup>59</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 which 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 and Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [*Indigenous Difference*], at 137, 152-3 for a discussion of these matters.

<sup>60</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>61</sup> *Ibid.* at 130.

<sup>62</sup> *Ibid.* at 133.

right of self-government, or internal sovereignty, under the protective umbrella of Crown sovereignty, in a manner consistent with Binnie J.'s conception in *Mitchell*.<sup>63</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 an example of the British understanding of the meaning of Indigenous forms.<sup>64</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>65</sup> The gathering at Niagara to make this treaty has been described as the most widely representative gathering of American Indians ever assembled, with 2000 Chiefs, representing 24 nations from Nova Scotia to the Mississippi to Hudson Bay, and possibly even Cree and Lakota, in attendance.<sup>66</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>67</sup> The two-row wampum belt exchanged here was used by Indigenous nations to reflect their understanding of the Royal Proclamation and the Treaty as one of peace,

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<sup>63</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.* pages 137-8, Macklem, *Indigenous Difference*, *supra* note 59, at 136, and Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T. Fac. L. Rev. 1, at 10-1.

<sup>64</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>65</sup> John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153, at 163.

<sup>66</sup> Borrows, "Constitutional Law From a First Nation Perspective", *supra* note 64, at 22.

<sup>67</sup> *Ibid.* at 23.

friendship, respect, and non-interference in one another's internal affairs.<sup>68</sup> The second belt exchanged represented an offer of mutual support and assistance, but also respected the independence of each party.<sup>69</sup> While the British Select Committee on Aborigines recommended, in 1837, against concluding treaties with Indigenous nations already under British sovereignty, as these admitted to the sovereignty of these nations, the advice came too late for Upper Canada, where treaty relations for the cession of land had become too well established as a practice to cease.<sup>70</sup>

As Barsh and Henderson describe it, the treaty process produced a consensual distribution of constitutional power, thus securing to the treaties the status of constitutional documents.<sup>71</sup> Tully refers to this as “treaty constitutionalism”, in which Indigenous peoples participate in the creation of constitutional norms to govern their relationship with the Crown,

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<sup>68</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>69</sup> *Ibid.* 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 30, 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 Johnston, *supra* note 63, at 14.

<sup>70</sup> McHugh, *supra* note 23, at 133. 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>71</sup> Macklem, *Indigenous Difference*, *supra* note 59, at 154.

thereby taking an active role in the production of the basic legal norms governing the distribution of authority in North America.<sup>72</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>73</sup>

Clearly, McHugh cannot offer a legally and normatively robust explanation for how this change in the relationship came about.

The normative significance today of the treaty-based claim, which combines with the sovereignty claim in the case of North American Indigenous peoples, lies in respect for the principle of consent and mutual recognition by the treaty parties of their respective political authorities.<sup>74</sup> There are a number of cases that suggest that the courts may be increasingly open to recognizing that the relationship established between Indigenous nations and the Crown is an intersocietal one that is captured by the treaties and 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>75</sup> with their source in the interaction of pre-existing Indigenous legal systems with the common law system, and has recognized Indigenous nations as holding pre-existing sovereignty, in *Haida Nation*.<sup>76</sup> Even Binnie J.’s concurring judgment in *Mitchell*, while

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<sup>72</sup> Tully, *supra* note 9, at 117.

<sup>73</sup> McHugh, *supra* note 23, at 156.

<sup>74</sup> *Ibid.* at 194.

<sup>75</sup> See, for example, *Van der Peet*, *supra* note 1, at para. 42 and *Delgamuukw*, *supra*, note 35, at para. 112.

<sup>76</sup> *Haida Nation*, *supra* note 3, at para. 20.

using the concept of “sovereign incompatibility” to deny the Mohawks of Akwasasne any international legal identity, recognized that the recognition of Mohawk sovereignty is an inherent part of Canadian sovereignty.<sup>77</sup> As well, the British Columbia Supreme Court, in *Campbell*, decided that Indigenous self-government was 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>78</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 grounds a longstanding recognition of the Aboriginal right to self-government; these principles have never been entirely abrogated and they therefore continue to underpin Canada’s legal structure.<sup>79</sup>

Interestingly, the American jurisprudence on an Indigenous right to self-government, which has its source in the 19<sup>th</sup> century, brings together elements of all three of these arguments to conclude that Indigenous nations in the United States are “domestic dependent nations”.<sup>80</sup> In *Worcester v. State of Georgia*,<sup>81</sup> in particular, United States Chief Justice John Marshall elaborated the law on the sovereignty of Indigenous nations in the United States.

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<sup>77</sup> *Mitchell*, *supra* note 15, at paras. 154, 129.

<sup>78</sup> *Campbell*, *supra* note 17.

<sup>79</sup> Patrick Macklem, “Normative Dimensions of an Aboriginal Right to Self-Government” (1995) 21 *Queen’s L.J.* 173, at 197.

<sup>80</sup> Chief Justice Marshall first used the term “domestic dependent nations” in *Cherokee Nation v. State of Georgia* (1831), 30 U.S. 1.

<sup>81</sup> (1832), 31 U.S. 515.

He concluded that the external sovereignty of Indigenous nations had been limited by virtue of the rule of European law of nations by which the first European discoverer had exclusive rights over the land so discovered against other European nations, which would include and exclusive right to treat with the Indigenous peoples of the territory, but that their internal sovereignty and status as nations was not removed by European discovery.”<sup>82</sup>

While American political and legislative practice has not always strictly adhered to a conception of American Indigenous nations as separate sovereign nations within the United States, the fact that the United States Supreme Court has concluded that the relationship between the settler state and Indigenous nations is between sovereign nations based on the same history of the relationship between the British Crown and Indigenous nations as applies to that relationship in what is now Canada suggests that Canadian courts could adopt the logic of the United States jurisprudence to conclude that an Aboriginal right to self-government must exist in Canada.<sup>83</sup> Indeed, as Macklem has suggested, it is imaginable that Canadian law could not only adopt the logic of the American jurisprudence but move beyond it to recognize Indigenous governments as a third order of government on par with the federal and provincial governments.<sup>84</sup> 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>85</sup>

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<sup>82</sup> Peter W. Hutchins with Carol Hilling and David Schulze, “The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine” (1995) 29 U.B.C. L. Rev. 251, at 254.

<sup>83</sup> Shaun Nakatsuru, “A Constitutional Right of Indian Self-Government” (1985) 43 U. T. Fac. L. Rev. 72, at 89.

<sup>84</sup> Macklem, “Distributing Sovereignty”, *supra* note 55, at 1323.

<sup>85</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 182.

*Canada's failure to implement the inherent right effectively to date: a critical review of existing self-government agreements*

The greatest disappointment with the limited progress that has been made in Canada to date in recognizing and implementing the right of Indigenous peoples to self-determination is how far short these efforts have fallen of the promise of the early treaty process. Since the James Bay and Northern Quebec Agreement was signed in 1975, there have been fewer than 20 self-government agreements concluded in Canada with First Nations, Métis and Inuit groups. As well, those that have been concluded generally fall far short of putting self-governing Indigenous peoples on an equal footing with the two orders of government established by the *Constitution Act, 1867* as a genuinely sovereign third order of government. While the Government of Canada claims that its self-government policy is based on the recognition of the inherent right, no recognition of the inherency of the right is proposed in the federal mandate and it is necessary that Indigenous authority be subjected to a narrow set of restrictions determined in advance by the federal government for there to be an agreement.<sup>86</sup> As Macklem has noted, the Crown is under a legal obligation in negotiations to explore all reasonable options, not just its preferred one, and to attempt to reach an agreement that minimizes the impairment of Aboriginal rights;<sup>87</sup> unfortunately, this has not been the approach generally used to date.

The agreement that is likely most prominent in the consciousness of Canadians is the Nisga'a Agreement. Admittedly, it is a significant advance in some ways, such as in provisions that provide the Nisga'a government with the authority to police themselves and

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<sup>86</sup> Richard Spaulding, "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1997) 47 U.T.L.J. 35, at 57.

<sup>87</sup> Macklem, *Indigenous Difference*, *supra* note 59, at 275.



establish their own court system.<sup>88</sup> It does, however, fall short of creating a third order of government on an equal footing with Canada's other constitutionally protected governments. To start with, the agreement only affects one First Nation of approximately 5,500 people, about 2,500 of whom live in Nisga'a villages along the Nass River valley;<sup>89</sup> this is a population far smaller than any Canadian province, or even territory, and one must question the capacity of such a small group to manage the full range of responsibilities of an equal third order of government. Secondly, the scope of the Nisga'a law-making authority is limited because the Nisga'a jurisdiction to make laws is always concurrent with federal and provincial laws, so those other laws are not replaced by Nisga'a law but continue to apply unless there is an "inconsistency or conflict".<sup>90</sup> As well, the Nisga'a rules for resource management must meet or exceed provincial and/or federal standards.<sup>91</sup> Even though, in some areas, Nisga'a law will prevail over conflicting federal and provincial laws, which is a significant innovation compared to most other modern treaties, this concurrency model falls well short of true self-determination, in which the only laws that would regulate a community in the spheres of jurisdiction of the community's government are its own. This, however, would require the Nisga'a to have exclusive jurisdiction over some subject-matters on Nisga'a lands and, possibly, over Nisga'a citizens, to allow them to displace non-Nisga'a laws with their own, culturally appropriate laws without having the legality of those laws judged by reference to the non-Nisga'a law. Critics such as the Assembly of First Nations

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<sup>88</sup> Lorie M. Graham, "Resolving Indigenous Claims to Self-Determination" (2004) 10 ILSA J. Int'l & Comp. L. 385, at 413.

<sup>89</sup> Canada, Indian and Northern Affairs Canada, *Fact Sheet: The Nisga'a Treaty*, online: <http://www.ainc-inac.gc.ca/ai/mr/is/nit-eng.asp>, accessed September 7, 2009.

<sup>90</sup> *Nisga'a Final Agreement*, online: <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.pdf>, accessed September 7, 2009, Chp. 2, article 13.

<sup>91</sup> Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003), at 139.

see the Nisga'a agreement as a means of increasing provincial government powers over Indigenous nations, as granting them little more than "municipal-like powers", and as co-opting Indigenous nations by making them give up their traditional territories and accept the extension of Canadian sovereignty over them.<sup>92</sup>

There have also been critiques of the Inuvialuit and Gwich'in Agreement-in-Principle.<sup>93</sup> Irlbacher-Fox has pointed out that the justice provisions of this agreement would result in compromising the exercise of the inherent right of self-government by the two major factors of forced reliance on the discretion of other governments to render the self-government authorities effective and the fragmentation of the institutions of government.<sup>94</sup> The result is that the Inuvialuit authority over the administration of justice under this agreement would merely confirm powers already available to Indigenous organizations under current federal policies and would reinforce federal control over the exercise of those powers.<sup>95</sup> The absence of meaningful control of authority by the Inuvialuit, exercised through cohesive institutions, creates an environment in which self-government institutions cannot be expected to fully exercise the authorities for which they have responsibility.<sup>96</sup>

The self-government agreements that come closest to creating a true, equal third order of government for Indigenous peoples in Canada are both in the North.<sup>97</sup> The well-

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<sup>92</sup> *Ibid.* at 142.

<sup>93</sup> These negotiations have not yet resulted in a Final Agreement that is legally binding.

<sup>94</sup> Stephanie Irlbacher-Fox, "Justice Authorities in Self-Government Agreements: The Importance of Conditions and Mechanisms of Implementation" in John D. Whyte, ed. *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008), at 130.

<sup>95</sup> *Ibid.* at 131.

<sup>96</sup> *Ibid.* at 133.

<sup>97</sup> The Labrador Inuit Final Agreement, like the two discussed here, also establishes a regional government and contemplates a multi-level governance structure, including municipalities and Inuit Community

known example is the Nunavut Final Agreement, which created a new territory in Canada and established a public, territorial government, with the same legislative authority as the other territories, elected by a population that is majority Inuit. The agreements of more direct relevance for First Nations and Métis living in jurisdictions in which they do not form a majority, however, are the Yukon First Nations Umbrella Final Agreement and the Final Agreements and Self-Government Agreements with the individual First Nations under this Umbrella. There are Final Agreements with eleven of the 14 First Nations in the Yukon.<sup>98</sup> The Umbrella Final Agreement, signed in 1993, represented what McHugh calls the first “new-model” settlement of the 1990’s in Canada.<sup>99</sup>

Likely the most important element of this set of agreements are that they provide that Yukon laws shall be inoperative to the extent that they provide for any matter for which provision is made in a law of the Yukon First Nations, thereby establishing a “displacement” model of First Nations’ jurisdiction.<sup>100</sup> This eliminates the requirement of reference to the dominant legal regime when Yukon First Nations pass laws. The agreements also create a number of co-management bodies to manage issues in which the Yukon First Nations and the Government of the Yukon have overlapping or concurrent authority and allow for the

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Government but its legislative jurisdiction is concurrent with federal and provincial governments, not exclusive. As will be discussed later, this distinction is important both in theory and in practice.

<sup>98</sup> These First Nations are the Vuntut Gwitchin First Nation, the Champagne and Aishihik First Nations, the First Nation of Nacho Nyak Dun, the Teslin Tlingit Council, the Selkirk First Nation, the Little Salmon/Carmacks First Nation, the Tr’ondëk Hwëch’in, the Ta’an Kwach’an Council, the Kluane First Nation, the Kwanlin Dun First Nation, and the Carcross/Tagish First Nation; see Indian and Northern Affairs Canada, *Building the Future: Yukon First Nations Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 2008), online: <http://www.ainc-inac.gc.ca/ai/scr/yt/pubs/btf-eng.pdf>, accessed September 7, 2009.

<sup>99</sup> McHugh, *supra* note 23, at 481.

<sup>100</sup> See, for example, the *Champagne and Aishihik First Nations Self-Government Agreement* (Ottawa: Minister of Supply and Services Canada, 1993), online: <http://www.ainc-inac.gc.ca/al/lcdc/ccl/fagr/ykn/casga/casga-eng.pdf>, accessed September 7, 2009, paragraph 13.5.3.

establishment of a multi-level governance structure between the individual First Nations and the Council of Yukon First Nations, to take account of the economies of scale that come with larger, regional governments.<sup>101</sup> Lastly, these agreements contemplate the establishment of First Nations courts and clearly state that none of the administration of justice provisions in the agreements are intended to preclude the establishment or continuation of any consensual or existing customary practices for the administration of justice of the First Nations.<sup>102</sup> While the challenges of implementation were not well thought out by the federal government, in particular, during the negotiation of the agreements, causing the implementation of the agreements to be a very slow and frustrating process, the self-government arrangements in the Yukon may nonetheless provide a real-world example of a starting point for imagining a new approach to negotiating Indigenous self-government nationally, on the basis of a desire to recognize and reconcile Indigenous sovereignty with Crown sovereignty and establish Indigenous governments as a genuine and equal third order of government in the federation.

***Reconciliation and the task of establishing an Indigenous third order of government***

While the results outlined above demonstrate that the current approach to self-government is inadequate to the task of achieving reconciliation between Indigenous nations and the Crown, it is not necessary that this be the case. An initial hurdle, though, is the conceptual problem with characterizing Indigenous self-government as an existing Aboriginal right within section 35 of the *Constitution Act, 1982*. The Supreme Court of Canada has defined Aboriginal rights as protecting those practices that are internal to the

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<sup>101</sup> See, for example, the *Champagne and Aishihik First Nations Final Agreement* (Ottawa: Minister of Supply and Services, 1993), online: [http://www.collectionscanada.gc.ca/webarchives/20071125202218/http://www.ainc-inac.gc.ca/pr/agr/ykn/chama1\\_e.pdf](http://www.collectionscanada.gc.ca/webarchives/20071125202218/http://www.ainc-inac.gc.ca/pr/agr/ykn/chama1_e.pdf), accessed September 7, 2009, chapters 8 and 10-14 and the *Champagne and Aishihik First Nations Self-Government Agreement*, *ibid.* section 12.

<sup>102</sup> *Champagne and Aishihik First Nations Self-Government Agreement*, *ibid.* sub-section 13.6.

community and integral to the culture 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 peoples.<sup>103</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>104</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>105</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>106</sup> It seems unlikely that this change in the characterization of the meaning of “reconciliation” was 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

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<sup>103</sup> See, for example, *Van der Peet*, *supra* note 1, at para. 46; *R. v. Powley*, 203 SCC 43 [2003] 2 S.C.R. 207, at para. 18.

<sup>104</sup> See *Pamejewan*, *supra* note 17, at paras. 24-5.

<sup>105</sup> See, for example, *Van der Peet*, *supra* note 1, at para. 31.

<sup>106</sup> *Haida Nation*, *supra* note 3, at para. 20.

of the Indigenous peoples (and then only to the extent to which it was ceded) or lost through conquest.

The continuing sovereignty of Indigenous peoples seems a better source for Indigenous self-government, as sovereignty of necessity includes the ability to make decisions about how to govern oneself 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 exists in the current state of Canadian law, in which only those practices that were integral to the distinctive culture of Indigenous nations and that existed prior to the 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 of the fact that Indigenous and European nations were formal equals at the time of contact and that vesting greater authority to make and interpret laws in Indigenous nations will assist in ameliorating contemporary substantive inequalities confronting Indigenous peoples.<sup>107</sup> The purpose, as Kerry Wilkins describes it, is to dedicate "sufficient constitutional 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>108</sup> As Wilkins notes, for

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<sup>107</sup> Macklem, *Indigenous Difference*, *supra* note 59, at 5.

<sup>108</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 ["Take Your Time and Do It Right", at 251.

Indigenous communities, the acknowledgement that they have enforceable rights to govern themselves may be the minimum price the mainstream legal system must pay to earn a modicum of respect from them.<sup>109</sup>

Inevitably, there must be some alteration to the character of both Indigenous and Crown sovereignty 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 imperative to show how it will be possible to integrate self-government rights harmoniously into the broader constitutional order by demonstrating that the constitutional order, properly understood, already provides sufficient means to ensure that Indigenous self-government rights are part of the constitutional order and their exercise would not do violence to the principles of the Constitution.<sup>110</sup> 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

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<sup>109</sup> *Ibid.* at 250.

<sup>110</sup> Mark Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's L.J.* 470, at 519-20.

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>111</sup>

The Court also stated that “The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”<sup>112</sup> 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.”<sup>113</sup>

The Supreme Court of Canada has contributed to our understanding of how to approach the task of reconciliation of sovereignties within what Tully refers to as an “ancient” constitutional order by articulating four fundamental principles of the unwritten constitution in the *Quebec Secession Reference*. The Court, in describing these principles, 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>114</sup> If one understands these four principles as fundamental to the Canadian

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<sup>111</sup> *Quebec Secession Reference*, *supra* note 42, at para. 32.

<sup>112</sup> *Ibid.* at para. 54.

<sup>113</sup> *Campbell*, *supra* note 17, at para. 81.

<sup>114</sup> *Quebec Secession Reference*, *supra* note 42, at para. 49.



constitutional order, applicable to the task of integrating the sub-state national minorities that are an integral part of Canada into a shared constitutional order in a just manner, it becomes possible to bring the entirety of our experience with federalism, democracy, constitutionalism and the rule of law, and the protection of minorities to bear on the question of advancing Indigenous self-government. As well, if we understand the reconciliation of the pre-existing sovereignty of Indigenous peoples and the *de facto* sovereignty of the Crown to be, in and of itself, a fundamental principle of our constitutional order, the fundamental principles articulated by the Supreme Court in the *Quebec Secession Reference* must, themselves, be interpreted in the context of the principle of reconciliation for the entire Constitution to be coherently understood. This is so because, as the Supreme Court said in that 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>115</sup>

With this conceptual framework in mind, it becomes possible to understand Indigenous self-government as a problem of the just distribution of powers among sovereign entities within a common constitutional order. This, in turn, allows for the articulation and establishment of an approach to Indigenous self-government that provides Indigenous nations significant space to create a 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 traditions are distinct from those of the Canadian majority, including institutions for the interpretation of Indigenous law and the resolution of disputes, without diverging from a shared set of constitutional norms. This, then, would allow for the reconciliation of the potentially competing sovereignties of Indigenous peoples and the

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<sup>115</sup> *Ibid.* at para. 50.

Crown. The details of how these fundamental principles of the Constitution could be understood and applied in the context of reconciling sovereignties and establishing a third, Indigenous, order of government will be explored in the following chapters.

## Chapter 2 – Federalism, Legal Pluralism and the Development of a Body of Indigenous Law

### *Federalism as a vehicle for the self-determination of peoples*

The first of the four fundamental constitutional principles that the Supreme Court discussed in the *Quebec Secession Reference* was the principle of federalism. As the Court described this principle,

The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.<sup>116</sup>

In many ways, this principle is the most important one for understanding how to accommodate Indigenous self-government into Canada's structure of governance. It is federalism, at least in its Canadian form, that provides the space for sub-state national minorities to exercise the right to internal self-determination within the multinational state in a manner consistent with international law norms and that allows for the reconciliation of otherwise competing sovereignties within a shared political and geographic space. The federal principle, whose purpose is to manage conflicting claims to authority, is therefore more appropriate ground on which to structure Indigenous/non-Indigenous relationships than is section 35, as it dissociates sovereignty from the particular, limited analytical process applied to Aboriginal rights jurisprudence.

The value of the sovereignty secured through federalism is that it creates legal space in which a community can negotiate, construct and protect a collective identity and express a

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<sup>116</sup> *Ibid.* at para. 58.

collective difference through democratic means. Sovereignty in this model is not absolute but a self-determining Indigenous nation would have powers related to its needs as a distinct community, which could include control over economic, social, cultural, and linguistic matters, as well as internal political autonomy, short of secession.<sup>117</sup> The content of self-government in a particular situation, however, must be left primarily to Indigenous peoples themselves to define, as the power being exercised is theirs. A pluralist society is marked by its capacity to leave 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>118</sup> A key to justice from such a pluralist point of view is that Indigenous communities possess the right to develop and give expression to any element of communal identity, whether culturally distinct or not.<sup>119</sup> Indigenous peoples must be equal partners in a political discourse with Canadian governments that is marked by reciprocity, co-existence, and consent if the evolving needs and circumstances of Indigenous communities are to be met.<sup>120</sup> The extent to which Indigenous peoples claim allegiance to their own forms of government as well as governments established by settler society ought to be reflected in a federal structure that recognizes that Indigenous people possess the authority to make laws in relation to matters that affect their daily lives.<sup>121</sup>

National minorities have typically responded to majority nation-building projects by fighting to maintain or rebuild their own societal culture and by engaging in their own

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<sup>117</sup> Bryant, *supra* note 49, at 293-4.

<sup>118</sup> Schouls, *supra* note 91, at 35.

<sup>119</sup> *Ibid.* at 120.

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

<sup>121</sup> Macklem, *Indigenous Difference*, *supra* note 59, at 180.

competing nation-building, often using the same tools as the majority, specifically control over language and curriculum in schools, language of government employment, requirements for immigration and naturalization, and the drawing of boundaries within the state.<sup>122</sup> This is certainly true of Indigenous peoples and it suggests a number of the jurisdictions that would need to be part of any self-government negotiations. Looking in part at the jurisdictions provided to provinces by the *Constitution Act, 1867* in light of Indigenous aspirations to be distinct, self-governing and equal partners in the federation, relevant jurisdictions would include jurisdictions in which culture has an obvious effect on the quality of services and those that affect the continuation of the minority culture, such as education, child welfare, health, and the administration of justice (including law enforcement and incarceration), but also jurisdictions that provide the necessary resources for governments to provide desired services, such as jurisdiction over at least direct taxation of individuals resident on Indigenous territory and businesses operating on that territory, the management of Indigenous land and its resources (including the collection of resource royalties), the borrowing of monies for public purposes, and the employment of government officials, and matters of a local or private nature, including local works and undertakings and the licensing of businesses operating on Indigenous territory.

Federalism is often used to accommodate these demands. While many federal systems arose for reasons quite unrelated to cultural diversity, federalism is one common strategy for accommodating national minorities. The incorporation of a sovereign community into a larger state is only legitimate if it is a voluntary act of federation.<sup>123</sup>

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<sup>122</sup> Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001) [*Politics in the Vernacular*], at 28.

<sup>123</sup> *Ibid.* at 149.

Forming a federation is thus one way of exercising a people's right to self-determination and the historical terms of federation reflect the group's judgement about how best to exercise that right.<sup>124</sup> It is not uncommon for two or more peoples to decide to form a federation and, if the two communities are of unequal size, it is not uncommon for the smaller community to demand various group-differentiated rights as part of the terms of the federation.<sup>125</sup>

Such an idea is certainly a familiar part of Canadian federalism. While American federalism is a conception of federalism that assumes the essential equality of the states and a relatively homogeneous country such that the rationale for federalism is a strictly democratic one, Canadian federalism is different, not only because it was more centralized, but also because it responded to the reality of two nations and therefore had to sustain distinctive ways of life as well as an allegiance that supported a common government.<sup>126</sup> Canada's founders rejected forced cultural coercion, at least as it related to French and English linguistic, cultural and juridical differences.<sup>127</sup> Those responsible for the political development of British North America that led to Confederation found that any proposition which involved the absorption of the distinctiveness of Lower Canada would not be received

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<sup>124</sup> *Ibid.*

<sup>125</sup> Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) [*Multicultural Citizenship*], at 117.

<sup>126</sup> Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal & Kingston: McGill-Queen's University Press, 1996), at 131. The *Federalist Papers*, written during the period of the debate on the United States Constitution, clearly articulate this democratic, or republican, justification for federalism as the best way to approximate within a large country the classical vision of a small but truly self-governing polity. See, for example, James Madison, "Federalist No. 14: Objections to the Proposed Constitution from Extent of Territory Answered" *New York Packet*, Nov. 30, 1787, online: [http://avalon.law.yale.edu/18th\\_century/fed14.asp](http://avalon.law.yale.edu/18th_century/fed14.asp), accessed September 7, 2009.

<sup>127</sup> Borrows, "Indigenous Legal Traditions in Canada", *supra* note 59, at 169.

with favour by the people of that region.<sup>128</sup> Instead, group-differentiated rights were accorded to French Canadians in Confederation, just as group-differentiated rights were accorded to Indigenous peoples under the treaties; these reflect the terms under which these communities joined Canada and because these agreements define the terms of federation, the authority of the Canadian state flows from and is simultaneously limited by these agreements.<sup>129</sup> Thus, Canada is a multinational federation in which federalism operates as an instrument to recognize the wishes of national minorities to control their collective destinies.

In many ways, the questions posed by Indigenous peoples parallel those posed by Quebec during the Quiet Revolution. Both struggled to reconcile the recognition of distinct societies with participation in Canadian society, as both believed that some decisions should be made in fora in which their culture was in the majority, but both also acknowledged that there were some issues that had to be determined at the broader, Canadian level.<sup>130</sup> The commitment to autonomy among Indigenous peoples rivals, and probably surpasses, that of francophone Quebecers but; like most Quebecers, they want to preserve a sphere within the Canadian state in which their concerns and their ways of ordering their communities can continue to shape public life.<sup>131</sup> As Webber states, however,

Few aboriginal peoples crave complete isolation. But they do not want their way of dealing with the world obliterated without having the opportunity to reach for some synthesis of the traditional and non-traditional. Self-government is designed to create the space for that synthesis.<sup>132</sup>

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<sup>128</sup> Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner, *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003), at 279.

<sup>129</sup> Kymlicka, *Multicultural Citizenship*, *supra* note 125, at 117.

<sup>130</sup> Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston & Montreal: McGill-Queen's University Press, 1994) [*Reimagining Canada*], at 73-4.

<sup>131</sup> *Ibid.* at 219-20.

<sup>132</sup> *Ibid.* at 221-2.

