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## **The Jurisdiction of Inherent Right Aboriginal Governments**

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# The Jurisdiction of Inherent Right Aboriginal Governments

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Since the recognition of Aboriginal and treaty rights in Canada by section 35(1) of the *Constitution Act, 1982*, the inherent right of the Aboriginal peoples to govern themselves has become a generally accepted aspect of Canadian constitutional law.<sup>1</sup> But what is the scope of the governmental authority, or jurisdiction, that is exercisable by inherent right Aboriginal governments? And how does the jurisdiction of Aboriginal governments interact with the jurisdiction of other governments in Canada, especially the federal and provincial governments? This research paper will attempt to answer these questions in a general way, without attempting to determine or assess the jurisdiction of any particular Aboriginal government.

I will start by explaining some basic concepts relating to jurisdiction. Jurisdiction can be:

- (1) territorial, so that it is exercisable over a specific geographical area, such as the traditional territory of an Aboriginal nation, and over any people who happen to be physically present within that territory;
- (2) personal, so that it is exercisable over particular people, such as the citizens of an Aboriginal nation, whether they are physically present in that nation's territory or not; or
- (3) a combination of territorial and personal.

Jurisdiction can also be either:

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<sup>1</sup> See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) [*Partners in Confederation*]; Canada, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services, 1996), Pt. 1, 105-382 [*RCAP Report*]; Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995); Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997), 13; *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.).

- (1) exclusive, so that it can be exercised by only one government, which, in Canada, could be an Aboriginal government, a provincial government, or the federal government; or
- (2) concurrent, meaning that it is shared and can be exercised by two or more governments, be they Aboriginal, provincial, or federal.

When jurisdiction is concurrent, rules are needed to determine which government's laws prevail in the case of conflicting exercises of jurisdiction. For example, where the federal government and the provinces have concurrent jurisdiction over particular subject matters such as agriculture and immigration, Canadian constitutional law provides that federal laws are paramount (that is, they take precedence) over provincial laws in the event of a direct conflict between them. This means that the provincial laws are inoperative to the extent that they are in direct conflict with the federal laws.<sup>2</sup>

Jurisdiction can also be divided among the three branches of government in the Canadian parliamentary system that came from Great Britain:

- (1) legislative jurisdiction, which is the authority of legislative bodies such as the Parliament of Canada to make laws;
- (2) executive jurisdiction, which is the authority of the executive branch (for example, the federal cabinet and government departments, such as Indian Affairs) to make and implement government policy, and administer laws made by legislative bodies; and
- (3) judicial jurisdiction, which is the authority of courts and other adjudicative bodies to interpret and apply laws and to resolve legal disputes.

Under the Canadian Constitution, the order of government – Aboriginal, federal, or provincial – that has legislative jurisdiction over a particular subject matter also has executive jurisdiction over the same subject matter. Judicial jurisdiction, however, is not so neatly divided, as the jurisdiction of courts does not depend on the distribution of legislative and executive powers in the Constitution. Judicial jurisdiction will not be dealt with in this paper.

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<sup>2</sup> See Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell), Loose-leaf Edition at 16-1 to 16-20.

Jurisdiction can be either inherent or delegated. The Parliament of Canada and the provincial legislatures exercise legislative jurisdiction that was delegated to them from the British Parliament by the *Constitution Act, 1867* (formerly the *British North America Act, 1867*), though the source of the authority of the British Parliament to legislate for Canada has never been adequately explained.<sup>3</sup> The legislative authority of the British Parliament over Canada was terminated by patriation of the Canadian Constitution in 1982.<sup>4</sup> Nonetheless, the jurisdictions of the Canadian Parliament and provincial legislatures are still determined by the division of powers in the *Constitution Act, 1867*, mainly contained in section 91 (listing federal powers) and section 92 (listing provincial powers). Municipal governments, such as cities and towns, also exercise jurisdiction in Canada, but this jurisdiction has been delegated to them, usually by provincial legislation. The three territorial governments in the Yukon, the Northwest Territories, and Nunavut also exercise delegated jurisdiction, acquired from the Parliament of Canada by legislation.

The inherent jurisdiction of Aboriginal governments is jurisdiction arising from the existence of the Aboriginal nations in North America prior to the arrival of the Europeans. Aboriginal nations who are also Indian bands under the *Indian Act* exercise delegated jurisdiction as well, jurisdiction that has been conferred on them and their band councils by the provisions of that Act.<sup>5</sup> As the discussion in this research paper is limited to the *inherent* jurisdiction of Aboriginal governments, delegated jurisdiction will not be examined, and so the delegated authority of band councils will not be covered.<sup>6</sup>

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<sup>3</sup> In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103, the Supreme Court apparently took this legislative authority for granted. For critical commentary, see Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 *Alberta Law Review* 498. Sákéj Henderson takes the position that the British sovereign’s jurisdiction in North America had to be acquired derivatively from the Aboriginal peoples by treaty: see James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan Native Law Centre, 2006), 6, and “Empowering Treaty Federalism” (1994) 58 *Saskatchewan Law Review* 241, especially at 247-48 [Henderson, “Empowering Treaty Federalism”].

<sup>4</sup> Since 1982, when the *Constitution Act, 1982* provided the means for the Canadian Constitution to be amended in Canada, the British Parliament has had no authority over Canada. For discussion of the implications of patriation for Canada as a nation-state, see Brian Slattery, “The Independence of Canada” (1983) 5 *Supreme Court Law Review* 369.

<sup>5</sup> For discussion, see Kent McNeil, “Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government” (2003) 22 *Windsor Yearbook of Access to Justice* 329.

<sup>6</sup> However, Indian *bands* do appear to have some inherent jurisdiction. For example, they have inherent authority to choose their leaders by custom: see *Bone v. Sioux Valley Indian Band No. 290 Council*, [1996] 3 C.N.L.R. 54 at 65 (F.C.T.D.); *Jock v. Canada (Minister of Indian and Northern Affairs)*, [1992] 1

The term “Aboriginal governments” also requires clarification. As used in this research paper, it refers to the governments of the Indian, Inuit and Métis nations who have the inherent right to govern themselves. In some instances, these may be the nations that occupied territories and exercised jurisdiction either prior to the arrival of Europeans (in the case of the Indian and Inuit nations),<sup>7</sup> or prior to the establishment of effective European control (in the case of the Métis).<sup>8</sup> It needs to be acknowledged, however, that these nations do not necessarily all exist today as they existed at the time of European colonization. The process of colonization has had a profound impact on the Aboriginal nations, causing some of them to be fragmented into smaller units.<sup>9</sup> For example, the creation of Indian reserves and the imposition of the band council system by the *Indian Act* resulted in the creation of Indian bands, many of which were previously part of larger Indian nations. Many of these bands now call themselves First Nations. In its 1996 Report, the Royal Commission on Aboriginal Peoples suggested that the inherent right of self-government of the Aboriginal peoples of Canada is held by the larger Aboriginal nations, rather than by smaller units that it called “local communities” (a term I understand to include most Indian bands).<sup>10</sup> The Commission’s approach may not, however, be suitable for all Aboriginal peoples today. Ultimately, I think identification of the appropriate units for exercising the inherent right of self-government should be up to the Aboriginal peoples themselves. So when I refer to “Aboriginal governments” in this paper, I am referring to the governments of those self-governing units, as identified and constituted by the Aboriginal peoples.

Before turning to the issue of the jurisdiction of inherent right Aboriginal governments, it is important to point out as well that this jurisdiction is protected by the Canadian Constitution to the extent that it is an Aboriginal or treaty right. This is

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C.N.L.R. 103 (F.C.T.D.); *Sparvier v. Cowessess Indian Band #73*, [1994] 1 C.N.L.R. 182 (F.C.T.D.); *Crow v. Blood Indian Band Council*, [1997] 3 C.N.L.R. 76 (F.C.T.D.); *McLeod Lake Indian Band v. Chingee*, [1999] 1 C.N.L.R. 106 (F.C.T.D.).

<sup>7</sup> In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, the Supreme Court decided that the Aboriginal rights of the “Indians” (and presumably the Inuit) depend in Canadian law on their practices, customs and traditions at the time of contact with Europeans.

<sup>8</sup> In *R. v. Powley*, [2003] 2 S.C.R. 207, the Supreme Court used effective European control rather than European contact as the appropriate time for determining the existence of Métis rights.

