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**UNCHARTERED TERRITORY:
FUNDAMENTAL CANADIAN VALUES
AND THE
INHERENT RIGHT OF ABORIGINAL SELF-GOVERNMENT**

by

Robert Kerry Wilkins

**A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of Law
University of Toronto**

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**UNCHARTERED TERRITORY:
Fundamental Canadian Values
and the Inherent Right of Aboriginal Self-Government
LL.M., 1998
Robert Kerry Wilkins
Graduate Department of Law, University of Toronto**

ABSTRACT

Those who seek judicial accreditation, under Canada's constitution, of meaningful rights of aboriginal self-government face two competing challenges. They must strive to maximize constitutional space for aboriginal difference by opposing all unnecessary mainstream interference with the use of such rights. At the same time, they must demonstrate that courts will be able, even after accepting self-government as a constitutional right, to ensure that its exercise does not compromise the arrangements and values fundamental to the mainstream constitutional order. Without such assurance, Canadian courts almost certainly will not take responsibility for declaring such rights to be constitutional rights.

The present work suggests a way of meeting and reconciling these two challenges. In doing so, it does not rely on the Charter of Rights, because the Charter most probably would not govern the exercise of aboriginal rights of self-government, and would not meet either challenge adequately if it did.

. iv .

for

Eileen Hipfner and Maureen Carter-Whitney

who helped make this work possible

and for

Philip Tunley

who helped make it necessary

ACKNOWLEDGEMENTS

Perhaps the best part of undertaking a major piece of legal writing is the occasion it provides to learn from the people who take an interest in it. In that respect, I have been especially fortunate while preparing this work. I am honored by the number of people who have found this project intriguing, and deeply grateful for the support they have given it.

The idea for this project emerged from a series of formative conversations I had a few years ago with Maureen Carter-Whitney and Eileen Hipfner, while the three of us worked together on something else. Many of the views we discussed and the sources we consulted back then survived to shape and improve the final text here. They led, as well, as is the way, to many more conversations with others, who suggested further refinements and additional source materials. I remember clearly such conversations with (in alphabetical order): Gavin Anderson, Jonathan Batty, Don Bourgeois, Michael Brown, Bruce Chapman, Doug Ewart, Jane Fogarty, Susan Gibson and Alan Stone, Scott Hutchison, Shin Imai, Julie Jai, Linda Johnson, Stan Jolly, Karen Knop, Yan Lazor, Lois Lowenberger, Tim McCabe, Alissa Malkin, Mayo Moran, Jennifer Nedelsky, Amnon Reichman, Dick Risk, Carol Rogerson, Ryan Rempel, Joyce Shannon, Brian Slattery, John Terry, Catherine Valcke, Arnold Weinrib, Ernie Weinrib and Lorraine Weinrib. Special thanks too to Heather Janack, for instant access to unreported Supreme Court of Canada judgments, to Ann Morrison, Gina Cullen, Iqbal Wagle and Lisa Doherty for special library assistance, to the amazing Julia Hall, for anticipating and solving all the administrative problems that can arise in the course of a graduate program, and to Jacob Levy, Kent McNeil, Denise Réaume and Ayelet Shachar for access to, and permission to quote from, unpublished manuscripts.

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portions of this work in earlier forms and made suggestions -- methodological, substantive and editorial -- that have improved the text materially. (The editorial interventions of Blackstone and Sassafras, my two cats -- most of them made right on the keyboard -- were, on the other hand, less uniformly constructive.) Jim Phillips read Chapter 4 in draft and gave me the benefit of his expertise in legal history. David Beatty brought his expertise in constitutional law to bear on Chapter 3, and then the entire manuscript, and urged me, correctly, to think more clearly about the Charter, and harder about section 1.

I reserve my deepest gratitude, though, for Patrick Macklem and Kent McNeil. Patrick's supervision of this project throughout the past year has always been patient, responsive, supportive and thoughtful. "Thoughtful" in both senses: at once considerate, of me and of the character of the work, and measured, wise and perceptive in his criticism. Kent, who had no responsibility for this project at all -- he teaches at another school, and was on leave all year --, took a special interest in it, read the entire manuscript and offered support and detailed, helpful comments on draft versions all year long. It is humbling and gratifying to have engaged the interest of these two scholars, each at the very top of his field and the very top of his form.

Whatever infelicities remain in the present version are there despite the best efforts of these teachers, friends and colleagues, not because of them.

Finally, my thanks to Deborah, my spouse, who most assuredly did not need the extra fuss that came with this year of writing, but who encouraged it all the same in the belief that I could see it through. Only she knows what a leap of faith that took.

Kerry Wilkins
September 11, 1998

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CHAPTER ONE: INTRODUCTION

Since at least 1982, when Canadian law first gave explicit constitutional protection to the "existing aboriginal and treaty rights of the aboriginal peoples of Canada,"¹ no aboriginal issue has been more important, legally or politically, here than the claim of its aboriginal peoples to have the inherent right to govern themselves. It was self-government rights that a special House of Commons committee recommended in 1983² for federal endorsement and for entrenchment in the constitution. It was self-government that prompted, then dominated the agendas at, no fewer than four constitutional conferences held during the 1980s specifically about aboriginal issues.³ It was first ministers' refusal at those conferences to support constitutional amendments entrenching self-government rights that led, as much as anything else, to the downfall, in 1990, of the unrelated constitutional amendments known as the Meech Lake Accord.⁴ And it was self-government rights that Canada's aboriginal leaders and first ministers agreed in Charlottetown in 1992 to include in an omnibus package of

¹ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11) ("Constitution Act, 1982"), s. 35(1). For an insightful account of how this happened, see Douglas Sanders, "The Indian Lobby" in Keith Banting & Richard Simeon, eds., And No One Cheered: Federalism, Democracy and the Constitution Act (Toronto: Methuen, 1983) 301.

² See Canada, House of Commons, Special Committee on Indian Self-Government, Indian Self-Government in Canada (Ottawa: Minister of Supply and Services Canada, 20 October 1983) esp. at 43-46.

³ In 1983, 1984, 1985 and 1987. See Constitution Act, 1982, ss. 37-37.1, repealed in 1983 and 1987, respectively, by ss. 54 and 54.1. For commentary on these conferences see, e.g., Brian Schwartz, First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal: Institute for Research on Public Policy, 1986) ("Schwartz, Second Thoughts"); Douglas Sanders, "The Constitution, the Provinces, and Aboriginal Peoples," in J. Anthony Long & Menno Boldt, eds., Governments in Conflict? Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988) 151 at 165-169.

⁴ See, e.g., M.E. Turpel & P.A. Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit in the Wake of the Meech Lake Accord" (1990) 15 Queen's L.J. 345.

constitutional amendments:⁵ a package later abandoned because it did not earn the support of a majority of voting Canadians in a majority of provinces.

The fate of the Charlottetown proposals, and the constitutional exhaustion it bespoke, may well have postponed indefinitely any prospect of entrenching self-government rights explicitly in the constitution;⁶ it has not, however, diminished the aboriginal peoples' own conviction that they have, and always have had, inherent self-government rights.⁷ In the years since the Charlottetown referendum, attention has turned with new intensity to the task of determining whether, as a matter of law, Canada's constitution might already protect inherent self-government rights: to whether, that is, the inherent right can qualify as an "existing aboriginal right" recognized and affirmed by section 35(1) of the Constitution Act, 1982.⁸ For the foreseeable future, "the political process has chosen to defer [this issue] to the courts."⁹

The notion that the constitution does indeed already protect the exercise, as Canadian law, of at least some inherent rights of aboriginal self-government has strong support in recent

⁵ See Canada, Consensus Report on the Constitution: Charlottetown (Final Text, 28 August 1992) (Ottawa: Minister of Supply and Services, 1992) ("Charlottetown Accord") and Draft Legal Text (9 October 1992) ("Draft Legal Text"). The self-government proposals, if approved, would have amended ss. 3, 25, 32 and 35 of, and would have added ss. 33.1 and 35.1-35.91 to, the Constitution Act, 1982.

⁶ See, e.g., Jeffrey Simpson, "The grand talk of constitutional reform for aboriginals is a mirage" [Toronto] Globe & Mail (15 August 1995) A16.

⁷ See, e.g., Assembly of First Nations, First Nations Circle on the Constitution, To the Source (1992) ("To the Source") at 13-23; Canada, Report of the Royal Commission on Aboriginal Peoples, vol. 2 (Ottawa: Minister of Supply and Services, 1996) ("2 RCAP Final Report") esp. at 139.

⁸ See, e.g., Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1994) 19 Queen's L.J. 95 ("McNeil, 'Constitutional Space'").

⁹ P.A. Monture-OKanee & M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 239 ("Monture-OKanee & Turpel, 'Rethinking Justice'") at 263 n. 79.

academic legal writing,¹⁰ has the formidable endorsement of the Royal Commission on

¹⁰ See, e.g., Shaun Nakatsuru, "A Constitutional Right of Indian Self-Government" (1985) 43 U. T. Fac. L. Rev. 72; Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T. Fac.L.Rev. 1; Bruce Clark, Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada (Montreal: McGill-Queen's University Press, 1990); Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29 Alta L. Rev. 498; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 ("Macklem, 'Borders'"); Patrick Macklem, "Ethnonationalism, Aboriginal Identities, and the Law," in Michael D. Levin, ed., Ethnicity and Aboriginality: Case Studies in Ethnonationalism (Toronto: University of Toronto Press, 1993) 9 ("Macklem, 'Ethnonationalism'"); Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311 ("Macklem, 'Distributing Sovereignty'"); Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 101 Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 ("Slattery, 'Question of Trust'"); Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall L.J. 101; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21 Man. L.J. 343; Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 338; Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1992) 2 N.J.C.L. 163; Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992) 17 Queen's L.J. 350 ("Walters, 'Comment on Delgamuukw'"); Mark D. Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 ("Walters, 'Mohegan Indians'"); John Borrows, "Constitutional Law from a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; McNeil, "Constitutional Space," note 8 above; Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (January 1998) [unpublished] ("McNeil, 'Aboriginal Rights'"); Delia Opekokew, "The Inherent Right of Self-Government As an Aboriginal and Treaty Right" in The Inherent Right of Aboriginal Self-Government, papers presented to Canadian Bar Association, Continuing Legal Education Program, Annual Meeting, 1994 ("CBA, The Inherent Right"), vol. 2; Mei Lin Ng, Convenient Illusions: A Consideration of Sovereignty and the Aboriginal Right of Self-Government (LL.M., Osgoode Hall Law School, York University, 1994) [unpublished]; Peter W. Hutchins, Carol Hilling & 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 ("'Ghost in the Machine'"); Peter W. Hogg, Constitutional Law of Canada, 4th ed., abridged (Toronto: Carswell, 1997) at 573, 589.

For commentaries that express doubt -- some regretfully, some not -- about the sufficiency of the legal basis in the existing constitution for meaningful rights of aboriginal self-government, see Schwartz, Second Thoughts, note 3 above, at 385-390; W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; Harry S. LaForme, "Indian Sovereignty: What Does It Mean?" (1991) 11 Can. J. Native Studies 253; William Johnson, "Modern Myths: Elements of Self-government Haven't Been Perpetuated" The [Montreal] Gazette (7 July 1992) B3; Sylvain Lussier, "Réflexions sur 'Partenaires au Sein de la Confédération' et le Droit 'Inherent' à l'Autonomie Gouvernementale" in CBA, The Inherent Right, vol. 1; Kenneth J. Tyler, "Another Opinion: A Critique of the Paper Presented by the Royal

Aboriginal Peoples¹¹ and is now the official policy of the government of Canada.¹² Canadian and commonwealth courts, on the other hand, have rarely, if ever, upheld aboriginal peoples' claims to have such rights,¹³ and the prospect of self-government continues to

Commission on Aboriginal Peoples Entitled: Partners in Confederation" in CBA, The Inherent Right, vol. 1; Bob Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in Delgamuukw v. British Columbia" (1994) 28 U.B.C. L.Rev. 49; Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon" (1997) 42 McGill L.J. 1011 ("Morse, 'Permafrost Rights'").

¹¹ See 2 RCAP Final Report, note 7 above, at 166-169, 186-213. The Royal Commission had announced this conclusion in at least two of its earlier reports: Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Minister of Supply and Services, 1996) ("RCAP, Bridging") esp. at 219-224, and Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution (Ottawa, Ministry of Supply and Services, 1993) ("RCAP, Partners") at 29-45.