As a consequence, federalism is frequently suggested as a solution to Indigenous issues because a federal division of powers can secure to Indigenous communities the degree of autonomy necessary for self-government, facilitate the development of Indigenous identity, and express the status of Indigenous peoples as founding peoples through the federal compact, while presupposing a common allegiance and some common identity between Indigenous and non-Indigenous Canadians.<sup>133</sup>

Federalism is also familiar to Indigenous peoples as a means to divide sovereignty. Horatio Hale, in his book *The Iroquois Book of Rites*, notes that few, if any, Indigenous nations had not at some time or other been part of a confederacy, such that it could almost be described as “their normal condition.”<sup>134</sup> The Haudenosaunee Confederacy was different, however, as it was meant to be a permanent form of government and, while each nation would retain its own council and control of local matters, general authority was to be vested in a “federal senate”, elected by members of each nation, who would hold office during good behaviour.<sup>135</sup>

Federalism is not, however, simply separation. There is a tradition in Canadian federalism that explicitly connects federalism and fraternity.<sup>136</sup> As La Selva notes, Henri Bourassa described the French and the English as separated by language and religion but united in a sense of brotherhood.<sup>137</sup> This is akin to the Indigenous understanding of the

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<sup>133</sup> LaSelva, *supra* note 126, at 142.

<sup>134</sup> Horatio Hale, *The Iroquois Book of Rites* (Philadelphia: D. G. Brinton, 1883), at 21.

<sup>135</sup> *Ibid.*

<sup>136</sup> LaSelva, *supra* note 126, at 26.

<sup>137</sup> *Ibid.*



relationship established between Indigenous peoples and the Crown in the period of treaty-making. Thus, Indigenous peoples' demand for self-government can be seen as a demand that the ideal of fraternity apply to them as well.<sup>138</sup> The paradox in Indigenous demands for self-government is that theirs is likely the strongest claim to independence of any sub-national community in Canada yet the realization of Indigenous self-determination presupposes the continuing moral and political interdependence of Indigenous and non-Indigenous Canadians.<sup>139</sup> If this paradox is accepted, though, Indigenous self-government becomes a part of the way in which the multiple dimensions of Indigenous existence contribute to a dialogue of democracy in Canada.<sup>140</sup>

A relational understanding of Indigenous self-determination compels us to recognize not only a sphere of autonomous self-government authority but also the need for sites of governance capable of managing the relationships among self-governing peoples living in situations of complex interdependence.<sup>141</sup> For his part, Jean Leclair advocates something he calls "federal constitutionalism", which would provide for the recognition of Indigenous peoples as constituent peoples within a truly federal constitutional framework that would be capable of being sanctioned by a domestic court of law.<sup>142</sup> The aim of such forms of constitutional interpretation or constitutional negotiations is not to reach agreement on a set of universal principles and institutions, but to establish a diverse federation which recognizes and accommodates cultural, political, legal and institutional differences through appropriate

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<sup>138</sup> *Ibid.* at 29.

<sup>139</sup> *Ibid.* at 11.

<sup>140</sup> *Ibid.*

<sup>141</sup> Michael A. Murphy, "Representing Indigenous Self-Determination" (2008) 58 U.T.L.J. 185, at 199.

<sup>142</sup> Jean Leclair, "Federalism Constitutionalism and Aboriginal Difference" (2006) 31 Queen's L.J. 521, at 529.

forms and degrees of self-rule for those whose claims survive a fair hearing while providing shared institutions to govern where the different communities have shared interests.<sup>143</sup> The Canadian approach to federalism, as a matter of both politics and law, already supplies the framework and principled justification for Indigenous peoples to exercise their right to self-determination as an internally sovereign third order of government without interference in matters of particular interest to the Indigenous nations from those governments that are not creatures of those nations.

***Limits of federalism as a vehicle for self-determination: aggregation and subsidiarity***

Federalism does, however, impose some practical limits on the exercise of the Aboriginal right to self-determination. The most important consideration is that individual Indigenous communities will lack the human, natural and capital resource capacity, due to their small geographic and population sizes, to exercise the full scope of jurisdiction of a third order of government, deliver the full range of services to their citizens that others have come to expect from their provincial and territorial governments, and participate effectively in the intergovernmental fora that have become increasingly important to the effective management of the federation in the post-World War II era. There are over 600 individual Indian bands recognized under the *Indian Act* along with numerous (though not yet enumerated) Métis communities and another large number of Inuit communities (though Inuit have for the most part already established regional government models). It is impractical to imagine that all of these separate communities have the capacity to exercise a full range of law-making authority, effectively deliver a wide range of services to their populations, and participate in intergovernmental relations in Canada as separate, independent governments.

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<sup>143</sup> Tully, *supra* note 9, at 55, 131.

As Cairns has commented, even the 60 to 80 Indigenous nations proposed by the Royal Commission on Aboriginal Peoples would numerically dwarf the federal, provincial and territorial governments, while the average population of these nations would be something in the range of 5,000 people.<sup>144</sup> Even this, then, would constitute too great a number of governments governing populations that are generally too small to make participation in Canadian federalism as full third order governments manageable and reasonably efficient. Indeed, even the Government of Nunavut, which exercises the jurisdiction and delivers the services of a territorial government (equivalent to the range of jurisdictions of a province) to a population of approximately 25,000 spread over a land mass of over 2 million km<sup>2</sup> but with a limited revenue base and a continuing gap between its human resource needs and capacity, seems destined to be a territory dependent on fiscal transfers from the federal government, at least for the foreseeable future.<sup>145</sup>

There is also the concern that small populations are inherently more vulnerable to the corruption and manipulation that is always a risk in any political system. Wilkins identifies the vulnerability of individuals to the power of governments because of the small size of communities, the way in which the stripping of their democratic traditions and transfer dependency that are hallmarks of colonialism insulate governments from accountability to their governed population, and the risk that protections for individual rights are vulnerable in small, homogeneous communities as some of the public's concerns with Indigenous self-

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<sup>144</sup> Alan C. Cairns, "Report of the Royal Commission on Aboriginal Peoples: Aboriginal Nationalism, Canadian Federalism, and Canadian Democracy" (2007) 70 Sask. L. Rev. 99, at 113.

<sup>145</sup> Canada, Indian and Northern Affairs Canada, *Nunavut, Canada's Third Territory "North of 60"* (Ottawa: Minister of Public Works and Government Services, 2000), online: <http://www.ainc-inac.gc.ca/ach/lr/ks/cr/pubs/nu-eng.pdf>, accessed September 7, 2009.

government.<sup>146</sup> He does note that these concerns, largely concerns of the non-Indigenous population, are likely to seem ironic to Indigenous peoples who have survived much worse at the hands of settler state governments, but these concerns nonetheless represent real barriers to securing support for Indigenous self-government both from within the dominant, non-Indigenous population and their governments and, in some cases, from within Indigenous communities.<sup>147</sup>

On the other hand, smaller governments, closer to their citizens, can often be more responsive to the needs of those citizens than larger, more remote governments; this is one of the underlying rationales for a federal form of government. European political theory and, later, the development of governance within the European Union has recognized these realities and has, as a consequence, adopted the principle of “subsidiarity” as a guide for the allocation of the authorities and responsibilities of government within a multi-level governance regime. The principle of subsidiarity dictates that functions of government should be exercised by the smallest, most “local” level of government with the capacity to exercise those functions effectively.<sup>148</sup> This principle provides the basis for ordering the exercise of governmental authority within not only a multi-state union, such as the European Union, but also within a multi-national state. Such an approach to the allocation of

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<sup>146</sup> Wilkins, “Take Your Time and Do It Right”, *supra* note 108, at 254-8.

<sup>147</sup> *Ibid.* at 261-2.

<sup>148</sup> For example, *The Treaty on European Union*, Article G, section 5, amended Article 3 of the *Treaty Establishing the European Economic Community* by adding a new Article 3b, which stated, “In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objective of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.” *Treaty on European Union*, available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.htm#0001000001>, accessed September 5, 2009.

governmental authority has also implicitly played a role in the interpretation of the division of powers between the federal and provincial governments in Canada.<sup>149</sup>

For Indigenous nations, the principle of subsidiarity simultaneously justifies the establishment of Indigenous governments, as they are closer to and more representative of the needs and aspirations of a distinct cultural and political community, and demands the constitution of Indigenous governments, or confederacies, at the level of nations, regions, treaty areas, or language groups, so that Indigenous peoples are represented by political units large enough to exercise the authority of an equal third order of government and that minimize the risk of the manipulation of the voting population by those seeking political office. As well, the practicalities of participating in the mechanisms of intergovernmental relations should encourage Indigenous peoples to break from the current model of small, politically and administratively weak communities (such as Indian bands under the *Indian Act*, a creature of non-Indigenous bureaucrats who sought to disempower and control Indigenous peoples) and establish larger, stronger units of government.

Of course, the need to reconstitute Indigenous nations, or construct larger groupings anew, as the units of a third order of government model of Indigenous self-government does not require that these nations be the only unit of Indigenous governance. There is nothing to prevent Indigenous nations from establishing multi-level governance arrangements within the larger units, including institutions for local government. As Macklem has noted, intersecting and overlapping collective affiliations can and do exist among individuals and communities, so the fact of one collective affiliation need not deny the possibility of another; this principle certainly provides support for multi-level governance within Indigenous nations (as well as

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<sup>149</sup> See, for example, *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

for integrating Indigenous nations into the federal system itself).<sup>150</sup> When Europeans arrived in North America, Indigenous tribes were in a process of integration and there were several great tribal confederacies, such as the Great Council Fire, the Blackfoot Confederacy, and the Great Sioux Nation, that continued into the 19<sup>th</sup> century.<sup>151</sup> The Mik'miq also had a traditional “Grand Council” structure to govern the seven territorial districts that made up the Mik'maq alliance.<sup>152</sup> Thus, the constitution of larger Indigenous governments and the establishment of multi-level governance arrangements within a new model of Indigenous self-government could, in some cases, constitute a return to Indigenous governance traditions.

### ***Federalism and legal pluralism***

Along with the ability to secure political self-determination for sub-state minority nations, federalism also provides space for legal pluralism within a single state. As Tully defines it, legal pluralism consists of the variety of ways that contemporary constitutions recognize and accommodate cultural diversity within legal systems.<sup>153</sup> Some have expressed concern that a preference for legal pluralism can undermine equality before the law and social cohesion.<sup>154</sup> Others, however, have noted that the fundamental problem of law is to determine how, despite our diversity, we can come to provisional conclusions that allow us to live together; this may involve the protection of spheres of autonomy for distinct legal

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<sup>150</sup> Macklem, *Indigenous Difference*, *supra* note 59, at 124.

<sup>151</sup> Russel Lawrence Barsh, “The Challenge of Indigenous Self-Determination” (1993) 26 U. Mich. J. L. Reform 277, at 282.

<sup>152</sup> Mary-Ellen Turpel, “Indigenous Peoples’ Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition” (1992) 25 Cornell Int’l L.J. 579, at 583.

<sup>153</sup> Tully, *supra* note 9, at 101.

<sup>154</sup> Sutton, *supra* note 22, at 166, 168.

orders.<sup>155</sup> Again, the Canadian experience of accommodating the former New France, with a legal system based on French civil law rather than English common law, provides valuable experience for imagining how federalism could integrate a distinct body of Indigenous law, coming from a different legal tradition, into a common constitutional order. These two quite distinct approaches to legalism exist quite comfortably within the Canadian legal system, a situation that holds out hope for the ability of the Canadian constitutional order to make space for Indigenous legal traditions through the operation of the federal principle.

Borrows considers the acceptance of legal pluralism to be an imperative, commenting that, “The continued existence of indigenous law requires a pluralistic approach to understanding the relationships among Canada’s *many* legal traditions.”<sup>156</sup> Indeed, the very notion of reconciliation presupposes a plurality of normative systems.<sup>157</sup> Borrows sums up his perspective on the implications of legal pluralism in Canada for Indigenous law, and of Indigenous law for legal pluralism in Canada, by observing that,

The continued existence of indigenous legal traditions could be of great benefit to indigenous peoples and to the wider public if they were given space to grow and develop. Canada has distinguished itself as a country that effectively operates with a bi-juridical tradition. There is much that can be learned and analogized from this experience in creating greater recognition for indigenous legal traditions in the country.<sup>158</sup>

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<sup>155</sup> Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 Osgoode Hall L.J. 167, at 170.

<sup>156</sup> Borrows, “Creating an Indigenous Legal Community”, *supra* note 65, at 160.

<sup>157</sup> Dwight G. Newman, “Reconciliation: Legal Conception(s) and Faces of Justice” in John D. Whyte, ed. *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008), at 81.

<sup>158</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 197.

*Indigenous legal traditions as a source for modern Indigenous law*

If federalism and legal pluralism are to provide space for the renewal of Indigenous legal systems within the Canadian constitutional order, it is worth investigating what are the Indigenous legal traditions that would ground the legal regime of self-determining Indigenous governments and whether these legal traditions have survived the colonial imposition of Canadian law such that they could be recovered and reconstituted as the basis for a body of modern Indigenous law. Indigenous jurisprudences existed before the Imperial Crown asserted and enforced its sovereignty and Indigenous nations developed their own laws without any knowledge of European jurisprudence.<sup>159</sup> John Borrows argues strongly that Indigenous law is a body of law that remains capable of being taught and learned by present and future generations of students of law, and Borrows has contributed to the documentation of Indigenous legal traditions. While different Indigenous nations naturally enough had different laws, numerous Indigenous legal traditions have survived the colonialism of Canadian Indigenous policies and have been documented by both Indigenous and non-Indigenous scholars. Borrows has argued that properly trained lawyers from all cultures could be able to learn and articulate Indigenous law, given appropriate access to, and support from, the Indigenous community, which could serve to bridge the gulf between Indigenous and Euro-Canadian legal systems.<sup>160</sup>

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<sup>159</sup> James (Sakéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed. *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) [“Aboriginal Jurisprudence”], at 70-1.

<sup>160</sup> John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill L.J. 629 [“With or Without You”], at 660.



Borrows sees a wide scope for the intertwining of Indigenous and common law traditions.<sup>161</sup> Indigenous law originates in the political, economic, spiritual, and social values of the society, expressed through the teachings and behaviour of knowledgeable and respected individuals and elders; their principles are enunciated in the rich stories, ceremonies and traditions of the Indigenous nations.<sup>162</sup> These stories articulate the law in Indigenous communities because they represent the accumulated wisdom and experience of Indigenous dispute resolution.<sup>163</sup> The ceremonies and stories of the different groups varied according to their history, material circumstances, spiritual alignment, and social structure and these diverse customs became the foundations for many complex systems of law.<sup>164</sup> All, however, had legal orders, as did other Indigenous nations.<sup>165</sup> They function, as does any law, to guide people in the resolution of disputes and they could be received by analogy into the common law to bridge the gap between Indigenous and non-Indigenous laws.<sup>166</sup>

According to Macklem, whether in Plains Indian societies, the Haudenosaunee Confederacy, or the Ojibway, there were clear rules to deter and respond to what Canadian

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<sup>161</sup> Borrows, “Creating an Indigenous Legal Community”, *supra* note 65, at 161.

<sup>162</sup> Borrows, “With or Without You”, *supra* note 160, at 646.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 178. Hale, in his 1883 book *The Iroquois Book of Rites*, provides one description of the laws of the Haudenosaunee; see *supra* note 134, at 67-74 for an account of some of the laws of the Haudenosaunee. See also Mark Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka and Bashir Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008), at 170-1, George Copway, *The traditional history and characteristic sketches of the Ojibway nation* (London: C. Gilpin, 1850), at 143-5, and Walters, “According to the old customs of our nation”, *supra* note 30, at 5, 8, 10, 12, 24 for further discussion of the laws of the Haudenosaunee and the Ojibway.

<sup>166</sup> Borrows, “With or Without You”, *supra* note 160, at 653.

law would describe as criminal acts.<sup>167</sup> Macklem suggests that Indigenous societies shared some common values in the treatment of individual misconduct, including the minimal use of force, flexibility of sanctions, and reliance on the local community to determine the appropriate response to wrongdoing.<sup>168</sup> Former Chief Justice of the Navajo Court Robert Yazzie has described Indigenous law and justice as built on the concepts of respect, solidarity, relationships, and good feelings.<sup>169</sup>

Cooter and Fikentscher have observed that most traditionalists assert that their tribe originally had its law or “Way” and that this was a comprehensive guide to a way of life, based on custom and tradition backed by sacred sanctions.<sup>170</sup> As Henderson describes them, Indigenous jurisprudences rely on performance and oral traditions and stress the principle of totality and the importance of using a variety of means to disclose the teachings of their societies and to display the legal order.<sup>171</sup> They have always been consensual, interactive, and cumulative and are intimately embedded in Indigenous heritages, knowledges, and languages and are part of the ancient law of the land; they do not exist as “things” but as overlapping and interpenetrating processes or activities that represent the teachings, customs, and agreements of Indigenous societies, living through conduct rather than having to be

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<sup>167</sup> Patrick Macklem, “Aboriginal Peoples, Criminal Justice Initiatives and the Constitution” (1992) 26 U.B.C. L. Rev. 280, at 281-2.

<sup>168</sup> *Ibid*, 282.

<sup>169</sup> Robert Yazzie, “Navajo Peacemaking and Intercultural Dispute Resolution” in Catherine Bell and David Kahane, eds. *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004), at 111.

<sup>170</sup> Robert D. Cooter and Wolfgang Fikentscher, “Indian Common Law: The Role of Custom in American Indian Tribal Courts” (1998) 46 Am. J. Comp. L. 287 & (1998) 46 Am. J. Comp. L. 509, at 314.

<sup>171</sup> Henderson, “Aboriginal Jurisprudence”, *supra* note 159, at 71.

written or produced through a specialized form of reasoning.<sup>172</sup> These legal systems have always operated of their own force on Indigenous peoples.<sup>173</sup>

The process of converting Indigenous customary law into common law should not be alien to non-Indigenous people, as the English common law was developed through this same process.<sup>174</sup> Indeed, it may be that Indigenous law has more in common with the English common law than at first supposed. In many ways, this story of the development of Indigenous law is also the story of the development of the English common law, except that common-law judges write down their decisions so that others can read the law, rather than having to seek out the judges to hear the law from them, as in oral legal traditions. Clearly, Indigenous legal traditions can be reinvigorated to contribute to the creation of a modern body of Indigenous law by Indigenous governments, as is being done most notably by the Navajo in the United States, and become part of the pluralist Canadian legal tradition, along with the common law and the Quebec Civil Code.

***Application of the principle of federalism to the development of a body of modern, self-determined Indigenous law***

It is clear from the discussion above that the principle of federalism supports legal pluralism in Canada and would provide Indigenous governments with the scope to develop a body of self-determined Indigenous law out of their distinct legal traditions. What is important for the purposes of using federalism as a constitutional vehicle for managing the twin sovereignties of Indigenous peoples and the Crown is that, in exercising their sovereignty within their areas of jurisdiction, Indigenous law need not be limited to the

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<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.* at 244.

traditional laws of Indigenous peoples. As part of the exercise of their sovereignty, Indigenous governments would have the authority, within their areas of jurisdiction, to establish whatever laws they deem appropriate to the Indigenous nations that they govern. The body of law thus created may be fully grounded in Indigenous legal traditions as they existed prior to European contact, but they need not be; they may also be grounded in some amalgam of Indigenous and Euro-Canadian legal traditions. Coyle has labelled a return to strict traditionalism irrelevant but sees a legal system of greater cultural relevance through a melding of Indigenous traditions and modern norms.<sup>175</sup> Indigenous legal traditions are not frozen in the past but continually develop to meet the needs of each succeeding generation, so Indigenous peoples should, and more importantly should be allowed to, draw on the best practices of both their legal traditions and those of other cultures.<sup>176</sup>

This has already occurred where Indigenous nations had self-governing authority in the past. For example, Walters notes that the followers of the Ojibway Peter Jones saw no inconsistency between adopting some elements of settler culture and maintaining their Indigenous nationhood; indeed, this process allowed the Credit River Mississauga to maintain their status as a self-governing nation.<sup>177</sup> The 1830 constitution of the Credit River Mississauga represented a synthesis of juridical traditions, with elements of the separation of powers and checks and balances but also with old customs, confirming its continuity with at least some aspects of customary law and governance.<sup>178</sup> Ojibway criminal, family, and land and natural resources law after this point also all represented an amalgam of customary law

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<sup>175</sup> Michael Coyle, “Traditional Indian Justice in Ontario: A Role for the Present?” (1986) 24 Osgoode Hall L.J. 605, at 629.

<sup>176</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 199-200.

<sup>177</sup> Walters, “According to the old customs of our nation”, *supra* note 30, at 21.

<sup>178</sup> *Ibid.* at 27.

and contemporary modifications.<sup>179</sup> While customs changed and some were abandoned in the face of European cultural influences, the normative foundations of the Ojibway customary system were not destroyed by this process.<sup>180</sup>

Ultimately, what matters in a conception of Indigenous government as an exercise of continuing Indigenous sovereignty is that the laws are legitimate in the eyes of the community governed by them, not that they can find their source in pre-contact Indigenous laws. Thus, the current, narrow approach to understanding Aboriginal rights as grounded in distinct, pre-contact practices of Indigenous peoples needs to be abandoned as inconsistent with both the recognition of continuing Indigenous sovereignty in Canada and the imperative of the democratic legitimacy of the law. As Borrows has said, “the authenticity of indigenous law and governance is not measured by how closely they mirror the perceived past, but by how consistent they are with the current ideas of their communities.”<sup>181</sup> Beyond this, only the overarching principles of the constitutional order under which Indigenous and non-Indigenous Canadians share a legal, political and geographic space can limit the scope of authority of Indigenous governments in making laws.

For this approach to legal pluralism for Indigenous law to function effectively, however, the jurisdiction of Indigenous governments must be exclusive jurisdiction to displace, or render inoperative against Indigenous governments and their citizens, federal and provincial laws on the same subject-matter as the Indigenous law, unless a concurrent jurisdiction can be justified by the particular circumstances and the “externalities” that the

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<sup>179</sup> *Ibid.* at 34-40.

<sup>180</sup> *Ibid.* at 22.

<sup>181</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 200.

exercise of exclusive Indigenous jurisdiction could impose on non-Indigenous people and governments. The Charlottetown Accord would have led to the implementation of this model, with federal and provincial or territorial laws continuing to apply to self-governing Indigenous nations until, but only until, they were displaced by Indigenous laws on the same matter.<sup>182</sup> The Yukon First Nations' self-government agreement is also based on this model. At the level of principle, if Indigenous governments are to be a true third order of government, they should have legislative authority on the same basis as the other constitutionally-protected governments in the country. As well, it must be recognized that Indigenous law includes not only written Indigenous laws but also Indigenous common law, so that this law, too, could displace Euro-Canadian law on the same matter once a body of Indigenous common law has been built up through Indigenous dispute resolution processes.<sup>183</sup>

There is more to this argument than an appeal to the justice of treating all three orders of government equally, however; as a practical matter, concurrent jurisdiction unduly limits the scope of legal and policy innovation by Indigenous governments and adds excessive complexity to legal drafting, by imposing the legal norms of non-Indigenous governments as part of the law of Indigenous governments. Indigenous governments operating within a regime of concurrent jurisdiction must always draft legislation with one eye on the legislation of the other governments, either to avoid unwanted legal debate over whether an actual operational conflict of laws (such that it is impossible to obey both laws, triggering the operation of a paramountcy rule) or to create such a conflict, where Indigenous governments

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<sup>182</sup> Spaulding, *supra* note 86, at 56.

<sup>183</sup> Brian Slattery, "First Nations and the Constitution: A Matter of Trust" (1992) 71 Can. Bar Rev. 261, at 283.

have paramountcy and wish to ensure the non-application of federal and provincial laws. These practices clearly increase the complexity of legal drafting but they also seem illegitimate from a democratic point of view, by imposing the laws of other governments on ostensibly self-governing Indigenous nations.

In an earlier work, Merrilee Rasmussen and I noted, in the context of Indigenous self-government, all jurisdictions that Indigenous governments can exercise will also have been allocated by the *Constitution Act, 1867* to the federal or provincial governments, so that every time an Indigenous government enacts a law, it will be legislating on a matter on which there is also Euro-Canadian law.<sup>184</sup> Constitutional jurisprudence developed to address problems at the margins of Canadian constitutional law cannot be applied to these very different circumstances without unduly constraining the capacity of Indigenous nations to be truly self-determining.<sup>185</sup> For Indigenous nations, the fundamental purpose of seeking to negotiate self-government arrangements with settler-state governments is to provide scope for the meaningful exercise of their inherent jurisdiction; it makes no sense, then, to spend the time required to negotiate a self-government arrangement that allows for the exercise of the inherent jurisdiction of Indigenous nations if all other laws also continue to apply.<sup>186</sup> Thus, for several reasons both principled and practical, Indigenous governments require exclusive jurisdiction, just as the federal and provincial governments have, if they are to be recognized as a third order of government equal to the other two that were established by the *Constitution Act, 1867*. Some process for harmonizing legal regimes would still be

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<sup>184</sup> Ian Peach and Merrilee Rasmussen, “Federalism and the First Nations: Making Space for First Nations Self-Determination in the Federal Inherent Right Policy” (2005) 31 *Commw. L. Bull.* 3, at 14.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.* at 15-6.

necessary, as overlaps and “double aspects” are inevitable in a federal state, but principles and structures similar to those for the harmonization of the civil and common laws could be created to harmonize Indigenous and Euro-Canadian legal traditions.<sup>187</sup>

***Non-territorial conceptions of federalism and the application of personal jurisdiction over Indigenous people: a conceptual challenge***

There is one factor that complicates the application of the federal model to Indigenous self-government, which is that the majority of Indigenous people live in locations that are not Indigenous territory. Indeed, other than in Alberta, the Métis have no land base, so Métis governance would, of necessity, be a non-territorial form of governance. While scholars of federalism are far more familiar with territorial jurisdiction, the extra-territorial (or non-territorial) application of jurisdiction over citizens (or personal jurisdiction) is not unknown to the law. Indeed, the conceptual challenges of a non-territorially-based government or one with jurisdiction that cuts across territorial borders has not prevented the Sami of Scandinavia from establishing the foundations of just such a government.<sup>188</sup> Also of interest is the fact that, in the Nisga’a Final Agreement, the Nisga’a Nation is empowered to establish Nisga’a Urban Locals or create other means by which Nisga’a citizens residing outside of the Nass River valley may participate in the government of the Nisga’a Nation.<sup>189</sup> The agreement also provides the Nisga’a government with the authority to make laws that apply to Nisga’a citizens, wherever they reside, in such areas as social services, adoption, and the devolution of cultural property and the authority to make laws to provide for a Nisga’a

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<sup>187</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 218-9.

<sup>188</sup> Brad Berg, “Introduction to Aboriginal Self-Government in International Law: An Overview” (1992) 56 Sask. L. Rev. 375, at 388.

<sup>189</sup> *Nisga’a Final Agreement*, *supra* note 90, at Chp. 11, art. 9.



Court.<sup>190</sup> Personal jurisdiction is also familiar to the common law. As early as the 1540's, the English Crown made English subjects abroad liable for the commission of certain crimes in territory over which the Crown held no sovereign claim, based on the ongoing allegiance a subject owed the Crown wherever he ventured.<sup>191</sup>

Under a model of personal jurisdiction, the laws of an Indigenous nation would apply to all citizens of that nation, or all persons who attorn to the jurisdiction of the Indigenous nation, wherever they may reside. There is no necessary connection between Indigenous identity and the location of one's residence as far as many Indigenous people are concerned; what is crucial is that these individuals identify with an Indigenous community.<sup>192</sup> The exercise of personal jurisdiction by Indigenous nations would therefore provide the majority of Indigenous people with access to the services of the Indigenous nation with which they identify and a legal regime that would be more culturally relevant to them. There are certain logical limitations on the extra-territorial application of personal jurisdiction to Indigenous people, however, in an environment in which they are also residents of a province or territory and citizens of Canada.