<sup>9</sup> See Wayne Warry, *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government* (Toronto: University of Toronto Press, 1998), especially at 51-61.

<sup>10</sup> See *RCAP Report*, above note 1, Vol. 2, Pt. 1, 234.

because section 35(1) of the *Constitution Act, 1982* provides that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. This section provides constitutional protection to those rights, the significance of which will be discussed later in this paper, especially in relation to the paramountcy of the jurisdiction of Aboriginal governments.

I think the two main issues to be addressed in relation to the jurisdiction of inherent right Aboriginal governments are its source and its scope. A third, related issue is the relationship between this jurisdiction and the jurisdiction of the federal and provincial governments. This raises issues of concurrency and paramountcy. These matters will be discussed in the context of the Canadian legal system and the Canadian Constitution in the three parts of this paper that follow. The Aboriginal peoples’ right of self-determination, in international law or as a basic human right, could entitle them to exercise broad jurisdiction, but this matter will not be addressed in this paper.

## **1. Source of the Jurisdiction of Aboriginal Governments**

### ***(a) Aboriginal Perspectives***

Many Aboriginal people say that the source of their inherent jurisdiction is the Creator, who placed them in North America and instructed them in the proper ways of living. Harold Cardinal and Walter Hildebrandt, relying on statements by Elders at Treaty Elder Forums conducted in Saskatchewan the late 1990s, explained it this way:

The Elders are emphatic in their belief that it is this very special and complete relationship with the Creator that is the source of the sovereignty that their peoples possess. It provided the framework for the political, social, educational, and cultural institutions and laws of their peoples that allowed them to survive as nations from the beginning of time to the present. In their view, it is part of the divine birthright given to their peoples by the Creator.<sup>11</sup>

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<sup>11</sup> Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), 11. See also Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007).

From this viewpoint, their political authority has a spiritual or divine basis, rather than a secular or human basis.<sup>12</sup> Other Aboriginal leaders have expressed similar views.<sup>13</sup> The Royal Commission on Aboriginal Peoples summed it up this way:

Sovereignty, in the words of one brief, is “the original freedom conferred to our people by the Creator rather than a temporal power.” As a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated. This view is shared by many Aboriginal people, whose political traditions are infused with a deep sense of spirituality and a sense of the interconnectedness of all things. Such concepts as sovereignty, self-government and the land, which for some Canadians have largely secular definitions, all retain a spiritual dimension in contemporary Aboriginal thinking.<sup>14</sup>

While one has to be careful applying English terms and European concepts to Aboriginal societies,<sup>15</sup> the basic point is that for Aboriginal people “sovereignty” and “jurisdiction” are inherent, with spiritual origins that are infused with a holistic view of the world.<sup>16</sup>

### ***(b) Non-Aboriginal Canadian Perspectives***

From the perspective of the Canadian legal system, the source of the inherent jurisdiction of Aboriginal governments appears to be more secular than spiritual. While not denying the spiritual dimensions of Aboriginal rights, the Supreme Court of Canada has said that those rights, including the inherent right of self-government, are based on the fact that Aboriginal nations occupied lands as peoples with their own distinctive

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<sup>12</sup> See generally Menno Boldt and J. Anthony Long, “Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada’s Native Indians” (1984) 17 *Canadian Journal of Political Science* 537, especially at 543.

<sup>13</sup> See, for example, Oren Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights”, in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 19 at 19: “Aboriginal rights were given to us by the Creator when we were put here.”

<sup>14</sup> *RCAP Report*, above note 1, Vol. 2, Pt. 1, at 109, quoting from Chiefs of Ontario, “Submission to the Royal Commission on Aboriginal Peoples (1993)”, 19.

<sup>15</sup> See *RCAP Report*, above note 1, Vol. 2, Pt. 1, at 111-12; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Halifax: Fernwood Publishing, 1999), especially at 35-38; Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006), especially at 57-70.

<sup>16</sup> See generally Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000).

cultures prior to European colonization. In *R. v. Van der Peet*, Chief Justice Lamer put it this way:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) [of the *Constitution Act, 1982*], because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.<sup>17</sup>

The words “living in communities” are significant because they reveal acceptance by the Supreme Court of the obvious fact that the Aboriginal peoples lived in organized societies prior to European colonization. This has been affirmed in subsequent decisions, leading courts to the conclusion that Aboriginal rights are communal (that is, are held by Aboriginal people as social and political collectivities rather than as individuals).<sup>18</sup>

In other cases, the Supreme Court has explicitly recognized the sovereign, political dimensions of these Aboriginal societies. For example, in *R. v. Sioui* Justice Lamer wrote, in relation to the period prior to the conquest of French Canada by the British in 1759-60, that

... we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality.<sup>19</sup>

More recently, in *Haida Nation v. British Columbia*, Chief Justice McLachlin explained that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed

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<sup>17</sup> *R. v. Van der Peet*, above note 7 at para. 30.

<sup>18</sup> See *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 67; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 115; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 9; *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54 at paras. 26, 31, 74.

<sup>19</sup> *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1052-53.

Crown sovereignty, and to define Aboriginal rights guaranteed by s.35 of the *Constitution Act, 1982*.”<sup>20</sup>

In Canadian law, the pre-existing sovereignty of the Aboriginal nations is therefore the source of their inherent right of self-government, and thus of the jurisdiction of Aboriginal governments. From this perspective, their jurisdiction therefore appears to have a factual, historical basis, rather than a spiritual one.

The scope of the jurisdiction of Aboriginal governments depends to a large degree on the source of that jurisdiction. Once again, one can view this matter from different perspectives, in particular the perspectives of Aboriginal peoples and the perspective of the non-Aboriginal, Canadian legal system.

## **2. Scope of the Jurisdiction of Aboriginal Governments**

### ***(a) Aboriginal Perspectives***

We have seen that many Aboriginal people regard the Creator as the source of the inherent jurisdiction of their governments. From this perspective, one would expect the scope of the jurisdiction to depend on the authority the Creator gave to the Aboriginal nations. The Creator may have given them complete or plenary authority over every possible matter that might arise, from hunting and fishing to matters like hydroelectric power generation that were totally outside any human’s contemplation at the time the authority was given. Or the authority may have been limited to specific matters, or have had certain restrictions placed on it. Leroy Little Bear has written, for example, that the authority Aboriginal nations have in relation to their lands has conditions placed on it:

To Natives it is as though the Creator, the original one to grant the land to the Indians, put a condition on it whereby the land remains Indian land “so long as there are Indians,” “so long as it is not alienated,” “on condition that it is used only by Indians,” etc.... Finally, a point raised above must be emphasized: that is, the source of the Indians’ title to their land can be

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<sup>20</sup> *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 at para. 20.

traced back to the Creator, who gave it not only to human beings, but to all living creatures.<sup>21</sup>

As a consequence, he observed that in treaties with the Crown

Indians could not give an interest even equal to what they were originally granted, because to do so would break the condition under which the land was granted by the Creator. Furthermore, they are not the sole owners under the original grant from the Creator; the land belongs to past generations, to the yet-to-be-born, and to the plants and animals.<sup>22</sup>

In this regard, I think it should be kept in mind that the scope of the jurisdiction any Aboriginal nation received from the Creator is a matter that is within the traditional knowledge of that nation's people. The holders of this knowledge are the Elders or other members of the community who are recognized by the nation as the keepers or custodians of this knowledge. These are the people who would have to be consulted in order to understand the scope of the jurisdiction given by the Creator. While this understanding could vary from one Aboriginal nation to another, it seems that Aboriginal people generally regard human beings as an integral part of the natural world, and that this worldview affects the way they view political authority. Humans were not placed on Earth to dominate and exploit it, but to share it with the rest of Nature and to care for it by fulfilling the responsibilities placed on them by the Creator.<sup>23</sup> Oren Lyons, a Faithkeeper of the Onondaga Nation, put it this way:

We are the aboriginal people and we have the right to look after all life on this earth. We share the land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfil its responsibility under the law of the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means aboriginal responsibility, and we were put here to fulfil that responsibility.<sup>24</sup>

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<sup>21</sup> Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'", in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986), 243 at 246.