¹² See Canada, Department of Indian Affairs and Northern Development, Federal Policy Guide: Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (Ottawa: Minister of Public Works and Government Services Canada, 1995) ("Federal Policy Guide") esp. at 3-4.

Between 1990 and 1995, it was also the policy of the government of Ontario to regard the inherent right of self-government as already recognized and affirmed under the constitution of Canada. See Bob Rae, "The Road to Self-Determination," in Frank Cassidy, ed., Aboriginal Self-Determination (Lantzville, B.C.: Oolichan Books, 1991) ("Aboriginal Self-Determination") 150 at 152, and Statement of Political Relationship between Ontario and the First Nations in Ontario, 6 September 1991.

¹³ For Canadian and commonwealth cases rejecting assertions of free-standing rights or powers of aboriginal governance, see, e.g., Doe d. Sheldon v. Ramsay (1852), 9 U.C.Q.B. 105, Burns J.; R. v. Beboning (1908), 17 O.L.R. 23 (C.A.); Sero v. Gault (1921), 50 O.L.R. 27 (S.C.); Logan v. Styres (1959), 20 D.L.R. (2d) 416 (Ont. H.C.); Isaac v. Davey (1974), 5 O.R. (2d) 610 (C.A.), aff'd. on other grounds (sub nom. Davey v. Isaac), [1977] 2 S.C.R. 897; Coe v. Commonwealth of Australia (No. 1) (1979), 24 A.L.R. 118 (H.C.A.); Re Stacey and Montour and The Queen (1981), 63 C.C.C. (2d) 61 (Que. C.A.); A.G. Ontario v. Bear Island Foundation (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.) at 407, aff'd. on other grounds (1989), 58 D.L.R. (4th) 117 (Ont. C.A.), aff'd. without reference to the point [1991] 2 S.C.R. 570; Delgamuukw v. The Queen in right of B.C. (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) ("Delgamuukw (S.C.)"), aff'd. [1993] 5 W.W.R. 97 (B.C.C.A.) ("Delgamuukw (C.A.)"), rev'd. on other grounds [1997] 3 S.C.R. 1010 (Delgamuukw"); Coe v. Commonwealth of Australia (No. 2) (1993), 118 A.L.R. 193 (H.C.A.); Walker v. New South Wales (1994), 182 C.L.R. 45 (H.C.A.); R. v. Williams, [1995] 2 C.N.L.R. 229 (B.C.C.A.). For Canadian and commonwealth judgments that suggest at least some basis for argument in support of existing aboriginal rights of self-government, see Connolly v. Woolrich (1867), 17 R.J.R.Q. 75 (S.C.) at 83-84, 138, 1 C.N.L.C. 70 at 78-79, 132, aff'd. sub nom. Johnstone v. Connolly (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Q.B.); Arani v. Public Trustee of New Zealand, [1920] A.C. 198 (P.C.); Delgamuukw (C.A.), Lambert J.A. (dissenting in part), Hutcheon J.A. (dissenting in part); Casimel v. Insurance Corp. of British Columbia (1993), 82 B.C.L.R. (2d) 387 (C.A.); R. v. Bear Claw

evoke both popular and considered apprehension, and even opposition.¹⁴ On both occasions when self-government has been squarely before the Supreme Court of Canada, it has chosen to deflect and defer the issue.¹⁵

Why has this issue generated so much interest and controversy: such persistence, such resistance, and, at Canada's highest court, such hesitancy?

Casino Ltd., [1994] 4 C.N.L.R. 81 (Sask. Prov. Ct.).

For Supreme Court of Canada consideration of aboriginal self-government, see note 15 below.

¹⁴ See notes 26-58 below and the text accompanying them. According to a 1995 Insight Canada research survey commissioned by the federal Department of Indian Affairs, 53% of Canadians believed that aboriginal peoples weren't ready to assume self-government powers, and only 46% believed that aboriginal peoples should be given more autonomy. By comparison, about 70% of Canadians polled in 1993 had supported ratifying the Charlottetown proposals that would have entrenched the inherent self-government rights. See Jack Aubry, "Canadians Wary of Native Autonomy" Calgary Herald (1 June 1995) A7.

By no means all the newspaper coverage of self-government issues has been negative. For examples of generally supportive reports or analyses, see Ruth Teichroeb, "Democracy on the Reserve: Reserve Proves Model of Democracy" Winnipeg Free Press (10 April 1992) B21 ("Teichroeb, 'Model of democracy'"); Peter Ferris, "Native Self-government: Change That Can Help Everyone" Winnipeg Free Press (31 May 1992) A7; Robert Sheppard, "Maybe It's Racist, But It's a Good Thing" [Toronto Globe & Mail] (2 June 1992) A17; Stephen Hume, "Time to Pop the Self-government Bogeyman Bubble" Vancouver Sun (7 October 1992) A15; "Self-government and the Charter" [editorial] [Toronto Globe & Mail] (15 October 1992) A30; Ruth Teichroeb, "Native Self-rule: Is It a Dead End? Victims Are Trying to Reclaim Control" Winnipeg Free Press (14 July 1996) B2 ("Teichroeb, 'Victims Are Trying'").

¹⁵ See Pamajewon v. The Queen, [1996] 2 S.C.R. 821 ("Pamajewon") esp. at 832-833 (¶24), where the court characterized the rights issue much more narrowly and decided the case on that basis, and Delgamuukw, note 13 above, at 1114-1115 (¶¶170-171), Lamer C.J.C., at 1134 (¶205), La Forest J. (concurring), where the court decided unanimously -- after over ten years of legal proceedings -- to send the entire matter back to trial. For discussion of Pamajewon, see Morse, "Permafrost Rights," note 10 above; for discussion of self-government issues in both Pamajewon and Delgamuukw, see McNeil, "Aboriginal Rights," note 10 above, at 56-68.

Earlier, in Sparrow v. The Queen, [1990] 1 S.C.R. 1075 ("Sparrow"), a case about aboriginal fishing rights, a unanimous court had noted (at 1103) that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [aboriginal] lands vested in the Crown"; in Matsqui Indian Band v. Canadian Pacific Ltd., [1995] 1 S.C.R. 3, the court had decided a statutory question of administrative law in part on the basis of a federal policy promoting aboriginal self-government.

For aboriginal communities, their members and supporters, acknowledgement that they have enforceable rights to govern themselves -- to resume responsibility for their own collective destinies¹⁶ -- may well now be the minimum price that the mainstream legal system must pay to earn from them a modicum of respect.¹⁷ For centuries now, such communities have done everything humanly possible to maintain the integrity and vitality of their own traditions, languages, ceremonies and other authoritative internal arrangements, and to continue fulfilling their ancestral obligations to one another and to the rest of creation,¹⁸ despite catastrophic changes to their physical and economic circumstances, inexorable pressures from non-aboriginal settlement and often concerted efforts by settler peoples to undermine and marginalize their most sensitive and deeply grounded relationships.¹⁹ To count as a meaningful departure from this history of interference and exploitation, mainstream acknowledgement of such rights must begin from a respect for both the fact and the legitimacy

¹⁶ See 2 RCAP Final Report, note 7 above, at 139-141.

¹⁷ I say this from the outside, as a non-aboriginal person, so please discount and cross-check this claim accordingly. But see first Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 ("Turpel, 'Interpretive Monopolies'") esp. at 25-26, 33-34, 45; Monture-OKanee & Turpel, "Rethinking Justice," note 9 above, at 262-263; Asch & Macklem, note 10 above, esp. at 517, and the other sources cited in this paragraph in the text.

¹⁸ For accounts of such efforts in two unrelated aboriginal communities, see Johnston, note 10 above (Iroquois) and John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 (Anishnabek).

¹⁹ There are, of course, too many useful accounts of colonial oppression of aboriginal peoples in Canada for me to be able to list them all in a single footnote. For a representative sampling of good brief accounts, however, see James R. Miller, "The Historical Context of the Drive for Self-Government" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., Continuing Poundmaker and Riel's Quest (Saskatoon: Purich Publishing, 1994) ("Poundmaker") 41 esp. at 42; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174 at 181-182 ("Turpel, 'Patriarchy'"); Mary Ellen Turpel-Lafond, "Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance," research study prepared for the Royal Commission on Aboriginal Peoples, 1995 ("Turpel-Lafond, 'Enhancing Integrity'") at 9-15; James Youngblood Henderson, "All Is Never Said" in Poundmaker, 423 esp. at 428, and the sources cited in these publications.

of aboriginal difference:²⁰ must dedicate sufficient "constitutional space for aboriginal peoples to be aboriginal," to borrow Donna Greschner's wonderful phrase.²¹ This entails respecting and protecting communities' power, and indeed duty, to defend such individuals, lands and resources as may remain to them against mainstream "laws and policies which are demonstrably threatening to their culture,"²² and generally to address their own needs and imperatives in ways that they themselves consider effective and appropriate, even when those aims and ways differ substantially from what we in the mainstream culture might have done or preferred.²³ This, in turn, necessarily involves "the significant letting go of Canadian government power over the lives of Aboriginal citizens"²⁴ and accepting that self-governing aboriginal communities are bound sometimes to make mistakes (even by their own reckoning) that it cannot be our business, uninvited, to correct.

For those in the nonindigenous mainstream, such prospects may be troubling for any of several complex and layered reasons. For some, especially those in positions of real power or legal

²⁰ To me, to be a First Nations person in Canada means to be free to exist politically and culturally (these are not separate concepts): to be free to understand our roles according to our own cultural and political systems and not according to a value system imposed upon us by the Indian Act for over 100 years, nor by role definition accepted in the Anglo-European culture:

Turpel, "Patriarchy," *ibid.* at 185. See also Turpel, "Interpretive Monopolies," note 17 above, at 33.

²¹ See Greschner, note 10 above, at 342.

²² LaForme, note 10 above, at 263. See also Monture-OKanee & Turpel, "Rethinking Justice," note 9 above, at 263.

²³ See LaForme, note 10 above, at 263-264 ("It is this capacity to deal with threats to cultural survival, in a manner that may be drastically different from that required by other elements of Canadian society, which is needed to ensure the survival of Aboriginal cultures"); Macklem, "Distributing Sovereignty," note 10 above, at 1354 ("Indian government involves more than the conferral of special rights to engage in particular activities: It also involves rights to determine how, when, where and by whom such activity can occur, and the possibility that such decisions will be made in ways that conflict with nonindigenous political values . . . "); RCAP, *Bridging*, note 11 above, at 277.

²⁴ Patricia Monture-OKanee, "Thinking About Aboriginal Justice: Myths and Revolution" in *Poundmaker*, note 19 above, 222 at 230. See also Tyler, note 10 above, at 7-8.

authority, judicial accreditation now of inherent self-government rights would most probably register as a profound rebuke: a rebuke to decades -- perhaps to centuries -- of careful, considered practice informed by accepted conceptions of permissible conduct and of the public interest. For if aboriginal peoples today possess aboriginal rights of self-government, it follows necessarily that they have always had such rights, at common law, in Anglo-Canadian jurisprudence,²⁵ and that a very great deal that has happened to aboriginal peoples and communities since the Crown asserted sovereignty in North America has been, by domestic Canadian standards, in breach of those rights. To be judged and found wanting, according to enforceable standards one has no choice but to accept, for having failed to respect legal rights that one's predecessors considered too ephemeral to bother extinguishing is, undoubtedly, not a welcome experience.

Other widely-shared apprehensions, which reinforce but do not depend upon such discomfort,²⁶ concern the practical consequences of constitutional protection for aboriginal self-government. Most such apprehensions fit within at least one of three general kinds.

Doubts about aboriginal communities' readiness, and current capacity, to assume the burdens of self-government. Transitions from colonial to indigenous forms of governance, some commentators point out, require patience and particular care, especially given the impatience and unrealistically high expectations such transitions often prompt in community members. Even at the best of times, there are real risks of failure and frustration: outcomes that can undermine communities' social vitality and the legitimacy, in the eyes of their members, of

²⁵ This is so, of course, whether or not such rights, as a matter, of history, had ever received "the legal recognition and approval of European colonizers": see Delgamuukw, note 13 above, at 1092-1093 (¶¶ 134-136), quoting (at ¶ 136) Côté v. The Queen, [1996] 3 S.C.R. 139 ("Côté") at 174 (¶ 52).