Most importantly, such an arrangement raises a variety of public choice issues. One of those issues is that there is no need for anyone to identify themselves as a citizen of an Indigenous nation if they do not wish to participate in the governance of the Indigenous nation. An Indigenous individual dissatisfied with their Indigenous government has not only the right to dissent and participate in changing their government, they have a right of exit;

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<sup>190</sup> *Ibid.* at chps. 11, 12.

<sup>191</sup> McHugh, *supra* note 23, at 69-70.

<sup>192</sup> Schouls, *supra* note 91, at 56.

they can choose to refuse to exercise the rights of citizenship in the government of their Indigenous nation, and could even choose to abandon their citizenship entirely, and live, instead strictly as a resident of their province or territory and a citizen of Canada. Federal, provincial and territorial governments have an obligation under section 15 of the *Canadian Charter of Rights and Freedoms* to provide services to residents of Canada without discrimination on the basis of race, among other grounds.<sup>193</sup> Thus, a legislative exclusion of persons who have a right of citizenship in an Indigenous nation, or even persons who exercise their citizenship rights but seek services from non-Indigenous governments that would be available from their Indigenous nation, from access to the services of a federal, provincial or territorial government would likely be found unconstitutional, thereby providing Indigenous people with a choice of service provider.

This also raises the question of whether one's service provider should be a subject of individual choice generally, such that non-Indigenous people could also choose to receive services from an Indigenous government. While opportunities for individual choice in service provider furthers individual self-determination, there are legitimate concerns that the influence of non-Indigenous service recipients could dilute the cultural relevance to citizens of the Indigenous nation of the services their government provides and, equally, that the migration of Indigenous citizens away from the service delivery institutions of their governments to those of other orders of government could undermine the viability of those

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<sup>193</sup> Section 15 of the *Canadian Charter of Rights and Freedoms* states that:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Indigenous institutions. This latter issue is a legitimate concern as, in recognition that service delivery institutions cost money to operate and if the population being served is too small the costs outweigh the benefits, it is common practice to limit the provision of services to minorities according to a “where numbers warrant” calculation, on a sliding scale equating the level of services provided to the size of the community to be served, even in circumstances in which a minority group has a right to receive a service based on their identity.<sup>194</sup>

If the purpose of Indigenous self-government arrangements is to reconcile the sovereignties of Indigenous nations and the Canadian Crown and, ultimately, to build stronger, more respectful intersocietal relations, however, the risks involved in limiting access to services on the basis of Indigenous citizenship, thereby continuing to separate Indigenous and non-Indigenous people, and the concern over the nexus between segregation and inequality, arising out of the experience of non-white peoples in states such as the United States and South Africa, seem to outweigh the risks involved in providing for individual choice. As well, the opportunity for individuals to make choices about their service provider is likely to have a positive effect on the commitment of service providers to innovate in providing services of high quality that respond to the distinctive needs of their client base, as a way of encouraging participation in their institutions.

The right to choose service providers does, however, lead to three key subsidiary questions, each of which raises considerations which could limit the right of individual choice. The first consideration is that individuals who receive services from a government should pay taxes to that government to contribute to the operation of those services. Taxation

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<sup>194</sup> See *Mahé v. Alberta*, [1990] 1 S.C.R. 342, at 366-7 for a discussion of the reasons for a “sliding scale” approach to service provision in the case of minority language rights.

is important not solely because it is a source of revenue for government but also because of the beneficial effect that aligning taxation and service delivery has on the accountability of governments. If citizens must bear the burden of taxation to pay for the operation of their government, the citizens are likely to demand more strongly that their government spends their tax revenues efficiently and effectively on public services that citizens actually consider a priority. Of course, this also means that Indigenous governments must have the jurisdiction to levy taxes.

If citizens can choose their public service provider and, more importantly, can choose different providers for different public services and can change service providers, real issues with efficient tax administration and the continuity of funding for public services arise. These would include how to attribute tax revenues to individual services, how to ensure that governments have enough certainty about their revenue stream to establish and operate necessary public services, and how to apportion tax revenues in such a way as to ensure there are sufficient revenues to operate the central institutions of government. These considerations may require that individuals choose one government or another as their service provider for all services that that government provides and that they only have a right to switch service providers at certain times or under certain circumstances (for example, by a declaration on an annual tax form).

A similar concern arises with the possibility of individuals making strategic choices about the regulatory regime that governs them, an activity commonly known as “forum shopping.” While having a choice of regulator can be a useful support to individual self-determination if there are meaningful differences in regulatory regimes (and especially if those differences are grounded in culturally different approaches to common problems), the strategic use of that choice, especially by the powerful in society, to ensure an outcome that is

the most beneficial for them as individuals, rather than the most just or of greatest public value, is problematic. As with taxation, this concern suggests that limits be placed on an individual's right of choice, so that they cannot select different regulatory regimes depending on the particular issue or readily change their choice of regulatory regime.

The principle of choice in service provider also raises a third issue, whether the choice by a citizen of an Indigenous nation to receive services from a non-Indigenous government should constitute a renunciation of their citizenship and the other rights that go with citizenship. Residents of a province, for example, do not have a right to receive services from the government of another province. Certainly, a rule that choosing to receive services from a non-Indigenous government leads to a revocation of an individual's Indigenous citizenship would increase the number of Indigenous individuals who seek services from their Indigenous nation, thereby making the "numbers" warrant the provision of distinct services by the Indigenous nation more frequently, and may accord with traditional linkages between identity, community membership, and participation in the community in at least some cases. It would, however, also constitute a significant barrier to the principle of individual choice, by making the right of exit an "all or nothing" proposition. Such a rule would have to be subject to a thorough democratic debate among all of the nation's members before being imposed, to ensure that the rule is democratically legitimate, and, even then, it may constitute the very sort of "internal restriction" on individual self-determination that Kymlicka views as inconsistent with liberal multiculturalism.<sup>195</sup>

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<sup>195</sup> See Kymlicka, *Multicultural Citizenship*, *supra* note 125 for Kymlicka's discussion of the distinction between "external protections" and "internal restrictions", as well as his approach to both within liberal multiculturalism.

Clearly, there would be a number of practical limitations on the scope of the law-making authority and service delivery role of Indigenous governments that arise from the application of the principle of federalism to the establishment of Indigenous governments as a third order of government. Federalism nonetheless holds much promise for securing space for Indigenous peoples to govern themselves in accordance with their own political and legal traditions and in accordance with what is seen to be legitimate by the Indigenous people themselves. The other three principles of the Constitution articulated by the Supreme Court of Canada in the *Quebec Secession Reference*, however, would set some limits on the possibilities for the design of the institutions of government and the law of Indigenous nations. These limitations may not, in fact, be as significant as they first appear, if they are understood and applied with sensitivity to the particular cultural context of Indigenous peoples and the requirement to reconcile pre-existing Indigenous sovereignty with asserted Crown sovereignty. It is to an exploration of the implications of these other three principles of the Canadian constitutional order for Indigenous nations that we will now turn.

### Chapter 3 – Constitutional Limits on Indigenous Self-Determination and Indigenous Law

#### *Democratic legitimacy of governance*

The second fundamental principle of the Canadian constitutional order that the Supreme Court of Canada articulated in the *Quebec Secession Reference* was the principle of democracy. The Supreme Court stated in its judgment in this case that,

Democracy is not simply concerned with the process of government. On the contrary, ... democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government.<sup>196</sup>

and later that,

It is, of course true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified ...

The consent of the governed is a value that is basic to our understanding of a free and democratic society. ... To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy ... The system must be capable of reflecting the aspirations of the people. ... Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule also, to the exclusion of other constitutional values. ...

Finally, we highlight that a functioning democracy requires a continuous process of discussion. ... At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.<sup>197</sup>

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<sup>196</sup> *Quebec Secession Reference*, *supra* note 42, at para. 64.

<sup>197</sup> *Ibid.* at paras. 66-8.

Unfortunately, for Indigenous peoples, the traditional mechanisms of group consultation and consensus that were part of Indigenous decision-making, and therefore Indigenous democracy, and which provided every member of Indigenous communities with meaningful rights to political participation and influence, were swept away by the settler state in the name of a “democracy” that provided Indigenous peoples (eventually) with a right to vote in an electoral process conducted in foreign languages by foreign institutions and within which they were a minority with no real influence.<sup>198</sup> This political exclusion represents a failure of democracy, not the protection of it.<sup>199</sup> The very phrase “Indigenous self-government” thus reflects the idea of a return to democracy, with Indigenous government for Indigenous people, with their consent.<sup>200</sup>

While the Euro-Canadian tradition is that the requirements of democracy are met through voting for representatives, the definition of democracy should not be confined to Euro-Canadian liberal democracy, as other systems also have a genuine historical and moral claim to being democratic.<sup>201</sup> The fact that political traditions of Indigenous peoples generally did not involve voting does not make them undemocratic in intent or in practice. Concern over the claims by some Indigenous groups, such as the Mohawks, that their non-elective traditional structures are legitimate structures of governance take insufficient account of the extent to which democratic principles are rooted within Indigenous communities.<sup>202</sup>

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<sup>198</sup> Kymlicka, *Politics in the Vernacular*, *supra* note 122, at 77.

<sup>199</sup> Borrows, *Recovering Canada*, *supra* note 28, at 130.

<sup>200</sup> Hutchins, *supra* note 82, at 296.

<sup>201</sup> LaSelva, *supra* note 126, at 143.

<sup>202</sup> Webber, *Reimagining Canada*, *supra* note 130, at 269.



Traditional Indigenous self-government is associated with direct participatory democracy and rule by consensus, so the heart of the demand for self-government is an appeal to Indigenous approaches to democracy.<sup>203</sup> Indigenous traditions of government may well, in truth, represent a stronger tradition of participatory democracy than Parliamentary traditions.

A consensus model of decision-making, in which no decision was taken until concurrence was achieved among those involved in decision-making, was a common form of democratic decision-making in Indigenous nations.<sup>204</sup> Early negotiators observed conciliatory and confederal forms of government, consensus decision-making, and rule of authority rather than coercion, yet this did not cause them to situate Indigenous peoples at a lower stage of development.<sup>205</sup> Boldt and Long have observed that,

unlike European states, the foundation of their [Indigenous peoples'] social order was not based on hierarchical power wielded by a centralized political authority. Power and authority could not be claimed by or delegated to any individual or subset of the tribe; it was vested only in the tribe as a whole. ... By unreservedly accepting customary authority as their legitimate guide in living and working together, Indians were freed from the need for coercive personal power, hierarchical authority relationships, and a separate ruling entity to maintain order.<sup>206</sup>

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<sup>203</sup> LaSelva, *supra* note 126, at 144.

<sup>204</sup> This is not to suggest that consensus was always achieved. Generally, the goal was to achieve consensus among the Chiefs and Elders of family and clan groups, who acted as representatives for those groups; within the groups, strong norms of social cohesion would make individual acceptance of the decisions arrived at by Chiefs and Elders likely. It was understood that those groups that could not agree to the general consensus would opt out of the decision; even individuals and families could opt out, though at a high cost, such as relocation at another village site away from their extended family or clan group.

<sup>205</sup> Tully, *supra* note 9, at 121. Johnston notes that the Haudenosaunee Great Law of Peace sets out an intensely democratic decision-making process, complete with checks and balances on the powers of each nation against the others such that no measure could be taken without the unanimous consent of all five (and later six) nations; see Johnston, *supra* note 63, at 8, 16. As well the Credit River Mississauga made provision in their laws, codified in 1830, for a "General Council" of all members of the community to be held each January 1, in accordance with their customs; see Walters, "According to the old customs of our nation", *supra* note 30, at 26

<sup>206</sup> Kerry Wilkins, "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49 U.T.L.J. 53 [... But We Need the Eggs], at 88-9.

Leaders were also carefully chosen by respected members of the community, often after consultation, and there were procedures for the removal of leaders who failed to govern in the best interests of the community. In this way, the leaders of the community carefully secured their legitimacy and the assent to their decisions from within the community. Hale, in *The Iroquois Book of Rites*, describes the process for selecting members of the Haudenosaunee Confederacy's "Senate" when a member died. Responsibility for the selection of the new member rested with the senior matron of the deceased Senator's family, while the choice had to be approved by both the deceased person's clan and his nation.<sup>207</sup> Johnston also notes that these approvals came through popular councils and that the selection also had to be confirmed by the Confederacy Council.<sup>208</sup> As well, both the national council and the Confederacy's Senate had the authority to depose any member who was found to be unqualified for the position.<sup>209</sup>

Along with the concern for democratic legitimacy and accountability of leaders in Indigenous societies, it is also interesting to note the role that women played in selecting leaders and making decisions in the governance traditions of many Indigenous nations. Prior to European contact, Indigenous women had a right to political participation equivalent to the right to vote, which took European women centuries more to achieve.<sup>210</sup> In Haudenosaunee nations, clan government was controlled by women, who enjoyed the right to both select and

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<sup>207</sup> Hale, *The Iroquois Book of Rites*, *supra* note 134, at 49. In an 1895 book, *An Iroquois Condoling Council*, Hale also describes the selection of a successor for a Council member who wished to retire; see Horatio Hale, *An Iroquois Condoling Council: A Study of Aboriginal American Society and Government* (Ottawa: John Durie and Son, 1895) [*An Iroquois Condoling Council*], at 58-9.

<sup>208</sup> Kymlicka, *Politics in the Vernacular*, *supra* note 122, at 8-9.

<sup>209</sup> Hale, *The Iroquois Book of Rights*, *supra* note 134, at 49.

<sup>210</sup> Thomas Isaac and Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 *Man. L.J.* 453, at 458.

depose chiefs and had competence in such matters as land allotment, supervision of field labour, care of the treasury, the ordering of feasts and the settlement of disputes.<sup>211</sup> As Hale says of the Haudenosaunee, “The complete equality of the sexes in social estimation and influence is apparent in all the narratives of the early missionaries.”<sup>212</sup> It is thus reasonable to ask which governance traditions are more deeply democratic in their operation.

Some of the concern about Indigenous self-government, however, is a concern that these participatory traditions of governance have been lost through the effects of colonialism, particularly for those First Nations that have been governed by the *Indian Act*, and that Indigenous self-government will merely replicate the lack of transparency, the manipulation of electors’ choices and the corruption that sometimes exists within *Indian Act* band governance. Leaders who are selected through competitive processes within small communities and have access to significant funds and power which they can use to reward and manipulate the democratic process have strong incentives to misuse their power. This is particularly true in communities in which members have few opportunities for economic and social advancement other than through involvement in government and where the strong social norms that would have previously discouraged the abuse of power by leaders have been stripped away by colonialism. These very problems are important reasons for insisting on the creation of larger units of Indigenous governance or the reconstituting of Indigenous nations. As mentioned above, larger units of government can allow for the fairer application

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<sup>211</sup> Patricia A. Monture-Okanee, “The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice” (1992) 56 Sask. L. Rev. 237, at 264. For example, Johnston notes that, along with their role in selecting Chiefs of the Haudenosaunee, women monitored the conduct of Chiefs closely and, if it became apparent that the welfare of the people was not uppermost in a Chief’s mind, they warned him to abide by the Great Law of Peace. After three warnings by the women who nominated him, the Chief would be removed. See Johnston, *supra* note 63, at 8-9.

<sup>212</sup> Hale, *An Iroquois Book of Rites*, *supra* note 134, at 65.

of the principle of democracy, as it is more difficult to manipulate a larger number of voters in a larger group than in a small community and a larger group of people is likely to generate greater competition for leadership positions. As well, self-government is likely to promote transparency and better democracy by clarifying that Indigenous governments are accountable to their citizens, rather than the federal government, and allowing Indigenous nations to return to their more robustly democratic governance traditions. It is also important to remember that democracy is not an end in itself, but an instrument to secure the legitimacy of the decisions of those who act as representatives of the community in decision-making processes. Viewed in this light, the acts of voting and standing for office, which are so important to Parliamentary democracies, may be less important and of less value in achieving democratic legitimacy than the elaborate structures for broad participation in decision-making common to Indigenous governance traditions.

Further, it should be remembered that, in an arrangement to allow Indigenous nations to exercise their sovereignty within the Canadian constitutional order, it will not be a requirement that Indigenous nations govern themselves as they did prior to European contact. Borrows notes that in restructuring Indigenous society today, some of what has been learned from settler society will be integrated into Indigenous society to provide the fullest opportunity for self-determination and self-government.<sup>213</sup> Thus, a modern Indigenous government may well be led by individuals who have secured their position by winning an election and decision-making within government could proceed by some combination of traditional models of participatory democracy and consensus and representative government. Jeremy Webber has commented on this, anticipating that, while some peoples would retain or

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<sup>213</sup> John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291, at 308.

re-establish hereditary elements of governance, it is likely that the principal power in a modern Indigenous government would be vested in democratically accountable institutions, founded on popular approval, due to Indigenous peoples' experience with elective models of band governance under the *Indian Act*.<sup>214</sup> The key is that the governance arrangements themselves secure the consent of the community and that the governments established under these arrangements continue to secure legitimacy from the community. As long as these requirements of democratic legitimacy are secured by the governance arrangements a self-determining Indigenous nation chooses, the constitutional principle of democracy will be adequately protected. Determining what the particulars of a governance arrangement that can achieve this are is, ultimately, up to the governed community itself.

### ***Constitutionalism and the rule of law***

The third fundamental principle of the Canadian constitutional order that the Supreme Court of Canada identified in the *Quebec Secession Reference* was the principle of constitutionalism and the rule of law. As the Court said, "At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."<sup>215</sup> The Court went on to comment that,

the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, ... "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". ... A third aspect of the rule of law is ... that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three

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<sup>214</sup> Webber, *Reimagining Canada*, *supra* note 130, at 269.

<sup>215</sup> *Quebec Secession Reference*, *supra* note 42, at para. 70.

considerations make up a principle of profound constitutional and political significance.<sup>216</sup>

While, on the surface, this principle would seem at least somewhat inconsistent with traditional Indigenous approaches to law and governance, a more detailed comparison of Indigenous and common-law constitutional and legal traditions suggests that a broader understanding of the concepts of constitutionalism, rule of law and law itself would recognize Indigenous constitutionalism and respect for the rule of law. Certainly, there has been debate among Europeans who have lived with and studied Indigenous societies in North America about whether or not they had law, but the source of this problem is the debate over the definition of law itself.<sup>217</sup> The common equation of law with proclamation or written codes is an anemic notion of law. Monture-Okanee and Turpel, among others, criticize this notion, commenting that the lack of a written legal code does not mean that Indigenous systems of law were not as advanced or civilized as European ones, but that they were conceptualized in different but equally valid ways.<sup>218</sup> As Borrows says, “Laws can arise whenever human interactions create expectations about proper conduct.”<sup>219</sup>

One might call the equation of law with written codes Eurocentric except that a notion of law as written law is not even capable of accounting for the English common law. A great deal of non-Indigenous law is not written down in the form of a statute, but also exists in the form of decisions of judges applying normative principles to particular fact situations, which is not fundamentally different in concept from the law of Indigenous

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<sup>216</sup> *Ibid.* at para. 71.

<sup>217</sup> Coyle, *supra* note 175, at 626.

<sup>218</sup> P. A. Monture-Okanee and M. E. Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) 26 U.B.C. L. Rev. 239, at 245.

<sup>219</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 189.

societies.<sup>220</sup> The common law, like Indigenous law, began as the customary law in a pluralist environment; even the notion of precedent was not part of the common law until the Industrial Revolution.<sup>221</sup> The theory of the English common law is that the law exists and has existed since time immemorial in social practice, even if it has not yet been articulated. The common law has been described as “the commonsense of the community, crystallised and formulated by our forefathers.”<sup>222</sup> It is an organic form of law, unfolding over the course of 1,400 years as particular decisions are made, in a manner conceptually similar to how Indigenous law develops.<sup>223</sup>

Despite the uncodified nature of the common law, the existence of a rule of law in the English legal system is unquestioned. Similarly, it would be considered an extreme assertion to claim that constitutionalism is not a fundamental value of the English legal system, even though the constitution of Great Britain is an unwritten one. Interestingly, even the civil law of Lower Canada, which we think of as an archetype of codified legal systems, was not codified until 1857, though its existence as law prior to this time cannot be a matter of doubt.<sup>224</sup>

All of this suggests the need for a broader understanding of what is law, and therefore what is required for a society to have a rule of law culture. H.L.A. Hart’s philosophy of law

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<sup>220</sup> Merrilee Rasmussen, “Honouring the Treaty Acknowledgement of First Nations Self-Government: Achieving Justice Through Self-Determination” in John D. Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008), at 55.

<sup>221</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 187, 189.

<sup>222</sup> Dale Dewhurst, “Parallel Justice Systems or a Tale of Two Spiders” in Catherine Bell and David Kahae, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004), at 223.

<sup>223</sup> *Ibid.*

<sup>224</sup> Dorsett, *supra* note 23, at 186.

identifies four fundamental tenets of law: that what law is is not just a matter of definition, but is to be found in the practice of the law itself; that law is a practice, rather than a purely linguistic phenomenon; that law is specifically a social practice that presupposes a community where general conduct follows common rules, so there is a community and a tradition backing the rule's use; and that the practice of law needs to be understood from the point of view of those that are taking part in the practice and follow its rules.<sup>225</sup> Dworkin, too, sees law as arising out of social practices and, more particularly, out of the ongoing argumentation and interpretation by lawyers and judges over the meaning of the norms by which society is bound; in other words, law is the outcome of the specific form of social practice called legal practice, with its commitment to ensuring that there is integrity and inclusiveness in legal rules and its own particular set of norms about how to create meaning in a legal forum.<sup>226</sup> As Dworkin puts it in his conclusion, "Law is not exhausted by any catalogue of rules or principles... . Nor by any roster of officials and their powers... . Law's empire is defined by attitude, not territory or power or process. ... It is an interpretive, self-reflective attitude addressed to politics in the broadest sense."<sup>227</sup> Building on this conception of law, Berteau defines law as the dynamic articulation of defensible reasons or a set of

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<sup>225</sup> Massimo La Torre, "Changes and Continuities in Neil D. MacCormick's Concept of Law" in Agustin José Menéndez and John Erik Fossum, eds., *The Post-Sovereign Constellation: Law and Democracy in Neil D. MacCormick's Legal and Political Theory* (Oslo: ARENA, 2008), at 23.

<sup>226</sup> See Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press, 1986), especially chapters 1, 7 and 11, for his discussion on law as the outcome of practice, acts of interpretation and a commitment to inclusive integrity.

<sup>227</sup> *Ibid.* at 413.



practices of deliberative reasoning.<sup>228</sup> None of these definitions see law as entirely separated from underlying social norms.

It is possible that Neil MacCormick's definition of law as an "institutional normative order" is the most useful definition.<sup>229</sup> For MacCormick, the institutionalization of norms and usage is essential to understanding the transition from a normative order to law.<sup>230</sup> Under this definition, law involves authoritative norms that are clear and stable enough guide human conduct, are possible to follow and are not contradictory, that are interpreted and applied by identifiable institutions composed of identifiable people with a mandate to make decisions on behalf of those that the law concerns, and equal opportunity for all subjects under the law to appeal to the law and to receive a decision from within a common legal order.<sup>231</sup> One needs institutionalization because there will be disagreement over the interpretation of norms and disagreement over who should be in charge and who should interpret the norms.<sup>232</sup> When moving from a normative order to an institutional normative order, or law, two institutional traits are therefore critical: the formulation of common and explicit norms and the

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<sup>228</sup> Stefano Berteia, "MacCormick's Latest Views of Legal Reasoning and the Positivist Concept of Law" in Agustin José Menéndez and John Erik Fossum, eds., *The Post-Sovereign Constellation: Law and Democracy in Neil D. MacCormick's Legal and Political Theory* (Oslo: ARENA, 2008), at 93.

<sup>229</sup> Neil D. MacCormick, "MacCormick on MacCormick" in Agustin José Menéndez and John Erik Fossum, eds., *The Post-Sovereign Constellation: Law and Democracy in Neil D. MacCormick's Legal and Political Theory* (Oslo: ARENA, 2008), at 12-3.

<sup>230</sup> Lars Blichner, "Juridification from Below: The Dynamics of MacCormick's Institutional Theory of Law" in Agustin José Menéndez and John Erik Fossum, eds., *The Post-Sovereign Constellation: Law and Democracy in Neil D. MacCormick's Legal and Political Theory* (Oslo: ARENA, 2008), at 43.

<sup>231</sup> *Ibid.* at 38-9.

<sup>232</sup> *Ibid.* at 51.

establishment of some form of institutionalized authority to keep track of and uphold these norms and to interpret them in cases of conflict.<sup>233</sup>

On this basis, the existence of a commitment to constitutionalism and the rule of law can be seen in Indigenous societies, despite the lack of written legal codes. One can establish instructive analogies between aspects of the British common law tradition and at least some Indigenous legal traditions. Borrows has discussed this extensively in his book *Recovering Canada: The Resurgence of Indigenous Law*. He sees Indigenous traditions and stories as simultaneously similar to and different from case law precedent. They are analogous because they attempt to provide reasons for, and reinforce social consensus about, broad principles and justify or criticize certain deviations from generally accepted standards.<sup>234</sup> Both also record fact patterns of past disputes and their related solutions, both are interpreted by knowledgeable keepers of wisdom, presented in a manner suitable to the particular dilemma of the moment, considered authoritative by their listeners, and there are natural, moral, and cultural sanctions for the violation of their instructions.<sup>235</sup> In both cases, the interpretation of stories encourages a basic personal and institutional adherence to the underlying values and principles of the society.<sup>236</sup> On the other hand, Indigenous stories are different from common-law precedent in the way they are recorded and applied; the oral tradition allows for a constant recreation of Indigenous systems of law, as reinterpretation is undertaken to meet the contemporary needs of the society.<sup>237</sup> There are more analogies between the two,

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<sup>233</sup> *Ibid.*

<sup>234</sup> Borrows, *Recovering Canada*, *supra* note 28, at 14.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

however, as the claim validation aspect of Indigenous stories obviously parallels the common law's functions and it may be argued that the broad social role of Indigenous tradition in expressing the underlying values and mores of Indigenous cultures is not really that much different from the role played by the common law.<sup>238</sup>

Sometimes elaborate rules by which Indigenous societies were governed (constitutions) and rules about the responsibilities of members of Indigenous societies to one another and to their society (laws) were well established by Indigenous nations by the time of contact with Europeans. They were also broadly accepted as governing the behaviour of members of those nations and the processes by which those rules would be interpreted and applied were institutionalized, with different members of the nation knowing the law and having the authority to perform different functions in the resolution of disputes at different stages of the process. Indeed, Hale commented that "The regard of Englishmen for their Magna Carta and Bill of Rights, and that of Americans for their national Constitution, seem weak in comparison with the intense gratitude and reverence of the Five Nations for the 'Great Peace'".<sup>239</sup> Lowery has also noted that certain Navajo customs also constitute an unwritten Navajo constitution which sets the limits of governmental authority within the nation and includes a conception of individual rights as rights "retained by the people."<sup>240</sup>

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<sup>238</sup> *Ibid.* at 15.

<sup>239</sup> Hale, *The Iroquois Book of Rites*, *supra* note 134, at 33-4. As well, when the Credit River Mississauga codified their laws in 1830, Article I.1 stated that, "According to our ancient customs, the Indians of this village, shall be governed by Chiefs, at present three, one of whom shall be called the Head Chief ... who shall have the supreme authority. ... He is in all cases to govern according to law, and in no case to enforce any Regulation till it regularly becomes a law by receiving the sanction of the Council." It is not clear to what extent this text was influenced by Euro-Canadian notions of law, but the reference to "ancient customs" suggests some grounding in pre-contact practices; see Walters, "According to the old customs of our nation", *supra* note 30, at 25.

<sup>240</sup> Daniel L. Lowery, "Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1982" (1993) 18 *Am. Indian L. Rev.* 379, at 389-90.