<sup>22</sup> Little Bear, above note 21 at 247. See also Fred Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America", in Boldt and Long, above note 13, 31 at 34.

<sup>23</sup> See *RCAP Report*, above note 1, Vol. 1, at 628-34; Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking, 1993), especially at 16; J. Donald Hughes, *American Indian Ecology* (El Paso: Texas Western Press, 1983).

<sup>24</sup> Lyons, above note 13 at 19-20.

This understanding can be contrasted with the Judeo-Christian worldview brought to North America by Europeans, which places humans above the natural world and directs them to dominate and exploit it for their own purposes.<sup>25</sup>

So if there were limits placed on the authority given to a particular Aboriginal nation by the Creator, this does not mean that the authority the Creator withheld could be exercised by some other government, such as the government of a European nation at the time of colonization or the government of Canada today. Leroy Little Bear did not suggest, for example, that because Aboriginal people had conditions placed on their ownership and were not the sole owners of the land, Europeans could come in and claim an interest for themselves. On the contrary, he expressly rejected the notion that the British Crown could acquire an underlying title to Indian land by discovery or means other than purchase or treaty.<sup>26</sup> So with regard to governmental authority, any jurisdiction not given to an Aboriginal nation would have been retained by the Creator, or perhaps more accurately would have been interwoven with the responsibilities of the people of that nation to the Creator and the rest of the natural world.<sup>27</sup> Consequently, limitations on the authority given to an Aboriginal nation would not create a jurisdictional vacuum that could be filled by a colonizing European government. For a European nation to usurp jurisdiction in this way would interfere with the sacred relationship between the Aboriginal nation and the Creator, and would violate Aboriginal understandings of the place of human beings in the natural world and the responsibilities that flow from the gifts they have received from the Creator.

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<sup>25</sup> See *The Bible*, King James Version, Genesis 1:28, referring to human beings: “And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.” This passage was relied upon by William Blackstone in his very influential *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69), Vol. 2, at 2-3, to conclude that “[t]his is the only true and solid foundation of man’s dominion over external things.”

<sup>26</sup> Little Bear, above note 21 at 255-56. See also the words of Oren Lyons, quoted above in text accompanying note 24.

<sup>27</sup> This understanding can be viewed as an aspect of the humility of Aboriginal peoples regarding their place and authority on Earth. It can be contrasted with European assertions of dominance and unlimited power, expressed, for example, in the English doctrine of parliamentary sovereignty. Blackstone, above note 25, Vol. 1 at 160, relying on Chief Justice Edward Coke, described the “power and jurisdiction of Parliament [as] so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.” An Aboriginal assessment of this kind of attitude to political authority is revealed by “the typical interpretation of sovereignty in the Cree languages, [namely] ‘pretending to be God’ (*mandohkasowin*)”: Henderson, “Empowering Treaty Federalism”, above note 3 at 246 n.18.

Aboriginal people also describe the scope of the governmental authority of their nations in historical terms.<sup>28</sup> When Europeans arrived in North America, Aboriginal nations were already here and were not subject to any human limitations on the jurisdiction they could exercise. In this sense, they were as sovereign as the nations of Europe. George Erasmus and Joe Sanders put it this way:

It is a matter of historical record that before the arrival of Europeans ... First Nations possessed and exercised absolute sovereignty over what is now called the North American continent.<sup>29</sup>

As pointed out by Patrick Macklem, this historical approach is supported by European traditions that regard prior occupancy as a source of rights.<sup>30</sup> It also forms the basis for the case law that acknowledges the inherent sovereignty and jurisdiction of the Indian nations in the United States.<sup>31</sup> These American cases have been relied on by the Supreme Court of Canada in leading Aboriginal rights decisions.<sup>32</sup>

### ***(b) Non-Aboriginal Canadian Perspectives***

Canadian courts have just begun to grapple with the matter of the inherent right of self-government of the Aboriginal nations. So far, there is a lack of clear guidance from the courts on the content of this right, and therefore on the scope of the jurisdiction of

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<sup>28</sup> See generally Mercredi and Turpel, above note 23 at 13-36.

<sup>29</sup> George Erasmus and Joe Sanders, "Canadian History: An Aboriginal Perspective", in John Bird, Lorraine Land and Murray Macadam, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, New Edition (Toronto: Irwin Publishers, 2002), 3 at 3. See also Grand Chief Michael Mitchell, "An Unbroken Assertion of Sovereignty", in Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press and the Assembly of First Nations, 1989), 107.

<sup>30</sup> Patrick Macklem, "Normative Dimensions of the Right of Self-Government", in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995), 1 at 9-17.

<sup>31</sup> See especially *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

<sup>32</sup> See, for example, *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sioui*, above note 19; *R. v. Van der Peet*, above note 7; *Mitchell v. M.N.R.*, above note 18. For further discussion, see Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence", in Hamar Foster, Heather Raven, and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, forthcoming, UBC Press, Vancouver [McNeil, "Judicial Approaches to Self-Government"].

Aboriginal governments.<sup>33</sup> However, I think one can identify at least two different approaches to this matter that have been taken by the courts. I will start by describing these approaches, and then will suggest a third approach that has received less judicial endorsement, but that I regard as preferable because I think it makes more sense conceptually, is more consistent with historical reality, and is more just.

**(i) Approach #1: *R. v. Pamajewon***

The first and only case where the Supreme Court of Canada has addressed the existence of the inherent right of self-government directly is the Court's 1996 decision in *R. v. Pamajewon*.<sup>34</sup> This case involved claims by two Anishnabe or Ojibwa First Nations in Ontario that they have a right of self-government in relation to gambling on their reserves. They claimed this right as part of a broader right to use and manage their reserve lands. Chief Justice Lamer, delivering the judgment of the Court, said that the First Nations had framed their right too broadly. Instead of a general right to govern the use of their reserve lands, he decided the claim should be characterized as a right to participate in and regulate gambling on their reserves.

Having characterized the claimed right in this narrow way, the Chief Justice decided that, in order to prove the right, the First Nations had to show that gambling had been integral to their distinctive Ojibwa culture at the time of contact with Europeans (probably at least 350 years before the case came to court). In other words, they had to convince the judges that gambling was such an important aspect of their culture that their society would be significantly different without it.<sup>35</sup> This test for proof of Aboriginal rights (other than Aboriginal title to land<sup>36</sup>), known as the "integral to the distinctive

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<sup>33</sup> See Kent McNeil, "The Inherent Right of Self-Government: Emerging Directions for Legal Research", online: <http://fngovernance.org/publications/index.htm>; McNeil, "Judicial Approaches to Self-Government", above note 32.

<sup>34</sup> [1996] 2 S.C.R. 821.

<sup>35</sup> Note that in *R. v. Sappier; R. v. Gray*, above note 18, the Supreme Court appears to have relaxed this test somewhat. Justice Bastarache wrote at para. 41: "The notion that the pre-contact practice must be a 'defining feature' of the aboriginal society, such that the culture would be 'fundamentally altered' without it, has also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights.... [C]ourts should be cautious in considering whether the particular aboriginal culture would have been fundamentally altered had the gathering activity in question not been pursued."

<sup>36</sup> In *Delgamuukw v. British Columbia*, above note 18, the Supreme Court decided that Aboriginal title to land can be established by proving exclusive occupation of land at the time of Crown assertion of sovereignty. See also *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220. For discussion, see Kent

culture” test, was created by the Supreme Court in the *Van der Peet* case,<sup>37</sup> decided the day before the judgment in *Pamajewon* was handed down. The *Van der Peet* case involved a claim to an Aboriginal right to sell fish, not a right of self-government. Nonetheless, in *Pamajewon* the Chief Justice said that the same test applies because “claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.”<sup>38</sup>

The “integral to the distinctive culture” test for proof of Aboriginal rights has been severely criticized by legal academics and other commentators.<sup>39</sup> Among other things, they have pointed out that the test wrongfully assumes that Aboriginal rights can be identified by taking a snapshot of Aboriginal cultures at an arbitrary time in the past, resulting in a frozen rights approach that ignores the dynamic nature of Aboriginal cultures. The application of the test to self-government claims has also been criticized.<sup>40</sup> Contrary to what Chief Justice Lamer said, exercise of governmental authority *is* very different from Aboriginal rights that involve access to natural resources such as fish.<sup>41</sup> Moreover, by limiting self-government claims to matters that were integral to Aboriginal cultures prior to European contact, the test does not take account of the very significant adaptations that Aboriginal nations have been obliged to make to come to terms with the impact of European colonization. Nor does the test permit Aboriginal nations to govern themselves in the modern world in accordance with their current needs and priorities. Finally, because the test fragments the right of self-government into piece-meal

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McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 *Saskatchewan Law Review* 281.