²⁶ See, e.g., Richard Gosse, "Charting the Course for Aboriginal Justice Reform Through Aboriginal Self-Government" in Poundmaker, note 19 above, 1 at 16.

their self-government efforts.²⁷ These risks seem to some particularly acute in many of Canada's aboriginal communities, for two reasons: because of the truly staggering scale of deprivation, despair, abuse and dysfunction that one too often finds in such communities, problems of a kind and scale beyond the contemplation of the collective coping mechanisms traditional to aboriginal societies;²⁸ and because of the fear that many such communities have too few members with sufficient leadership skills, technical expertise or practical experience to meet the collective's needs in these highly complex and difficult circumstances.²⁹ Indications that leaders in some aboriginal communities have not used effectively even the very limited powers now available to them makes many outsiders, especially, still more cautious about the prospect of their having more power.³⁰

²⁷ Roger Gibbins & J. Rick Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in Alan Cairns and Cynthia Williams, eds., The Politics of Gender, Ethnicity and Language in Canada (Toronto: University of Toronto Press, 1986) 171 at 189, 192, 220-221. See also Miles Morrisseau, "Will Self-government Set Natives Against Each Other?" The [Montreal] Gazette (18 August 1992) B3 ("And what will be left of the fragile unity that now exists [among aboriginal peoples] when we have only ourselves to blame?").

²⁸ See Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in Poundmaker, note 19 above, 206 at 209 ("Problems of alcohol and solvent abuse, family violence and sexual abuse, and youth crime -- these are indications of a fundamental breakdown in the social order in Aboriginal communities of a magnitude never known before"); Monture-OKanee, note 24 above, at 227 ("We cannot look to the past to find the mechanisms to address concerns such as abuse, because many of the mechanisms did not exist. The mechanisms did not exist because they were not needed").

²⁹ Gibbins & Ponting, note 27 above, at 191; David C. Hawkes & Allen M. Maslove, "Fiscal Arrangements for Aboriginal Self-Government" in David C. Hawkes, ed., Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles (Ottawa: Carleton University Press, 1989) 93 at 123. See also To the Source, note 7 above, at vi ("While all the people spoke of the need for change, many also said, almost in the same breath, that they are not ready for it. They are afraid, and their fears need to be addressed").

³⁰ See, e.g., Gerald Flood, "Native Woman, Elder Fear Self-government" Winnipeg Free Press (8 October 1992) B5 (quoting a native elder in Manitoba as saying "aboriginal leaders have failed in their efforts to improve conditions, and now expect to be trusted with more power"); Tom Oleson, "Native Self-rule: Is It a Dead End? Know Sovereignty Before Building It" Winnipeg Free Press (14 July 1996) B2 ("[Self-government] might receive more public sympathy . . . if there could be a clearer perception that the bands could run well the business they already have authority over").

Concerns about the consequences for vulnerable individuals (who may or may not be community members or even aboriginal people) of giving constitutional protection to aboriginal governance. According to several commentators, individuals living in aboriginal communities are especially vulnerable to the power of their aboriginal governments: not so much because those governments happen to be aboriginal, but because such communities share a number of features each of which contributes independently to the risk of excessive centralization of government power:

- transitions from colonial to local rule are themselves occasions and incentives for those in power at the time to consolidate their authority by trading on their prestige;³¹
- when communities have no tradition of selecting their leaders regularly and democratically,³² and their governments obtain the vast majority of their wealth through fiscal transfers from sources outside the community,³³ those governments have much less incentive to account to community members for their conduct or to make a point of addressing community members' needs or concerns, because they are effectively insulated from the consequences of residents' disapproval;
- generally speaking, individual rights and freedoms are more vulnerable in small, homogeneous communities, because such arrangements encourage highly personal

³¹ See Gibbins & Ponting, note 27 above, at 190; Schwartz, Second Thoughts, note 3 above, at 396.

³² See William Johnson, "Not All Are Leaping on Native Self-government Bandwagon" The [Montreal] Gazette (5 May 1992) B3 ("Johnson, 'Bandwagon'"); William Johnson, "Native Self-government: Let's Pay Attention" The [Montreal] Gazette (12 May 1992) B3 ("Johnson, 'Let's Pay Attention'").

³³ "If a high proportion of total revenues are provided by an external authority, can the accountability link between the aboriginal government and its citizens be as strong and effective as in situations in which the community itself is the major source of government revenues?": Hawkes & Maslove, note 29 above, at 113. See also ibid. at 123; 2 RCAP Final Report, note 7 above, at 345-346; Richard Simeon, "Sharing Power: How Can First Nations Government Work?" in Aboriginal Self-Determination, note 12 above, 99 at 105; Schwartz, Second Thoughts, note 3 above, at 396; William Johnson, "What Would Indian Self-government Look Like? Big, Very Big" The [Montreal] Gazette (20 May 1992) B3 ("Johnson, 'Big, Very Big'"); William Johnson, "Why Native Leaders Don't Want Charter of Rights in Their Government" The [Montreal] Gazette (10 October 1992) B5 ("Johnson, 'Don't Want Charter'").

styles of community management and discourage both the diversity of overlapping minorities that tend to foster respect for such rights and the articulation of separate roles and powers within government that tend to be required to protect them.³⁴

Published reports of favoritism,³⁵ personal harassment,³⁶ misuses of funds,³⁷ unaccountable leadership³⁸ and other alleged abuses of political authority by chiefs or other band officials in some communities³⁹ only lend credibility to these apprehensions.⁴⁰ The Royal

³⁴ See generally Schwartz, Second Thoughts, note 3 above, at 394-396; Bryan Schwartz, "Bryan Schwartz Takes a Close Look at Aboriginal Self-government" [Toronto Globe & Mail] (4 August 1992) A12 ("Schwartz, 'Close Look'"); Gibbins & Ponting, note 27 above, at 216-219; Roger Gibbins, "Citizenship, Political, and Intergovernmental Problems with Indian Self-Government" in J. Rick Ponting, ed., Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland & Stewart, 1986) 369 ("Gibbins, 'Problems'") at 374-376; Johnson, "Bandwagon," note 32 above; Johnson, "Big, Very Big," ibid.

³⁵ See, e.g., Iris Yudal, "Chiefs Abuse Power, Funds, Group Charges" Winnipeg Free Press (21 February 1992) B23; Ruth Teichroeb, "Democracy on the Reserve: Limits Sought on Powers of Chiefs" Winnipeg Free Press (6 April 1992) B13 ("Teichroeb, 'Limits'"); Wendy Dudley, "MP Sees Pitfalls in Self-rule" Calgary Herald (12 September 1994) B1; Rudy Platiel, "Native Councils Facing Challenges from Within" [Toronto Globe & Mail] (15 May 1996) A8.

³⁶ See, e.g., Heidi Graham, "Natives 'Rebels' Meet in Bid to 'Get Self-government Stalled'" Winnipeg Free Press (29 March 1992) B14; Patrick Nagle, "Male Domination Heightens Fear of Self-rule" Calgary Herald (1 April 1992) B8; Teichroeb, "Limits," ibid.; Ruth Teichroeb, "Democracy on the Reserve: Mother Who Reported Abuse Ostracized" Winnipeg Free Press (8 April 1992) B18 ("Teichroeb, 'Mother ostracized'"); Ruth Teichroeb, "Democracy on the Reserve: Family Pays Heavy Price for Reporting Sex Abuse" Winnipeg Free Press (8 April 1992) B18 ("Teichroeb, 'Heavy Price'"); Flood, note 30 above; Platiel, ibid.

³⁷ See, e.g., "Native Group Fears Dictatorial Ways" Calgary Herald (21 February 1992) A9; Yudal, note 35 above; Teichroeb, "Limits," note 35 above; Platiel, note 35 above.

³⁸ See generally Turpel-Lafond, "Enhancing Integrity," note 19 above, at 1-23.

³⁹ Some communities, of course, have no such problems: see, e.g., Teichroeb, "Model of Democracy," note 14 above. For a somewhat more favorable account of the internal accountability practices and attitudes among leaders of aboriginal communities generally, see Simon McInnes & Perry Billingsley, "Canada's Indians: Norms of Responsible Government Under Federalism" (1992) 35 Can. Pub. Admin. 215.

⁴⁰ See 2 RCAP Final Report, note 7 above, at 345 ("There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent"); Turpel-Lafond, "Enhancing Integrity," note 19 above, at 19 ("Without the existence of [internal conflict of interest guidelines], the trust and confidence in the integrity of a band council to act in the interest of all members is significantly lessened due to the inability to

Commission on Aboriginal Peoples, for example, received more than two hundred submissions expressing concerns about ethics and conflicts of interest in aboriginal governments.⁴¹ Such reports and experiences, it seems safe to suppose, contributed significantly to aboriginal voters' own reluctance to support the explicit constitutional entrenchment of their inherent self-government rights pursuant to the Charlottetown Accord.

No issue better illustrates this kind of apprehension, among both aboriginal and non-aboriginal people, than the concern about the fate of aboriginal women if today's aboriginal governments were constitutionally empowered. Although it seems widely accepted that neither sexual nor domestic abuse nor any of the other usual incidents of patriarchy or sexism was characteristic of North American native societies before they began to have regular contact with the Europeans,⁴² it seems equally clear, at least to several commentators, that substantial numbers of aboriginal men today, including many in positions of community leadership, have engaged in such practices and acted upon such attitudes to the disadvantage of the women in their communities.⁴³ During negotiations that led to the Charlottetown Accord, for

require individuals to account for their conduct"). See also "Inherent But Unclear" [editorial] Winnipeg Free Press (11 April 1992) A6; Johnson, "Big, Very Big," note 33 above; Peter O'Neil, "Self-rule for Natives Arouses Hopes, Doubts" Vancouver Sun (7 October 1992) A4 ("O'Neil, 'Hopes, Doubts'"); Johnson, "Don't Want Charter," note 33 above.

⁴¹ Turpel-Lafond, "Enhancing Integrity," note 19 above, at 1. See also To the Source, note 7 above, at 21 ("many of our witnesses . . . worried that additional power could be abused by some of the leaders").

⁴² See, e.g., To the Source, *ibid.* at 59; Thomas Isaac & 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 454-457; Greschner, note 10 above, at 339-340; Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 Const. Forum 110 at 112; Turpel, "Patriarchy," note 19 above, at 180; Monture-OKanee, "Myths and Revolution," note 24 above, at 227. But see also Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed., Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference (Vancouver: UBC Press, 1997) ("Aboriginal and Treaty Rights") 75 at 83-84.

⁴³ See, e.g., To the Source, *ibid.* at 59-61; Isaac & Maloughney, *ibid.*; Nagle, note 36 above; Teichroeb, "Limits," note 35 above; Teichroeb, "Mother Ostracized," note 36 above; Teichroeb, "Heavy Price," note 36 above; Ruth Teichroeb, "Democracy on the Reserve: Professor Says Indian Women Have Reason to Fear Autonomy" Winnipeg Free Press (8 April 1992) B18 ("Teichroeb,

example, it became clear that many aboriginal women simply did not believe that male aboriginal leaders, armed with constitutionally protected rights of self-government, could be trusted, left to their own devices, to respond fairly and respectfully to the women's interests or to give sufficient priority to their need for protection from abuse.⁴⁴ NWAC has insisted that mainstream human rights standards, and mainstream courts, remain available for the protection of aboriginal women in communities acting pursuant to rights of self-government.⁴⁵ It considered these protections so crucial to the safety and well-being of Canada's

'Professor Says'); Turpel, "Patriarchy," note 19 above, at 181-182; Green, *ibid.* esp. at 112; John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics" (1994) 43 U.N.B.L.J. 19 ("Borrows, 'Equality'") esp. at 46; Karina Byrne, "Indian Women Want Protection" Winnipeg Free Press (27 March 1994) A3; Patricia Robertson, "Native Women Demand Role" Winnipeg Free Press (18 May 1996) A11; LaRocque, *ibid.*

⁴⁴ In the words of Sharon McIvor, at the time a spokesperson for the Native Women's Association of Canada ("NWAC"), "It's really scary to know that these guys are going to be in complete control, they are going to be able to do whatever they want. . . . We are lost; if you non-Indian Canadians don't put pressure on your people to help look after our rights, then we are dead in the water": "Native Women Fear Autonomy Will Hide Sex Abuse" Calgary Herald (29 July 1992) A9. See also, e.g., To the Source, *ibid.* at 61 ("Women who have been raped, beaten, sexually harassed, overlooked, excluded, ignored, or otherwise oppressed by Aboriginal men are hardly eager to trust the men to look after their interests"); Susan Delacourt, "Natives Divided Over Charter" [Toronto] Globe & Mail (14 March 1992) A4 ("Delacourt, 'Natives Divided'"); Peter O'Neil, "Native Women Push for Human Rights" Vancouver Sun (14 March 1992) A3 (O'Neil, "Native Women Push"); Sarah Scott, "The Native Rights Stuff: Many Women Fear Self-government Without Charter Guarantees" The [Montreal] Gazette (28 March 1992) B5 (Scott, "Native Rights Stuff"); Nagle, note 36 above; Teichroeb, "Limits," *ibid.*; Teichroeb, "Professor Says," *ibid.*; "Native Fights for Charter" Calgary Herald (23 April 1992) A12 ("Native fights for Charter"); Flood, note 30 above; Green, *ibid.*; Byrne, *ibid.*; Borrows, "Equality," *ibid.* at 41-46; LaRocque, *ibid.* esp. at 93-95.