In the case of the Haudenosaunee, the constitution and the laws were, in a way, written down prior to their codification in English through the use of wampum belts.<sup>241</sup> Kathryn Muller comments that some wampum belts paralleled European written treaties in their ability to record and preserve agreements.<sup>242</sup> It is interesting to note that the early treaties between the British and the Haudenosaunee Confederacy took the form of wampum belts and “Covenant Chains.” This suggests that the British recognized the authority of these forms for recording the rules of intersocietal relations in this period, rules that have subsequently become part of the Canadian constitutional order.

In the face of the historical record about the existence of rules by which Indigenous nations governed themselves and assigned responsibilities for decision-making within the nations, and the way in which disputes were resolved in Indigenous societies through, where necessary, the authoritative application of established norms of behaviour to particular conflicts, it is difficult to sustain the assertion that constitutionalism and the rule of law were unknown to Indigenous traditions of social ordering. These rules of social ordering were, in all of their essential features, legal rules. If a modern Indigenous government chose to recover its legal traditions and govern itself accordingly, the fundamental principle of constitutionalism and the rule of law presents no barrier to a traditional Indigenous government.

Of course, a modern Indigenous society may not wish to be governed entirely by its pre-contact legal traditions. If, as an exercise of its continuing sovereignty, an Indigenous nation wishes to codify its constitutional arrangements and its laws, there would be no barrier in the Canadian constitutional order to them doing so; the point is merely that unwritten

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<sup>241</sup> Johnston, *supra* note 63, at 9.

<sup>242</sup> Muller, *supra* note 68, at 129.

constitutions and laws are not, by virtue merely of their unwritten form, somehow extra-legal and therefore inconsistent with the fundamental principle of constitutionalism and the rule of law. Thus, this principle of the Canadian constitutional order provides no fundamental constitutional barrier to the reconciliation of Indigenous sovereignty and Indigenous law with Crown sovereignty and the common law, or to the recognition of Indigenous governments as partners in the governance of the Canadian federation.

***Protection of minorities and the application of the Canadian Charter of Rights and Freedoms to Indigenous governments***

Possibly the most challenging principle for Indigenous and Euro-Canadian society to agree on is the Supreme Court of Canada's fourth principle from the *Quebec Secession Reference*, that of the protection of minorities. On this principle, the Court noted that there are a number of constitutional provisions to protect minority language, religious and education rights and said that, "the protection of minority rights is itself an independent principle underlying our constitutional order."<sup>243</sup> The Court then went on to note that,

The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation. ... Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.<sup>244</sup>

In the context of their discussion of this principle, the Court also stated that,

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<sup>243</sup> *Quebec Secession Reference*, *supra* note 42, at para. 80.

<sup>244</sup> *Ibid.* at para. 81.

Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* including in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. ... The protection of these rights, ... whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.<sup>245</sup>

Given the concern for the protection of the legal and cultural distinctiveness of Indigenous peoples that is reflected in sections 25 and 35 of the *Constitution Act, 1982*, the application of the *Charter* to self-determined Indigenous governments is controversial. Borrows states that, “One of the greatest internal barriers to the enhancement of self-government ... is the division the *Canadian Charter of Rights and Freedoms* has caused within the First Nations community.”<sup>246</sup> Underlying much of this debate is the appropriateness of invoking the language of “rights” to achieve progressive social change for Indigenous peoples. Though acceptance of the *Charter* varies among Indigenous people, those who object to it almost always do so on cultural grounds.<sup>247</sup> Some see rights language as undermining the cultural distinctiveness of Indigenous communities, while others argue that the *Charter* includes a number of precepts that are currently accepted and were traditionally endorsed by a number of Indigenous people.<sup>248</sup> Turpel has certainly argued that, in Indigenous communities with different political and spiritual traditions, recourse to the *Charter* could result in the further encroachment on the cultural identity of Indigenous

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<sup>245</sup> *Ibid.* at para. 82.

<sup>246</sup> John Borrows, “Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics” (1994) 43 U.N.B.L.J. 19 [“Contemporary Traditional Equality”], at 20.

<sup>247</sup> Schouls, *supra* note 91, at 102.

<sup>248</sup> Borrows, “Contemporary Traditional Equality”, *supra* note 246, at 20.

peoples.<sup>249</sup> As Wilkins notes, because Indigenous societies have traditionally relied much less extensively on coercive power, they have had less exposure to the dangers it poses and therefore less reason to create internal barriers, such as rights, to manage it.<sup>250</sup>

Because the *Charter* applies to the federal, provincial and territorial governments, and their delegates, it cannot be assumed that it would also automatically apply to an Indigenous government exercising its inherent sovereignty, rather than powers delegated from other governments. Indeed, Wilkins has argued convincingly that the *Charter* would not apply to Indigenous nations exercising their pre-existing sovereignty. He points out that the Supreme Court of Canada has decided that the *Charter* applies exclusively to governments mentioned in section 32 of the *Constitution Act, 1982*; this would not be the case where an Indigenous government is an independent entity exercising its inherent authority to govern itself, rather than exercising powers delegated by the federal government.<sup>251</sup> This means that how the interests of minorities within Indigenous governments are protected will be a matter for negotiation between Indigenous and non-Indigenous governments and will, ultimately, be a decision for Indigenous governments to make.

While the application of the *Charter* to Indigenous governments is certainly regarded by some as presumptuous or as colonial arrogance, many Indigenous people themselves are strong supporters of the *Charter*, as *Charter* advocates point out.<sup>252</sup> The *Charter* is an

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<sup>249</sup> Mary-Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” in Richard Devlin, ed., *First Nations Issues* (Toronto: Edmond Montgomery, 1991) [“Aboriginal Peoples and the Canadian Charter”, at 59.

<sup>250</sup> Wilkins, “... But We Need the Eggs”, *supra* note 206, at 89.

<sup>251</sup> *Ibid.* at 70, 74.

<sup>252</sup> Schouls, *supra* note 91, at 102.

obvious answer to a genuine need for reassurance about the consequences of recognizing the constitutional status of Indigenous self-government rights and some may well see this as the price of constitutional recognition and public acceptance of the inherent right.<sup>253</sup> In fact, many Indigenous people would insist that their governments demonstrate a commitment to the protection of minorities and others, such as women, who have been systematically disempowered by the effects of colonialism on Indigenous peoples. One of the tools put forward as a means to “bridge the divide” between Indigenous self-determination and equality for Indigenous women, for example, is the *Charter*.<sup>254</sup>

Indeed, when the recognition and implementation of an inherent Aboriginal right to self-government seemed most likely to be realized, with the negotiation of the Charlottetown Accord in 1992, many Indigenous women, represented by the Native Women’s Association of Canada, expressed deep concerns about how Indigenous governments might treat women and insisted that the *Charter* apply to inherent-right Indigenous governments to ensure the equality of men and women. Some Indigenous women who support self-government see the *Charter* as a way to ensure their involvement in the creation, implementation, and ongoing operation of Indigenous governments.<sup>255</sup> The Native Women’s Association articulated its position by stating that,

What we want to get across to Canadians is our right as women to have a voice in deciding upon the definition of Aboriginal government powers. ... Governments simply cannot choose to recognize the patriarchal forms of government which now exist in our communities. ... We are telling you we have a right, as women, to be part

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<sup>253</sup> Wilkins, “... But We Need the Eggs”, *supra* note 206, at 80.

<sup>254</sup> Jennifer Koshan, “Aboriginal Women, Justice and the *Charter*: Bridging the Divide?” (1998) 32 U.B.C. L. Rev. 23, at 25.

<sup>255</sup> *Ibid.* at 27.



of that decision. Recognizing the inherent right to self-government does not mean recognizing or blessing the patriarchy created by a foreign government.<sup>256</sup>

The counter-argument, that the individual-rights focus of the *Charter* is inappropriate as it is fundamentally inconsistent with Indigenous culture, was unconvincing for those who the Native Women's Association represented. They had experienced the disempowerment of women that went with *Indian Act* governance and they were not prepared to have their capacity for individual self-determination limited by potentially male-dominated Indigenous governments exercising a constitutionally-recognized inherent right to self-government. Some Indigenous groups also called for the constitutional entrenchment of an Indigenous *Charter of Rights*, along with the right to self-government, though Indigenous women also had many concerns about the effect of such an undefined *Charter*.<sup>257</sup>

Borrows has arrived at the conclusion that,

intersections in the objectives of the *Charter* and traditional First Nations practices provide a meeting place for the potential transformation of rights discourse. By creating a conversation between rights and tradition, the *Charter* presents First Nations with an opportunity to recapture the strength of principles which were often eroded through government interference.<sup>258</sup>

It is important in debates about the principle of the protection of minorities and the application of the *Charter* to Indigenous governments to start from the recognition that, since Indigenous peoples are minorities, respecting their collective interests and their collective right to self-determination is, itself, a requirement of the constitutional principle of the protection of minorities. One cannot infer from the fact that Indigenous governments

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<sup>256</sup> Quoted in Borrows, "Contemporary Traditional Equality", *supra* note 246, at 41.

<sup>257</sup> Isaac and Maloughney, *supra* note 210, at 467.

<sup>258</sup> Borrows, "Contemporary Traditional Equality", *supra* note 246, at 21.

exercising traditional forms of government do not comply with or accommodate the *Charter* that they are somehow inherently unjust.<sup>259</sup> Kymlicka argues that liberals should endorse certain external protections, where they promote fairness between groups in society, but should reject internal restrictions.<sup>260</sup> Insofar as self-government rights for national minorities help secure access to a societal culture, they can therefore contribute to individual freedom, and the failure to recognize these rights will result in further tragic cases of groups being denied the protection of the cultural context within which individual choices are meaningful and that therefore supports individual autonomy.<sup>261</sup> As Dickson notes, the “multicultural dilemma” will always elude a perfect solution, but the importance of the interests involved demands that we formulate a sophisticated approach to it that encourages, as much as possible, the co-existence of both individual and collective rights.<sup>262</sup> If self-determination is viewed as a principle of allowing and encouraging individuals and groups to order their own lives free of unsolicited state interference, it should be treated with equal respect with such other principles as due process and equality under the law in balancing individual and collective interests in the constitutional order.<sup>263</sup> Sensitivity to the legitimate interests of national minority communities must also govern the debate over the application of individual rights within Indigenous nations in the same way that it has been an important factor in

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<sup>259</sup> Wilkins, “... But We Need the Eggs”, *supra* note 206, at 98.

<sup>260</sup> Kymlicka, *Multicultural Citizenship*, *supra* note 125, at 37.

<sup>261</sup> *Ibid.* at 101.

<sup>262</sup> *Ibid.* at 157.

<sup>263</sup> Frank Brennan, “Self-Determination: The Limits of Allowing Aboriginal Communities to be a Law Unto Themselves” (1993) 16 U.N.S.W.L.J. 245, at 262.

Supreme Court of Canada decisions about language rights and the application of the *Charter* in Quebec.<sup>264</sup>

With this as context, one can begin the enquiry into the fundamental purposes of the *Charter* and how these purposes could be applied to Indigenous governments in a way that protects both the individual rights of Indigenous people and the cultural distinctiveness and collective rights of Indigenous nations. As both the *Charter* and section 35 of the *Constitution Act, 1982* articulate a strong commitment to gender equality, in particular, this must be understood as a central underlying purpose of the *Charter*'s rights regime. Not even section 25 of the *Charter* seems to affect the operation of the section 28 guarantee of gender equality, a view further supported by the commitment to gender equality in the application of Aboriginal and treaty rights contained in section 35(4).<sup>265</sup> As Monture has commented, the failure to take account of gender in efforts to reclaim Indigenous ways means that Indigenous nations can only partially succeed in stepping beyond the imposed norms of colonialism.<sup>266</sup> The sense that a commitment to equal respect for individuals may hold an intersocietal mandate is one reason self-determination advocates should be prepared to accept individual equality as a limitation on self-determination claims.<sup>267</sup> As well, as noted above, gender equality in the political affairs of Indigenous nations was part of traditional Indigenous governance practices.

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<sup>264</sup> See, for example, *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at para. 73; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238, at para. 31; *Solski (Tutor of) v. Quebec (Attorney General)*, 205 SCC 14, [2005] 1 S.C.R. 201, at para. 44.

<sup>265</sup> Thomas Isaac, "Canadian Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor Y.B. Access Just. 431, at 451.

<sup>266</sup> Patricia A. Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?" in Kerry Wilkins, ed. *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004), at 59.

<sup>267</sup> *Ibid.* at 70.

Some of the concern, though, is with the safety of women and children in dysfunctional communities that have adopted patriarchy and lost this connection to their traditions, as Val Napoleon points out in the case of the Gitksan.<sup>268</sup> The danger, though, is that the concern for Indigenous women will be used as an excuse for opposition to Indigenous sovereignty by opponents of self-government.<sup>269</sup> The existence of self-interested elites in Indigenous societies because of the structures created by colonial administrators is scarcely an argument for continuing to subject Indigenous peoples to non-Indigenous rule; the better solution is to ensure that Indigenous peoples are able to draw on their older constitutions and traditions, and innovate from these starting points, in order to overthrow the established elites in the transition to self-government.<sup>270</sup>

Along with a general commitment to equality are specific commitments, available equally to all members of society, to participation in the political affairs of society, to the freedom to engage in such politically important activities as assembly and speech, to engage in such private activities as religious observance without state interference, and to be protected from abuse of the state's coercive power by those who act in the name of the state, all of which are important to the realization of individual self-determination. These can also be integrated into Indigenous models of governance. In the case of the Navajo, courts have found that Navajo common law preserves a great variety of individual rights, including rights of association with relatives, access to the courts, due process, equal protection of the law, political liberty, non-discrimination on the basis of sex, and the right to legal representation;

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<sup>268</sup> *Ibid.* at 190.

<sup>269</sup> Koshan, *supra* note 254, at 46.

<sup>270</sup> Tully, *supra* note 9, at 193.

the Navajo court has also developed children's rights and accept some rights as fundamental.<sup>271</sup>

While the principles behind the language of the *Charter* may have an intersocietal mandate, certain *Charter* provisions, such as mobility rights and minority language education rights, could have anomalous impacts if they were applied to those governments.<sup>272</sup> The phrasing of the *Charter* sometimes assumes the existence of institutions that may not be present or may be structured differently under Indigenous self-government regimes.<sup>273</sup> The right of all citizens to vote in federal and provincial elections is a right that would extend to Indigenous citizens of the country but, since self-determined Indigenous governments, as a third order of government, would be neither federal nor provincial governments, this constitutional right is irrelevant to Indigenous governments; by its very terms, it says nothing about the process for selection of the governors of Indigenous nations. As well, rights such as the right to an independent adjudicator, if conscientiously enforced, would probably undermine and transform the entire basis of dispute resolution in Indigenous communities, a possibility that Wilkins, for one, finds deeply troubling.<sup>274</sup> The imposition of the *Charter*, in its entirety, on Indigenous governments would substantially interfere with the foundations of Indigenous difference in Canada and also cast doubt on the efficacy of the *Charter* in achieving the desired protection of the vulnerable and securing a consistent citizenship, by eroding traditional ways of protecting the vulnerable without promoting among members of

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<sup>271</sup> Lowery, *supra* note 240, at 421.

<sup>272</sup> Wilkins, "... But We Need the Eggs", *supra* note 206, at 84.

<sup>273</sup> Webber, *Reimagining Canada*, *supra* note 130, at 273.

<sup>274</sup> Wilkins, "... But We Need the Eggs", *supra* note 206, at 93.

Indigenous communities any stronger or clearer notion of the value of their Canadian citizenship.<sup>275</sup>

Clearly, the protection of individual rights, and particularly the equality of men and women, against potential abuses by Indigenous governments, including those appealing to tradition to justify their actions, has significant resonance within Indigenous societies. As well, the protection of individual rights has a strong resonance within the majority society. Respect for the autonomy of Indigenous communities may well be conditional, particularly on the community's willingness to protect certain basic human rights.<sup>276</sup> Any suggestion that self-determined Indigenous governments would not also be required to protect individual rights would likely meet with such strong resistance from the majority society that it could well jeopardize the willingness of federal and provincial governments to participate in the project of recognizing and providing constitutional and political space for the exercise of the sovereignty of Indigenous nations.

The language of the *Charter* is not the only way to articulate a commitment to constitutional protection of individual rights, however, and some of its provisions are simply irrelevant to Indigenous governments. As Webber notes, even given a shared commitment to individual rights, the specific expression of those rights in a concrete legal order is always marked by cultural features that have little or nothing to do with respect for the individual; statements of law that work perfectly well in one culture may have to be adjusted for another, not because the other culture is less committed to the individual but simply because the presumptions underlying the particular expression of that commitment in the law are wrong

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<sup>275</sup> *Ibid.* at 96.

<sup>276</sup> Webber, *Reimagining Canada*, *supra* note 130, at 224.

for that culture.<sup>277</sup> If that were not so, there would have been no need for Canada to draft its own *Charter*; instead it could simply have adopted the American *Bill of Rights*.<sup>278</sup>

As well, section 25 of the *Charter*, which states that “the guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada...,” and section 32 of the *Charter*, which states that it applies to the federal, provincial and territorial governments, raise serious questions about the application of the *Charter* to Indigenous peoples exercising an inherent right to self-government, or exercising their continuing sovereignty. Thus, a better approach to the protection of the fundamental rights of individuals may well be to secure a constitutional guarantee that particular key provisions of the *Charter* would apply to Indigenous governments, for example through the terms of self-government agreements. This could even include some additional language to provide clearer direction to those who would apply these rights in an Indigenous context to take appropriate account of Indigenous difference and Indigenous traditions in exercising their authority, so as to bring something like a culturally nuanced form of the analysis of justification that takes place under section 1 of the *Charter* into the application of *Charter* rights to Indigenous governments.

Such an idea is not without precedent; Ovide Mercredi, when he was national Chief of the Assembly of First Nations, called for the creation of an Indigenous *Charter of Rights* to replace the *Canadian Charter of Rights and Freedoms* for self-governing Indigenous

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<sup>277</sup> *Ibid.* at 237

<sup>278</sup> *Ibid.* at 247.

communities.<sup>279</sup> As early as 1986, the Native Women's Association of Canada began to develop a First Nations human rights and responsibilities law, in an effort to discourage internal challenges to the actions of Indigenous governments in Canadian courts.<sup>280</sup> This law would be based on a concept of rights and responsibilities that come from the teaching of the Four Directions, with strength being the basis for cultural rights, kindness being the basis for social rights, sharing being the basis for economic rights, and trust being the basis for civil and political rights.<sup>281</sup> As long as this approach was sanctioned in a democratically legitimate way by Indigenous peoples, it may represent an approach to the controversial issue of the application of the *Charter* to Indigenous governments that is more sensitive to some Indigenous criticism of the *Charter* while still being consistent with the underlying, fundamental principles of the Canadian constitutional order. If an Indigenous *Charter* is proposed in the future, however, it is reasonable to suggest that it must, at a minimum, include a guarantee of equality for Indigenous women, as this would re-establish the historical position of women in Indigenous society.<sup>282</sup>

Indigenous systems of law and governance may well look different from Euro-Canadian systems, but that fact alone does not make them incompatible with our constitutional order. As long as Indigenous systems are democratically legitimate, legal, in the sense of being based on rules that are applicable to all members of society, and respect the equal citizenship of both genders and minorities within their society, including the right to participate in decision-making and engage in debate and dissent, Indigenous systems will be

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<sup>279</sup> Isaac and Maloughney, *supra* note 210, at 471.

<sup>280</sup> Turpel, "Aboriginal Peoples and the Canadian Charter", *supra* note 249, at 61.

<sup>281</sup> *Ibid.*

<sup>282</sup> Isaac and Maloughney, *supra* note 210, at 474.



consistent with the fundamental constitutional order. The need to apply these principles in an Indigenous governance context with sensitivity, as well as the need to understand and apply Indigenous law to legal disputes does, however, raise the question of what bodies can legitimately engage in dispute resolution within Indigenous societies. Interpretation of the law is as much at the core of self-determination as is law-making, as the act of interpretation reflects the culture within which the interpretive act takes place. Can the Canadian judiciary undertake these tasks with the necessary degree of sensitivity despite the fact that it is a creature of the Euro-Canadian legal tradition? Should disputes within Indigenous societies instead be settled by dispute resolution processes created by those societies and with a connection to Indigenous traditions of dispute resolution? What would be required of an Indigenous dispute resolution body to ensure that it is consistent with the Canadian constitutional order, in particular the principle of constitutionalism and the rule of law, and what are the implications of these alternatives for equality before the law? These are significant questions for any effort to build a third order of sovereign Indigenous governments and create a body of Indigenous law within the Canadian legal and constitutional order and will be addressed in the following two chapters.

## Chapter 4 – Comparing Indigenous and Common-Law Dispute Resolution

### *Can the Canadian judiciary legitimately play the role of interpreting Indigenous law and resolving disputes under Indigenous law or between Indigenous law and the Canadian constitutional order?*

The desire to provide Indigenous governments the constitutional space to develop a body of Indigenous law within an environment of legal pluralism necessarily raises the question of who should have the authority to interpret those laws. Equally, the need to be sensitive to Indigenous distinctiveness in balancing individual and collective rights within culturally distinct communities raises the corollary question of who should have the authority to interpret the Canadian constitutional order in the unique cultural context of Indigenous nations. At heart, these are questions about whether a Euro-Canadian judicial branch, trained not in the legal traditions of Indigenous peoples but in the common law or civil law traditions of the settler society, can secure sufficient legitimacy among the citizens of Indigenous nations to exercise its judicial function in the context of Indigenous law and government. A traditional concern with the conceptual and institutional framework for judging rights claims, for example, is the culturally-specific character of the courts, which are formalized adversarial institutions unknown to Indigenous peoples and in which members of the dominant culture are in the position of interpreting law for all Canadians.<sup>283</sup> That common-law courts are “white man’s courts” thus represents a threshold problem for Indigenous peoples seeking justice from those courts.<sup>284</sup> The experience of colonialism naturally affects Indigenous people’s trust in state-sponsored institutions, so to be legitimate, the very

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<sup>283</sup> Turpel, “Aboriginal Peoples and the Canadian Charter”, *supra* note 249, at 50.

<sup>284</sup> Peter H. Russell, “High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence”, (1998) 61 Sask. L. Rev. 247, at 248.

structure of dispute settlement may have to be negotiated.<sup>285</sup> It is particularly difficult for Indigenous peoples to view existing institutions as independent and impartial when they are deciding questions of the rights of Indigenous peoples against the dominant society.<sup>286</sup>

The argument against granting the existing judicial branch the authority to interpret Indigenous law and apply the Canadian Constitution to Indigenous governments is thus a powerful one. As Henderson notes, there are important differences in the way Indigenous and European languages relate to the world and to life; this creates an absence of shared communication, of which it is important for a judge to be aware when attempting to create a mutual historical context for the analysis of Indigenous rights and reconciliation.<sup>287</sup> While the first step in such a contextual analysis is the awareness of this dilemma, the second step, to attempt to construct Indigenous contexts, is harder for non-Indigenous judges, as it requires a transformation of judicial consciousness to step outside the limitations of the English or French language and thought.<sup>288</sup> The interpreting judge must rely on ancient Indigenous teachings and knowledge, most of which remain undocumented, to undertake this step and move on to the third step of formulating an equitable synthesis of Indigenous and European contexts.<sup>289</sup> It cannot be assumed that the cultural context out of which a modern body of Indigenous law arises, if created by Aboriginal governments exercising a right to collective self-determination, will be sufficiently similar to the Euro-Canadian cultural

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<sup>285</sup> Jeremy Webber, “Commentary: Indigenous Dispute Settlement, Self-Governance and the Second Generation of Indigenous Rights” in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) [“Indigenous Dispute Settlement”], at 150.

<sup>286</sup> Russell, *supra* note 284, at 248.

<sup>287</sup> Henderson, “Interpreting *Sui Generis* Treaties”, *supra* note 70, at 59.

<sup>288</sup> *Ibid.* at 70.

<sup>289</sup> *Ibid.*

context with which the Canadian judiciary is familiar that the existing judicial branch will be well placed to interpret Indigenous law with appropriate sensitivity to its cultural context. Indigenous leaders fear that non-Indigenous judges may interpret certain rights in culturally biased ways, for example by seeing traditional Indigenous forms of consensus decision-making as a denial of democratic rights because they do not use the particular method for securing the consent of the governed that is envisioned for non-Indigenous governments by the Constitution, even though they would not violate the underlying constitutional principle of democracy.<sup>290</sup>

Borrows points to this problem in the context of the *Delgamuukw* case.<sup>291</sup> He notes that the Gitksan *adaawk* and the Wet'suwet'en *kungax* were treated by the courts as something to be judged and not as legal standards that would assist in making a judgment.<sup>292</sup> Such an approach, however, will ensure that Indigenous oral history will be subordinated to other, Euro-Canadian historical and legal methodologies and, with its subordination, Indigenous peoples will also be subordinated.<sup>293</sup> If judges are unaware of a culture's values, those values cannot be incorporated into the court's decisions and find their way into the legal system as principles of law.<sup>294</sup> As Borrows has said, "The ideological undertones of judicial decisions are revealed when viewed through the eyes of communities that are disadvantaged by the exercise of legal power."<sup>295</sup> Those who have experienced oppression

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<sup>290</sup> Kymlicka, *Multicultural Citizenship*, *supra* note 125, at 39.

<sup>291</sup> *Delgamuukw*, *supra* note 35.

<sup>292</sup> John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgoode Hall L.J. 1 ["Listening for a Change"], at 28.

<sup>293</sup> *Ibid.*

<sup>294</sup> Dewhurst, *supra* note 222, at 223.

<sup>295</sup> Borrows, "Constitutional Law From a First Nation Perspective", *supra* note 64, at 3.

and victimization may feel that they need one of “their own” and even when dominant parties honestly believe they are treating everyone equally, the concerns of subordinated parties may go unaddressed.<sup>296</sup> As this is the case, there is a real risk of judicial interpretation of Indigenous law by the Canadian judiciary being seen as “foreign” and therefore failing to secure the legitimacy that is the key to the authority of any judicial branch in a liberal democracy.

The counter-argument relies on the idea that the important principle of equality before the law requires that all persons be subject to the same independent, disinterested, and impartial judicial process. McNamara has observed that in Australia, Canada, and the United States there remains a deep-seeded reluctance to allow parallel Indigenous justice systems to develop, which has placed serious limits on the emergence of potentially effective community justice systems.<sup>297</sup> While it is true that judicial independence and impartiality are at the heart of the structure of the judiciary in the Canadian legal system, one must question whether a unitary court structure is, in fact, the best, or at least most legitimate, way to ensure the equality before the law of individuals from a culturally distinct background in an environment of cultural and legal pluralism.

If the purpose of engaging the principle of federalism in support of Indigenous self-government is to provide Indigenous nations the space to establish a legitimate, culturally relevant form of governance for their citizens, it may be more legitimate, and thus secure more respect for the principle of the rule of law, to include in the scope of Indigenous

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<sup>296</sup> Michelle LeBaron, “Learning New Dances: Finding Effective Ways to Address Intercultural Disputes” in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004), at 25.