<sup>37</sup> *R. v. Van der Peet*, above note 7.

<sup>38</sup> *R. v. Pamajewon*, above note 34 at para. 24.

<sup>39</sup> For example, see John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22 *American Indian Law Review* 37; Russel Lawrence Barsh and James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 *McGill Law Journal* 993; Catherine Bell, “New Directions in the Law of Aboriginal Rights” (1998) 77 *Canadian Bar Review* 36 at 44-50.

<sup>40</sup> For example, see Bradford W. Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*” (1997) 42 *McGill Law Journal* 1011; 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” (2003-2004) 35 *Ottawa Law Review* 1; McNeil, “Judicial Approaches to Self-Government”, above note 32.

<sup>41</sup> In Canadian constitutional law, there is a clear distinction between rights to natural resources and jurisdiction over those resources. For example, in *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46, the Privy Council distinguished the ownership of lands and timber resources from legislative jurisdiction over them. See also *Attorney-General for Canada v. Attorney-General for Ontario [Fisheries Reference]*, [1898] A.C. 700.

jurisdiction over specific subject matters such as gambling, Aboriginal nations are required to prove every aspect of their jurisdiction separately. This places an impractical burden of proof and unreasonable costs upon them.

Despite the criticisms of the “integral to the distinctive culture” test and of its application to self-government claims, the fact remains that *Pamajewon* is a decision of the Supreme Court that remains the law of Canada until overruled or modified by the Court or supplanted by amendment of the Canadian Constitution. We therefore need to consider the implications of the decision for the jurisdiction of Aboriginal governments. The *Pamajewon* approach means that Aboriginal nations start with an empty box insofar as jurisdiction is concerned.<sup>42</sup> If they assert a section 35(1) right of self-government in Canadian courts, it is up to them to prove that each matter they claim jurisdiction over was integral to their distinctive culture, and apparently regulated by them, at the time of European contact. Jurisdiction therefore has to be established piece by piece. The total jurisdiction of any Aboriginal nation is therefore the sum of all the matters that nation can establish jurisdiction over in this way. This approach obviously does not offer much promise for Aboriginal nations that would like the courts to acknowledge that they have broad jurisdiction to govern their territories and peoples so they can be active participants in the modern world.

The impracticality of the *Pamajewon* approach may, however, be tempered to some extent if the Supreme Court’s more recent decision in *Haida Nation v. British Columbia* applies to self-government claims. In that case, Chief Justice McLachlin said that the “Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.”<sup>43</sup> The Court held that the Crown has a duty to consult with the Aboriginal nation making the claim, and in appropriate circumstances accommodate its interests. Although the *Haida* decision related to an Aboriginal title claim, this duty could apply to

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<sup>42</sup> The empty box/full box metaphor has been used before in relation to Aboriginal rights: for example, see Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, B.C.: Theytus Books, 2003).

<sup>43</sup> *Haida Nation v. British Columbia*, above note 20 at para. 27. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (applying the duty to consult in the context of treaty rights).

self-government claims as well, requiring the Crown to consult with Aboriginal nations in situations where the exercise of jurisdiction by Parliament, for example, has an impact on Aboriginal claims to a right of self-government.

**(ii) Approach #2: *Campbell v. British Columbia***

The first modern treaty in British Columbia was entered into by the Nisga'a Nation, and came into effect in 2000. Among the detailed provisions of this treaty is a chapter that acknowledges the inherent right of self-government of the Nisga'a Nation and sets out the jurisdiction of the Nisga'a Lisims government and the Nisga'a Village governments. Gordon Campbell, who was then the leader of the opposition in the British Columbia legislature, and two of his Liberal colleagues commenced a case in the British Columbia Supreme Court challenging the constitutional validity of the self-government provisions in the Nisga'a Treaty. This case is known as *Campbell v. British Columbia*.<sup>44</sup> Among other things, Mr. Campbell and his colleagues argued that the Canadian Constitution did not leave any space for Aboriginal governments because all the legislative powers had been distributed between the federal and provincial governments by the *Constitution Act, 1867*.

Justice Williamson heard the *Campbell* case and rejected the arguments made against the constitutional validity of the Nisga'a Treaty's self-government provisions. He decided that legislative powers had not been exhaustively distributed in 1867, and so there was room in the Canadian Constitution for Aboriginal governments to exist and to exercise inherent jurisdiction. What the self-government provisions of the Nisga'a Treaty did was define the inherent jurisdiction of the Nisga'a Nation and set it down in writing. He saw no problem with the parties to the treaty settling the matter in this way. In fact, the Supreme Court of Canada had been encouraging Aboriginal peoples and the Crown to enter into negotiated agreements rather than try to resolve their differences by litigation.<sup>45</sup>

Among other reasons, Justice Williamson upheld the constitutional validity of the self-government provisions by relying on the 1997 decision of Chief Justice Lamer in *Delgamuukw v. British Columbia*. In *Delgamuukw*, the Supreme Court of Canada

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<sup>44</sup> Above note 1.

<sup>45</sup> See *Delgamuukw v. British Columbia*, above note 18 at para. 186.

examined the claims of the Gitksan (or Gitx̱san) and Wet'suwet'en Nations in British Columbia to Aboriginal title to the lands in their traditional territories. Those nations also claimed a right of self-government over their territories and peoples, but the Supreme Court passed over that aspect of the case without saying anything about the validity of that claim, other than suggesting that, in light of *R. v. Pamajewon*, it had been framed too broadly. However, in his discussion of Aboriginal title Chief Justice Lamer made the following observations that were interpreted by Justice Williamson in *Campbell* as an acknowledgment of the inherent right of self-government:

A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons. It is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.<sup>46</sup>

Referring to this passage, Justice Williamson said this:

Can it be, as the plaintiffs' submission would hold, that a limited right to self-government cannot be protected constitutionally by Section 35(1) [of the *Constitution Act, 1982*]? I think not. The above passages from *Delgamuukw* suggesting the right for the community to decide to what uses the land encompassed by their Aboriginal title can be put are determinative of the question. The right to Aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35.

An analysis of the reasoning of the Supreme Court of Canada in *Delgamuukw* can lead to no other result.<sup>47</sup>

Justice Williamson's interpretation of *Delgamuukw* provides the basis for a second judicial approach to the issue of the inherent right of self-government. Aboriginal title to land, and indeed all other Aboriginal and treaty rights as well, are communal in

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<sup>46</sup> *Delgamuukw v. British Columbia*, above note 18 at para. 115 [Lamer C.J.'s emphasis].

<sup>47</sup> *Campbell v. British Columbia*, above note 1 at paras. 137-38, quoting from *Delgamuukw v. British Columbia*, above note 18 at para. 133. Justice Williamson, at paras. 138-39, also found support for his view that treaties can contain self-government provisions in the judgment of Justice Lamer in *R. v. Sioui*, above note 19 at 1043: "There is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s.88 of the *Indian Act*."

nature.<sup>48</sup> Aboriginal communities must, therefore, have decision-making authority over how those rights can be exercised. As Justice Williamson said, there must be “a political structure” – that is, a government – within the community for exercising this authority. Consequently, Aboriginal nations must have an inherent right of self-government in relation to all their Aboriginal and treaty rights. Moreover, given that the *Campbell* decision was not appealed, Justice Williamson’s judgment is the law, at least in British Columbia.