⁴⁵ Aboriginal women have sexual equality rights. We want those rights respected. Governments simply cannot choose to recognize the patriarchal forms of government which now exist in our communities. The band councils and Chiefs who preside over our lives are not our traditional forms of government. . . . Recognizing the inherent right to self-government does not mean recognizing the patriarchy created by a foreign government:

NWAC, "Statement on the Canada Package" (Ottawa: NWAC, 1992) at 7, quoted in Borrows, "Equality," note 43 above, at 41. See also Michele Rouleau, "Proposal for Native Self-government Could Deny Fundamental Human Rights to Women" The [Montreal] Gazette (23 October 1992) B3; Green, *ibid.*; LaRocque, *ibid.* esp. at 93-95.

There is, of course, controversy, especially among aboriginal peoples, about the extent to which these views of the current male aboriginal leadership are fair and, assuming that they are fair, about whether recourse to external tribunals and standards is, as NWAC maintains, the most appropriate

aboriginal women, and so different from the positions being taken by the four aboriginal organizations participating officially in the Charlottetown negotiations, that it brought legal proceedings seeking independent representation at those negotiations.⁴⁶

Concerns about the implications for mainstream Canadian institutions, and for Canadian society generally, of implementing aboriginal rights of self-government. For some commentators, apprehensions such as those itemized above matter not just for their own sake, as signs of an altruistic regard for disadvantaged peoples, but also because the aboriginal peoples of Canada are entitled, as Canadian citizens, to the ongoing assurance that the law will protect their rights as individuals no less fully than it protects the rights of the other citizens of Canada.⁴⁷ It would, on this view, be awkward at best for Canada's federal and provincial governments, each of which is subject to enforceable obligations to respect and protect the constitutional rights of individuals, to have to provide ongoing financial support to aboriginal governments that recognized, and were subject to, no such constraints.⁴⁸

way of addressing that reality in self-governing aboriginal communities. These issues, unfortunately, lie beyond the scope of the present work. The academic sources cited here and in notes 42-44 above provide a useful range of views on these issues. For additional contributions and viewpoints, see, e.g., Turpel, "Interpretive Monopolies," note 17 above; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" (1989) 10 *Can. Woman Studies* (Nos. 2 & 3) 149; Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the Indian Act: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 *Queen's L.J.* 279; Ruth Teichroeb, "Democracy on the Reserve: Solidarity Vital, Province's Native Leaders Say" Winnipeg Free Press (10 April 1992) B1; "Native Women Urged to Ignore 'White Feminists'" Calgary Herald (31 July 1992) A10; Margaret A. Jackson, "Aboriginal Women and Self-Government" in John H. Hylton, ed., Aboriginal Self-Government in Canada (Saskatoon, Purich Publishing, 1994) 180.

⁴⁶ The Queen v. Native Women's Association of Canada, [1994] 3 S.C.R. 627. For commentary on this litigation and its context, see Green, ibid. and Borrows, "Equality," ibid. at 42-44.

⁴⁷ See, e.g., Report of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 3 (Ottawa: Minister of Supply and Services, 1985) ("3 Macdonald Report") at 371; Gibbins & Ponting, note 27 above, at 205, 218-219; Brian Schwartz, "The General Sense of Things: Delgamuukw and the Courts" in Frank Cassidy, ed., Aboriginal Title in British Columbia: Delgamuukw v. The Queen (Lantzville, B.C.: Oolichan Books, 1992) 161 ("Schwartz, 'General Sense'") at 172; "Inherent But Unclear," note 40 above.

⁴⁸ Schwartz, Second Thoughts, note 3 above, at 394; Gibbins, "Problems," note 34 above, at 376.

These and other commentators, including the Royal Commission on the Economic Union,⁴⁹ have expressed public worry about what could happen to the institutions and arrangements on which Canadians and their governments now routinely depend if Canada were suddenly to accredit as many as 600 truly self-governing aboriginal communities:⁵⁰ especially given the breadth and strength of the powers and the immunities that such communities are sometimes said to expect.⁵¹ For some critics, the mere existence of so many additional governments, each with its own internal structures, conventions and priorities, poses serious risks of fragmentation in a country whose national institutions already sometimes seem dangerously weak,⁵² and whose need for economic integration can only continue to grow.⁵³ Others have emphasized the risks that such potentially different approaches and outlooks pose to the country's defining and fundamental values.⁵⁴ Still others doubt the possibility of creating workable intergovernmental arrangements that could possibly accommo-

⁴⁹ 3 Macdonald Report, note 47 above, at 368-371.

⁵⁰ "At this point we cannot assume that self-government can be implemented without inflicting serious damage to democratic principles, to the intergovernmental structures of the Canadian federal state, and to the citizenship rights of Canadian Indians": Gibbins, "Problems," note 34 above, at 376. See also Binnie, note 10 above, esp. at 218, 225; William Johnson, "Mercredi Has No Mandate, But That Doesn't Stop Him" The [Montreal] Gazette (26 June 1992) B3; Philip Authier, "Quebec Lawyers Slam Native Self-government: It Poses 'Unprecedented Threat to Province's Powers,' Legal Paper Says" The [Montreal] Gazette (22 July 1992) B1; Schwartz, "Close Look," note 34 above; Bob Cox, "Self-rule Scenario Packs Potential for Future Conflict, Author Says" Vancouver Sun (29 September 1992) A8; "Reformer Inflaming Issues, Says Minister" Calgary Herald (8 February 1994) A9.

⁵¹ See, e.g., Johnson, "Big, Very Big," note 33 above; Ted Byfield, "Native Self-government Goes Beyond What Canadians Think" Financial Post (21-23 March 1992) S3; Tyler, note 10 above, at 7-10.

⁵² See, e.g., Johnson, "Bandwagon," note 32 above; Authier, note 50 above; Schwartz, "Close Look," note 34 above; Milo Cernetig, "Reform Attacks Native Self-rule" [Toronto] Globe & Mail (5 October 1992) A1 at A1, A4.

⁵³ See Jeffrey Simpson, "The Words Are Magnificent, But Can They Be Realistically Implemented" [Toronto] Globe & Mail (28 February 1997) A18 (review of RCAP Final Report).

⁵⁴ See "Aboriginal Gamble" [editorial] Winnipeg Free Press (2 June 1992) A6; Authier, note 50 above; Gordon Gibson, "Where the Aboriginal Report Takes a Wrong Turn" [Toronto] Globe & Mail (26 November 1996) A19 ("Gibson, 'Wrong Turn'").

date so many distinct aboriginal polities that are at once so small and so poorly resourced, and insist that self-government cannot work unless there is significant consolidation of aboriginal communities into larger governance units that have the power to bind all their members.⁵⁵

For these -- and occasionally, as well, for other, less credible⁵⁶ -- reasons, many non-native individuals and institutions, and some aboriginal people themselves, continue in some measure to fear, and even sometimes to oppose, the notion of aboriginal governments having constitutional protection.⁵⁷ According to published reports, the Chretien government, having recognized the potential for public opposition to this notion, gave serious thought in 1995 to backing away from its earlier promise to treat the inherent right of self-government as an existing aboriginal right.⁵⁸

⁵⁵ See 3 Macdonald Report, note 47 above, at 370-371; Gibbins & Ponting, note 27 above, at 209-213.

⁵⁶ See, e.g., Gordon Gibson, "Let's Not Use Racism to Tackle Native Needs: Isolating Aboriginal People from the Mainstream Is a Mistake" [Toronto] Globe & Mail (1 June 1992) A15.

⁵⁷ See, e.g., Byfield, note 51 above; Susan Delacourt, "Native Self-government Difficult Sell, Clark Says" [Toronto] Globe & Mail (2 June 1992) A1, at A1-A2; Peter O'Neill, "B.C. Tories Voice Fears Over Native Government" Vancouver Sun (4 June 1992) A4; Sandro Contenta, "Native Deal Stirs Deep Fears in Quebec" Toronto Star (19 July 1992) A10; "Go Slowly on Self-government: Canadians Deserve More Than Vague Concepts" [editorial] The [Montreal] Gazette (24 January 1994) B2; Oleson, note 30 above; Gibson, "Wrong Turn," note 54 above.

From this standpoint, it hasn't helped, either, that, in just the past five years, aboriginal communities have gone to court asserting constitutionally protected rights: to abduct community members and subject them, without consent, to tribal rituals involving physical punishment (Thomas v. Norris, [1992] 2 C.N.L.R. 139 (B.C.S.C.)); to hear on reserve, exclusively before a jury composed of community members, sexual assault charges brought against a community elder, despite objections from the complainant (also a community member) that she could not be safe, or be fairly heard, in such circumstances (R. v. A.F. (1994), 30 C.R. (4th) 333 (Ont. (G.D.)), aff'd. (1997), 101 O.A.C. 146 (C.A.)); to withhold band membership and related entitlements from women born and raised in the community merely because they had "married out" (Sawridge Band v. The Queen, [1996] 1 F.C. 3 (T.D.), rev'd. [1997] 3 F.C. 580 (C.A.)), and to promote and engage in high-stakes gaming completely free of any provincial or federal supervision (Pamajewon, note 15 above).

⁵⁸ Jim Bronskill, "Liberals Wavered on Promise: Native Self-government Memorandum" Calgary Herald (6 May 1996) A8. In the end, the federal government confirmed its original intention to proceed on the basis that the constitution already protects the inherent right: ibid.; Federal Policy Guide, note 12 above.

Considered as reasons to deny the constitution's protection to aboriginal peoples' inherent rights to govern themselves,⁵⁹ these various apprehensions are open to criticism on several grounds. Members of surviving aboriginal communities, whose cultures and institutional arrangements have already endured much worse and whose ancestors were not given the option of weighing the merits and implications of settler peoples' self-government claims, will be forgiven for finding many of these apprehensions ironic, if not precious, and for observing how little faith those who express them seem to have in the staying power of the mainstream system.⁶⁰ No less ironic, or unfair, from their standpoint is the inference that aboriginal peoples are now disqualified from governing themselves precisely because of all the disruption and deprivation suffered in their communities at the hands of the settler peoples.⁶¹ Others are bound to find convenient, if not colorable, some non-native critics' sudden expressions of tender concern for the welfare of native women and other vulnerable individuals engaged with aboriginal communities.⁶² Still others, who have documented our courts' propensity, when

⁵⁹ To be fair, one must acknowledge that several of those cited above with concerns about self-government made clear that their intention was not to discourage its eventual constitutional entrenchment or accreditation, but only to identify pitfalls that would have to be addressed in the course of design or implementation. See, e.g., Gibbins & Ponting, note 27 above, at 174, 193, 235; Schwartz, Second Thoughts, note 3 above, at 396; Green, note 42 above, at 119.