<sup>297</sup> Luke McNamara, “Aboriginal Human Rights and the Australian Criminal Justice System: Self-Determination as a Solution?” (1992) 21 *Man. L.J.* 544, at 584.

government authority the authority to establish distinct Indigenous institutions for dispute resolution, rather than insisting on the authority of the existing Euro-Canadian judicial branch to interpret and apply Indigenous law and resolve disputes among Indigenous citizens. Indigenous peoples' assertions of the right to self-determination in the area of criminal procedure, for example, are based on a view that no amount of reform of the existing criminal justice system will resolve the basic contradiction in attempting to achieve justice for Indigenous peoples within the context of an imposed legal system; the acceptance of the right of Indigenous peoples to develop and implement their own solutions is crucial.<sup>298</sup>

The only limitation on this principle would be that the Indigenous institutions of dispute resolution share the protections for judicial independence and impartiality that are necessary for the operation of the principle of the rule of law, so that this pluralistic approach to dispute resolution can exist within the common constitutional framework of the Canadian state. This, however, may not be a significant limitation on the ability of Indigenous governments to establish culturally relevant institutions for dispute resolution, if we separate the fundamental requirements that the rule of law imposes on the judicial function from the particular form that the implementation of these requirements takes in the Canadian judiciary. A multi-stage dispute resolution process that places an emphasis on a non-adversarial approach to dispute resolution, possibly facilitated by respected individuals who are known to the parties, is by no means inconsistent with the rule of law, especially if there is an ultimate appeal to an authoritative application of the law to resolve a dispute; pre-trial mediation is already mandatory in civil disputes in provinces such as Saskatchewan, for example. Whether a dispute resolution process without any element of authoritative interpretation and

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<sup>298</sup> *Ibid.* at 595-6.

application of the law by a third party and an emphasis on the restoration of social relations, rather than punishment, would be consistent with the fundamental requirements of the Canadian constitutional order and, indeed, whether a process without any authoritative interpretation and application of the law to a particular dispute is part of Indigenous traditions of dispute resolution, on the other hand, remain open questions. In an attempt to address these questions, let us first look at the development of judicial independence and a separate judicial function in the common-law legal system.

***Judicial independence and the judicial function in the common-law legal tradition***

The common-law legal system has created elaborate structures for legal decision-making and elaborate protections for the independence of the judiciary, in particular. The seminal work on judicial history in Canada was written in 1956 by William R. Lederman. In that work, “The Independence of the Judiciary”, Lederman reviews the history of the establishment of the judiciary as a separate branch of government, composed of lawyers, as well as the history behind the protection of judicial independence. The reason for judicial independence is that, in its absence, the judiciary may no longer have the impartiality which is essential if justice is to prevail.<sup>299</sup> Judicial independence, however, was not always a marker of the English justice system; rather, it evolved over time, along with the evolution of the judiciary as a separate branch of government. In the early years of the Norman kings, the functions of the royal courts, or *Curia Regis*, were undifferentiated; they acted as both an executive and a judiciary.<sup>300</sup> The specialization of functions began under Henry II, along with the delegation of judicial functions to itinerant judges; this process of specialization and

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<sup>299</sup> William R. Lederman, “The Independence of the Judiciary” (1956) 34 Can. Bar Rev. 769 & (1956) 34 Can. Bar Rev. 1139, at 770.

<sup>300</sup> *Ibid.* at 772.

delegation of functions continued through the 14<sup>th</sup> century, with the establishment of several separate courts.<sup>301</sup>

Originally, judges were drawn from the civil service but, by early in the 14<sup>th</sup> century, the King turned from the civil service to the newly-established legal profession for the supply of judges, due to the deterioration in the quality of the civil service.<sup>302</sup> Judicial independence from Royal instructions came gradually, however, after this change, with the power of appointment and removal of judges remaining with the monarch until after the Stuart period.<sup>303</sup> While there had been, in practice, a real measure of judicial independence in the Tudor period, the situation had deteriorated under the Stuart kings, with judges being removed and appointed on the basis of their sympathies with the King until all judges of ability and integrity were driven from the bench.<sup>304</sup> The practice of the Commonwealth period of making all judicial appointments during good behaviour was re-established, however, by William II after the Glorious Revolution and the removal of the Stuarts; this practice was then enshrined in the *Act of Settlement* in 1701 and, by 1760, this security of tenure was coupled with the guarantee that a salary would be provided to the judges throughout the period of their appointment.<sup>305</sup> As Green and Roiphe note, these constitutional guarantees were established to ensure the independence of the judiciary by preventing judges from becoming tools of the executive and by providing them with

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<sup>301</sup> *Ibid.* at 772-3.

<sup>302</sup> *Ibid.* at 774, 776.

<sup>303</sup> *Ibid.* at 778-9.

<sup>304</sup> *Ibid.* at 780-1.

<sup>305</sup> *Ibid.* at 781-2, 792.



sufficient remuneration that they could exercise virtue by subordinating their own interests to that of the law and the common good.<sup>306</sup>

Pressure from the executive or Parliament, however, were not the only threats to judicial independence and impartiality; having a direct interest in the result of a case also represented a problem for judicial independence, as no person should be a judge of their own cause, so it became a well-established rule that judges with a direct interest in a case were expected to disqualify themselves from hearing it.<sup>307</sup> To further ensure judicial independence and impartiality, judges also have personal legal immunity for their judicial acts, so that the only recourse if they abuse their judicial power is their removal from office, and it is a general principle that judges are to be judges only and not be members of the executive or legislative branches.<sup>308</sup>

Looking back on this history, one can see that the protection of judicial independence is the core objective of the guarantees of security of tenure of judges: that they cannot be removed from the bench without cause, that their removal requires an extraordinary procedure, that their salaries are guaranteed, that they hold no other position simultaneously with their judicial appointment, and that they are disqualified from deciding a case in which they have a direct personal interest. Both directly and indirectly, then, superior courts promote the impartial and objective application of the laws to the persons and circumstances those laws contemplate, including the government, and that judges are protected from the threats and influences that would lead to biased decision-making, which would undermine the

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<sup>306</sup> Bruce A. Green and Rebecca Roiphe, “Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence” (2009) 64 N.Y.U. Ann. Surv. Am. L. 497, at 499.

<sup>307</sup> Lederman, *supra* note 299, at 796-7.

<sup>308</sup> *Ibid.* at 803, 808.

principle of the rule of law, as was the case in the period of the Stuart kings; the protections for judicial independence will encourage persons of moral integrity to do their best to judge all cases before them fairly.<sup>309</sup> All of these protections for judicial independence were constitutionally entrenched for superior courts in Canada by sections 99 and 100 of the *Constitution Act, 1867*.

Of course, since Lederman's day, these guarantees of judicial independence have been secured more strongly, in part through the reference in section 11(d) of the *Canadian Charter of Rights and Freedoms* to the requirement that criminal cases be tried by an "independent and impartial tribunal" and in part by virtue of the Supreme Court of Canada finding in the *Reference re. Remuneration of Judges of the Provincial Court of Prince Edward Island* that judicial independence is a fundamental unwritten principle of the Canadian constitutional order by virtue of our Constitution being "similar in principle to that of the United Kingdom."<sup>310</sup> Specifically, the Court stated that,

The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

The same approach applies to the protection of judicial independence. In fact, this point was already decided in *Beauregard*, and, unless and until it is reversed, we are governed by that decision today. In that case (at p. 72), a unanimous Court held that the preamble of the *Constitution Act, 1867*, and in particular, its reference to "a Constitution similar in Principle to that of the United Kingdom", was "textual recognition" of the principle of judicial independence.<sup>311</sup>

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<sup>309</sup> *Ibid.* at 1178.

<sup>310</sup> *Reference re. Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 [*Provincial Court Judges Reference*], at para. 109.

<sup>311</sup> *Ibid.* at paras. 104-5.

One can also see from the history of the development of the English judiciary, however, that the protections for judicial independence and the form of the judiciary arose in response to actual events and evolving social norms of justice in English society; such protections are now part of the Canadian constitutional order, but they evolved out of a specific cultural context and their particular form is culturally situated.

While the Supreme Court of Canada identifies judicial independence as a separate fundamental principle of the Constitution in the *Provincial Court Judges Reference*, one can also understand judicial independence as an instrumental virtue, supporting the principle of the rule of law and, in particular, that element of the rule of law that requires that the law apply equally to all. For the rule of law to apply in a society, there must be a body capable of actually applying the law and for it to apply to all equally, that body must also be able to apply the law fairly to those in positions of political power, including those who appoint members of the body. By securing to judges independence from the influence of the executive branch of government once they are appointed by the executive, judicial independence seeks to protect judges from threats or manipulation by the other branches of government, so that they are in a position to apply the law to all equally, without the political implications of their decisions unduly influencing those decisions, as the rule of law demands. For judges to be able to perform their constitutional tasks properly, they need to be free from the influences of both governmental and private power, or “sovereign and subject”.<sup>312</sup> As John Whyte says, “As mediators between the claims of individuals and the interests of the political community, judges must be seen to be in thrall, neither to the state

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<sup>312</sup> John D. Whyte, “Legality and Legitimacy: The Problem of Judicial Review of Legislation” (1987) 12 Queen’s L.J. 1, at 15.

nor to powerful private interests whose ambition it may be to confound public regulation.”<sup>313</sup>  
The conditions that apply to judicial appointments reflect a separation from both political will and political interest that is a precondition not only for the administration of justice between citizens but also for the judicial control of political conduct.<sup>314</sup>

Of course, judges, as people who exist within society, are not completely insulated from the political debate that goes on within society, including political debate about matters that either may or do come before the court. Thus, it is likely false to suggest that fair and impartial judging requires that judges be disinterested in the outcomes of their decisions, or that it is even possible for judges to be so separated from the implications of their decisions for both the litigants and society as a whole that they can be disinterested. Indeed, Green and Roiphe suggest that the myth of the emotionally detached judge risks undermining the quality of judging, obscuring the transparency of judicial decision-making, and deterring the development of diverse judicial styles.<sup>315</sup> What is necessary is that judges be insulated from influences that may bias their application of legal reasoning to resolve a dispute according to the requirements of the law and justice, so that the result of any dispute is fair, impartial and recognizably “legal” (and hopefully recognizably just as well). The institutional mechanisms to protect these fundamental values may vary according to the norms and traditions of the community that is subject to the decisions of the judges, and in the case of dispute resolution within Indigenous nations may even look significantly different from the dominant Euro-Canadian legal traditions, but such variations are compatible with the constitutional order that

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<sup>313</sup> *Ibid.* at 18-9.

<sup>314</sup> *Ibid.* at 18.

<sup>315</sup> Green and Roiphe, *supra* note 306, at 498-9.

governs Canadian society as long as the fundamental principle of the rule of law and its corollary, judicial independence, are secured.

### ***Indigenous traditions of dispute resolution***

Do Indigenous traditions of dispute resolution include protections for the fairness, impartiality and independence of those responsible for resolving disputes within Indigenous societies, akin to the protections for judicial independence in the common-law court system, such that Indigenous dispute resolution processes could be part of an approach to Indigenous self-government that seeks to reconcile Indigenous sovereignty and Crown sovereignty within the Canadian constitutional order? First, one must ask what are Indigenous traditions of dispute resolution and what underlying norms have influenced the development of these traditions. Of course, the dispute resolution traditions of different Indigenous nations were different, and some are better documented in the historical record, but there are certain common qualities among various Indigenous traditions of dispute resolution.

One of the most important qualities of traditional Indigenous dispute resolution was its participatory nature. The entire community tended to be implicated in the dispute resolution process, as the purpose was not to attempt to settle an isolated difference between individual parties, but to reaffirm the community and restore peace.<sup>316</sup> Descriptions of traditional Indigenous justice practices in the literature emphasize that practices were grounded in the need to restore peace, balance and harmony to relations between the offender and the victim, their kin, and the community as a whole and that fact and guilt determination was often undertaken through a consensual process, with the offender rarely denying their involvement in an offence, as the values of truth and responsibility (and likely a keen sense of

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<sup>316</sup> Webber, “Indigenous Dispute Settlement”, *supra* note 285, at 151.

personal honour) were paramount.<sup>317</sup> As the emphasis in Indigenous systems was on collective deliberation and collective healing and reconciliation, it is clear why Indigenous dispute settlement was concerned with the values of the community.<sup>318</sup> Yazzie, for example, emphasizes that the restoration of social solidarity, mutuality and reciprocal obligations was one of the aims of Navajo justice, so dispute settlement took on a different cast from that which is generally the case in non-Indigenous justice.<sup>319</sup>

One way to restore harmony was through compensation to the victim and their family, with the degree of compensation being determined by the seriousness of the offence and the rank of the victim; as well, crimes against women were often treated more harshly than those against men.<sup>320</sup> Sanctions could also be imposed, such as ridicule, shaming, and avoidance for minor offences.<sup>321</sup> In the case of the Dene for example, “harsh words” and reconciliation processes were also part of dispute resolution.<sup>322</sup>

The Dene system was traditionally a loosely structured three-tier system, with the first level a private level in which individuals who came into conflict would try themselves to resolve the conflict.<sup>323</sup> At the second stage, the individuals in conflict would approach a

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<sup>317</sup> Koshan, *supra* note 254, at 29-30.

<sup>318</sup> Webber, “Indigenous Dispute Settlement”, *supra* note 285, at 152.

<sup>319</sup> *Ibid.* at 151.

<sup>320</sup> Koshan, *supra* note 254, at 30.

<sup>321</sup> *Ibid.*

<sup>322</sup> *Ibid.*

<sup>323</sup> Jane Dickson-Gilmore, “The Incentive for Separate Justice Systems” in Andrea P. Morrison, ed. *Justice for Natives: Searching for Common Ground* (Montreal & Kingston: McGill-Queen’s University Press, 1997), at 49.

common older person who they would ask to mediate the dispute.<sup>324</sup> This person could refuse to become involved or tell the parties to resolve the conflict themselves if they thought that outside input was not necessary; if they did intervene, they would work with the disputants to mediate the dispute and, if mediation proved impossible and the dispute threatened to fester to the point of potentially disrupting the community, the community would become involved and the dispute would assume a public quality.<sup>325</sup> This system would essentially rely on the force of public opinion, as the dispute would be resolved as soon as public opinion about who was right and who was wrong was readily apparent; at that point the individual who was in the wrong would know this clearly and would be forced to take appropriate measures to deal with the offence, most commonly through restitution or self-imposed banishment.<sup>326</sup>

On the West Coast, among the Gitksan, the offender's family would hold a "shame feast" to display collective remorse and announce compensation.<sup>327</sup> After a Gitksan shame feast, the victim's house would hold a "cleansing feast" at which the restitution would be accepted and balance restored; where, however, an offender refused to acknowledge responsibility or make restitution, more severe sanctions such as shunning or banishment were imposed or, for the most serious offences, the death penalty.<sup>328</sup> Outsiders did, however, play a role in Gitksan dispute resolution, as kinship networks extended beyond the particular community; this involvement of house members from outside the community ensured enough

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<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.* at 49-50.

<sup>326</sup> *Ibid.*

<sup>327</sup> Koshan, *supra* note 254, at 30.

<sup>328</sup> *Ibid.* at 31.

disinterest and distance that dispute resolution had to consider the common good beyond the particular matter in dispute.<sup>329</sup> Enough people were involved who had no direct vested interest in the dispute that they could take a broader view of the problem, in the same way judges in the Euro-Canadian justice systems are meant to.<sup>330</sup>

To avoid cycles of retaliatory violence for criminal behaviour, in Ojibway society, too, chiefs from opposing families, bands, or clans met in customary gift-giving ceremonies designed to achieve reconciliation; unlike in Euro-Canadian systems of justice, no independent trier of fact presided, as the purpose was not to determine truth or apportion individual blame but to restore balance to a community through reconciliation.<sup>331</sup> Similarly, Mohawk social relations were regulated by the importance of individual autonomy, mutual respect and responsibility to the group, rooted in the social institution of the clan.<sup>332</sup> When an individual acted, they represented the clan and if they were deviant, the whole clan had to accept responsibility and make reparations for the individual's offence.<sup>333</sup>

Coyle observes that the traditional Haudenosaunee procedures for dealing with murders were well documented by Morgan. Immediately on the commission of a murder, the matter was taken up by the tribal groups to which the parties to the act belonged and strenuous efforts were made to effect a reconciliation, to avoid private retribution.<sup>334</sup> A

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<sup>329</sup> Val Napoleon, "Who Gets to Say What Happened: Reconciliation Issues for the Gitksan" in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004), at 189.

<sup>330</sup> *Ibid.*

<sup>331</sup> Walters, "'According to the old customs of our nation'", *supra* note 30, at 12.

<sup>332</sup> Dickson-Gilmore, *supra* note 323, at 52.

<sup>333</sup> *Ibid.*

<sup>334</sup> Coyle, *supra* note 175, at 619.



council of the offender's nation determined if the offender was prepared to confess his crime and make atonement.<sup>335</sup> If so, a belt of white wampum was sent to the council of the victim's tribe and the council of the victim's tribe attempted to pacify the family of the victim and convince them to accept the white wampum; if the wampum was not sent quickly enough or the family of the victim would not accept it, they had a right to exact vengeance on the offender, and the offender generally fled.<sup>336</sup> The Haudenosaunee method of dealing with murder thus attached a heavy stigma to the offence, including threats of exile, execution, or the imposition of a chastening sanction on the murderer and their family, yet it also provided for flexibility in its response to the crime.<sup>337</sup> Possibly its greatest strength was the engagement of the offender's family and tribe, as knowledge of collective responsibility would be likely to make a potential offender hesitate before acting.<sup>338</sup>

Dickson-Gilmore has described the traditional Mohawk Longhouse justice system as a five-tiered system of dispute resolution. As with the Dene, the first tier was a private tier in which the individuals tried to resolve the dispute themselves without taking it to the community and disrupting the affairs of others; if they were unable to do so, they would approach an Elder or clan leader and ask them to help mediate the dispute.<sup>339</sup> The Elder could agree to help, give the dispute back to the disputants to resolve themselves, or, when the offence was very serious or part of a persistent pattern of deviance, they could move the

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<sup>335</sup> *Ibid.*

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.* at 620.

<sup>338</sup> *Ibid.*

<sup>339</sup> Dickson-Gilmore, *supra* note 323, at 53.

dispute to the next level, involving all of the clans in a community meeting.<sup>340</sup> If the clan leaders could not resolve the dispute, it would move automatically to the level of the Community Council, in which representatives of the entire community, sitting in clans within the Longhouse, would deliberate over the nature of the offence and an appropriate remedy that reflected the seriousness of the offence and the acceptability of the solution to the parties and the community.<sup>341</sup> If a dispute was still not resolved at this level, it might go to the Nation Council, where the same process would effectively be repeated, though if the Nation Council did not believe that it could resolve the dispute for lack of evidence or available information, it could set the dispute aside and resume consideration of it later, in light of additional information.<sup>342</sup> If the Nation Council could not resolve the dispute, the “court” of last resort was in the Mohawk Nation, but the disputants would have to apply to have their dispute heard; if it was accepted for a hearing, the Nation would use the same process as at the lower levels but with the additional advantage of being able to determine the best compromise and impose it in order to return the community to peaceful relations.<sup>343</sup> It is important to note that, because a dispute must always have been resolved in a way that was to the satisfaction of both parties, a right of appeal was implicit in the Longhouse justice structures.<sup>344</sup> This process could clearly provide the grounding for a modern Indigenous justice system, with elements of informal dispute resolution, formal but community-based decision-making and appeals to higher, more distanced levels of dispute resolution built in.

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<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.* at 53-4.

<sup>342</sup> *Ibid.* at 54.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

Australian Indigenous traditions were also highly participatory, with members of each clan sitting facing each other, arranged around their spokespeople.<sup>345</sup> First, a general discussion was undertaken and then the aggrieved parties spoke, along with their family members and any other person with an interest in the proceedings; they could speak whatever they felt, as open displays of anger were seen as part of the resolution process.<sup>346</sup> People were then encouraged to get control of their emotions before facing those with whom they were in dispute.<sup>347</sup>

As can be seen from some of these descriptions, though, while they were participatory and tended not to create an institutional separation between “judicial” and other types of decision-making, Indigenous legal traditions often relied on Elders or designated wisdom-keepers to identify and communicate the law and play a leadership role in resolving disputes, thus putting them into a position somewhat akin to that of a judge.<sup>348</sup> These were the most respected members of the community, who were respected because of their accumulated life experience and because they held the wisdom of the community, including the law.<sup>349</sup> As Borrows observes, Indigenous law originates in the political, economic, spiritual, and social values expressed through the teachings and behaviour of knowledgeable and respected individual and Elders, who enunciate the principles of the law in rich stories, ceremonies, and

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<sup>345</sup> Larissa Behrendt, “Cultural Conflict in Colonial Legal Systems: An Australian Perspective” in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004), at 123.

<sup>346</sup> *Ibid.*

<sup>347</sup> *Ibid.*

<sup>348</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 59, at 191.

<sup>349</sup> Monture-Okanee and Turpel, *supra* note 218, at 246.

traditions.<sup>350</sup> These stories express the law of Indigenous communities, as they represent the accumulated wisdom and experience of Indigenous peoples in conflict resolution.<sup>351</sup> Respect for the knowledge and wisdom of Elders is the equivalent of respect for a judge's expertise and impartiality.<sup>352</sup> Equally important, the Elders whose wisdom was sought earned this respect through their ability to understand the law and apply it in a dispassionate, or independent, manner to help resolve disputes in the best interests of their society. Traditional Woodland Cree, Ojibway and Haudenosaunee society all had similar procedures for maintaining community harmony, including the teaching of wisdom by Elders and community leaders, mediation by leaders and Elders in an effort to resolve disputes, the public and private warning of offenders that their conduct must not be repeated, fear of supernatural retribution for wrongdoing, and fear of public disgrace.<sup>353</sup>

Monture-Okanee and Turpel note that, as a consequence of Indigenous communities being closely-knit kinship communities, the "impartiality" of judges as understood by the Euro-Canadian legal system is not an essential ingredient of Indigenous justice.<sup>354</sup> The person with the authority to resolve conflicts in Indigenous communities must be someone known to the community, rather than an unknown person set apart from it; a non-Indigenous judge is simply an outsider without any legitimacy in the community.<sup>355</sup> The fairness of their decisions and their duty to the best interests of their society were, nonetheless, of central

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<sup>350</sup> Borrows, *Recovering Canada*, *supra* note 28, at 13.

<sup>351</sup> *Ibid.*

<sup>352</sup> Monture-Okanee and Turpel, *supra* note 218, at 246.

<sup>353</sup> Coyle, *supra* note 175, at 623.

<sup>354</sup> Monture-Okanee and Turpel, *supra* note 218, at 246.

<sup>355</sup> *Ibid.*

concern. The independence of Elders in coming to a determination on how to resolve a dispute was not interfered with, due to the significant social stigma attached to failing to respect an Elder. Cooter and Fikentscher noted that, even in the absence of explicit constitutional authorization, assembling Elders to provide advice on custom has been a common practice among Pueblo.<sup>356</sup> In Australia, too, a group of Elders would make decisions and intervene in disputes if they had not been settled by family members, though no-one had the vested authority to decide the outcome of a dispute, as decision-making was less formal and systematic than in common law justice systems.<sup>357</sup> In Australia, as in North America, women had a prominent role in the process, having the power to make decisions if the person who had broken the law was a woman.<sup>358</sup>

In this way, while dispute resolution in Indigenous communities was a community process, and was not referred to a separate institution composed of disinterested individuals, there were individuals who were recognized as the keepers of the law who had a specialized role in dispute resolution, thus creating some degree of institutionalization of dispute resolution. Those with responsibility for formal dispute resolution were also expected to exercise their responsibilities with an independence of mind and concern for the best interests of their society and they secured independence in fulfilling their role as keepers and interpreters of the law through the respect they held within the community. In this sense, Indigenous traditions of dispute resolution were consistent with a commitment to the rule of law and to the independence and impartiality of the interpreters of the law.

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<sup>356</sup> Cooter and Fikentscher, *supra* note 170, at 323-4.

<sup>357</sup> Behrendt, *supra* note 345, at 122.

<sup>358</sup> *Ibid.*

## Chapter 5 – Indigenous Self-Government, Indigenous Law and Their Implications for the Creation of an Indigenous Judiciary

### *Melding Indigenous and common-law traditions: an Indigenous judicial branch as part of Indigenous self-government*

While Indigenous traditions of dispute resolution could be understood to be consistent with the principles of judicial independence (in the sense of impartiality) and the rule of law, it is unclear what would be required of a self-determining Indigenous government in a modern context to ensure that those values would continue to be reflected in a way that was consistent with Canada's overarching constitutional order. There is a genuine concern in some quarters about the implications of a separate Indigenous justice system in Canada. Bryan Schwartz, for example, has raised concerns about separate Indigenous justice systems leading to indifference to Indigenous justice issues from the majority population, creating real or perceived limitations on the right of Indigenous people to participate in the majority political system, eliminating the "checks and balances" that come with having different orders of government, lacking the degree of impartiality that is required for the proper administration of justice because of the small size of communities, constituting too great a departure from the principle of equality before the law, and masking the underlying causes of Indigenous disadvantage.<sup>359</sup>

Borrows has addressed each of these concerns in turn, noting, for example, that Indigenous separatism can lead to indifference from the majority but that assimilation has been a worse burden for Indigenous peoples than indifference would be.<sup>360</sup> In response to Schwartz's concern that separate Indigenous justice systems could undermine the checks and

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<sup>359</sup> Bryan Schwartz, "A Separate Aboriginal Justice System?" (1990) 19 Man. L.J. 77, at 78-80.

<sup>360</sup> Borrows, "A Separate Peace", *supra* note 12, at 346.

balances that protect against the abuse of authority, Borrows suggests that Indigenous people should be encouraged to design their own systems of checks and balances to generate culturally appropriate constraints on those exercising authority within Indigenous communities and set up a review system that takes advantage of larger cultural groupings, but he also notes that the use of people known to the parties is an important part of many Indigenous dispute settlement systems.<sup>361</sup> He further observes that administrative law tribunals demonstrate the advantages of having people with specialized knowledge and experience settling disputes among distinct groups of people.<sup>362</sup> Borrows further points out that the argument that separate Indigenous dispute settlement systems would depart from the principle of equality before the law is disingenuous when one considers the inequality of Indigenous people in the existing legal system.<sup>363</sup> As well, implementing separate justice systems does not necessarily imply a departure from the principle of one law for all, as is demonstrated by the existence of multiple laws, and multiple courts, within the federal system, all of which are unified by the fact that each must be consistent with the Constitution; the idea that Canadians currently live under one legal regime, thus, is overly simplistic.<sup>364</sup>

This debate makes it clear that there is a serious discussion to be had about what modern Indigenous institutions of dispute resolution would need to look like to be consistent with Canada's constitutional order and how Indigenous and Euro-Canadian legal traditions could be melded effectively in the creation of modern, legitimate institutions for the resolution of disputes within Indigenous nations. This enquiry is assisted, however, by the

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<sup>361</sup> *Ibid.* at 351-2, 355.

<sup>362</sup> *Ibid.* at 355.

<sup>363</sup> *Ibid.* at 356.

<sup>364</sup> *Ibid.* at 357-8.

existence of a variety of precedents for Indigenous dispute resolution processes in several common-law jurisdictions. While some of these modern processes involve some departure from traditional Indigenous processes of dispute resolution, such as by the establishment of separate institutions to exercise a judicial function, either because these forms have been imposed on Indigenous peoples or because Indigenous peoples have chosen to adopt them as they fit their modern context better than a pure return to tradition would, they nonetheless represent precedents for Indigenous or “Indigenized” processes of dispute resolution that function within modern liberal democracies. These existing institutions and practices, the analysis of their strengths and weaknesses, and efforts to reform them to increase their fairness, cultural relevance and, as a consequence, legitimacy provide valuable guidance for considering what the Indigenous institutions and practices of dispute resolution of a modern Indigenous government within Canada could look like.

The Australian Law Reform Commission reviewed a number of practices in Australia and the Torres Strait Islands and issued a two-volume report on customary Indigenous dispute resolution in 1986. Jackson describes this report as the most comprehensive review undertaken in any country of the problems associated with Indigenous peoples in an imposed criminal justice system.<sup>365</sup> This report provides a detailed assessment of different Indigenous approaches to dispute resolution and supplies valuable lessons for those contemplating the establishment of Indigenous institutions of dispute resolution within a modern, liberal legal framework. Both Queensland and Western Australia, for example, have systems of Aboriginal courts in which Indigenous personnel enforce local by-laws of Aboriginal trust territories (which are equivalent to reserves); these courts have jurisdiction over virtually all

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<sup>365</sup> Michael Jackson, “Locking Up Natives in Canada” (1989) 23 U.B.C. L. Rev. 215 [“Locking Up Natives”], at 222.