What, then, is the scope of the jurisdiction of inherent right Aboriginal governments under this second approach? Unless set out in a treaty such as the Nisga’a Treaty,<sup>49</sup> the scope of their jurisdiction is determined by the extent of the Aboriginal and other treaty rights of the Aboriginal nation claiming the jurisdiction. With regard to their Aboriginal title lands, this means they have jurisdiction over the management and use of those lands and of the resources on and under them, such as forests and minerals.<sup>50</sup> They also have jurisdiction over their hunting and fishing rights, and over any other matters in relation to which they are able to establish Aboriginal or treaty rights. This could include jurisdiction over such things as family matters, education, and health care. However, in litigation this still places the onus of proof on Aboriginal peoples – in order to establish jurisdiction over any particular subject matter, they first have to prove that they have an Aboriginal or treaty right in relation to that matter. Where Aboriginal title to land is concerned, this means proving that they were in exclusive occupation of the claimed land at the time of Crown assertion of sovereignty.<sup>51</sup> Where other Aboriginal rights are concerned, they have to prove those rights in accordance with the “integral to the distinctive culture” test laid down by the Supreme Court in the *Van der Peet* case.<sup>52</sup>

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<sup>48</sup> Regarding Aboriginal rights, see *R. v. Sparrow*, above note 3 at 1112. Regarding treaty rights, see *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 533 at para. 17.

<sup>49</sup> The *Campbell* decision reveals that, where Aboriginal peoples enter into a treaty like the Nisga’a Treaty that defines the scope of their inherent right of self-government, a court will not require proof of the prior existence of the specifics of the jurisdiction set out in the treaty. Having concluded that the Nisga’a Nation has an inherent right of self-government, Justice Williamson did not question the authority of the parties to the Nisga’a Treaty to agree upon the scope of that right.

<sup>50</sup> In *Delgamuukw v. British Columbia*, above note 18, the Supreme Court held that Aboriginal title encompasses natural resources, including resources such as oil and gas that Aboriginal peoples may not have made use of prior to European colonization.

<sup>51</sup> See note 36 above.

<sup>52</sup> See text accompanying notes 35-37 above.

Where treaty rights are concerned, they have to convince a court that the treaty relied upon provides the rights they are claiming.<sup>53</sup>

So as in the case of the first approach that came from the *Pamajewon* decision, the second approach derived from Justice Williamson's decision in *Campbell* also means that Aboriginal governments start with an empty box of jurisdiction. The onus is on them to fill this box by proving Aboriginal or treaty rights, or a combination of Aboriginal and treaty rights. The second approach, while more generous to Aboriginal peoples than the first approach, therefore has limitations, and places a heavy burden of proof on Aboriginal claimants who try to prove their rights in Canadian courts. However, in situations where Aboriginal rights are asserted but not yet proven, we have seen that the Crown has a duty to consult the Aboriginal nation making the claim and to accommodate their interests in appropriate circumstances. Those interests would include their claim to a right of self-government over the Aboriginal rights being asserted. For the Haida Nation, for example, this should mean that the Crown's duty to consult and accommodate has to take into account their decision-making authority – that is, their right of self-government – over their Aboriginal title lands.

But despite the opening provided by the *Haida Nation* decision, I think the *Campbell* approach, while preferable to the *Pamajewon* approach, is still problematic. Neither *Campbell* nor *Pamajewon* takes account of the obvious historical fact – a fact accepted by the Supreme Court in *Sioui* and *Haida Nation*<sup>54</sup> – that the Aboriginal peoples were independent nations prior to European colonization. And both approaches are impractical because, when an Aboriginal right of self-government is claimed in court, they do not allow for inherent Aboriginal jurisdiction to extend to matters that were not integral to distinctive Aboriginal cultures prior to European contact, are not in relation to Aboriginal title, or have not been defined by a treaty such as the Nisga'a Treaty. Both approaches could therefore exclude jurisdiction over matters that are vital for Aboriginal nations to realistically exercise governmental authority in the modern world. I am therefore going to suggest a third approach that has not yet been accepted as such by

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<sup>53</sup> For an example of a successful treaty claim, see *R. v. Marshall [No. 1]*, [1999] 3 S.C.R. 456. For an example of an unsuccessful claim, see *R. v. Marshall*; *R. v. Bernard*, above note 36.

<sup>54</sup> See text accompanying notes 19-20 above.

Canadian courts, but that is more consistent with historical fact and with the present-day needs of Aboriginal nations.

**(iii) Approach #3: Residual Aboriginal Jurisdiction**

The third approach starts with the undeniable fact that the Aboriginal peoples were independent prior to European colonization of North America. As the Supreme Court has acknowledged, they lived in organized societies and exercised political authority as nations. Borrowing the words of Chief Justice McLachlin in *Haida Nation*, they had “pre-existing Aboriginal sovereignty.”<sup>55</sup>

What was the scope of their jurisdiction as independent, sovereign nations? We have seen that, according to the traditions of at least some Aboriginal peoples, that jurisdiction came from the Creator and may have had limitations, in the form of responsibilities, placed on it. Those responsibilities might restrict the authority of Aboriginal governments vis-à-vis the Creator. For example, certain uses of spiritually significant sites might not be permissible if those uses were beyond what was authorized by the Creator’s laws. But we have also seen that this does not mean there would be a jurisdictional vacuum that would permit another government, such as that of a colonizing European nation, to come in and authorize uses that would violate the Aboriginal people’s traditions. Moreover, the Aboriginal nation would be responsible for the site and would have an obligation to protect it from unauthorized uses by any human beings, in keeping with the sense of responsibility that Aboriginal peoples generally have to the land.<sup>56</sup> So restrictions on the uses that nation could make of the site would not mean that its government would have no jurisdiction over it. Moreover, any limitations on that nation’s jurisdiction would not mean that another nation could assert jurisdiction and ignore the restrictions.

Apart from any limitations contained in the original gift of jurisdiction by the Creator, the jurisdiction Aboriginal nations had prior to European colonization would have been all-encompassing. As factually independent nations, they would have had

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<sup>55</sup> See text accompanying note 20 above.

<sup>56</sup> See the quotation from Oren Lyons accompanying note 24 above. See also Plain, above note 22 at 34; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ontario: Oxford University Press, 1999), 60-62.

complete authority within their own territories (territorial jurisdiction) and over their own citizens (personal jurisdiction). In other words, they would have had a full box of jurisdictional powers.<sup>57</sup> The third approach I am suggesting therefore starts with this full box. Instead of envisaging an empty box of jurisdiction and expecting Aboriginal peoples to meet formidable burdens of proof in order to fill it, this approach accepts that the Aboriginal nations had plenary jurisdiction at the time of colonization. This is consistent with the historical reality of Aboriginal North America, and is supported by American law.<sup>58</sup> By contrast, the empty box position endorsed by Canadian courts in the first two approaches we have examined amounts to a denial of this reality. It is also inconsistent with the Supreme Court's reliance on American case law and its acceptance of the pre-existing sovereignty of the Aboriginal nations.

The approach I am suggesting has very significant implications for the onus of proving the jurisdiction of inherent right Aboriginal governments. Because one starts with plenary Aboriginal jurisdiction, there is no need for Aboriginal peoples to prove the components of their jurisdiction. Instead, the onus is on the Crown to show how their complete jurisdiction has been diminished.<sup>59</sup> Canadian case law provides some guidance on how this might be done.

First, according to Justice Binnie, who wrote a separate judgment (concurring in by Justice Major) in *Mitchell v. M.N.R.*,<sup>60</sup> acquisition of sovereignty by the Crown reduced the jurisdiction of the Aboriginal nations by taking away authority that would be incompatible with Crown sovereignty.<sup>61</sup> The positive side of this is that Justice Binnie implied that Aboriginal jurisdiction is residual, so that it could include all governmental

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<sup>57</sup> See the quotation from Erasmus and Sanders accompanying note 29 above.

<sup>58</sup> See the cases cited above in note 31, and discussion in McNeil, "Judicial Approaches to Self-Government", above note 32.

<sup>59</sup> This is also consistent with American law, according to which the United States has the onus of proving the extent to which the internal sovereignty of the Indian nations has been reduced: see William C. Canby, Jr., *American Indian Law*, 2<sup>nd</sup> ed. (St. Paul: West Publishing, 1988), 71-72. This approach is revealed in part by the rule of statutory interpretation that Acts of Congress are to be construed if possible in favour of Indian sovereignty: see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

<sup>60</sup> Above note 18.