⁶⁰ "[H]ave faith that your own system of laws is flexible enough and will not crumble if you accept that First Nations have a right to administer their own justice": Blaine Favel, "First Nations Perspective of the Split in Jurisdiction" in Poundmaker, note 19 above, 136 at 139. See also Monture-OKanee, note 24 above, at 224-225. Compare Asch & Macklem, note 10 above, at 517.

⁶¹ See, e.g., Macklem, "Distributing Sovereignty," note 10 above, at 1360; Teichroeb, "Victims Are Trying," note 14 above. Compare J. Anthony Long & Katherine Beaty Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" (1994) 18 *Am. Ind. Culture & Rsch. J.* 91 at 103-111.

⁶² Concern for aboriginal women is piously invoked by closet opponents of aboriginal self-determination who reject the idea and practice of aboriginal sovereignty and use a new-found solidarity with women as an expedient and politically correct justification for their resistance. This belief in an inherent or irremediable chauvinism of aboriginal men, worse than the chauvinism of non-aboriginal men, must be shown for what it is: false, pernicious and racist:

Greschner, note 10 above, at 339. See also, Borrows, "Equality," note 43 above, at 46-47. Compare Turpel-Lafond, "Enhancing Integrity," note 19 above, at 2, 5.

adjudicating the claims of aboriginal peoples, to rely on unacknowledged and unacceptable assumptions about the superiority of mainstream traditions and arrangements, are apt to conclude, with some justification, that most of the apprehensions being expressed by self-government's critics are further examples of this pattern, and of such assumptions.⁶³ Others still, asked to imagine settler society's powerlessness to deal with rogue inherent right communities, may insist on recalling the "very large club" that mainstream governments will continue to hold over the aboriginal peoples dependent on their fiscal transfers.⁶⁴

Although I share these reservations about the critique of self-government rights, it seems to me essential -- especially for those who believe, as I do, that judicial accreditation of existing aboriginal rights of self-government is both legally sound⁶⁵ and morally and politically timely

⁶³ Patrick Macklem has explored these issues most thoroughly and consistently. See, e.g., Asch & Macklem, note 10 above; Macklem, "Borders," note 10 above; Macklem, "Ethnonationalism," note 10 above; Patrick Macklem, "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125. See also Colin H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada" in N. Dyck and J.B. Waldram, eds., Anthropology, Public Policy, and Native Peoples in Canada (Montreal: McGill-Queen's University Press, 1993) 311 esp. at 327, and Turpel, "Interpretive Monopolies," note 17 above, at 33-35.

⁶⁴ "The point to stress here is that any continued dependency on fiscal transfers from the broader Canadian community gives the federal and provincial governments a very large club that can be used to force Indian compliance with conventional norms of taxation": Gibbins, "Problems," note 34 above, at 370. See also Gibbins & Ponting, note 27 above, at 233; Hawkes & Maslove, note 29 above, at 123; O'Neil, "Hopes, Doubts," note 40 above ("One government official pointed out that few if any aboriginal governments will be self-sufficient. Any that abuse individual rights will have trouble getting government cooperation.")

⁶⁵ Tempting though it is, I cannot pause here to substantiate this conclusion in any detail. I am satisfied, though: (1) that social organization with some recognizable form of governance and laws is a precondition to the kinds of aboriginal rights that the Supreme Court of Canada has already recognized (see, e.g., Delgamuukw, note 13 above, 1099-1100 (11147-148), quoting Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Development, [1980] 1 F.C. 518 (T.D.) at 559; Mabo v. Queensland (No. 2) (1992), 175 C.L.R. 1 (H.C.A.) ("Mabo"), at 59-62; McNeil, "Aboriginal Rights," note 10 above, at 66-77; (2) that jurisdiction and governance arrangements were, as a matter of anthropological fact, characteristic of all North American aboriginal societies identifiable as such (see Catherine Bell & Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in Aboriginal and Treaty Rights, note 42 above, 38 esp. at 64-71); (3) that colonial law provided for pre-existing indigenous legal arrangements to survive and continue to operate in British colonies, subject only to the power of duly authorized colonial legislatures to extinguish them (see, e.g., Walters,

-- to acknowledge its currency and appeal and to seek to address it on its merits. This is so, in my view, for at least three reasons.

First, whatever else one may say about some of the inherent right's opponents, they identify real problems that, like it or not, are going to need attention if effective self-government arrangements are to endure and flourish, even under the special protection of the constitution. Practically speaking, it is going to take patience, cooperation and special effort to situate such arrangements, and such rights, in relation to the rest of the Canadian legal order. Underestimating these challenges will not make them easier to address.

Second, whatever the law may say, the success or failure, in Canada, of self-government initiatives is going to depend, indefinitely, on how much support and cooperation such initiatives receive from non-aboriginal Canadians.⁶⁶ Mainstream Canadians, generally speaking, are likely to be less supportive of the self-government rights and arrangements of aboriginal peoples if they remain apprehensive about the impact such arrangements may have on the individuals living in self-governed communities,⁶⁷ on themselves, or on Canadian society generally. Hostility or resistance from the non-aboriginal public may very well make prohibitively time-consuming, expensive and difficult the already daunting tasks of revivifying,

"Comment on Delgamuukw," note 10 above; Walters, "Mohegan Indians," note 10 above), and (4) that nothing that any duly authorized colonial or Canadian legislature is known to have done exhibits a sufficiently clear and plain intention to extinguish aboriginal communities' pre-existing rights and powers of self-government (see, e.g., 2 RCAP Final Report, note 7 above, at 206-213).

⁶⁶ "In reconstructing our world we cannot just do what we want. We require a measure of our oppressors' cooperation to disentangle ourselves from the web of enslavement they created": Borrows, "Equality," note 43 above, at 23. Compare Bradford W. Morse, "Indigenous Laws and State Legal Systems: Conflict and Compatibility" in Bradford W. Morse & Gordon R. Woodman, eds., Indigenous Law and the State (Dordrecht: Foris Publications, 1988) ("Indigenous Law") 101 at 114 ("The challenge today is to find a mix of solutions which can respond to the different needs and circumstances of indigenous peoples. To do so will require the support of the general community, which means that some minimum standards must be adhered to in order to gain that approval and tolerance").

⁶⁷ See Turpel-Lafond, "Enhancing Integrity," note 19 above, at 2, 5, quoted below in the text accompanying note 83. See also ibid. at 39-40.

realizing and protecting indigenous forms of government for contemporary use.

Finally, and above all, it seems to me extremely unlikely -- especially given the nature and extent of the current public apprehension about self-government rights -- that Canadian courts will treat such rights as constitutional rights unless they are confident that the existing law equips them to address, in practical ways and case by case, the concerns that self-government's critics have identified. This claim is exceptionally important, so let me elaborate.

As I have said, I believe there is, from a purely legal standpoint, a sound and credible path to the conclusion that self-government is an existing aboriginal right protected by section 35(1) of the Constitution Act, 1982. In my view, the arguments that create this path deserve to prevail, on their legal merits and on other grounds.⁶⁸ They are not, however, by any standard, so compelling -- still from a legal standpoint -- that no responsible court could decide the question otherwise. Most current precedents, again, support the opposing view.⁶⁹ And there is, as some have already noted, a certain rhetorical awkwardness about arguing now, after five unsuccessful efforts in fifteen years to amend the constitution to provide for self-government rights, that such rights, in fact, have been there all along.⁷⁰

⁶⁸ For a list of sources offering legal arguments to this effect, see notes 10-11 above and the text accompanying it. For a very brief summary of my own view, see note 65 above.

⁶⁹ See note 13 above and the text accompanying it.

⁷⁰ Kenneth Tyler, no particular fan of the inherent right, has framed the situation with his characteristic force and flair:

Were the Aboriginal governments secretly inducted into the Confederation partnership on the 17th of April, 1982? There is no evidence that any of the participants in the patriation of the Canadian constitution thought they were doing any such thing. Neither the Queen, nor the Prime Minister, nor any of the Provincial Premiers, nor any member of the Canadian or United Kingdom Parliaments made any mention of such a momentous event. Representatives of the First Nations themselves, far from greeting their long-awaited acceptance into the Canadian family, rushed to the English Courts in a desperate and unsuccessful attempt to block an initiative which they were convinced placed their Aboriginal and Treaty rights in mortal danger. Since 1982 we have had four First Minister's [sic] Conferences devoted exclusively to Aboriginal Constitutional

Under these conditions, it will take effort, and some professional courage, for the courts to include the inherent right among those aboriginal rights that the constitution already protects. In these circumstances, a worthy legal argument leading them to that result is little more than an instrument available for their use: it almost certainly will not, on its own, give them sufficient reason to use it and to endorse that result, precisely because it leads them upstream, into uncharted waters. If self-government's supporters are going to expect Canadian judges to follow their legal argument upstream, they are going to have to satisfy them, at a minimum, that the intended destination is not only one that deserves their patronage, but one that they can recognize and inhabit, as judges, in full conscience.⁷¹ In the current vernacular of aboriginal rights, that means showing that rights of self-government can be "reconciled with

Reform plus the Charlottetown process, in each of which the major priority for the Aboriginal participants was to have the 'right of self-government' entrenched in the Constitution. Surely it would require some very startling new evidence, and some very convincing arguments, to persuade Canadians that all of these efforts were unnecessary, and all of the earnest concerns of the Aboriginal people were unwarranted, because the framers of the Constitution Act, 1982 had unwittingly accomplished all that they desired:

Tyler, note 10 above, at 25. See also Schwartz, "General Sense," note 47 above, at 174 ("The 1982 Constitution recognizes the 'existing' rights of aboriginal peoples. Can the courts, in good intellectual conscience, suddenly 'discover' that these rights all along contained rights for self-government that would require a massive set of negotiations, leading to a certain kind of outcome?").

⁷¹ Compare Mabo, note 65 above, per Brennan J. (for the plurality) at 29-30:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. . . . Whenever such a question [here, about overturning some well-established pre-existing common law rule] arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

See also Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo" (1995) 17 Sydney L. Rev. 5 at 27-28.

the sovereignty of the Crown."⁷²

It is this additional task that the public apprehensions about self-government complicate. Many of them, taken full strength, suggest that self-government rights and powers, unchecked, could pose significant risks to values, institutions and arrangements considered fundamental to, and constitutive of, the Canadian legal and constitutional order. The character of those apprehensions, the basis they have in observable fact and the hold they appear, from the coverage, to have on much of the public imagination make them especially difficult for mainstream courts to ignore.⁷³ Our courts would almost certainly consider it irresponsible to recognize and enforce such rights within Canadian law without first satisfying themselves that our legal system, as a whole, can absorb and manage such risks.

The paramount concern is that section 35(1) of the Constitution Act, 1982, if it protected inherent rights of self-government at all, would protect them so well as to deprive the mainstream orders and branches of Canadian government of the effective capacity to do

⁷² Van der Peet v. The Queen, [1996] 2 S.C.R. 507 ("Van der Peet") at 539 (¶31); Delgamuukw, note 13 above, at 1096 (¶141).

⁷³ The large number of intervenors and the significant economic dimensions of the 1996 [Supreme Court] decisions [on Aboriginal rights] are a clear indication to the court that they [sic] must be constantly aware of the practical and political consequences of their decisions in this area. Decisions which are detrimental to existing non-Aboriginal government and economic interests are bound to result in increased public criticism as Canadian citizens feel the impact of Supreme Court decisions in their daily lives:

Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 65-66. Compare Jonathan Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in R. v. Sparrow, R. v. Van der Peet and Delgamuukw v. British Columbia" (1998) 13 J. L. & Social Pol'y. 67 at 68 ("In the area of Aboriginal rights, the Court cannot provide much support in the face of significant political opposition to the expansion of such rights"). As Rudin observes, the courts cannot afford to ignore the political climate in which they proceed, because they must depend on other branches of government, and on public cooperation, to give effect to their decisions: ibid. at 79-89. It is worth recalling that both the United States government and the Georgia state courts refused to enforce the U.S. Supreme Court's decision on aboriginal sovereignty in Worcester v. Georgia, 31 U.S. (6 Peters) 515 (1832): see, e.g., Phillip Bobbitt, Constitutional Fate: Theory of the Constitution (New York: Oxford University Press, 1982) at 111-114 and the sources cited there.

precisely that: to prevent or contain the risks that aboriginal self-government may have the potential to pose to the rest of the constitutional order.