Indigenous and non-Indigenous individuals in the territory and can take into account the usages and customs of the community in resolving disputes.<sup>366</sup> These courts cannot, however, order imprisonment for breaches of by-laws and their procedures for, and enforcement of, decisions must be the same as in other Australian courts presided over by Justices of the Peace or Magistrates.<sup>367</sup> Some of the criticisms of these court systems are that they are “second-class” courts, that they lack real Indigenous influence or control, and that they fail to take adequate account of Indigenous customs and traditions; essentially, underpinning all of these criticisms is that the court system is an imposition of alien structures and values.<sup>368</sup> The Law Reform Commission pointed out, however, that legislative changes in Queensland have attempted to address some of these issues, particularly in giving Indigenous councils greater by-law-making powers and authorizing the courts to exercise their jurisdiction with account for usages and customs of the community.<sup>369</sup>

While the Aboriginal courts in Queensland have been in operation since the 1950s, the Aboriginal courts in Western Australia are of more recent vintage, arising largely because one Western Australian judge made it a practice to invite local elders to sit with him when Indigenous defendants were being dealt with.<sup>370</sup> In 1977, he was asked to conduct an inquiry into aspects of Indigenous law, the outcome of which was the establishment of “Aboriginal” courts in Western Australia.<sup>371</sup> The Western Australian courts are, in fact, regular justice of

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<sup>366</sup> *Ibid.* at 230.

<sup>367</sup> *Ibid.*

<sup>368</sup> *Ibid.* at 230-1.

<sup>369</sup> *Ibid.* at 231.

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

the peace courts staffed by Indigenous personnel who, once trained, are left to run the courts themselves; this, however, has only occurred to a limited extent in practice.<sup>372</sup> Reviews of these courts have been mixed, with some seeing them as an effective synthesis of local customary law and formal by-laws while others argue that the limitations imposed on the discretion of the judges leave even Indigenous judges in a position of being unable to deal with Indigenous defendants according to Indigenous law.<sup>373</sup> McNamara has commented that the minimal autonomy that characterizes the Western Australian justice of the peace scheme undermines the utility of the scheme as a model for Indigenous community justice.<sup>374</sup> The Law Reform Commission noted, however, that these courts were never intended to be a recognition of “tribal law” but were merely an extension of the regular court system into Indigenous communities.<sup>375</sup>

A further example from Australia is the authority that the Cherbourg Aboriginal Council has to establish its own Aboriginal court, which cannot only deal with breaches of Council bylaws but can hear and determine disputes involving matters accepted by the community as being rightly governed by the “usages and customs” of the community.<sup>376</sup> The Council, acting as a court, exercised its powers to ban several youths from the community for fighting with non-Indigenous youths from the neighbouring community; the problem is that it did so without hearing from the alleged offenders, without legal representation for them, and

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<sup>372</sup> *Ibid.* at 232.

<sup>373</sup> *Ibid.* at 232-3.

<sup>374</sup> McNamara, *supra* note 297, at 581.

<sup>375</sup> Jackson, “Locking Up Natives”, *supra* note 365, at 233.

<sup>376</sup> Brennan, *supra* note 263, at 246.

without any record of what would constitute the applicable “Aboriginal tribal law”.<sup>377</sup> This exposes the importance when establishing the authority of Indigenous governments to develop their own legal institutions of striking a balance between the collective right of a community to determine its law, including by reference to traditional law, in community-based institutions, and the individual rights of community members demanding due process and just outcomes.<sup>378</sup>

A more limited approach to Indigenous involvement in the criminal justice system is reflected in a pilot project initiated in 1982 in the Northern Territory, in which a group of local clan elders sit with the magistrate to give their views on the seriousness of the offence and the appropriate sentence.<sup>379</sup> The family of the accused and other community members may also attend court and give their views on the behaviour of the accused and the proper sentence; as well, an anthropologist and two local Aborigines prepare a background report on the offender and strategies for the offender’s future, for the use of the magistrate.<sup>380</sup> This model is easier to implement than a separate Indigenous justice system, while increasing the involvement of the community and Indigenous traditions of justice; in fact, it has been tried in some of the Canadian territories as well.<sup>381</sup>

In Papua New Guinea, village courts have been operating since 1975 after the *Village Courts Ordinance* of 1974 authorized the establishment of village courts with jurisdiction

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<sup>377</sup> *Ibid.* at 247.

<sup>378</sup> *Ibid.*

<sup>379</sup> Jackson, “Locking Up Natives”, *supra* note 365, at 234.

<sup>380</sup> *Ibid.*

<sup>381</sup> *Ibid.*

over minor civil and criminal disputes involving people normally resident in the area.<sup>382</sup> They are administered by magistrates from the community, who are appointed by the community for a three-year term; the magistrates require no special qualifications, though some knowledge of the community and traditional dispute resolution techniques is considered necessary.<sup>383</sup> These courts represent an effort to make the legal system more relevant to the Melanesian people by making a blend of customary law and the common law the dominant law of the country.<sup>384</sup> One of the functions of the court is to mediate a just and amicable settlement of disputes prior to sending a dispute to be adjudicated, though if mediation fails the court has the jurisdiction to hear both civil and criminal cases.<sup>385</sup> The effectiveness of the mediation approach is demonstrated by the fact that resolution at this stage is twice as common as are formal court sittings.<sup>386</sup> For matters that get to the adjudication stage, however, the courts can order compensation or impose fines or community service on offenders, though they cannot order imprisonment except if a prior compensation order has been ignored.<sup>387</sup>

Rather than developing as institutions of Melanesian juridical traditions, however, many village courts have adopted the model of common-law courts and, thus, have to some extent neglected their less formal mediation mandate and customary law.<sup>388</sup> The Law Reform

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<sup>382</sup> D. E. Paterson, "South Pacific Customary Law and Common Law: Their Interrelationship" (1995) 21 *Commw. L. Bull.* 660, at 664.

<sup>383</sup> Dickson-Gilmore, *supra* note 323, at 51.

<sup>384</sup> Jackson, "Locking Up Natives", *supra* note 365, at 235.

<sup>385</sup> *Ibid.*

<sup>386</sup> Dickson-Gilmore, *supra* note 323, at 51.

<sup>387</sup> Jackson, "Locking Up Natives", *supra* note 365, at 236.

<sup>388</sup> *Ibid.*

Commission did point out, however, that this criticism should be tempered by the fact that there are also unofficial dispute resolution processes that operate in parallel with the village courts and reduce the number of disputes that come before the courts.<sup>389</sup> The Commission concluded that the village courts were filling a gap in achieving order in the community, that the large number of cases that come before them suggests that they are meeting local needs and reducing the number of cases that come before the higher courts, and that this model had the greatest potential application in Indigenous communities because of its focus on resolving disputes, they rely on local custom and local administration, they do not suffer from jurisdictional conflicts (as is the case with tribal courts in the United States), and most importantly because they are seen by the local population as the “their” courts.<sup>390</sup>

As well, customary land law is adjudicated Papua New Guinea in special courts created for the purpose, with mediation an inherent part of the dispute resolution process and both mediators and magistrates involved.<sup>391</sup> The statute establishing these courts invites the land courts to integrate customary law into the common law of property, though the courts themselves are not sure what to do with this invitation.<sup>392</sup> The idea of a land “court”, though, is something of a departure from customary forms of dispute resolution, which involved elders and bigmen as mediators, and appeal to the common-law derived provincial land courts is also available.<sup>393</sup> It is interesting to note, however, that the high standards of judicial independence bequeathed by Australia on Papua New Guinea are being upheld, with

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<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.* at 237.

<sup>391</sup> Robert D. Cooter, “Inventing Market Property: The Land Courts of Papua New Guinea” (1991) 25 *Law & Soc’y Rev.* 759, at 760.

<sup>392</sup> *Ibid.* at 783.

<sup>393</sup> *Ibid.*

few land court magistrates sitting in their home communities, few bribery and corruption allegations being leveled at magistrates (though certainly there are some leveled at mediators), and a dearth of stories of business transactions that could create conflicts of interest for magistrates.<sup>394</sup> As well, the relationship between the mediators and the magistrates can be seen as a successful compromise between local knowledge and the disinterestedness that supports judicial independence.<sup>395</sup>

One scheme that was presented to the Australian Law Reform Commission, the Yirrkala scheme, is particularly interesting, as it sought to build on traditional ways of settling disputes and restoring order while institutionalizing the procedures.<sup>396</sup> This scheme envisages a Law Council, the Garma Council, comprising two senior persons from each clan as chosen by the clans themselves and relying as far as possible on traditional structures of authority.<sup>397</sup> This council would have authority for the preservation of friendly relations among the clans, the maintenance of traditional law and custom, the settlement of disputes between persons, families and clans, the maintenance of social order and discipline, and the relationship with judicial and law enforcement authorities.<sup>398</sup> Though the council would be responsible for local justice, it would choose who should constitute a “community court” in particular cases in which disputes could not be resolved without recourse to a judicial process, rather than sitting as a court itself.<sup>399</sup> The likely composition of a court would be a

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<sup>394</sup> *Ibid.*, 791.

<sup>395</sup> *Ibid.*, 792.

<sup>396</sup> Jackson, “Locking Up Natives”, *supra* note 365, at 237.

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.* at 240.

<sup>399</sup> *Ibid.*

senior member of the clan or family of each of the victim and offender and a senior person or persons from another clan or family, chosen for their wisdom and standing in the community; this court would hear disputes in public and, upon making a decision, report back to the community for final approval of the disposition of the dispute.<sup>400</sup> The scheme also envisions that the Garma Council would have some say in all disputes or offences involving community members and would be responsible for appointing people with police functions, establishing the community's rules for maintaining social order, and appointing persons to oversee and implement punishments imposed by the community courts.<sup>401</sup> The range of sanctions that could be imposed by the community court would include compensation, fines, compulsory community service, temporary banishment from the community, overnight imprisonment in a lock-up in the community, or committal to the care of a member of the offender's clan; the principal distinction of this scheme from the dominant criminal justice system is that compensation, not imprisonment, would be the primary remedy.<sup>402</sup>

Later, the Law Reform Commissions of both New South Wales and Western Australia addressed issues of Aboriginal customary law in their states. The 2000 Report of the New South Wales Law Reform Commission notes that, as with other Indigenous societies, shaming and banishment are frequently used forms of punishment in the customary law of Aboriginal people in that state and that, even in urban areas, there are discrete and strong Aboriginal communities in which authority is vested in an Elder or Elders.<sup>403</sup> As with

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<sup>400</sup> *Ibid.*

<sup>401</sup> *Ibid.* at 241.

<sup>402</sup> *Ibid.*

<sup>403</sup> Australia, Law Reform Commission of New South Wales, *Report 96: Sentencing – Aboriginal Offenders* (2000), online: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r96chp3#2>, accessed September 8, 2009, at paras. 3.6, 3.7.

other reports, it also noted that disputes within Aboriginal communities are not generally perceived as restricted to individuals but that the negotiation, mediation and conciliation involves everyone in the community; in particular, where the conflict involves an offence perpetrated by one against another, members of both the offender's and victim's families become involved and if physical punishment is appropriate, it is inflicted not by an authorised law officer, but rather by the people personally aggrieved by the behaviour.<sup>404</sup> Nonetheless, there was some institutionalization of dispute resolution as, when there was a dispute, the Elders met to discuss the punishment and their word was the "law" on the matter.<sup>405</sup>

The Western Australian Law Reform Commission Report noted that, "processes developed consistently with Aboriginal law and culture may assist in solving law and order issues in Aboriginal communities."<sup>406</sup> In particular, the Commission sought to enhance the cultural authority of Elders and other respected persons by providing an opportunity for their direct participation in the criminal justice system.<sup>407</sup> This report also identified the involvement of families and communities in disputes, the direct involvement of disputants, and collective decision-making in resolving disputes as key distinctions between Indigenous customary law systems and the Australian legal system; these make a strong case for the direct involvement of Indigenous people in the criminal justice system, such as through the establishment of Aboriginal courts and Community Justice Groups in which Elders and other

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<sup>404</sup> *Ibid.* at para. 3.20.

<sup>405</sup> *Ibid.*

<sup>406</sup> Australia, Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture, Final Report* (Perth: Government of Western Australia, 2006), at 79.

<sup>407</sup> *Ibid.*



respected individuals would be involved.<sup>408</sup> The Commission was careful to note, as well, that these Community Justice Groups should be community-owned, community-designed, and community-operated, rather than merely community-based; its proposals seek to “recognise Aboriginal customary law processes for dealing with justice matters”.<sup>409</sup> As well, the establishment of these Community Justice Groups would be supported by the creation of an Aboriginal Justice Advisory Council, consisting of members of both the Indigenous community and government departments, to consult with Indigenous communities and initiate the implementation of the groups.<sup>410</sup> Within discrete Indigenous communities, the Community Justice Groups would have the authority to set community rules and community sanctions for wrong-doing, subject to the constraints of Australian law (such as not inflicting physical punishment that would itself constitute a criminal offence); membership in the community would require adherence to these rules and sanctions, and refusal to abide by them could result in banishment.<sup>411</sup> As well, all Community Justice Groups would have a significant role in the criminal justice system in all locations; for example, they could present information to the courts about an accused and about customary law and culture, participate in diversion programs and the supervision of offenders, and provide a panel from which Elders could be drawn to sit with Magistrates.<sup>412</sup>

Interestingly, the Commission preferred the Community Justice Group model to Aboriginal-controlled courts because court-like structures do not appear to be part of

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<sup>408</sup> *Ibid.* at 81.

<sup>409</sup> *Ibid.* at 97.

<sup>410</sup> *Ibid.* at 98.

<sup>411</sup> *Ibid.* at 104, 106.

<sup>412</sup> *Ibid.* at 109.

Indigenous customary law in Australia; the Report states that, “Any attempt to create an Aboriginal-controlled court that is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulty.”<sup>413</sup> Nonetheless, the Commission did observe that it appeared that Aboriginal courts (courts within the general criminal justice system in which Indigenous people were substantially and directly involved) had achieved significant gains in justice outcomes for Indigenous people, as they appear to create a more meaningful court experience and increase compliance with courts orders and changes in behaviours; as well, Indigenous communities are strengthened by the reinforcement of the traditional authority of Elders.<sup>414</sup> Thus, the Commission proposes the establishment of Aboriginal courts in both metropolitan areas and regional centres, as a separate division of the Magistrate’s Court.<sup>415</sup> As part of the sentencing process, these courts could impose at least some traditional Indigenous punishments, though the Commission notes that courts could not condone the imposition of traditional punishments that would be unlawful under Australian law.<sup>416</sup> The Commission also supported diversion options managed and controlled by Indigenous people as an alternative to both the formal criminal justice system and to sentencing options such as imprisonment; these would allow for the use of customary law and community-based sentencing options to rehabilitate Indigenous offenders.<sup>417</sup> The

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<sup>413</sup> *Ibid.* at 124-5.

<sup>414</sup> *Ibid.* at 126-7.

<sup>415</sup> *Ibid.* at 127.

<sup>416</sup> *Ibid.* at 178.

<sup>417</sup> *Ibid.* at 185-6.

Commission also recognized the importance of traditional healing methods in addressing family violence within Indigenous communities.<sup>418</sup>

Looking elsewhere in the British Commonwealth, customary court systems have developed in India, in the form of *Lok Adalat* courts, out of criticism of the foreign nature of formal British law and a desire for a dispute resolution system that advanced more traditional values of social harmony, concerns and desires similar to those of Indigenous communities in North America and Australasia.<sup>419</sup> The *Lok Adalat* courts also had state support, as Indian governments sought to advance social and economic equality and improve the speed, participatory nature and legitimacy of dispute resolution by indigenizing the formal judicial systems.<sup>420</sup> These courts have come under criticism as they have become increasingly established and formal, to the point that the Conciliation Courts established within the judicial system of Himachel Pardesh are now preferred to the *Lok Adalat* courts by participants because the Conciliation Courts are permanently accessible, judges come from the district and speak the regional language, they have a better grasp of the local context and conflicts, and the judges were experienced practicing judges.<sup>421</sup>

Distinctively African judicial structures have also developed through a similar blending customary African judicial procedures and modern procedures introduced by the colonial powers.<sup>422</sup> Customary, informal, or Indigenous courts existed in South Africa

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<sup>418</sup> *Ibid.* at 289.

<sup>419</sup> Sarah Lee Whitson, “‘Neither Fish, nor Flesh, nor Good Red Herring’ *Lok Adalats*: An Experiment in Informal Dispute Resolution in India” (1992) 15 *Hastings Int’l & Comp. L. Rev.* 391, at 399.

<sup>420</sup> *Ibid.* at 400, 407-8.

<sup>421</sup> *Ibid.* at 415, 426.

<sup>422</sup> Robert A. Bush, “Modern Roles for Customary Justice: Integration of Civil Procedure in African Courts” (1974) 26 *Stan. L. Rev.* 1123, at 1125.

throughout the period of colonization, with this tradition now taken up in cities by “street committees” and “people’s courts” that have no state sanctions.<sup>423</sup> The key attributes of African customary systems are their simplicity, informality, intelligibility, and accessibility, which are a result of the activist nature of customary courts, driven in turn by the social needs and values of the populations they serve.<sup>424</sup> It is interesting to note that, in the *ibaanc* of the Kuba, the primary concern is not in the detached neutrality of the judge but in understanding the facts and background to the dispute, so the competence of a judge is assessed based on the status relationship and personal connections between the judge and the parties to the dispute; judges in this system use their background knowledge to play something of the role of counsel in the common-law system, as well, implicitly structuring the pleadings and cross-examining witnesses, as is often done in continental European judicial systems.<sup>425</sup>

These systems provide dispute resolution processes that allow the parties to air their grievance fully, without complexity or formality, while ensuring the parties of a fair resolution by a knowledgeable community member that will facilitate their necessarily interwoven and continuing social relations; the ultimate purpose of dispute resolution in this system is to offer a resolution that, while apportioning a measure of blame, harmonizes the disputants through a conciliation they can both respect, an objective shared by Indigenous dispute resolution systems in Australasia and North America.<sup>426</sup> The very legitimacy of these customary courts relies on their ability to facilitate the resumption of harmonious community

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<sup>423</sup> See Sandra Burman and Wilfried Scharf, “Creating People’s Justice: Street Committees and People’s Courts in a South African City” (1990) 24 *Law & Soc’y Rev.* 693, at 694-6.

<sup>424</sup> Bush, *supra* note 422, at 1126.

<sup>425</sup> *Ibid.* at 1127-8.

<sup>426</sup> *Ibid.* at 1129-30.

life.<sup>427</sup> There is a risk that moves to integrate customary and common-law systems, and thereby formalize the existing customary system, will result in the boycott of the system by traditional populations, the destruction of substantive customary law, and the loss of customary procedure as a tool of social integration; if the use of formal courts is not to be alienating and confusing to those who are most satisfied with customary judicial procedures, the integration of the two systems must involve the adjustment of the procedures of the formal courts to better link their procedures to customary procedures.<sup>428</sup> Senegal is one example of an African country trying to achieve integration between custom and the common law, through the retention and use of customary procedures throughout the judicial system.<sup>429</sup> Reforms in Senegal include sanctioning customary extra-judicial and conciliatory dispute resolution procedures and incorporating conciliation into higher courts, retaining elements of customary procedure in the lowest courts, and adapting procedure in the higher courts to create greater continuity in the character of proceedings throughout the judicial system.<sup>430</sup>

The Americas have also seen the development of Indigenous judicial systems. In Bolivia, the Constitutional Assembly has redesigned the justice system to create a second judiciary, the “community justice system”, to apply Indigenous and customary law.<sup>431</sup> The process of integrating Indigenous law and institutions into the Bolivian legal system began in 1994 with the recognition of Indigenous laws and customs as alternative dispute resolution

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<sup>427</sup> *Ibid.* at 1131.

<sup>428</sup> *Ibid.* at 1146, 1150.

<sup>429</sup> *Ibid.* at 1154.

<sup>430</sup> *Ibid.* at 1156.

<sup>431</sup> Christopher J. Fromherz, “Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples” (2008) 156 U. Pa. L. Rev. 1341, at 1373.

mechanisms, so long as that were not contrary with the constitution or other laws; of course, this accommodation falls short of an actual grant of jurisdiction over dispute resolution to Indigenous courts but it does constitute real progress toward the integration of the two systems.<sup>432</sup>

Possibly the most extensive experience with indigenous approaches to dispute resolution within a modern liberal democratic state is in the United States. The most traditional court systems are among the Pueblo, which have traditional courts in which the Governor of the Pueblo performs judicial functions, enforcing laws based on long-standing tribal customs that are passed down through a continuing oral tradition.<sup>433</sup> Among other Indigenous nations, tribal courts have been operating for decades. While these institutions have been subject to criticism for their informality, absence of due process requirements, lack of trained personnel, poor facilities, insertion of tribal politics into judicial selection, being little more than Indigenous administration of settler legal practices, limitations in the scope of the tribal codes, and a lack of customary law in those codes, more recently, many tribes have been engaged in addressing these issues and, among other actions, have redesigned their tribal codes in the pursuit of self-determination and have sought to indigenize these courts, in order to increase their cultural relevance to, and therefore legitimacy within, the communities they serve.<sup>434</sup>

While Tribal Courts may be intrinsically offensive to traditional ways of dispute resolution, tribes are increasingly using courts as vehicles for the exercise of sovereignty, by

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<sup>432</sup> *Ibid.* at 1374-5.

<sup>433</sup> Jackson, "Locking Up Natives", *supra* note 365, at 225.

<sup>434</sup> *Ibid.*, 227-8.

bringing traditional law into use and beginning to institutionalize traditional norms and values.<sup>435</sup> The most important example of this is the introduction of the Peacemaker Court as part of the Navajo tribal justice system, the most sophisticated and complex in the United States.<sup>436</sup> As described by the Navajo courts themselves, in their court manual,

On April 23, 1982 the judges of the Navajo nation adopted rules and procedures of establishing the Navajo Peacemaker Court. The new court is based on the ancient practice of the Navajo to choose a "Naat'aanii," or 'headman,' who would "arbitrate disputes, resolve family difficulties, try to reform wrong-doers and represent his group and its relations with other communities, i.e., tribes and governments". ...

The current judges of the Navajo Tribal Courts desired to revive the old practice of appointing community leaders to resolve disputes because of the fact that there are many problems in the community which cannot be resolved in a formal court setting. ...

Under Navajo law, the Navajo Tribal Courts are required to use the customs and traditions of the Navajo people as law in civil cases. Not only is this the legislative command of the Navajo Tribal Council, but it is an assurance that the Navajo people can have their problems taken care of in their own way... . Aside from the fact the Navajo have the legal right to use traditional ways, there are very good policy reasons for doing so, particularly through a community court system. ... the law should look to individual reconciliation with the community in criminal law and individual conciliation in civil disputes ...<sup>437</sup>

Under the Navajo system, peacemakers are selected by local communities, although the parties to a particular dispute may select someone of their own choosing to act as peacemaker, and the peacemaker function combines both mediation and, if the parties agree, the determination of a final decision regarding the dispute.<sup>438</sup> The peacemaker guides discussions not only between the parties but among other concerned individuals, including the families of the parties, and may interject themselves, especially where a discussion of

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<sup>435</sup> Lowery, *supra* note 240, at 437.

<sup>436</sup> Michael Jackson, "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) 26 U.B.C. L. Rev. 147 ["In Search of Pathways to Justice"], at 230.

<sup>437</sup> *Ibid.* at 230-1.

<sup>438</sup> *Ibid.* at 231.

traditional Navajo values is considered appropriate.<sup>439</sup> The process can be initiated by the parties themselves or by the District Court, the trial level of the Navajo system, can refer a matter to the Peacemaker Court; there is a high degree of flexibility and interaction between the two dispute resolution processes, with the view that the strength of both be brought to bear in the interests of the administration of justice.<sup>440</sup>

Navajo courts also use stories to answer legal questions in the cases they adjudicate, as was the case under their traditional dispute resolution system.<sup>441</sup> For example, in *Re. Certified Question II: Navajo Nation v. MacDonald*, involving a question of whether their tribal chairman had breached any fiduciary duties by receiving bribes and kickbacks from contractors, the court referred to the story of the two “Hero Twins”, as it embodied the traditional concept of the fiduciary trust of a leader.<sup>442</sup> This story enabled the Navajo to solve a pressing constitutional crisis in their nation by fitting general principles of traditional Navajo law to the specific realities of their community.<sup>443</sup> Thus, the court is reaching back and restoring a contemporary version of its traditional processes.<sup>444</sup> In creating an Indigenous “common law” in tribal courts through this process, custom operates in conjunction with appropriate legal principles from federal and state legal systems.<sup>445</sup> Interestingly, Lowery notes that the use of Navajo common law in decisions of Navajo courts has increased

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<sup>439</sup> Lowery, *supra* note 240, at 384-5.

<sup>440</sup> Jackson, “In Search of Pathways to Justice”, *supra* note 436, at 231.

<sup>441</sup> Borrows, *Recovering Canada*, *supra* note 28, at 13.

<sup>442</sup> *Ibid.* at 13-4.

<sup>443</sup> *Ibid.* at 14.

<sup>444</sup> Jackson, “In Search of Pathways to Justice”, *supra* note 436, at 231.

<sup>445</sup> Gloria Valencia-Weber, “Tribal Courts: Custom and Innovative Law” (1994) 24 N.M. L. Rev. 225, at 229.



dramatically since they began writing reasons; an abundance of Navajo legal customs and traditions have been catalogued, including by the Navajo themselves, so they are available for use by the courts.<sup>446</sup> Any decision rendered by the peacemaker may be entered as a formal order of the Navajo court system.<sup>447</sup> Although the principal jurisdiction of the Peacemaker Court is civil it also deals with lesser criminal cases.<sup>448</sup>

Since the reintroduction of peacemaking in the Navajo courts in 1982, Navajo have voiced their acceptance of the revival of their traditions of dispute resolution, people are using the peacemaker courts, people express their satisfaction with their decisions, and, in some cases, they state clearly that they prefer this system to the Anglo-American system, all indicators of the success of the peacemaker courts.<sup>449</sup> Community members are increasingly selecting peacemaking as their preferred dispute resolution process and peacemakers are forming their own organizations to exercise control over their processes and regulate their behaviour.<sup>450</sup> On the basis of this experience, Yazzie argues that any community that wants to revive effective Indigenous dispute resolution practices must first ask what is the basis for that culture's ideas of right and wrong and how to do things, as well as what existing institutions would be institutionally capable of learning and using Indigenous methods.<sup>451</sup>

Sitka tribal law, too, represents a practical approach to integrating customary and settler-state sources of law to serve an Indigenous people. The Sitka Community Association

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<sup>446</sup> Lowery, *supra* note 240, at 386, 430.

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

<sup>449</sup> Yazzie, *supra* note 169, at 108.

<sup>450</sup> *Ibid.* at 113.

<sup>451</sup> *Ibid.* at 110.

code and tribal court rules provide that the tribal court can have questions of tribal custom certified to the “Court of Elders” and they specify the duty of tribal court judges to seek knowledge both within and outside the tribe.<sup>452</sup> This integrative approach can use similar procedures to those of common-law courts to arrive at results similar to those of the common-law courts, but legal reasoning justifying the conclusion may be different due to the influence of customary law.<sup>453</sup>

Tribal court systems are becoming increasingly legitimate as dispute resolution bodies in the communities in which they operate at the same time as their procedures are becoming increasingly indigenized. Some indicators of the increasing legitimacy of these tribal courts include the growing number of legally-trained Indigenous people within these judicial systems, revisions to tribal constitutions to establish independent judiciaries, recognition of tribal courts by the United States Supreme Court, the increasing use of customary law, and the availability of training and certification programs for persons who have operated within traditional dispute resolution processes as elders, peacemakers, advocates, and community representatives.<sup>454</sup> As well, over the last 20 years, a number of state courts have held that tribal court decisions and orders should be recognized by state courts; some courts have done so because they see the tribes as having the status of foreign jurisdictions but South Dakota has suggested the alternative doctrine of comity, based on the

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<sup>452</sup> Valencia-Weber, *supra* note 445, at 253.