<sup>61</sup> Although Canadian courts generally take Crown sovereignty for granted, the issue of how and when this sovereignty was acquired has never been resolved. For critical assessments, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall Law Journal* 537; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 107-31; Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's Law Journal* 470, especially at 502-17.

authority that is not incompatible with Crown sovereignty. He was nonetheless of the opinion that control of Canada's borders is essential to Crown sovereignty, and so Aboriginal nations cannot have an Aboriginal right to bring goods from the United States into Canada without obeying Canada's customs laws.<sup>62</sup> So apparently Aboriginal jurisdiction in relation to trade over what are now international borders was lost and so has to be subtracted from the complete jurisdiction the Aboriginal nations had prior to European colonization. Another example Justice Binnie gave of lost jurisdiction relates to military matters that are vital to the defence of Canada. Nonetheless, he said that the doctrine of sovereign incompatibility must be applied "sparingly" and "with caution".<sup>63</sup> In particular, he pointed out that "the sovereign incompatibility principle has not prevented the United States (albeit with its very different constitutional framework) from continuing to recognize forms of *internal* aboriginal self-government which it considers to be expressions of residual aboriginal sovereignty."<sup>64</sup> But if the doctrine of sovereign incompatibility is accepted by the Supreme Court,<sup>65</sup> it may be a means for the Crown to prove that some aspects of Aboriginal jurisdiction have been lost.<sup>66</sup>

A second way in which the Crown might be able to prove that the jurisdiction of inherent right governments has been diminished would be to show that aspects of that jurisdiction have been extinguished, either unilaterally by or under valid legislation prior

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<sup>62</sup> For criticism of this aspect of Justice Binnie's judgment, see Leonard I. Rotman, "Developments in Aboriginal Law: The 2000-2001 Term" (2001) 15 *Supreme Court Law Review* (2d) 1 at 20-28; Peter W. Hutchins and Anjali Choksi, "From *Calder* to *Mitchell*: Should the Courts Control Cultural Borders?" (2002) 16 *Supreme Court Law Review* (2d) 241 at 260-66; Gordon Christie, "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) 16 *Supreme Court Law Review* (2d) 285. Compare the more positive assessment in Moodie, above note 40 at 27-39.

<sup>63</sup> *Mitchell v. M.N.R.*, above note 18 at paras. 151, 154.

<sup>64</sup> *Mitchell v. M.N.R.*, above note 18 at para. 165 [Binnie J.'s emphasis].

<sup>65</sup> Note that in *Mitchell v. M.N.R.*, above note 18 at paras. 61-64, Chief Justice McLachlin, who wrote the judgment for the majority of the Court, expressly declined to deal with the matter of "sovereign incompatibility", leaving open the issue of "the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s.35(1)" (para. 64). However, she did write at para. 10 that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them".

<sup>66</sup> See, for example, *Canada (Minister of National Revenue) v. Ochapowace Ski Resort Inc.*, [2002] S.J. No. 526 (Sask. Prov. Ct.) at paras. 74-76. Compare *Walpole Island First Nation v. Canada (Attorney General)*, [2004] O.J. No. 1970 at paras. 11-12, 17.

to the enactment section 35(1) of the *Constitution Act, 1982*, or voluntarily by treaty.<sup>67</sup> However, the burden on the Crown to prove extinguishment of any Aboriginal right is onerous. In *Delgamuukw v. British Columbia*, Chief Justice Lamer expressed it this way:

That standard [of extinguishment] was laid down in *Sparrow* [<sup>68</sup>], at p. 1099, as one of “clear and plain” intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been “necessarily inconsistent” with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown “use language which refers expressly to its extinguishment of aboriginal rights” (*Gladstone* [<sup>69</sup>] at para. 34), the standard is still quite high.<sup>70</sup>

It would therefore appear that exercise of jurisdiction in relation to Aboriginal peoples by the Parliament of Canada, for example, over a particular subject matter would not of itself extinguish the jurisdiction of Aboriginal governments in relation to that matter. For extinguishment to occur, the intention of Parliament to that effect would have to be demonstratively manifest.<sup>71</sup> Moreover, if the inherent right of self-government is a single Aboriginal right, legislative restrictions on the exercise of that right would probably be infringements rather than extinguishments,<sup>72</sup> and so the infringement approach discussed below would apply.

Extinguishment of the jurisdiction of Aboriginal governments by treaty is legally possible, but this would depend on the terms of the treaty the Crown is relying on for this purpose. The Supreme Court has laid down a number of rules for treaty interpretation that would make it more difficult for the Crown to establish extinguishment in this way. For example, treaties are to be interpreted liberally, and any ambiguities are to be

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<sup>67</sup> See the quotation from McLachlin C.J.’s decision in *Mitchell v. M.N.R.* in note 65, above. For discussion of extinguishment, see Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 *Ottawa Law Review* 301.

<sup>68</sup> *R. v. Sparrow*, above note 3.

<sup>69</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723.

<sup>70</sup> *Delgamuukw v. British Columbia*, above note 18. See also *R. v. Sappier*; *R. v. Gray*, above note 18 at para. 60, where the Supreme Court followed *R. v. Sparrow*, above note 3, and held that “the regulation of Crown timber through a licensing scheme does not meet the high standard of demonstrating a clear intent to extinguish the aboriginal right to harvest wood for domestic uses.”

<sup>71</sup> For further discussion in relation to enactment of the *Indian Act* by Parliament, see McNeil, above note 5.

<sup>72</sup> See *Partners in Confederation*, above note 1 at 31-35.

resolved in favour of the Aboriginal parties.<sup>73</sup> Moreover, the historical, political, and cultural contexts need to be taken into account, and oral understandings have to be incorporated into treaties along with the written terms.<sup>74</sup> While the Aboriginal parties may have acknowledged that the Crown was a sovereign entity with whom jurisdiction could be shared, it is unlikely that they intended to cede their own jurisdiction to the Crown.<sup>75</sup> This would, however, depend on the treaty in question and the historical, political, and cultural contexts in which it was negotiated.

Thirdly, the Crown might try to prove that the jurisdiction of Aboriginal governments has been diminished by infringement of the inherent right of self-government by or pursuant to legislation. If the infringement occurred before section 35(1) of the *Constitution Act, 1982* came into force on April 17, 1982, justification of the infringement would not have been required when it took place. However, the legislature enacting the infringing legislation would have had to have the constitutional authority to do so. Section 91(24) of the *Constitution Act, 1867* gave the Parliament of Canada exclusive jurisdiction over “Indians, and Lands reserved for the Indians”. In *Delgamuukw v. British Columbia*, the Supreme Court held that Aboriginal rights are within the core of this federal jurisdiction.<sup>76</sup> In its recent decision in *R. v. Morris*, the Court came to the same conclusion regarding treaty rights.<sup>77</sup> So while the Canadian Parliament could have infringed the jurisdiction of inherent right Aboriginal governments without justification prior to April 17, 1982, it is doubtful whether provincial legislatures had the constitutional authority to do so.<sup>78</sup>

When Aboriginal rights received constitutional protection by section 35(1) of the *Constitution Act, 1982*, a major change took place. Since then, those rights have not been

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<sup>73</sup> See *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 402; *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41; *R. v. Morris*, [2006] S.C.J. No. 59 at para. 29.

<sup>74</sup> See *R. v. Badger*, above note 73 at para. 52; *R. v. Marshall [No. 1]*, [1999] 3 S.C.R. 456; *R. v. Morris*, above note 73 at para. 18.

<sup>75</sup> See the quotation from the *Report of the Royal Commission on Aboriginal Peoples* accompanying note 14 above. See also Cardinal and Hildebrandt, above note 11, especially at 31-38; Walters, above note 61 at 510-12.

<sup>76</sup> *Delgamuukw v. British Columbia*, above note 18 at paras. 177-78.

<sup>77</sup> *R. v. Morris*, above note 73 at paras. 41-60, 90-100.