It was Ian Binnie who first articulated this concern, almost immediately after the Supreme Court of Canada first prescribed, in the Sparrow decision,⁷⁴ the kind and degree of protection that section 35(1) was to give aboriginal rights:

. . . the Sparrow doctrine makes it improbable that the judicial concept of Aboriginal rights will extend to such key objectives as Aboriginal self government. The application of the Supreme Court's interpretations of section 35 in Sparrow would afford too much immunity from other levels of government to Aboriginal communities, many of which lie cheek by jowl with non-Aboriginal communities in densely populated areas of southern Canada. "Constitutionalizing' a right to Aboriginal self-government would, in light of Sparrow, leave the courts with inadequate mechanisms to regulate the overlapping interests of communities occupying contiguous territory.⁷⁵

If one accepts Binnie's premises, it seems almost impossible to quarrel with his conclusion. In the absence of clear constitutional text instructing them to do so, Canadian judges are most unlikely to take responsibility for extending Sparrow's protection to rights of self-government if they are frightened, as judges, by the consequences of doing so, no matter how many scholars and royal commissions tell them -- correctly -- that it would be the right thing for them to do. And accrediting constitutional rights that pose uncontrollable threats to basic institutions or fundamental values would certainly frighten them.⁷⁶

Twice now -- in Pamajewon and more recently in Delgamuukw -- the Supreme Court of Canada has taken pains to avoid deciding the broader self-government issue; on both

⁷⁴ Sparrow, note 15 above.

⁷⁵ Binnie, note 10 above, at 218. See also ibid. at 225, 234.

⁷⁶ Consider, for instance, the court's evident anxiety in Gladstone v. The Queen, [1996] 2 S.C.R. 723 ("Gladstone") at 774-775 (¶¶73-75) about how to accommodate within mainstream commercial arrangements the constitutionally protected right of the Heiltsuk to harvest herring spawn on kelp for commercial purposes and in commercial quantities.

occasions, it also sought to narrow significantly the breadth of the self-government inquiries it was invited to undertake.⁷⁷ This means, I think, two very important things: the court is not eager to close the door on self-government rights altogether, but it is still quite concerned about how -- or whether -- it is possible to integrate such rights harmoniously into the larger legal framework for which the courts are responsible. For aboriginal peoples and other supporters of self-government, these two decisions are a reprieve and an invitation to demonstrate how such integration could work. It will be a prudent invitation to accept, before the next self-government case appears before the courts. For if it is forced to decide the issue without being shown a cogent way of addressing the risks that self-government, at its worst, could pose for its members and for the rest of society, the Supreme Court will, I am almost certain, close the door on self-government rather than exposing the rest of the legal system to risks that it believes it cannot contain.

Success at showing that such integration is indeed possible depends, in my view, on meeting successfully two related challenges: reducing to a minimum the avoidable tensions and apprehensions that now attend the notion of aboriginal self-government, and demonstrating, in response to Ian Binnie's challenge,⁷⁸ that Canada's legal system already provides sufficient means to ensure that existing aboriginal rights of self-government could not be exercised, even with the constitution's protection, in ways or for purposes that would do violence to the principles and arrangements on which our legal order depends.

Meeting the first of these challenges means increasing mainstream public confidence in the enterprise of aboriginal self-government by improving the public understanding of what self-

⁷⁷ See note 15 above and the text accompanying it.

⁷⁸ See notes 74-76 above and the text accompanying them.

government is, why it matters, and how it is intended that it will operate.⁷⁹ Efforts to do so might usefully call greater attention to the complementarity that already exists, especially at the higher levels of generality, between aboriginal peoples' various defining traditions and values and those of the mainstream culture,⁸⁰ and to the extent to which aboriginal practice and precedent has already informed and improved the development of mainstream political institutions in North America.⁸¹

Success at this task, however, seems to me almost inconceivable unless there is real progress, soon, on two others. One is for aboriginal peoples themselves, especially, to begin addressing the reasons for the apparent loss, within significant numbers of aboriginal communities, of trust and confidence in those communities' leaders and governance arrangements.⁸² As long as

⁷⁹ The results of a 1992 study, based on the constitutional reform proposals for self-government as of September, 1991, support the hypotheses that public attitudes toward aboriginal self-government correlate affirmatively with cultural and economic security and "that providing factual information about Aboriginal self-government would result in an attitude change towards favouring Aboriginal self-government": see Marlene Wells & J. W. Berry, "Attitudes Toward Aboriginal Self-Government: the Influences of Knowledge, and Cultural and Economic Security" (1992) 12 Can. J. Native Studies 75 esp. at 85. "Many people," Wells & Berry add, "have heard of Aboriginal self-government but are unfamiliar with the meaning. As a result, many people may hold inaccurate beliefs about it. The results of this study suggest that if people knew more about the meaning of Aboriginal self-government they would hold more positive attitudes towards it" (*ibid.*).

⁸⁰ See, e.g., James W. Zion, "Searching for Indian Common Law" in Indigenous Law, note 66 above, 121 at 123-125. But see Turpel, "Interpretive Monopolies," note 17 above, at 30 for a pointed warning about the risks, built into such efforts, of overlooking important differences among distinct aboriginal cultural systems.

⁸¹ See, e.g., James Youngblood Henderson, First Nations' Legal Inheritance, Working Paper No. 91-5, University of Manitoba Canadian Legal History Project (1991) esp. at 10-20; Bruce Johansen, Forgotten Founders: Benjamin Franklin, the Iroquois and the Rationale for the American Revolution (Ipswich, Mass.: Gambit Inc., 1982); RCAP, Partners, note 11 above, at 40; Menno Boldt & J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Menno Boldt and J. Anthony Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) 165 at 170; Greschner, note 10 above, at 345-347, and the sources cited in these works.

⁸² We must also establish trust and communication between our leaders and the people. The Elders said: listen to your grassroots. The youth said: walk your talk. Leaders must assure the people that the grassroots will be involved in rebuilding and reimplementing self-government. The grassroots feel that their leaders have left them behind. The leaders must also be consistent: if they talk

those who live in aboriginal communities are widely perceived to be suffering under unresponsive and sometimes untrustworthy leadership, and as long as aboriginal women are perceived to face aggravated risks of abuse and marginalization in their own communities, Canada's non-native governments are going to be reluctant to relax the supervisory powers they now exert over such communities. This is so regardless of where responsibility ultimately lies for the deterioration of conditions in those communities. As Mary Ellen Turpel-Lafond observed in her report about these issues to the Royal Commission on Aboriginal Peoples:

[The adversarial character of some disputes between Aboriginal citizens and their governments] is the consequences [sic] of an absence of alternative internal political structures to address grievances regarding ethics and accountability in Aboriginal governments. Meanwhile, increased media attention is being paid to these allegations and internal debates. Without appropriate responses or initiatives, public confidence in self-government initiatives on these matters, already tentative in many regions, faces further erosion. What is required by Aboriginal leaders is to squarely address these concerns and the underlying problems from which they stem.

. . .

Any widely-held perception that First Nations' governments act arbitrarily, unilaterally and capriciously and are not accountable to their people, whether legitimate or otherwise, will have adverse effects upon the opportunities for First Nations to implement self-government and assume greater recognition for First Nations' governments. Indeed, increased negative attention to the activities of the former are particularly susceptible to being seized upon to discredit self-government.⁸³

The other is for proponents of the view that self-government rights are existing aboriginal rights to start being much more specific about the parameters -- legal, political and operational -- of the rights being claimed. The greater the public uncertainty about what such rights might

about self-government, they should act according to their own traditions and values, not the Indian Act. Again, education and communication are essential:

To the Source, note 7 above, at vi.

⁸³ Turpel-Lafond, "Enhancing Integrity," note 19 above, at 2, 5. See also *ibid.* at 39-40; RCAP, *Bridging*, note 11 above, at 275-277. For some confirmation of Turpel's observations about the impact of such concerns on public attitudes, see notes 35-46 above and the text accompanying them.

possibly mean, about the size and composition of the self-governing aboriginal collectivities and about the interface between such units and existing mainstream governments, the more reluctant the courts will be to assume the responsibility for locating such rights within the existing constitution.⁸⁴ Fortunately, the self-government options proposed for consideration in the final report of the Royal Commission on Aboriginal Peoples,⁸⁵ the recent developments in the Canadian law of aboriginal rights,⁸⁶ and the federal government's recent willingness to proceed with self-government talks on the basis that the constitution already includes the inherent right⁸⁷ should make it much easier than it would have been five years ago to begin thinking more concretely about self-government issues.

Progress toward minimizing the avoidable apprehensions about the potential impact of aboriginal rights of self-government will encourage, and free, the courts to be more receptive to the legal arguments that support such rights. Even complete success at this task, however, seems most unlikely to eliminate altogether the kinds of risks to which Binnie alluded: the risk that the exercise of such rights would threaten values and institutions fundamental to the Canadian constitutional order and that section 35(1) of the Constitution Act, 1982 would protect such rights so well that mainstream courts and governments would not be able to address and contain such threats as they arose.⁸⁸ This second challenge, therefore, deserves

⁸⁴ The Supreme Court of Canada has already emphasized several times the importance of "identify[ing] precisely the nature of the claim being made" in aboriginal rights litigation (see, e.g., Van der Peet, note 72 above, at 551-553 (¶¶51-54)), and has twice expressed displeasure at the "excessively general terms" in which communities have framed their claims to existing aboriginal rights of self-government: see Pamajewon, note 15 above, esp. at 834 (¶27); Delgamuukw, note 13 above, at 1114-1115 (¶170).

⁸⁵ See 2 RCAP Final Report, note 7 above.

⁸⁶ See especially Nikal v. The Queen, [1996] 1 S.C.R. 1013; Van der Peet, note 72 above; Gladstone, note 76 above; Adams v. The Queen, [1996] 3 S.C.R. 101; Côté, note 25 above; Delgamuukw, note 13 above.

⁸⁷ See note 12 above and the text accompanying it.

⁸⁸ See notes 73-76 above and the text accompanying them.

and requires independent attention.

The principal purpose of the present work is to respond to that second challenge. Its central contention -- what I call the "fundamental values hypothesis" -- is that our courts already have all the power they need to constrain, as necessary, the exercise of existing aboriginal rights of self-government in the interest of preserving truly fundamental Canadian values and institutions. This is so, in brief, because our courts, in giving effect to any rights enforceable within mainstream law, have both the power and the duty to define the scope of such rights in a way that ensures their ongoing harmony with the arrangements and values essential to the legal system on which their protection depends.⁸⁹ Properly understood, the task of protecting our legal system's integrity -- what the court in Mabo called its "skeleton of principle"⁹⁰ -- from the harms that could result from misuse of self-government rights requires not a one-time-only assessment, winner take all, of the havoc such rights could conceivably cause but continuing alertness to the need for systemic harmony in the ongoing work of articulating, case by case, what such rights mean (and protect) and what they do not.

To me, the greater danger is that the courts will find it too easy, and too tempting, to constrict the protected scope of self-government rights in the course of applying them. The purpose of the harmonization exercise is not to find ways of domesticating, to the point of impotence or uniformity, what are, after all, supposed to be inherent rights. The virtue of including self-government rights within the constitution's protection -- at least for those of us who believe that doing so has some virtue -- just is, again, to secure constitutional space within

⁸⁹ For earlier adumbrations of this general approach, see Bruce H. Wildsmith, Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 2, 24-29, 50-52 and "Ghost in the Machine," note 10 above, at 293-298. See also Dan Russell & Jonathan Rudin, Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past (Toronto: Ontario Native Council on Justice, 1992?) at 154-155.

⁹⁰ See Mabo, note 65 above, at 29-30, Brennan J. (for the plurality), quoted above at note 71.

which aboriginal difference, its sources and foundations, are authoritative, not just inconveniences in need of ongoing management, and within which respect for aboriginal difference is enforceable.⁹¹ Constraining more than necessary authoritative expressions or examples of aboriginal difference would compromise the integrity of the undertaking from the courts, and from the constitutional order, to protect such rights.⁹² Where fundamental values or institutions are not at risk, therefore, it will be extremely important that courts approach such rights with restraint and respect, in order to maximize the protected space available to inherent right communities for self-direction and -realization.

Here, in brief outline, is the structure of the argument I want to make.