<sup>453</sup> *Ibid.*

<sup>454</sup> *Ibid.* at 240-1.

adherence of the tribal courts to the key procedural requirements of the Anglo-American legal system.<sup>455</sup>

In Canada, too, Indigenous communities have begun the important task of both re-asserting and re-shaping their own justice processes over the last several years. The South Vancouver Island Tribal Council has been engaged in research and analysis to identify the general principles of Coast Salish Indigenous law and its dispute resolution processes and, as part of this initiative, established a diversion program under the *Young Offenders Act* that includes a Tribal Court consisting of five members selected from prominent and respected elders of the South Island region, along with three alternates to sit when one of the Court members is required to excuse himself or herself because of conflict of interest, particularly because of close family relations which might cause bias.<sup>456</sup> Two members of the Tribal Court together with the diversion coordinator conduct an initial interview with the diversion candidate; if the interview committee deems the candidate acceptable for diversion, it submits a report and recommendations to the Tribal Court, which will then consider the case.<sup>457</sup> Any interested individual or agency recognized by the Tribal Court may make representations to the Court on behalf of the diversion candidate on concerns relating to the diversion candidate, so the victim may participate in the process.<sup>458</sup> If the Tribal Court decides to accept the candidate for diversion, it sets the length and terms of the diversion contract and selects an

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<sup>455</sup> Fredric Bradfon, "Tradition and Judicial Review in the American Indian Tribal Court System" (1991) 38 UCLA L. Rev. 991, at 1003.

<sup>456</sup> Jackson, "In Search of Pathways to Justice", *supra* note 436, at 202-3.

<sup>457</sup> *Ibid.*

<sup>458</sup> *Ibid.* at 203.

Elder to act as sponsor for the young person, who will then work with the young person on a one-to-one basis and report on progress to the diversion coordinator.<sup>459</sup>

This model demonstrates how Indigenous communities can devise justice mechanisms which integrate traditional processes into a contemporary social context in ways which are distinctively Indigenous, such as through the role an Elder would be expected to play, compared to that usually played by a probation officer.<sup>460</sup> An Elder, while understanding the importance and need for individual change, is able to locate this within a historical and cultural continuum that is distinctively Indigenous, to show the young person how he or she has a valued place within the context of Indigenous society.<sup>461</sup> No non-Indigenous probation officer, however well-intentioned and however well-informed, could perform this role.<sup>462</sup>

This tribal council has also established innovative processes and institutions in the areas of family law and criminal law. Their most publicized success to date has been in the area of child custody. The Tribal Council obtained intervenor status in the Provincial Court hearing on a child custody case involving a Coast Salish child and proposed that the matter be referred to a “Council of Elders” to mediate the dispute.<sup>463</sup> This was agreed to and the Council of Elders met with parties, discussed the case history and Salish Indigenous law precedents, and proposed a solution with which the parties agreed; although traditionally such resolution was not formally transcribed in writing, in this case to enable the court to

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<sup>459</sup> *Ibid.*

<sup>460</sup> *Ibid.* at 203-4.

<sup>461</sup> *Ibid.*

<sup>462</sup> *Ibid.*

<sup>463</sup> *Ibid.* at 206-7.

incorporate the terms of the resolution, a formal agreement was drawn up and signed by all parties and their legal representatives.<sup>464</sup> The application of Salish law and the invocation of its dispute resolution process avoided the hostility and pain usually associated with custody battles and the parties were able to accept the recommendations of the Council of Elders because they have legitimacy as law-givers, the forum – the Big House – in which their deliberations took place reflected the inter-connectedness of Coast Salish families and its carvings, totem poles and crests encapsulates their shared history, and the procedures in the Big House, including the making of speeches which are listened to with respect and without interruption in the search for a consensus, draw upon time honoured traditions of Coast Salish decision making.<sup>465</sup>

The Gitksan and Wet'suwet'en, too, have made a proposal to the Government of British Columbia which includes diversion but which is part of a much larger vision for the development of a tribal justice system reflecting their own distinctive social organization and the dispute resolution process that flows from it. They are seeking ways to establish a process of justice that bears the hallmarks of their own system rather than indigenizing the existing system.<sup>466</sup> The Gitksan and Wet'suwet'en proposal identifies four areas which are of special concern to the communities (and indeed to many other Indigenous communities): assault, spousal abuse, sexual assault and child sexual abuse.<sup>467</sup> The proposal starts from the proposition that the holistic nature of the Gitksan and Wet'suwet'en world view and the social structure of its kinship society requires an integrated conception of dispute resolution which

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<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.* at 207-8.

<sup>466</sup> *Ibid.* at 214.

<sup>467</sup> *Ibid.* at 216.

sees it as part of the fabric of social and political life rather than as a distinctly formal legal process.<sup>468</sup> The Gitksan and Wet'suwet'en system of control of anti-social behaviour, like many other Indigenous systems, places a heavy emphasis on social censure within the kinship network and pays more attention to compensation rather than punishment.<sup>469</sup>

Recognizing that a separate justice system built strictly on the Gitksan and Wet'suwet'en system of justice is a long-term goal, the proposal suggests that, through transitional reforms such as diversion and Indigenous sentencing advisors to the courts, responsibilities could be shared without undermining the integrity of either the Indigenous or provincial systems.<sup>470</sup> Thus, the proposal advocates the more extensive use of alternative measures under the *Young Offenders Act* and the use of pre-trial diversion for adult offenders from Gitksan and Wet'suwet'en villages.<sup>471</sup> The distinctive feature of diversion in the Gitksan and Wet'suwet'en communities would be that there would be a formal role not just for the offender and victim but also for the offender's and victim's houses; in this way collective responsibility in the Gitksan and Wet'suwet'en system can be an important part of the process.<sup>472</sup> The proposal also envisages that the importance of the House system can be acknowledged by having one sentencing advisor drawn from the offender's House and another coming from the victim's.<sup>473</sup> Given that the Gitksan's traditions used kinship groups larger than individual communities in dispute resolution, to ensure some distance, disinterest,

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<sup>468</sup> *Ibid.* at 210.

<sup>469</sup> *Ibid.* at 212.

<sup>470</sup> *Ibid.* at 216.

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid.*

<sup>473</sup> *Ibid.*

and accountability, Napoleon has argued that modern justice initiatives should be designed on the basis of the nation, not the band.<sup>474</sup>

The Saulteaux Indian Band of northeast British Columbia has also proposed a justice system for its community, with its proposal building on the Navajo Peacemaker model. In the Saulteaux proposal, there would be a Tribal Justice Commission, whose members would be elected by the community, which would have authority to nominate respected people within the community to act as peacemakers and also as Justice Tribunal jurors.<sup>475</sup> The system envisages a two-level process with a single peacemaker at the first instance and a panel of Tribunal jurors at the second level for more complicated cases where resolution is not achieved before the peacemaker.<sup>476</sup> The significant difference between this proposal and the Navajo system is that under the Navajo system if the peacemaker process does not work the case then enters a tribal court process in accordance with the non-Indigenous model, while under the Saulteaux proposal the Tribunal would not be based on the adversary model but would reflect Saulteaux decision-making.<sup>477</sup> Also reflecting the Saulteaux worldview, a complaint filed with the Tribunal may involve both civil and criminal matters.<sup>478</sup>

In addition to these initiatives, Canada's first Indigenous court has been established by the Tsuu T'ina First Nation, also in British Columbia; it is designed, however, to be an enhancement of the adversarial system, rather than a separate system.<sup>479</sup> The Nisga'a also

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<sup>474</sup> Napoleon, *supra* note 329, at 190.

<sup>475</sup> Jackson, "In Search of Pathways to Justice", *supra* note 436, at 231.

<sup>476</sup> *Ibid.* at 232.

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*

<sup>479</sup> Dewhurst, *supra* note 222, at 213, 216-7.

have the authority under their self-government agreement to establish their own court system, equivalent to a Provincial Court, that would apply traditional Nisga'a methods and values, such as the use of elders in adjudication and sentencing and an emphasis on restitution.<sup>480</sup> The agreement dictates, however, that the Nisga'a government will make laws to ensure that the Nisga'a court and its judges comply with generally recognized principles for judicial fairness, independence, and impartiality and provide for means of supervision of the judges of the Nisga'a court by the Judicial Council of British Columbia or other, similar means, thus establishing some limits on the application of Nisga'a tradition to modern disputes.<sup>481</sup> It will be interesting to see, as implementation of this agreement continues, what use is made of this grant of jurisdiction.

In Alberta, both First Nations and Métis have developed their own distinct institutions of dispute resolution. In the case of the Métis, the institution is the Métis Settlements Appeal Tribunal, which hears appeals of the decisions of the individual Métis Settlement Councils and the Métis Settlements General Council. This tribunal has been described as bi-cultural or bi-juridical, observing Euro-Canadian legal norms but also involving elders and treating their opinions as important evidence in the settlement of disputes.<sup>482</sup> First Nations in Alberta have established a system of tribal courts, which is a two-tiered system involving a peacemaker, commonly an Elder, who would intervene in a dispute as early as possible, in an effort to avoid having a dispute reach the point at which a

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<sup>480</sup> Graham, *supra* note 88, at 413; McHugh, *supra* note 23, at 482.

<sup>481</sup> *Nisga'a Final Agreement*, *supra* note 90, at article 33.

<sup>482</sup> Catherine Bell, "Indigenous Dispute Resolution Systems Within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004), at 249.



formal resolution was required.<sup>483</sup> If the peacemaker was unable to resolve the dispute, however, it would go to the second tier, a tribunal of three members who are appointed by the larger tribal justice committee and who hear disputes and resolve them based on traditional dispute resolution philosophies.<sup>484</sup>

In Manitoba, the Roseau River First Nation established a tribal justice committee in 1975 to operate a pre-charge diversion program for Indigenous youth referred to it by police, probation services and community members.<sup>485</sup> The committee, which consists of several members of the band council and other respected community members, emphasizes traditional values in dealing with offenders who choose the program and may take such actions as requiring the offender to apologize, give restitution or reparation to the victim, or perform community service.<sup>486</sup> The committee also provides pre-sentence recommendations and post-sentence supervision in the cases of reserve members dealt with in the regular court system and acts as a general vehicle to address local justice problems.<sup>487</sup> A similar initiative was established by the Beausoleil Ojibway community near Midland, Ontario, in which a “lay assessors group” of twelve community members was created; in any cases of charges against youth from the community when the offence was committed on the reserve, two of these lay assessors who are not related to the accused preside over the case with the judge to determine an appropriate sentence.<sup>488</sup> The assessors have generally sentenced youth to such

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<sup>483</sup> Dickson-Gilmore, *supra* note 323, at 51.

<sup>484</sup> *Ibid.*

<sup>485</sup> Coyle, *supra* note 175, at 630.

<sup>486</sup> *Ibid.*

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.* at 631.

punishments as community service, payment of restitution to the victim, and banishment from the social activities of the community for a period of time.<sup>489</sup> Both of these initiatives have achieved their results through the involvement of lay community members, rather than a large justice bureaucracy, and both rely on Indigenous traditions and flexibility in their application to particular cases.<sup>490</sup>

Dewhurst has commented that, while some may complain that these innovations breach the fundamental principles of justice by providing a separate justice system for Indigenous people, the deeper concern is that the introduction of Indigenous justice systems into adversarial justice systems is prone to failure if the Indigenous justice system is seen as of lower authority or as an “alternative”; instead, these systems need to be authoritative, parallel models.<sup>491</sup> The precedents suggest that it is not, in fact, offensive to the principles of justice for separate Indigenous dispute resolution processes to exist within a liberal democratic state dedicated to the rule of law and equality before the law, either within the framework of the existing court system or in parallel to it. What will be necessary is that this desire for distinct systems grounded in Indigenous traditions be balanced by a sufficient adherence to the key procedural requirements of the common-law system that they can be recognized as legitimate by all disputants that come before them, whether Indigenous or non-Indigenous.

Whether courts are adaptations of European-derived institutions or designed by the Indigenous nations themselves, they share a concern about the legitimacy and integrity of the

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<sup>489</sup> *Ibid.*

<sup>490</sup> *Ibid.* at 632.

<sup>491</sup> Dewhurst, *supra* note 222, at 213.

decision-making process, as persons affected by judicial decisions expect to be protected from partiality, deceit, and other abuses of process and courts should, over time, produce decisions that manifest a consistency with a set of guiding normative principles that evoke respect and obedience.<sup>492</sup> While Indigenous courts must operate under a set of guiding principles that promote integrity, which may well be similar to the guiding principles of judicial independence and rule of law that govern European-derived courts, Indigenous courts cannot be justified solely by the extent to which they imitate non-Indigenous judicial procedures.<sup>493</sup> Conflict resolution systems should be tailored to the needs, capacities, and sensibilities of those they serve.<sup>494</sup> Indigenous worldviews need to be included in the design of institutions that dispense justice in Indigenous communities; separate Indigenous justice systems are the solution most often sought by Indigenous peoples because of a lack of an embodiment of Indigenous worldviews in the existing justice system.<sup>495</sup> Borrows has commented that the chances of Canadian law accepting Indigenous legal principles would be substantially weakened if Indigenous nations did not continue to practice their own laws within their own systems.<sup>496</sup> Elsewhere, he has argued that,

Indigenous governments should recognize and/or recreate institutions to exercise dispute resolution powers over matters internal to their communities. Indigenous governments should affirm the powers of these institutions in a manner consistent with their legal traditions. Law must embrace a community's deeper normative values to be a just and effective force in facilitating peace and order.<sup>497</sup>

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<sup>492</sup> Valencia-Weber, *supra* note 445, at 235, 237.

<sup>493</sup> *Ibid.* at 245.

<sup>494</sup> LeBaron, *supra* note 296, at 20.

<sup>495</sup> Leroy Little Bear, "An Independent Native Judiciary" in Andrea P. Morrison, ed., *Justice for Natives: Searching for Common Ground* (Montreal & Kingston: McGill-Queen's University Press, 1997), at 290-1.

<sup>496</sup> Borrows, "With or Without You", *supra* note 160, at 663.

<sup>497</sup> Borrows, "Indigenous Legal Traditions in Canada", *supra* note 59, at 208

He has also commented that Indigenous citizens would enjoy greater accountability from their governments and the governments would enjoy greater legitimacy if Indigenous institutions were able to resolve disputes between Indigenous citizens and their governments.<sup>498</sup>

As is undisputed in the context of the division of powers under the *Constitution Act, 1867*, which assigns the authority for the administration of justice to the provinces, different systems can still provide citizens with the equal protection and benefit of the law.<sup>499</sup> Borrows has also commented that intercultural dispute resolution in an Indigenous context would best thrive through the recognition of separate Indigenous justice systems and that independent Indigenous justice systems are, in fact, necessary for healthy intercultural relations.<sup>500</sup> Having both separate and shared approaches to dispute resolution can overcome entrenched power dynamics that disadvantage Indigenous peoples in the colonial state.<sup>501</sup>

Monture-Okanee and Turpel have argued, in the context of criminal justice, that separate Indigenous justice systems are necessary because Indigenous cultures are holistic, which means that Indigenous people focus on their relationships with the land and each other and not on separation or removal from the social life of the community, as the goal is to restore balance and harmony throughout the community when an anti-social act occurs.<sup>502</sup> They emphasize that they are not asking non-Indigenous peoples to share Indigenous beliefs,

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<sup>498</sup> *Ibid.*

<sup>499</sup> *Ibid.* at 212.

<sup>500</sup> Borrows, “A Separate Peace”, *supra* note 12, at 343.

<sup>501</sup> *Ibid.* at 347.

<sup>502</sup> Monture-Okanee and Turpel, *supra* note 218, at 257-88.

but only to respect them because they are the beliefs of the First Peoples of North America, which provides the basis for their constitutional status.<sup>503</sup>

It is important to understand that these institutions would be courts, with a status equal to the superior courts in the provinces. While one aspect of this is that judicial independence would need to be protected, as it is with superior courts through the constitutional rules protecting the tenure and remuneration of justices,<sup>504</sup> it is the second aspect that is important here. Superior courts have a core jurisdiction to review legislation for its constitutionality and the actions of governments for their consistency with both the law and the constitution; this core jurisdiction cannot be removed from superior courts, so that they cannot be denied their role in protecting the principle of constitutionality and the rule of law.<sup>505</sup> Indigenous courts would also need to have the jurisdiction to apply the entirety of the law applicable to Indigenous nations, unlike mere specialized administrative tribunals, which would only have the jurisdiction to apply Indigenous law, as a specialized body of law, and would do so subject to judicial review by the courts of the settler state. This is an important distinction, as, whether the Indigenous institutions are applying substantive Indigenous law, as that body of law develops over time, or the substantive law of the settler state, to the extent that it is applicable to Indigenous nations, the norms, practices, and interpretive approaches to the law will be distinctive, reflecting Indigenous cultural distinctiveness, and the increased cultural relevance in the process of interpreting and applying law to Indigenous nations will make all applicable law more legitimate.

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<sup>503</sup> *Ibid.*

<sup>504</sup> See sections 97 to 100 of the *Constitution Act, 1867*.

<sup>505</sup> Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2005), 27-8.

Dewhurst has argued that, since many criminal offences are beyond the jurisdiction of provincial courts, to really address the concerns of Indigenous peoples over their interaction with the current criminal justice system, in particular, the authority of Indigenous justice systems must be equal to those of the superior courts.<sup>506</sup> She has also pointed out that, even if Indigenous justice systems are given the authority of superior courts, they would still be bound by the law and any objection to parallel systems offending the principle of equality before the law could be addressed by allowing all accused to elect the system under which they wish to be tried.<sup>507</sup> Spiritual laws, traditional moral standards, and cultural conceptions of natural law, though, must have a part to play in the development of plural legal systems, as was the case with the earlier development of the Courts of Equity in England.<sup>508</sup> It is worth remembering that, as the common law has been developing over 1,400 years and continues to develop, sufficient time must be given to Indigenous legal systems to fully develop their forms, as well.<sup>509</sup>

The status of Indigenous institutions for dispute resolution as courts does, however, raise interesting questions about the membership and procedures of these courts and, as a practical matter, where the authority to appoint members of the institutions should lie. On the first issue, while innovative institutional designs should not be precluded, it seems likely that at least some members of a modern Indigenous “court” with the jurisdiction to interpret and apply all law application within Indigenous nations would have to be legally trained, although this cadre of legally trained individuals could well be complemented by Elders,

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<sup>506</sup> Dewhurst, *supra* note 222, at 217.

<sup>507</sup> *Ibid.* at 218.

<sup>508</sup> *Ibid.* at 226.

<sup>509</sup> *Ibid.*

whose purpose would be to ensure that the interpretation and application of the law within Indigenous societies reflected Indigenous conceptions of justice. This may be one of the practical requirements for the recognition of Indigenous dispute resolution systems by the non-Indigenous majority; it is an approach common to many of the existing precedents reviewed above. Similarly, while substantial room should be provided for procedural innovations, for example to emphasize more informal and participatory forms of dispute resolution, once a formal dispute resolution process is reached, it is likely that a certain degree of procedural due process, such as the right to be heard before a fair and unbiased decision-maker, will be required to ensure that protection of the rule of law.

As to the constitutional source for the authority to create these institutions and appoint their members, it is possible that Indigenous “courts” could be established by the Government of Canada, through the exercise of its power under section 101 of the *Constitution Act, 1867* to establish courts “for the better Administration of the Laws of Canada”. This would certainly be one way to ensure that Indigenous institutions for dispute resolution had the status equal to the superior courts of the provinces but this option raises three issues. First, it is generally understood that the reference to the “Laws of Canada” in s. 101 is limited to laws within federal jurisdiction, which should not include the laws of Indigenous nations exercising their continuing sovereignty.<sup>510</sup> Secondly, the implication of the establishment of these institutions by the federal government as the equivalent of superior courts is that the federal government would also make the appointments of members of the Indigenous “bench”, as is the case with superior courts (though a different appointment process could be defined by the federal statute establishing the Indigenous courts). It is a

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<sup>510</sup> Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985), 142-3.

question worthy of debate whether it would be appropriate to have the members of the Indigenous dispute resolution institutions appointed by the federal government as a way of ensuring their impartiality and equal status with Justices of the superior courts, or whether the federal government, as a government of the settler state, is poorly positioned to make appointments that would be sufficiently sensitive to Indigenous difference and the distinct practices of dispute resolution of Indigenous peoples for their appointments to be as legitimate as if appointments were made by Indigenous governments. It may be that, if the appointments were made from lawyers with a certification in the law of the Indigenous nations (the equivalent to having an “Indigenous bar”), federal appointments could be sufficiently sensitive to the competing needs for knowledge of Indigenous law, sensitivity to Indigenous difference, and professionalism in the administration of justice to make federal appointments legitimate in the eyes of the citizens of Indigenous nations, but this is certainly a debatable assertion.

This, however, leads to the third, and larger, issue of whether it is appropriate for the federal government to establish Indigenous institutions of dispute resolution through federal legislation, when the purpose of establishing Indigenous governments as a third order of government is to provide Indigenous nations constitutional space for the exercise of their sovereignty, in the name of reconciling the continuing sovereignty of Indigenous peoples with the asserted sovereignty of the Crown. If Indigenous institutions for dispute resolution are to be integrated into an Indigenous system of governance, to be designed in a way that is culturally relevant and, thus, legitimate to those who are to be bound by their decisions, and to be part of the modern exercise of Indigenous sovereignty, the most appropriate authorities to establish these institutions are Indigenous governments themselves. As already noted, interpretation of the law is as important an element of self-determination as law-making and



interpretation is inevitably infused with the cultural context of the interpreter. In establishing institutions for their nations, Indigenous peoples would be exercising their inherent right to self-government and their continuing sovereignty over the governance of their communities, which would be consistent with the underlying constitutional principles of federalism and reconciliation. It will be important, however, that all governments clearly recognize that the right to establish Indigenous “courts” of general jurisdiction is within the right of self-determination held by Indigenous peoples, as the judicial branches of non-Indigenous Canadian governments will need to understand that it is not their role to undertake judicial review of the outcomes of Indigenous dispute resolution processes.<sup>511</sup> As well, in designing these institutions, Indigenous governments would be bound by the fundamental principles of the Canadian constitutional order in determining the design of the institutions and their procedures, so that the institutions could be accepted by the non-Indigenous judiciary as equivalent to superior courts in the provinces. Within those constraints, though, it should be for Indigenous governments themselves, not the Government of Canada, to design and establish the institutions.

***Application of Canadian constitutional law to Indigenous governments – the importance of Indigenous jurisdiction***

As alluded to above, that Indigenous institutions of dispute resolution should be equal to the superior courts of the provinces and have a general jurisdiction over the law that applies to citizens of the Indigenous nations means that these institutions would also have the

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<sup>511</sup> As the superior courts of the provinces have a general jurisdiction as “guardians of the rule of law”, it is likely impossible to deny an individual access to the existing superior courts if they choose to bring their case before them and require them, instead, to bring their claim before an Indigenous dispute resolution institution. While a choice of legal forum is, thus, inevitable, it is likely more important that Indigenous institutions be recognized as having the jurisdiction of superior courts, rather than being merely tribunals. If this recognition is secured and a dispute is initially brought before an Indigenous institution for dispute resolution, it will not be subject to judicial review, and thus to effectively being “taken over”, by an existing superior court.

jurisdiction to apply Canadian constitutional law to Indigenous governments and interpret that law in the context of Indigenous nations. This is an important element of the jurisdiction of Indigenous institutions for dispute resolution, especially in the context of the application of individual rights in Indigenous nations. The interpretation of constitutional law, and individual rights and the justification for their limitation in particular, must be sensitive to the context of the society in which it is being applied for it to be legitimate. Legal texts are never self-executing, and this is especially true for constitutional norms; determining the effect of constitutional norms in specific cases involves a very complex set of judgments which necessarily involve conceptions of values and context shaped by the general understanding of judges of the structure of Canadian society and the nature of its social life.<sup>512</sup> This is best done by institutions that have an understanding of the complexity of our political communities, which are most likely to be institutions of the distinct communities themselves. This is particularly important for national minorities, whose cultural and societal existence pre-dates the presence of the dominant culture and who seek to ensure that the constitutional order that applies to them is a shared order. One can see this sensitivity to context and the cultural distinctiveness of national minorities in the constitutional decisions of the Quebec superior courts; the Supreme Court of Canada has also demonstrated its commitment to this approach to the interpretation of individual rights in its decisions on a number of rights claims against the Quebec government under the *Canadian Charter of Rights and Freedoms*.<sup>513</sup>

Some could argue that, since Euro-Canadian courts are well-versed in accommodating governmental objectives in the analysis under section 1 of the *Charter*, they

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<sup>512</sup> Webber, *Reimagining Canada*, *supra* note 130, at 244.

<sup>513</sup> See *supra* note 264.

could apply the same analysis flexibly in appraising traditional Indigenous approaches to governmental ends but, to do so, they would have to accept Indigenous difference itself as a justification.<sup>514</sup> If mainstream courts believe strongly enough in the *Charter*'s application to inherent right governments to overcome the doctrinal impediments to its application, however, it is hard to imagine that they would easily be persuaded to consider Indigenous difference itself to be a section 1 justification.<sup>515</sup> Indeed, one of the primary threats of requiring that the *Charter* apply to Indigenous self-government, Timothy Dickson has argued, is its application to Indigenous governments by non-Indigenous lawyers and judges; this problem provides a strong reason for establishing Indigenous courts to address issues of Indigenous law and the interaction of Indigenous law with Canadian constitutional law.<sup>516</sup> While section 25 of the *Charter*, which states that, "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada...",<sup>517</sup> could operate in a way to encourage courts to choose the interpretation of *Charter* rights most accommodating of Indigenous difference, there is a great potential that rights would simply be interpreted by non-Indigenous judges from a mainstream liberal perspective, thereby eviscerating the potential of s. 25 to ensure sensitivity to Indigenous difference.<sup>517</sup> Of course, this argument for the need for Indigenous courts to undertake the task of interpreting rights with a sensitivity to Indigenous difference would be that much stronger if the rights regime being applied is a *sui generis* Indigenous *Charter*.

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<sup>514</sup> Wilkins, "... But We Need the Eggs", *supra* note 206, at 103, 105.

<sup>515</sup> *Ibid.* at 107.

<sup>516</sup> Timothy Dickson, "Section 25 and Intercultural Judgment" (2003) 61 U.T. Fac. L. Rev. 141, at 152.

<sup>517</sup> *Ibid.* at 158.

Given the degree of difference between Indigenous peoples and the largely European-derived cultural and legal traditions of the majority society in Canada, it is important in the context of Indigenous self-determination within the Canadian constitutional order that Indigenous institutions of dispute resolution have the jurisdiction to interpret Canadian constitutional law and apply it to Indigenous governments. Constraints on the authority of culturally appropriate dispute resolution processes may be portrayed as necessary protections for individual rights or guarantees of fairness across systems, but they risk imposing dominant cultural values and power relations on Indigenous peoples and keeping them under the sway of non-Indigenous systems of law.<sup>518</sup> As Macklem has noted, even the constitutional recognition of an Indigenous right of self-government would not completely resolve the dilemma of having non-Indigenous judges determine what is essential to Indigenous cultural difference, if these judges were given the exclusive authority to police the boundaries of Indigenous jurisdiction.<sup>519</sup> At a minimum, non-Indigenous judges ought to defer to what the members of Indigenous cultures themselves regard as integral to their cultural identities;<sup>520</sup> a better result could be achieved by granting an Indigenous judiciary the authority to settle disputes over Indigenous jurisdiction and Indigenous rights, subject to appeal to higher courts.