<sup>78</sup> Note, however, that the Supreme Court has sent conflicting messages on this, stating on the one hand that Aboriginal rights are within the core of exclusive federal jurisdiction and on the other that provincial legislatures can infringe them: see, for example, *Delgamuukw v. British Columbia*, above note 18 at paras. 160, 177-78. On federal infringement through the *Indian Act*, see McNeil, above note 5.

extinguishable by the federal government, even by legislation.<sup>79</sup> The protection against extinguishment that had been in place against the provinces since Confederation was thus extended to protection against Parliament. However, Parliament (and possibly provincial legislatures) can still infringe Aboriginal rights, including the inherent right of self-government, if the infringement can be justified in accordance with the test laid down by the Supreme Court in 1990 in *R. v. Sparrow*.<sup>80</sup> This test requires the Crown to prove that the infringement is for a valid legislative objective, and that the Crown's fiduciary obligations have been respected. The second part of this test involves asking whether the infringement has been limited to what is necessary to meet the objective, whether compensation has been offered in appropriate circumstances, and whether the Aboriginal people in question have been consulted. As we have seen, the requirement for consultation applies even if the claimed right has not yet been proven.<sup>81</sup>

So in situations where the jurisdiction of Aboriginal governments has been infringed by or pursuant to constitutionally valid legislation, for the infringement to be effective after April 17, 1982, it would have to be justified in accordance with the *Sparrow* test. This requirement for justification applies to infringements taking place before but continuing after that date, as well as to those taking place later.<sup>82</sup> If the Crown could not meet the burden of proof required by this test, the infringement would be invalid and could be ignored by the Aboriginal governments. Moreover, even valid infringements would only suspend the jurisdiction of Aboriginal governments for as long as the infringing law was in force and continued to be justifiable. If the law was repealed or the infringement ceased to be justifiable, the jurisdiction of Aboriginal governments that had been suspended by the infringement would once again be exercisable.

To sum up the third approach, the starting point is the complete jurisdiction that Aboriginal peoples had as independent nations prior to European colonization. Depending on whether the Supreme Court accepts the doctrine of sovereign incompatibility, this jurisdiction may have been reduced to the extent that it is

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<sup>79</sup> *R. v. Van der Peet*, above note 7 at 28; *Mitchell v. M.N.R.*, above note 18 at 11.

<sup>80</sup> Above note 3.

<sup>81</sup> See text accompanying note 43 above.

<sup>82</sup> This is because, after section 35(1) came into force in 1982, any infringements have to be justified in order to avoid incorporating prior regulatory schemes into the definition of existing Aboriginal rights in section 35(1) and creating a patchwork of rights across Canada: see *R. v. Sparrow*, above note 3 at 1091-92.

inconsistent with Crown sovereignty. It also could have been extinguished in whole, and possibly in part, by or pursuant to constitutionally valid legislation, but the onus of proving extinguishment is on the Crown and the burden of proof is onerous. In principle, it could also have been extinguished in whole or in part by treaty, but this would depend on a proper understanding of the treaty in its historical, political, and cultural context. Finally, to the extent that the jurisdiction of Aboriginal governments was not lost or extinguished prior to the coming into force of section 35(1) of the *Constitution Act, 1982*, it would have received constitutional protection and could no longer be extinguished unilaterally by or pursuant to legislation. After that, extinguishment would require the consent of the Aboriginal nation in question. The jurisdiction of Aboriginal governments could, however, still be infringed by legislation, but only if the infringement could be justified in accordance with the *Sparrow* test.

### **3. Concurrent Jurisdiction and Paramountcy**

Aboriginal governments exercising inherent jurisdiction in the context of section 35(1) of the *Constitution Act, 1982*, do not act in isolation. They necessarily have relationships with other governments – Aboriginal, federal, provincial, territorial, and municipal – with whom they share jurisdiction. Where the federal and provincial governments in particular are concerned, there are bound to be overlaps in jurisdiction. For example, provinces have jurisdiction over education and health care, which are matters that are likely to be found within the jurisdiction of Aboriginal governments as well. We have also seen that the federal government has broad jurisdiction over “Indians, and Lands reserved for the Indians”, which probably includes jurisdiction over most if not all matters within the jurisdiction of Aboriginal governments.<sup>83</sup> It is therefore apparent that the jurisdiction of Aboriginal governments is concurrent with the jurisdiction of other governments in many respects, requiring paramountcy rules to determine whether the laws of Aboriginal governments or those of the federal or provincial governments prevail in the case of conflict. In the limited space available in

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<sup>83</sup> See *RCAP Report*, above note 1, Vol. 2, Pt. 1, at 216.

this paper, I can do no more than suggest a broad outline for approaching these complex issues.

Regardless of which of the three approaches to the jurisdiction of Aboriginal governments described in the preceding part of this paper is adopted, these issues of concurrent jurisdiction and paramountcy will arise. On the first approach described above (the *Pamajewon* approach), we have seen that the jurisdiction of Aboriginal governments depends on the matters Aboriginal nations can prove are within their inherent right of self-government through application of the “integral to the distinctive culture” test. On the second approach (the *Campbell* approach), their jurisdiction depends on the other Aboriginal rights and title, and treaty rights, that they are able to prove and over which they have decision-making authority. On the third approach (the residual sovereignty approach), their jurisdiction is whatever remains of their complete governmental authority after subtracting jurisdiction that has been lost, possibly through incompatibility with Crown sovereignty, extinguishment, or justifiable infringement. Subject to applicable burdens of proof being met, on each approach Aboriginal governments have definable areas of jurisdiction that are probably concurrent with the areas of jurisdiction of Parliament and the provincial legislatures. So whose jurisdiction is paramount in the event of conflicting exercise of jurisdiction?

This is an area where Canadian courts have not yet provided much direct guidance. Nonetheless, I think one can give at least a tentative answer by applying general principles of Canadian law derived from decisions the courts have handed down. In my opinion, no matter which of the three approaches one takes to the jurisdiction of Aboriginal governments, it will generally be concurrent with the jurisdiction of either the federal or a provincial government, or with that of both. This is because sections 91 and 92 in particular of the *Constitution Act, 1867* distributed broad legislative and executive authority to the federal and provincial governments, including the conferral by section 91(24) of exclusive jurisdiction over “Indians, and Lands reserved for the Indians” to the Parliament of Canada. In addition, section 91 gave Parliament residual jurisdiction over all subject matters not assigned to the provincial legislatures. But as pointed out by Justice Williamson in the *Campbell* case,<sup>84</sup> this distribution of legislative and executive

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<sup>84</sup> *Campbell v. British Columbia*, above note 1.

authority did not take away the inherent right of self-government of the Aboriginal peoples.<sup>85</sup> He went on to hold that this right has been included as an Aboriginal right in section 35(1) of the *Constitution Act, 1982*. This means that since 1982 Aboriginal jurisdiction has been protected from infringement by the exercise of both federal and provincial jurisdiction, unless the infringement can be justified in accordance with the *Sparrow* test. Moreover, if a province attempts to exercise its jurisdiction in a way that affects the core of federal jurisdiction over “Indians, and Lands reserved for the Indians”, it should be precluded from doing so by section 91(24) of the *Constitution Act, 1867*.<sup>86</sup>

Consequently, due to section 35(1) of the *Constitution Act, 1982*, the jurisdiction of inherent right Aboriginal governments should be paramount to the jurisdictions of the federal and provincial governments, except in situations where an infringement of Aboriginal jurisdiction can be justified in accordance with the *Sparrow* test.<sup>87</sup> This means that, at least in the event of a direct conflict,<sup>88</sup> federal and provincial laws will usually have to give way to Aboriginal laws that come within the scope of the jurisdiction of Aboriginal governments. Federal laws will only prevail over those Aboriginal laws if the federal government can prove a valid legislative objective for infringing the inherent

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<sup>85</sup> See also *Partners in Confederation*, above note 1 at 31-35.

<sup>86</sup> See *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Morris*, above note 73. For detailed discussion, see Kerry Wilkins, “Of Provinces and Section 35 Rights” (1999) 22 *Dalhousie Law Journal* 185; Kent McNeil, “Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction”, (1998) 61 *Saskatchewan Law Review* 431, reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001), 249 [*Emerging Justice?*].

<sup>87</sup> The Royal Commission on Aboriginal Peoples came to a similar conclusion (*RCAP Report*, above note 1, Vol. 2, Pt. 1, at 213-24), but only with respect to what it called “the core of Aboriginal jurisdiction”, which it defined as “all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern” (p. 215). Outside this core, the Commission suggested there is a periphery of Aboriginal jurisdiction, which, though inherent, cannot be exercised without agreement with the federal and provincial governments.