Chapter 2 attempts to situate aboriginal rights of self-government within (what we know so far about) the Canadian law of aboriginal rights, in order to clarify the key initial characteristics and coordinates of self-government rights, considered as rights having force in mainstream law, and the jurisdictional relationships that obtain within mainstream law among federal, provincial and "inherent right" governments. In doing so, it examines mainstream governments' capacity to impose effective external limits on the exercise of constitutionally protected self-government rights.

Chapter 3 explains why my approach does not rely upon, or advocate, the application of the Canadian Charter of Rights and Freedoms⁹³ to inherent right governments. Several

⁹¹ See notes 16-24 above and the text accompanying them.

⁹² Concern about this kind of risk has given rise to doubts about the "cultural authority" of mainstream courts to interpret, apply and enforce aboriginal peoples' self-government rights. See, e.g., Gibbins & Ponting, note 27 above, at 229-230; Turpel, "Interpretive Monopolies," note 17 above, esp. at 4-6, 23-26, 45; RCAP, Bridging, note 11 above, at 277-279; Kelly Gallagher-Mackay, "Interpreting Self-Government: Approaches to Building Cultural Authority," [1997] 4 C.N.L.R. 1.

⁹³ Part I of the Constitution Act, 1982 ("Charter" or "Charter of Rights").

influential commentators⁹⁴ and organizations⁹⁵ have argued forcefully that it is essential, as a matter of policy, that the Charter apply to aboriginal governments exercising inherent self-government powers, if those powers are going to receive the protection of mainstream law. Others have argued that, as a matter of law, the Charter probably would apply to inherent right communities exercising existing aboriginal rights of self-government.⁹⁶ I disagree. My view is that the Charter would not apply to inherent right governments and that, if it did apply, it would not be very helpful in protecting our most basic values against a misuse of self-government rights. Any protection it did provide would come at the cost of excessive intrusion on aboriginal difference. Chapter 3 is where I argue for these views.

Acceptance of these conclusions, of course, makes Ian Binnie's challenge that much more difficult to answer successfully. Chapter 4 offers my response to it: an explanation and defence of the fundamental values hypothesis. It identifies several different sources of mainstream judicial authority to constrain from within the protected scope of existing aboriginal rights of self-government, whether we understand such rights as common law rights or as constitutional rights, and it demonstrates a consistency of approach among these doctrines designed to preclude unnecessary interference with aboriginal difference.

⁹⁴ See, e.g., Schwartz, Second Thoughts, note 3 above, at 394-396; Gibbins & Ponting, note 27 above, at 218-219; Gibbins, "Problems," note 34 above, at 374-375; Green, note 42 above, at 115; Johnson, "Let's Pay Attention," note 32 above; Johnson, "Don't Want Charter," note 33 above; "Native Groups Need Strategy to Achieve Self-government" Calgary Herald (26 May 1994) A5. For a different view, see Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall L.J. 61.

⁹⁵ These include the Royal Commission on the Economic Union and the Native Women's Association of Canada and its affiliates. See, e.g., 3 Macdonald Report, note 47 above, at 371; Delacourt, "Natives Divided," note 44 above; O'Neil, "Native Women Push," note 44 above; Borrows, "Equality," note 43 above, at 41-46; Teichroeb, "Limits," note 35 above; "Native Fights for Charter," note 44 above; Rouleau, note 45 above; Byrne, note 43 above.

⁹⁶ See, e.g., 2 RCAP Final Report, note 7 above, at 168, 226-236; RCAP, Bridging, note 11 above, esp. at 257-264; RCAP, Partners, note 11 above, at 39-41; Slattery, "Question of Trust," note 10 above, at 286-287; Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187 at 199, 213-215.

Chapter 5, the final chapter, considers some consequences of adopting the fundamental values hypothesis, especially in comparison with an approach that would insist on resort to the Charter. It concludes, on four grounds, that the fundamental values approach is preferable: because it has a sounder foundation within Canadian law; because it can address a broader range of "fundamental values" issues than can the Charter, alone; because, at the same time, it minimizes unnecessary interference with aboriginal difference, and because it creates the occasion for an ongoing intercultural conversation about which values and institutions are truly fundamental to the Canadian constitutional order, instead of enforcing a pre-established code of individual rights that may have little anchorage in the cultures, traditions and languages of many of the aboriginal peoples living in Canada.

CHAPTER TWO: SELF-GOVERNMENT AS AN ABORIGINAL RIGHT

Chapter 1 suggests that it will take more than defensible legal arguments to achieve judicial acceptance, within the existing constitution, of aboriginal peoples' inherent rights of self-government and meaningful protection for such rights within mainstream law. Those of us who seek that result will also have to satisfy two other, sometimes contrary, imperatives. We must, on the one hand, continue to oppose unnecessary restrictions on the scope and exercise of inherent self-government rights, in order to maximize "the constitutional space for aboriginal peoples to be aboriginal."¹ At the same time, we must address the existing public apprehensions about self-government rights,² and demonstrate that the exercise and domestic protection of such rights need not compromise those essential arrangements and values on which our whole legal order depends. Courts should not, and most probably will not, take responsibility for locating inherent self-government rights within our constitution unless they are confident that they will have the means, after doing so, to continue securing the coherence and the integrity of our legal system as a whole.³

The best way of initiating either of these undertakings is to try to understand what it would mean, as a matter of law, for self-government to be an "existing aboriginal right[.] . . . recognized and affirmed" by section 35(1) of the Constitution Act, 1982.⁴ That question soon resolves into several others. What would have to be true of an aboriginal community

¹ Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 338 at 342ff. Compare Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1995) 19 Queen's L.J. 95 ("McNeil, 'Constitutional Space'"). See generally Chapter 1, notes 16-24, 91-92 and the text accompanying them.

² See Chapter 1, notes 26-58, 65-77 and the text accompanying them.

³ See Chapter 1, notes 68-77, 88 and the text accompanying them.

⁴ Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), c. 11 ("Constitution Act, 1982").

for it to have an existing aboriginal right of self-government? What kinds of conduct and arrangements would such a right, once established, protect? And how would constitutionally protected self-government powers relate to the legislative and executive powers still vested in Canada's federal and provincial orders of government?

The purpose of this chapter is to try to answer these questions, given the existing Canadian law of aboriginal rights. My hope is that, after these inquiries, we can appraise more concretely how much room the constitution seems apt to provide for the realization of aboriginality and, conversely, what risk, if any, enforcement of self-government rights might pose to the mainstream legal system's defining arrangements and values. Once we begin to understand the dimensions of any such risk, we can consider possible ways of addressing it.

In this chapter and throughout, my project is to understand and explore the inherent right of aboriginal self-government considered as a right that exists, and that can be enforced, within the Canadian constitutional order. An inquiry that adopts that agenda necessarily takes for granted the sovereignty of the Crown.⁵ In doing so here, I mean only to leave to one side,

⁵ This approach has certain other advantages, as well. One is that it reflects and accords with current Supreme Court of Canada authority on Crown sovereignty and aboriginal rights; see, e.g., Sparrow v. The Queen, [1990] 1 S.C.R. 1075 ("Sparrow") at 1103 ("there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [aboriginal] lands vested in the Crown"); Van der Peet v. The Queen, [1996] 2 S.C.R. 507 ("Van der Peet") at 539 (¶31) ("the aboriginal rights recognized and affirmed by s. 35(1) [of the Constitution Act, 1982] must be directed toward the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown"). Another is that it accommodates the fact that domestic courts, whose own authority derives from that of the Crown, have no jurisdiction themselves to question the fact of Crown sovereignty: Sobhuza II v. Miller, [1926] A.C. 518 (P.C.) at 525, 528; Mabo v. Queensland (No. 2) (1992), 175 C.L.R. 1 (H.C.A.) at 31-32, 69, Brennan J., at 78, Deane and Gaudron JJ).

I accept, though, that the Crown's sovereignty may well be problematic from other perspectives (see, e.g., Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29 Alta. L. Rev. 498 at 510, 512-515; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991), 29 Osgoode Hall L.J. 101), and that attributions of sovereignty always risk arbitrariness unless they are successfully grounded in more basic principles of justice (ibid. esp. at 110-116). And Kent McNeil has reminded me that domestic courts may indeed draw conclusions of law from the timing and the manner of the Crown's acquisition of sovereignty, even though they have no power to question the fact of Crown

not to predetermine, the issue of whether aboriginal peoples living in Canada themselves have sovereignty, in the sense of separate international personality.

I want for two reasons to leave aside discussion of aboriginal sovereignty. One, of course, is to keep my own project manageable. There is ongoing controversy about the incidents and attributes of sovereignty⁶ and about whether that term -- originally a European notion -- itself distorts in troubling ways authentic aboriginal notions of governance.⁷ These are important and difficult issues, worthy of study for their own sake, but they complicate, instead of clarifying, discussion of Canada's constitutional readiness to protect domestic rights of self-government. The other, better reason is that aboriginal sovereignty is not an issue that we can expect our domestic courts to help solve.⁸ There is substantial Canadian and commonwealth authority that sovereignty determinations are simply not justiciable as questions of law before domestic courts, not least because such courts' powers themselves derive from, and depend upon, the sovereignty of the Crown.⁹ When sovereignty issues arise in domestic proceedings,

sovereignty itself.

⁶ For a helpful overview of the different relevant uses of the term "sovereignty," see Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stanford L. Rev.* 1311 ("Macklem, 'Distributing Sovereignty'") at 1346-1349, and the sources cited there. See also Harry S. LaForme, "Indian Sovereignty: What Does It Mean?" (1991) 11 *Can. J. Native Studies* 253 at 254-256, 259.

⁷ See, e.g., Menno Boldt & J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" in Menno Boldt & J. Anthony Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) ("Quest for Justice") 333 esp. at 333-334. For criticism of Boldt & Long, see Thomas Flanagan, "The Sovereignty and Nationhood of Canadian Indians: A Comment on Boldt and Long" (1985) 18 *Can. J. Pol. Sci.* 367 and Macklem, "Distributing Sovereignty," note 6 above, at 1349-1350.

⁸ "Indian sovereignty is not a domestic constitutional issue": Macklem, "Distributing Sovereignty," ibid. at 1367.

⁹ [T]he Court does not enjoy its usual stance of independence in these cases. It is itself an emanation of the Crown, and the very sovereignty being questioned by aboriginal peoples is the source of the judges' authority. If judges were to deny the Crown's claim to sovereignty over all of Canada they would deny their own authority to determine these cases:

our courts refer them to the federal executive and accept as dispositive the position communicated by the federal minister responsible.¹⁰ For this reason, and to this extent, aboriginal sovereignty is a political, not a legal question, and must be dealt with as such.¹¹

I. THE NATURE AND SCOPE OF SELF-GOVERNMENT RIGHTS

Although we still know very little about what protection, if any, section 35(1) of the Constitution Act, 1982 affords to self-government rights, we do know two important and

Noel Lyon, "A Perspective on the Application of the Criminal Code to Aboriginal Peoples in Light of the Judgment of the Supreme Court of Canada in R. v. Sparrow" [1992] U.B.C. L. Rev. (Sp. Ed.) 306 at 308-309. See also Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 ("Lyon, 'Essay'") at 101-102.

¹⁰

It is established beyond doubt that a certificate given on the authority of a Minister, that a party to a proceedings is an independent sovereign, will be accepted by the Courts as conclusive. . . . Judgments clearly imply that the issue is not justiciable, and that if the Executive informs the Court that a Ruler is independent, that is conclusive whatever the qualifications. In other words, 'independent' in the rule of law means what the Executive says it means:

Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law (New York, Praeger, 1966) at 589. See generally *ibid.* at 589-591. For relevant judicial authority, see, e.g., Old HW-GW Ltd. v. Minister of National Revenue (1993), 153 N.R. 136 (F.C.A.) at 143-144; De la Penha v. The Queen in right of Newfoundland (1986), 63 Nfld. & P.E.I.R. 356 (Nfld. C.A.) at 359; Chateau-Gai Wines Ltd. v. A.G. Canada, [1970] Ex.C.R. 366 at 384; Carl Zeiss Stiftung v. Rayner & Keeler Ltd., [1967] A.C. 853 (H.L.) at 901-902; Duff Development Co. v. Government of Kelantan, [1924] A.C. 797 (H.L.) at 813, Viscount Finlay, at 820, Lord Carson; Aksionarnoye Obschestvo A.M. Luther v. James Sagor & Co., [1921] 1 K.B. 456 at 474, *aff'd.* on the point (but *rev'd.* on other grounds) [1921] 3 K.B. 532 (C.A.).