### ***Managing conflicts of laws and the risk of “forum-shopping”***

Of course, as with Indigenous law, Indigenous institutions for resolving disputes would exist alongside the court systems that exist in provinces and territories, which means

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<sup>518</sup> David Kahane, “What is Culture?: Generalizing about Aboriginal and Newcomer Perspectives” in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2003), at 51.

<sup>519</sup> Macklem, *Indigenous Difference*, *supra* note 59, at 168.

<sup>520</sup> *Ibid.*

that individuals may have a choice of fora in which to have their disputes resolved. In this circumstance, those who do not find it in their interest to abide by customary law would have to option of calling Euro-Canadian law and procedure into play.<sup>521</sup> While a choice of fora, like the choice of regulatory regime discussed above, is not inherently bad, the existence of two “court” systems in parallel does create the possibility of a conflict of applicable laws and the risk of individuals “forum shopping” to seek the dispute resolution process that will be most beneficial to them, rather than the one that will achieve the fairest and most legitimate result. This, however, is an issue common to any federal or pluralist legal system and different legal systems have already developed rules to resolve them. The co-existence of distinct and institutionalized legal orders inevitably renders it necessary to look for a way of settling the boundaries of the interaction of these different legal orders.<sup>522</sup> Jackson has noted the challenges in managing the choice of forum where tribal courts exist in the United States, requiring an assessment of factors such as whether the persons involved are Indian or non-Indian, the nature of the offence, and the location of the offence to determine which court has jurisdiction over the offence.<sup>523</sup>

When there was very little interaction between Indigenous societies and colonial societies, the two justice systems could operate in parallel without conflict but this became more difficult as intersocietal contact increased and the challenges of managing legal pluralism became more common.<sup>524</sup> In these circumstances, either the integration of

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<sup>521</sup> Jennifer Corin Care and Jean G. Zorn, “Legislating for the Application of Customary Law in Solomon Islands” (2005) 34 *Comm. L. World Rev.* 144, at 149.

<sup>522</sup> Flavia Carbonell, “Coherence and Post-Sovereign Legal Argumentation” in Agustin José Menéndez and John Erik Fossum, eds., *The Post-Sovereign Constellation: Law and Democracy in Neil D. MacCormick’s Legal and Political Theory* (Oslo: ARENA, 2008), at 130.

<sup>523</sup> Jackson, “Locking Up Natives”, *supra* note 365, at 227.

<sup>524</sup> Bush, *supra* note 422, at 1136.

institutions and procedures or choice of forum rules became crucial.<sup>525</sup> Normally, in colonial systems in which a local customary dispute resolution body existed beside a common-law court, the customary body had jurisdiction over disputes between members of the colonized society. Where a member of the colonial society was involved, however, the common-law courts generally had jurisdiction. This reflects a colonial sense of the superiority of the common-law system over local customary systems (which were felt not to be good enough to adjudicate disputes that involved a member of the settler society) and it served to discriminate against the colonized peoples, by requiring them to submit themselves to a “foreign” judicial process whenever a conflict had an inter-societal dimension. This remains the case in the United States; tribal courts have no jurisdiction over non-Indian offenders, even if the victim was an Indian.<sup>526</sup> As well, offences occurring off reserves are in the jurisdiction of state or federal courts regardless of the identity of the offender, with the exception of offences in tribal fishing areas off reserves that are recognized by treaties.<sup>527</sup> On reserves, or in these fishing areas, tribal courts have jurisdiction over Indian offenders except in the case of fourteen major crimes and for all offences where federal responsibility for the administration of criminal law among tribes has been transferred to the states.<sup>528</sup> Walters, however, notes that, in what is now Ontario in the 18<sup>th</sup> century, if settlers offended against Indigenous people, British officials respected Indigenous customary law by allowing the Indigenous nations to determine penalties, be they retaliation or a condolence ceremony and

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<sup>525</sup> Jackson, “Locking Up Natives”, *supra* note 365, at 227.

<sup>526</sup> *Ibid.*

<sup>527</sup> *Ibid.* at 228.

<sup>528</sup> *Ibid.*

restitution.<sup>529</sup> As well, when Indigenous people committed offences against settlers, initial attempts to have the Indigenous nation surrender the accused to British authorities were unsuccessful, so British officials were instructed to seek satisfaction from the nation of the accused in accord with the customs of that nation.<sup>530</sup>

In Canada, conflicts of laws rules seek to determine which legal system, and therefore which court system, has the most substantial connection to the dispute where multiple jurisdictions have some claim to jurisdiction. The connection can be assessed by such factors as the applicable law, whether by the operation of the division of powers or the choice of the parties as to the applicable law (for example, in the case of contracts), the residency of the parties, the location in which the event that caused the dispute occurred, or the jurisdiction in which a contract which is in dispute was made. Whichever province or territory has the strongest connection with the dispute, based on an assessment of these factors, has the jurisdiction to hear the dispute and the right to apply the law as it exists in that province or territory to the dispute.

These rules could also easily be applied to situations in which Indigenous institutions of dispute resolution exist alongside provincial and territorial judiciaries. Federal courts have no right to judicially review tribal court decisions in the United States and state court jurisdiction is also limited where it would infringe on the right of Indians to govern themselves.<sup>531</sup> In Bolivia, the draft constitution provides an innovative solution for jurisdictional conflicts between the civil law and Indigenous court systems; they are to be

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<sup>529</sup> Walters, “The Extension of Colonial Criminal Jurisdiction”, *supra* note 31, at 281.

<sup>530</sup> *Ibid.*

<sup>531</sup> Bradfon, *supra* note 455, at 1002.

resolved by a Plurinational Constitutional Tribunal made up of both Indigenous and civil law judges.<sup>532</sup> The grant of such extensive authority to Indigenous legal systems is unprecedented anywhere in the world.<sup>533</sup>

One challenge, however, is determining the institution, and therefore the law, applicable to a dispute between an individual who is a citizen of an Indigenous nation but does not live within Indigenous territory and a non-Indigenous person. This is a more difficult case, as the territorial model of jurisdiction would automatically grant the courts of the province or territory in which the disputants reside jurisdiction over the dispute. This may be unfair to one of the disputants, in the case of a citizen of an Indigenous nation who has made themselves subject to the laws and regulations of their nation and receives services from their nation but lives beyond the territory over which the nation has jurisdiction. At one level, this issue could be resolved in a practical way; if the only institutions of the Indigenous nation are a significant distance from the location of the dispute or the place of residence of the disputants, the Indigenous nation's institutions ought not to have jurisdiction, as resolving the dispute in the Indigenous nation's institutions will be inconvenient to the disputants and any witnesses. The argument that it is important for justice that institutions for the resolution of disputes be part of the community, an element of the argument for Indigenous institutions of dispute resolution, can also work against Indigenous institutions having jurisdiction in this circumstance. On the other hand, where there is a sufficient number of citizens of the Indigenous nation in a location to make it practical for the nation to establish a dispute resolution institution in that location, the choice of forum becomes more difficult. Bennett suggests that the goal is to apply customary or common law in a way that does justice

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<sup>532</sup> Fromherz, *supra* note 431, at 1375.

<sup>533</sup> *Ibid.*



between the parties by applying the system of law that the litigants, on reflection, would consider it reasonable to apply and by attempting to satisfy the reasonable expectations of the parties.<sup>534</sup> Generally, conflicts problems are avoided in situations in which there are multiple courts by allowing claimants an election; if they wish the common law to apply, claimants go to a common law court while, if they wish customary law to apply, they go to a customary court.<sup>535</sup> This is a practical solution, as a non-Indigenous court that would be required to apply Indigenous law would have a difficult time determining it, given that the documentation of Indigenous customary law is often scant.<sup>536</sup> A perfect solution that would be demonstrably fair in all circumstances may, however, be impossible to achieve, so that best that can be sought is transparency and consistency in the rules that would apply.

### ***One or two final courts of appeal for Canada?***

The argument so far has been that Indigenous institutions for dispute resolution should be equal of the superior courts of the provinces, and that the rationale for separate Indigenous institutions is the importance of knowledge of Indigenous law, sensitivity to Indigenous cultural difference, and Indigenous sovereignty. This, however, raises one final issue for consideration: should the Supreme Court of Canada also be the final court of appeal for decisions about the law applicable in Indigenous nations or will the distinctiveness of Indigenous law be so great as to require an entirely parallel Indigenous dispute resolution system, including its own final decision-maker? It is certainly an open question whether centralized judicial review should apply to self-governing national minorities, as national minorities form distinct political communities and attempts to impose liberal principles

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<sup>534</sup> Bennett, *supra* note 23, at 66.

<sup>535</sup> *Ibid.* at 69-70.

<sup>536</sup> Cooter and Fikentscher, *supra* note 170, at 561.

through centralized judicial review are often perceived as paternalistic colonialism.<sup>537</sup> Some contemporary liberal societies have therefore exempted national minorities from centralized judicial review, often in the terms of federation by which the national minority entered the larger state.<sup>538</sup> Many national minorities, including Indigenous peoples, would endorse a system in which the decisions of self-governing national minorities are reviewed first by their own courts and then by an international court, skipping the court system of the state entirely.<sup>539</sup> This resistance to the idea that rights should be adjudicated and enforced by a single national court exists among national minorities even if they share a commitment to the principles of individual rights regimes.<sup>540</sup>

Indigenous difference does offer a serious challenge to the integrity and legitimacy of a single final court of appeal in Canada, but there are also arguments in favour of retaining the Supreme Court of Canada's jurisdiction as the final court of appeal for all law in Canada, even after Indigenous self-government leads to the creation of sovereign Indigenous governments and the development of a body of Indigenous law. As Dickson notes, Hannah Arendt's "enlarged mentality" requires publicity and contact with the thinking of other people; if a major barrier to intercultural judgment is the instinct that there are no valid judgments beyond one's own, incorporating difference into judgment, as Arendt's theory suggests, provides judges with a way to recognize that their own judgments are imbued with their particular perspectives.<sup>541</sup>

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<sup>537</sup> Kymlicka, *Multicultural Citizenship*, *supra* note 125, at 167.

<sup>538</sup> *Ibid.* at 168.

<sup>539</sup> *Ibid.* at 169.

<sup>540</sup> Kymlicka, *Politics in the Vernacular*, *supra* note 122, at 84-5.

<sup>541</sup> Dickson, *supra* note 516, at 162-3.

The strongest argument in favour of retaining the Supreme Court of Canada's authority as the final court of appeal over all law in Canada arises from the central principle of this entire thesis: that the purpose of establishing Indigenous self-government on the basis that Indigenous nations are a third order of government is to reconcile the continuing sovereignty of Indigenous peoples with the asserted sovereignty of the Crown through self-determination within a single, shared constitutional order. That the Canadian constitutional order is to be common to, and shared by, both Indigenous and non-Indigenous governments in Canada suggests that the complete separation of theories and traditions of constitutional interpretation would be inappropriate. If Indigenous nations were to have a separate Indigenous "Supreme Court", the interpretation of the shared constitutional order could, over time, separate to such an extent that Indigenous and non-Indigenous governments would effectively be living under two separate constitutional orders, rather than a shared one. Conflicts over constitutional interpretation that could well arise when disputes have an inter-societal dimension would be irresolvable, by virtue of having two bodies empowered to provide a final determination of what is intended to be a single constitutional order.

To suggest that the Supreme Court of Canada should retain its jurisdiction as the final court of appeal for all law in Canada even after Indigenous nations establish their own, third-order, governments is not to suggest that the distinctiveness of Indigenous cultural and legal traditions should be treated as irrelevant to the task of deciding "the law". As has already been pointed out, the need to understand the cultural and legal context in which disputes arise and are resolved is inherent in legal interpretation and judicial decision-making, particularly in the case of arguments about the protection of individual rights within national minorities. The ability of the Supreme Court of Canada to deal with such cases sensitively in the case of Quebec has also been noted. One must necessarily ask why the Supreme Court of Canada

has demonstrated a capacity for sensitivity to the cultural distinctiveness of Quebec and its status as a national minority to understand what would be required to ensure its sensitivity to Indigenous difference. While, to some extent, the sensitivity of the Supreme Court of Canada is a consequence of effective advocacy by the Attorney General of Quebec, a significant reason for the ability of the Supreme Court of Canada to understand Quebec specificity comes from the fact that three of the nine members of the Court must come from the courts or bar of Quebec.<sup>542</sup> As judging is not a matter of the simple, neutral application of laws to particular fact situations, but requires the interpretation of laws in the circumstance of contested interpretations and claims about justice, the fact that one-third of the Justices of the Supreme Court of Canada come from the distinct national minority that Quebec represents will influence their interpretation of the law in cases that will affect Quebec, either directly or indirectly.

This conclusion has important implications for the Supreme Court if it is to exercise the role of final court of appeal for the interpretation of Indigenous law and Canadian constitutional law in its application to Indigenous governments. The body that monitors compliance of governments with both human rights and minority rights must be seen as an impartial body if it is to do this for all nations within the state.<sup>543</sup> If the composition of the Court has a substantive effect on both how it is perceived and its capacity to interpret law with due regard to the unique context of national minorities, retention of the Supreme Court

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<sup>542</sup> *Supreme Court Act*, R.S., c S-19, s. 6. I recognize, of course, that there have long been arguments within Quebec that this is insufficient when the Justices of the Supreme Court of Canada are appointed by the Prime Minister and that provinces should, therefore have a role in the appointment of the Justices. While this critique is certainly relevant to any debate about the Supreme Court's role as the final court of appeal for Canada, the fact that three of its Justices inevitably come from Quebec does have a substantive effect on its decisions, even when those three are appointed by the Prime Minister.

<sup>543</sup> Kymlicka, *Politics in the Vernacular*, *supra* note 122, at 86.

of Canada's status as final court of appeal for all law in Canada will require that the composition of the Court be reformed to include some jurists trained in Indigenous legal traditions. This is likely best done by adding a number of Justices to the Court. The lack of Indigenous judges is a serious failing, as it deprives Indigenous litigants of the opportunity to present their cases to judges who have a direct understanding of the issues surrounding Indigeneity and it precludes the transfer of Indigenous understanding to other, non-Indigenous judges.<sup>544</sup> Given that there is some variety in the legal traditions of different Indigenous nations, the alternative of making one of the existing six positions that do not have to be filled by members of the Quebec bar an Indigenous lawyer would seem to be mere tokenism, as a single Justice would neither be capable of representing all Indigenous nations nor, likely, of exerting sufficient influence on the Court as a whole to alter the Court's approach to interpreting the law of Indigenous nations in a significant way. If, however, three Justices trained in Indigenous law (or ultimately from an "Indigenous law bar") were added to the Court, the Court would be more likely to have a better sense of the different legal traditions of Indigenous nations and three Justices would be better placed to exert an influence over the Court's decision-making paradigm.

Because one-third of the Justices of the Supreme Court must, by convention, be from the courts or bar of Quebec,<sup>545</sup> adding Indigenous Justices would also require an increase in the number of Quebec Justices. Thus, the composition of the Court may need to expand to fifteen to ensure a reasonable balance of representation of the three principal cultural and legal traditions that make up the legal landscape of the country. In this model, there would be

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<sup>544</sup> Dickson, *supra* note 516, at 171.

<sup>545</sup> Section 6 of the current *Supreme Court Act* states that three (of the nine) Justice of the Court must be from the courts or bar of Quebec.

five Justices from the Quebec bar, three from the “Indigenous bar” and seven from the common law bar. This provides a reasonable balance between the three founding traditions in the country and ensures an appropriate sensitivity to the cultural distinctiveness of the two national minorities in the country. Along with separate Indigenous institutions for dispute resolution within Indigenous nations, on an equal footing with the superior courts of the provinces, this model of a Supreme Court of Canada would secure to Indigenous law an equal status in the Canadian legal and constitutional system with the common law and civil law, thereby helping to secure respect for the fundamental principle of constitutionalism and the rule of law within all societies in Canada while serving the other fundamental constitutional principle of particular importance in Aboriginal law, that of reconciliation.

## Chapter 6 – Conclusion

### *Self-determination, Indigenous law and the reconciliation of competing sovereignties: a constitutional imperative*

This thesis has sought to set out an approach to Indigenous self-government that would be better grounded in the historical Indigenous-Crown relationship in Canada and the continuing requirement that the Crown act honourably in its modern relationship with Indigenous peoples. It takes as its premise the Supreme Court of Canada's challenge to reconcile the continuing sovereignty of Indigenous peoples with the asserted sovereignty of the Crown. Underlying this approach is the recognition that the Aboriginal right to self-government in Canada rests on a foundation much stronger and deeper than simply section 35 of the *Constitution Act, 1867*; to understand the place of Indigenous self-government in the Canadian constitutional order, one must reach back to the earliest days of the relationship between the Crown and Indigenous peoples. A proper understanding of the place of the Aboriginal right to self-government requires one to develop a global, unified understanding of the Constitution of Canada in its entirety, including the treaties and commitments made by the Crown and Indigenous peoples to one another and the unwritten principles that underlie our constitutional texts (most importantly, the principle of federalism). Such an understanding of the Constitution of Canada as an "ancient constitution" admits of no other result than the recognition that the Indigenous peoples of Canada have never abandoned their right and responsibility to be self-determining.

The most effective way to give practical meaning to this understanding in a modern context is by providing Indigenous nations with sufficient constitutional space to exercise their continuing sovereignty on matters that affect Indigenous peoples' ability to secure their status as culturally distinct national minorities within Canada. Indigenous self-government

would thus genuinely become a part of the Canadian federal system, with Indigenous governments sovereign within their spheres of jurisdiction, but integrated into the Canadian system of governance through a genuinely shared constitutional order. For Indigenous peoples to be truly self-determining, however, this sovereignty must include not only the right to make laws, but to interpret the laws that govern their relationship with one another, with their governments, and with the governments and members of broader Canadian society when their interests are affected. Indigenous law, as with other law, is both found and created through the interpretive activities that give it shape and meaning in the real world of human interaction. To deny to Indigenous people the same sovereignty to establish institutions for the interpretation of the laws that affect them as the settler majority takes for granted is to deny them the full benefit of the constitutional principles of federalism, the rule of law, and the reconciliation of the competing sovereignties of Indigenous peoples and the Crown. Ultimately, the non-Indigenous majority must accept that it is up to Indigenous peoples to decide what forms of political organization they seek to use for the exercise of the right of self-government.<sup>546</sup>

### ***Challenges in getting from here to there***

Achieving this vision, however, will not be without its challenges. This thesis has sought to define a new relationship, but a new relationship requires changing the existing one, in some cases in fundamental ways. For the federal, provincial and territorial governments, and Canadian society generally, the biggest change is a conceptual one; rather than wards of the state, a disempowered minority, or administrative units exercising powers delegated by the federal government, as Indigenous peoples have been throughout too much

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<sup>546</sup> McNamara, *supra* note 297, at 614-5.



of Canadian history, Indigenous peoples and their nations would become equals, exercising self-government powers on behalf of their citizens just as provincial governments exercise self-government powers on behalf of their residents. This change in our conception of Indigenous peoples will require strong, principled arguments that appeal to a shared commitment to justice and to our respect for our constitutional commitments and the rule of law, continued effective advocacy by Indigenous peoples to articulate their demands for self-determination in a manner that will resonate with the dominant settler society, and political courage on the part of Canada's leaders to do what is just, rather than seek to sustain the colonial relationship by doing only the minimum necessary to manage Indigenous dissent.

If this conceptual leap could be made, however, this thesis has demonstrated just how readily distinct Indigenous governments could be integrated into our constitutional order as a third order of government within the federation. Indigenous governance would likely look different from Parliamentary governance. The institutions and laws of Indigenous nations would come out of a different tradition or a unique melding of Indigenous and Euro-Canadian traditions, but providing space for the development of distinctive institutions and approaches to social ordering is the very purpose of having a federal system of government. While distinctive, Indigenous governance would nonetheless be democratic governance and constitutional governance, as Indigenous traditions, too, demonstrated a commitment to securing the democratic legitimacy of decisions and governing according to the rule of law. Indigenous governments would also be capable of protecting the fundamental interests of minorities and women, though this would occur within the context of Indigenous nations as culturally distinct national minorities. Indeed, Indigenous self-government itself is a strategy for the protection of these national minorities within Canada, so to fail to provide Indigenous

peoples with scope for self-determination would be for Canadian society to act in a way that is inconsistent with fundamental principles of our constitutional order.

Neither would self-determined Indigenous institutions for dispute resolution be somehow fundamentally at odds with the Canadian constitutional order's commitment to judicial independence. While customary Indigenous methods of dispute resolution did not formally separate and seek to isolate those who were looked to to provide an authoritative resolution of legal disputes from other types of governmental decisions and other processes for decision-making within Indigenous societies, Indigenous traditions did, in their own way, institutionalize the role of Elders and law-keepers as legal decision-makers. They also secured the independence of mind of those who were the keepers of the law and were tasked with resolving disputes, through the esteem in which the keepers of the law were held and the strong social norms against showing disrespect for the Elders who kept the law, such as by seeking to manipulate them. In this way, the independence of Indigenous decision-makers was secured, if we understand independence as independence from manipulation and undue influences that could affect the impartiality, fairness, and legitimacy of "judicial" decision-making. These traditional forms of independence through respect could also be supplemented in modern Indigenous institutions of dispute resolution through more formal guarantees of independence taken from Euro-Canadian constitutional tradition.

The most novel element of Indigenous self-government proposed in this thesis is likely the ability of Indigenous nations to exercise personal jurisdiction over their citizens who reside outside Indigenous-controlled territory. While this basis for the exercise of jurisdiction is unfamiliar within the Canadian federal system, it is certainly not unheard of within the international community. Neither is it impossible to imagine and structure as part of a federal system of governance, as this thesis has demonstrated.

It may actually be the case that some of the greatest challenges to achieving this model of Indigenous self-government will be within Indigenous communities themselves. In particular, the requirement that Indigenous peoples establish political units large enough to exercise the full jurisdiction of a third order of government effectively and to participate as equals in the intergovernmental mechanisms that are part of Canadian federal governance, would be a major change to the current structures of Indigenous governance, especially those created by the *Indian Act*. There will inevitably be challenges to this requirement, especially from those who see larger units of government as threats to their ability to exercise extensive political and administrative authority under the *Indian Act* and therefore to their dominance over their local communities. Indeed, the requirement that *Indian Act* bands aggregate their authority into larger units of government has been a cause of the failure of at least one self-government negotiation in this country.<sup>547</sup> This leap must be made, though, as the only realistic choice is between the constitution (or in some cases reconstitution) of larger units of government that would be capable of exercising power as sovereign governments equal to the other orders of government in the Canadian federal system or the perpetual status of Indigenous governments as mere administrators of a continuing colonial relationship established by the federal government, whether under the *Indian Act* or through so-called “self-government” agreements under the current model of First Nations self-government.

There will also be challenges to this model of self-government from those who argue that Indigenous nations never ceded any of their sovereignty to the Crown and thus remain

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<sup>547</sup> The Canada-Saskatchewan-Federation of Saskatchewan Indian Nations self-government negotiations were put “in abeyance” in the summer of 2003, at the stage of reviewing an Agreement-in-Principle that had been negotiated, when the Federation insisted on certain changes. One of these changes was to remove the requirement that Indigenous jurisdiction over education and child and family services be aggregated to the level of a province-wide First Nations government, a “bottom-line” requirement of the other two governments involved in the negotiations.

fully sovereign nations with a right to exercise their sovereignty as separate states within the international community. Such as critique could certainly impede progress toward the establishment of Indigenous governments as a third order of government, especially as there is a great deal of theoretical coherence to this argument, at least for some Indigenous nations. This argument is not, however, without its own problems. Given the strength of the principle of state sovereignty and the inviolability of national borders in international law, as discussed in the *Quebec Secession Reference*, it seems highly unlikely that the international community would recognize Indigenous nations as independent members of the international community and sovereignty without international recognition is no sovereignty at all. As a practical matter, the most promising basis for Indigenous self-determination is self-government within the existing Canadian state. We are all here to stay, as Chief Justice Antonio Lamer commented,<sup>548</sup> so we should seek an honourable way to secure meaningful self-determination, and the reconciliation of the two sovereignties that exist within this shared geographical and political space, within the Canadian state. An approach to self-determination that would establish Indigenous governments as a third order of government, on an equal footing with the other orders within the Canadian federal system, holds out far greater hope for meaningful Indigenous self-determination than does waiting for recognition of Indigenous nations as independent nation-states by the international community. As with all things in life, perfection ought not to be allowed to become the enemy of the good.

Implementing the proposed model of Indigenous self-government also requires that the self-government arrangements agreed to have a legal basis and can secure constitutional protection. To date, self-government agreements have been enshrined in law through federal

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<sup>548</sup> *Delgamuukw*, *supra* note 35, at para. 186.

implementing legislation, even where they have been characterized as treaties, but this approach to giving self-government agreements legal force suggests that Indigenous governance is in some way delegated to Indigenous peoples by federal legislation, rather than being an exercise of Indigenous peoples' continuing sovereignty. A third order of government could be established by explicit constitutional amendment, as was proposed in the Charlottetown Accord, but governments since 1992 have been loath to attempt to make major, national amendments to the Constitution. If Indigenous self-government is truly to represent an exercise of Indigenous sovereignty, then, it would be best if the parties agreed to treat any new self-government agreements as treaties or, where treaties already exist, as agreements on treaty interpretation that would have constitutional status as agreements between sovereign peoples. Under this model, federal legislation would not be necessary to give the agreements legal force. Federal and provincial governments may have to make amendments to existing legislation to implement their commitments under the self-government agreements, as is the case with other treaties, but the agreements themselves would have independent legal force.

***Imagining a new approach to Indigenous self-determination as a challenge of federal governance: a reason to hope for future progress***

While there are certainly challenges in implementing a new approach to the realization of Indigenous self-government, there is also reason to believe that integrating Indigenous governments into the Canadian system of governance as a third order of government, sovereign within its spheres of jurisdiction, is possible. Most importantly, the Supreme Court of Canada, in recognizing Indigenous nations as having sovereignty and reinforcing the status of the reconciliation of this sovereignty with asserted Crown sovereignty as a constitutional principle in *Haida Nation* and *Taku River Tlingit*, has set a new bar for what is required of a self-government regime. These cases signal that any

legitimate approach to Indigenous self-government must start from the position that Indigenous peoples retain a sovereignty that pre-dates the Crown's assertion of sovereignty and that this sovereignty was only limited by the agreement of Indigenous peoples to share, or merge, their sovereignty with that of the colonizers. Thus, finding a means to reconcile the potentially competing sovereignties within our constitutional order today, and making that constitutional order a genuinely co-created one, through the implementation of Indigenous self-government is a constitutional imperative. Such an enterprise, of necessity, will also foster the development of a distinct body of Indigenous law, thus expanding the scope of legal pluralism in Canada.

In addition, numerous scholars in recent decades have contributed to our understanding of Indigenous histories and Indigenous self-determination today, as well as theories of liberal multiculturalism, Indigenous self-determination, Indigenous rights, Indigenous law and legal pluralism. This body of knowledge creates a "roadmap" for imagining what an effective, democratically legitimate approach to Indigenous self-government and Indigenous legalism could look like in the context of the modern, multinational Canadian state. Their work helps to explicate that implementing Indigenous self-government in a way that recognizes and respects the continuing sovereignty of Indigenous peoples is a conceptually familiar task, and one that is at the core of the Canadian constitutional order. The traditions of Indigenous governance, Indigenous law, and Indigenous dispute resolution are unique and modern Indigenous governance, a modern body of Indigenous law, and modern Indigenous institutions of dispute resolution may be unfamiliar to non-Indigenous Canadians in their details, but making space for unique legal, political, and cultural traditions within a shared constitutional framework is central to what defines Canada as a plural, multinational state. Indeed, it is no great leap to go further and

insist that we must accommodate Indigenous distinctiveness within our legal, political and constitutional order if we are to achieve a coherent understanding of the Constitution of Canada and the place of Indigenous self-government within it.

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