<sup>88</sup> In this context, we do not yet know whether Canadian courts will apply the test of operational conflict developed in relation to the paramountcy of federal over provincial laws: see note 2 and accompanying text, above. A preferable approach would be for Aboriginal laws to prevail if they occupied the field. For example, if an Aboriginal government enacted laws dealing with fish and fishing within the territory of that Aboriginal nation, federal or provincial laws dealing with fish and fishing would not apply within the territory (unless they could be shown to constitute a justifiable infringement, using the *Sparrow* test), even if those laws were not in direct conflict with the Aboriginal laws. Occupation of the field of fish and fishing by the Aboriginal laws would thus exclude the application of federal and provincial laws in relation to those matters. Unlike the direct conflict approach, this approach would not give rise to burdensome and impractical situations where Aboriginal people would be required to abide by two or three sets of laws in relation to the same subject matter. It has been used to avoid this problem in the Nisga’a Final Agreement, in relation to some areas of Nisga’a jurisdiction.

right of self-government of the Aboriginal people concerned, and show minimal impairment of the right, payment of compensation if economic interests of the Aboriginal people have been affected, and adequate consultation with them.<sup>89</sup> Where provincial laws are concerned, however, it is doubtful whether they can ever infringe the inherent right of self-government, given that it is an Aboriginal right that comes within the core of exclusive federal jurisdiction under section 91(24) of the *Constitution Act, 1867*.<sup>90</sup>

Where an Aboriginal government chooses not to exercise its jurisdiction in relation to a particular subject matter, concurrency of jurisdiction means that federal or provincial laws in relation to that matter will continue to apply to the Aboriginal people and territory in question, as long as other Aboriginal and treaty rights are not infringed (or, if infringed, as long as the infringement is justified under the *Sparrow* test). This prevents a legal vacuum from occurring in relation to that matter. It also gives Aboriginal nations the choice of continuing to operate under federal and provincial laws in areas where they are not yet ready to take charge. Concurrency of jurisdiction can therefore be seen as a useful device for Aboriginal peoples to rely upon to build self-government capacity and to extend the exercise of their jurisdiction into new areas at their own pace and in accordance with their own needs and priorities.<sup>91</sup>

## Conclusions

For many Aboriginal peoples, the source of the inherent jurisdiction of their governments is the Creator. The scope of their jurisdiction is therefore determined by the authority granted to them by the Creator. Authority not granted to them would presumably have been retained by the Creator, or take the form of responsibilities placed on them by the Creator, and so would not have been exercisable by another government, whether a colonizing European government or the government of Canada. Moreover, it

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<sup>89</sup> These are the main aspects of the *Sparrow* justification test: see notes accompanying notes 80-81 above. In my opinion, justification of infringements of the inherent right of self-government will be difficult in most instances: see McNeil, above note 5 at 344-48, 357-60.

<sup>90</sup> See notes 76-78, 86, and accompanying text, above.

<sup>91</sup> See Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 *Queen's Law Journal* 95 at 133-36, reprinted in *Emerging Justice?*, above note 86, 184 at 211-14; *RCAP Report*, above note 1, Vol. 2, Pt. 1, at 217.

is doubtful that Aboriginal peoples intended to give up jurisdiction when they entered into treaties with the Crown. According to the oral traditions of many Aboriginal peoples, they intended to share jurisdiction with the Crown.

The Canadian legal system has acknowledged that the Aboriginal peoples were sovereign nations prior to the arrival of Europeans in North America. If the imposition of Crown sovereignty diminished the sovereignty and hence the jurisdiction of the Aboriginal nations, one would expect the onus to be on the Crown to demonstrate how this happened and prove what jurisdiction has been taken away from them. Instead, Canadian courts have placed the onus on Aboriginal peoples to prove what jurisdiction they had after the imposition of Crown sovereignty. Moreover, in order to prove this directly they have to meet a test created by the Supreme Court for proof of Aboriginal rights generally, known as the “integral to the distinctive culture” test. Alternatively, they can prove other Aboriginal rights, such as hunting or fishing rights or Aboriginal title to land, and rely on their decision-making authority in relation thereto as the basis for their jurisdiction over those rights.

Whichever approach one takes to determine the scope of the jurisdiction of inherent right Aboriginal governments, in Canadian constitutional law this jurisdiction is probably concurrent with the overlapping jurisdictions of the federal and provincial governments. Prior to the enactment of section 35(1) of the *Constitution Act, 1982*, federal laws would have been paramount over Aboriginal laws, at least in the event of conflict between them. Section 35(1) reversed this paramountcy by providing constitutional protection to Aboriginal rights, including the inherent right of self-government. So after April 17, 1982, Aboriginal laws should prevail over federal as well as over provincial laws, except in situations where the Crown can prove that infringement of Aboriginal jurisdiction by federal law is justified. As it is doubtful whether provincial governments have ever had the authority to infringe the inherent right of self-government, justification of the infringement of Aboriginal jurisdiction by provincial law should not be constitutionally permissible.

This research paper has outlined what I believe to be the applicable principles for determining the jurisdiction of inherent right Aboriginal governments as a matter of Canadian constitutional law. We have seen, however, that there are at least three

approaches to this. The first two – the *Pamajewon* and the *Campbell* approaches – have been explicitly endorsed by Canadian courts. The third – the residual sovereignty approach – has only been alluded to by Justice Binnie in the *Mitchell* case without being accepted by a majority of the Supreme Court. I am nonetheless of the opinion that the third approach is the only one that is consistent with the Supreme Court’s acknowledgment of the pre-existing sovereignty of the Aboriginal nations. It also places the onus on the Crown of proving how and to what extent that sovereignty has been reduced, which is where I think the onus should lie as a matter of both legal principle and justice. But given that the third approach has not yet been explicitly accepted by Canadian courts, I cannot state that it is an expression of Canadian law.

It has often been said that the issue of the jurisdiction of Aboriginal governments is a matter that is best settled by negotiation and agreement with the federal and provincial (or territorial) governments. However, many Aboriginal nations are unwilling to forgo exercising jurisdiction for years while negotiations take place. They do not need to do so. Because their right of self-government is inherent, they can act upon it and exercise jurisdiction without first obtaining the agreement of the federal and provincial governments.<sup>92</sup> If they want to avoid court challenges as much as possible, it would probably be safest for them to exercise jurisdiction in relation to Aboriginal and treaty rights that they claim they already have, because the *Campbell* case decided that they do have a right of self-government in relation to these rights. If, for example, they have an Aboriginal title claim to their traditional territory, they can assert a right of self-government in relation to the lands and resources within that territory and exercise jurisdiction over management and use of them. Any exercise of jurisdiction over the same lands and resources by the provincial government, for example, would be a potential infringement of their Aboriginal title and of their decision-making authority in relation to those lands and resources. This would trigger a duty on the provincial government to consult with them and, in appropriate circumstances, accommodate their interests. In this context, those interests would include not only their claimed title to the land but also their claimed right of self-government over it. In this situation, it would be

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<sup>92</sup> See *RCAP Report*, above note 1, Vol. 2, Pt. 1, at 215 (referring to the core of Aboriginal jurisdiction: see note 87 above).

advisable for the province not only to consult with the Aboriginal nation, but also to come to a negotiated agreement with them. Otherwise, the province would expose itself to legal liability if a court were later to uphold the Aboriginal title and self-government rights and decide that the province lacked the constitutional authority to infringe those rights.<sup>93</sup>

So while the full scope of Aboriginal jurisdiction remains uncertain, Canadian law does acknowledge that it is extensive enough to provide Aboriginal nations with real authority and substantial bargaining power in their dealings with the federal and provincial governments. This authority does not depend on finalization of comprehensive agreements or treaties that define the rights of the Aboriginal nations and the jurisdiction of their governments. Other governments have to consult with them, on a government-to-government basis, whenever their claimed rights or interests might be negatively affected by policies or decisions of those governments. Agreements can be negotiated between Aboriginal nations and other governments in relation to specific policies and projects, such as resource development on lands within those nations' territories. Participation by Aboriginal governments in these negotiations would be an exercise of their jurisdiction, and could lead to financial benefits that would fund other government projects and programs within their communities. The essential point is that Aboriginal governments can become engaged in these ways immediately – they have the authority to do so under existing Canadian law, and do not have to seek permission to exercise their jurisdiction from the federal government, provincial governments, or Canadian courts.

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<sup>93</sup> See Kent McNeil, “Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*” (2005) 29 *Supreme Court Law Review* (2d) 447, especially at 460.