¹¹

"[S]overeignty is a political fact for which no purely legal authority can be constituted . . . ": Reference re Secession of Quebec (20 August 1998) (S.C.C.) [unreported] ("Quebec Secession Reference") at 70 (¶142), quoting H.W.R. Wade, "The Basis of Legal Sovereignty" [1955] Cambridge L.J. 172 at 196.

It is reasonable to wonder whether the Supreme Court of Canada, or a provincial court of appeal, would entertain and answer a question about aboriginal sovereignty in the exercise of its advisory jurisdiction, in response to a reference from the federal or a provincial executive. It is clear that these courts have broader jurisdiction when they act in an advisory capacity than they have when they exercise their usual adjudicative functions: Quebec Secession Reference, at 11 (¶25); even there, however, "the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficiently legal component to warrant the intervention of the judicial branch": *ibid.* at 12 (¶26), quoting Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525 at 545 (added emphasis deleted). Although much would depend on the context and on the question referred to the court, my sense is that a court would likely decline to advise on whether an aboriginal people possessed international personality.

useful things. Self-government claims are "not cognizable under s. 35(1)" if they are "framed in excessively general terms."¹² And claims to self-government rights, "[i]n so far as they can be made under s. 35(1), . . . are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard."¹³

One must be a bit cautious in making use of these clues. In Adams, the Supreme Court had said that claims of aboriginal title "are simply one manifestation of a broader-based conception of aboriginal rights";¹⁴ in Delgamuukw, however, where it dealt with aboriginal title in much greater detail, it prescribed an approach somewhat different from the one it had adopted before in dealing with aboriginal rights that are not, as such, rights to land.¹⁵ The same thing could happen again when the court deals in depth with self-government.

All the same, our best current hope of understanding how self-government rights might operate under section 35's protection is to explore the current Canadian law of aboriginal rights and to situate self-government in relation to it. That task will require some care, because of the differences between the standards the court has approved for dealing with claims of aboriginal title and those it uses for other claims of aboriginal right.

A. The Current Law of Aboriginal Rights

It was in Van der Peet that the Supreme Court first set out the conceptual foundation of Canadian aboriginal rights law:

¹² Delgamuukw v. The Queen in right of B.C., [1997] 3 S.C.R. 1010 ("Delgamuukw") at 1114-1115 (¶170). Compare Pamajewon v. The Queen, [1996] 2 S.C.R. 821 ("Pamajewon") at 834 (¶27).

¹³ Pamajewon, ibid. at 832-833 (¶24).

¹⁴ Adams v. The Queen, [1996] 3 S.C.R. 101 ("Adams") at 117 (¶25). Compare ibid. at ¶26.

¹⁵ Compare Delgamuukw, note 12 above, at 1079-1107 (¶¶109-159) with Van der Peet, note 5 above, at 548-562 (¶¶44-74).

the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), 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.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.¹⁶

So understood, the court continued, "the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence -- the ancestry -- of aboriginal people in North America."¹⁷ Three conclusions follow from these founding principles.

First, because aboriginal rights are exceptions from the general law and particular to aboriginal peoples, they must be specially proved. The burden is on those who claim protection under an aboriginal right to prove that the right exists, and that it protects them.¹⁸

Second, "the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal,"¹⁹ even among aboriginal peoples, because different aboriginal communities have different histories, and, as a matter of history, have occupied different territories in different ways. As a result,

¹⁶ Van der Peet, note 5 above, at 538-539 (¶¶30-31). Emphasis in original. Compare ibid. at 543 (¶36).

¹⁷ ibid. at 539 (¶32).

¹⁸ See ibid. at 526 (¶2); Gladstone v. The Queen, [1996] 2 S.C.R. 723 ("Gladstone") at 742 (¶20) (aboriginal rights); Delgamuukw, note 12 above, at 1097 (¶¶143-144) (aboriginal title).

¹⁹ Van der Peet, ibid. at 559 (¶69).

determinations involving the existence, content and scope of aboriginal rights can take place only with specific reference to the constitutive features of the community claiming the right, and to any relevant land in issue.²⁰ "The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right."²¹

Finally, aboriginal rights exist and derive unique protection from the mainstream legal system, not to give aboriginal peoples unique advantages when they take part routinely in mainstream activity, but to respect and preserve, so far as is possible today, the dynamic integrity of the aboriginal cultures and legal arrangements underway already when the Europeans arrived. Contemporary practices, activities and relationships qualify as protected uses of aboriginal rights only where, and only because, they demonstrably keep faith with the customs, themes and traditions constitutive of those cultures from those times.²²

This theme of maintaining faith with ancestral community traditions pervades the law of aboriginal rights in Canada. So far, though, it has figured differently in the law of aboriginal title than it has in relation to other kinds of aboriginal rights. To understand this notion, we need to consider not only its implications for aboriginal rights jurisprudence generally but the specific variations that have arisen in its application to different kinds of aboriginal rights.

²⁰ Ibid. Compare Kruger and Manuel v. The Queen, [1978] 1 S.C.R. 104 ("Kruger & Manuel") at 109; Gladstone, note 18 above, at 769 (¶65).

²¹ Van der Peet, ibid. at 559 (¶69). Compare, e.g., Gladstone, ibid. (the Heiltsuk peoples have an aboriginal right to harvest herring spawn on kelp in commercial quantities to supply a commercial market) with Van der Peet and N.T.C. Smokehouse Ltd. v. The Queen, [1996] 2 S.C.R. 672 ("N.T.C. Smokehouse") (the Sto:lo and the Tseshaht and Opetchesaht peoples, respectively, do not have aboriginal rights to exchange even smaller quantities of fish for money or other goods).

²² This idea has resonance elsewhere in mainstream law, as well. In "On the Moral Presence of Our Past" (1991) 36 McGill L.J. 1153, Gerald Postema argues (at 1170ff) that some notion of "keeping faith with our past" is crucial to the moral force that mainstream law attributes to precedent. See also Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo" (1995) 17 Sydney L. Rev. 5 esp. at 18, 24-25, which relates Postema's argument to Australian aboriginal rights jurisprudence.

There are at least three features that an aboriginal relationship, custom, tradition or practice must have if it is to qualify for protection as an aboriginal right. It makes sense to consider each in turn, with both of these interests in mind.

1. Certainty (or Ascertainability)

If mainstream law is going to protect a community's right to engage in a particular custom or tradition, courts must be able to ascertain with sufficient precision the nature, dimensions and limits of that custom or tradition. They must, for example, be able to determine, in any given case, whether or not the relevant tradition or custom involves the relevant territory, individuals, relationships, arrangements or activities.²³ Otherwise, they will not be able to

²³ The Supreme Court has repeatedly emphasized the importance of identifying precisely the right being claimed: see, e.g., Van der Peet, note 5 above, at 551-553 (¶¶51-54); Gladstone, note 18 above, at 743-744 (¶¶23-24); Pamajewon, note 12 above, at 833-834 (¶¶26-27); Adams, note 14 above, at 122-123 (¶¶35-36); Côté v. The Queen, [1996] 3 S.C.R. 139 ("Côté") at 176-177 (¶¶55-57).

Unfortunately, it has sometimes approached this perfectly legitimate inquiry in a particularistic, "size to fit" way that seems to me to risk distortion and to promote uncertainty. In Gladstone, for instance, the court described its task as one of

determining what the appellants will have to demonstrate to be an aboriginal right in order for the activities they were engaged in to be encompassed by s. 35(1). There is no point in the appellants' being shown to have an aboriginal right unless that aboriginal right includes the actual activity they were engaged in; this stage of the Van der Peet analysis ensures that the Court's inquiry is tailored to the actual activity of the appellants:

ibid. at 743-744 (¶23). Compare Pamajewon, at 833-834 (¶¶26-27). If the courts insist on confining their gaze to those features of a tradition or custom that happen to engage the specific conduct at issue before them, they are most unlikely to gain a clear picture of the tradition or custom as a whole, on its own terms. Disregarding the full range of interconnections that constitute a tradition or custom can easily lead them either to understate the range of conduct that the tradition comprises or to exaggerate its scope by overlooking internal limits recognized within the community. John Borrows has argued that the latter may well have been what happened in Gladstone: see "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am Ind. L. Rev. 37 ("Borrows, 'Frozen Rights'") at 58-59. And taken full strength, this approach deprives both governments and community members of the guidance they need to deal with similar instances in the future. If the only way of finding out whether some aboriginal right protects particular conduct is to go to court about each specific incident (see, e.g., Kelly Gallagher-Mackay, "Interpreting Self-Government: Approaches to Building Cultural Authority," [1997] 4 C.N.L.R. 1 at 7), then, as Brad Morse has argued effectively, there is going to have to be a lot of very expensive and time-consuming litigation: see Bradford W. Morse, "Permafrost Rights:

distinguish what is protected from what is not.²⁴ In aboriginal title cases, courts will need to be able to identify the lands that are subject to title, the kinds of relationships with the lands on which the community's title is based, and the kinds of arrangements that give rise to authoritative collective decisions about uses or allocations of those lands.²⁵

2. Antiquity

Mainstream law protects and enforces as aboriginal rights only those traditions, customs and relationships that already existed in some form, and were of central or defining significance to the culture of the relevant aboriginal community, before and apart from European influence.²⁶ These are the ancestral touchstones with which contemporary practice must keep faith to qualify for constitutional protection. When adjudicating aboriginal rights claims generally, Canadian law measures the antiquity of traditions and customs with reference to the moment of first contact with Europeans;²⁷ only those having the requisite status at or before

Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon" (1997) 42 McGill L.J. 1011 ("Morse, 'Permafrost Rights'") esp. at 1036. Taken together, these predicaments seem bound to have a chilling effect on those who might have been tempted to assert or rely on aboriginal rights.

In Delgamuukw, note 12 above, on the other hand, the Supreme Court dealt quite comfortably, and fairly expansively, with broadly-based claims of aboriginal title. (In Delgamuukw, however, there was no "actual activity" at issue.) We can only wait and see whether this difference is a change of direction in aboriginal rights law generally or whether it is one more distinction between aboriginal title and other kinds of aboriginal rights.

²⁴ Because aboriginal rights, as exceptions from the general law, must be specially proved (see note 18 above and the text accompanying it), a claim of aboriginal right will fail if a court cannot discern its boundaries.

²⁵ The clearest account of these specifications so far appears in La Forest J.'s concurring judgment in Delgamuukw, note 12 above, at 1128-1129 (¶¶194-196).

²⁶ Van der Peet, note 5 above, at 554-556 (¶¶60-62); Delgamuukw, ibid. at 1097-1099 (¶¶144-145).

²⁷ See Van der Peet, ibid. at 554-555 (¶¶60-61). Contact is the appropriate moment, the Supreme Court explains (ibid. at 555 (¶60)), because aboriginal rights exist to accommodate "the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans" (emphasis added).

that time are capable of anchoring modern claims of aboriginal right. For purposes of aboriginal title adjudication, however, the Supreme Court deliberately selected a different historical referent: the moment the Crown asserted sovereignty over the relevant territory.²⁸

There is still ample room for dispute and confusion about what kinds of interaction, and by whom with whom, would qualify in a given case as "first contact with Europeans." Did "contact" occur the day the first aboriginal person encountered the first European in North America? The day the first European first visited, or settled permanently in, a given community's traditional area? The first day a community member encountered a European explorer, trader or settler? And was personal contact necessary, or was indirect interaction enough? (As Greg Levine has reminded me, some aboriginal societies encountered European goods -- guns and horses especially -- through trade with other aboriginal peoples long before they encountered any Europeans themselves.)

The Supreme Court's own jurisprudence to date does not help much in trying to answer these questions. In *Adams*, note 14 above, a case about Mohawks in Quebec, the Supreme Court used Champlain's arrival there in 1603 as "the time which can most accurately be identified as 'contact'" (*ibid.*, at 128 (¶46)), despite noting (at 125 (¶40)) Cartier's presence in the area in 1535. In *Delgamuukw*, *ibid.*, the court speaks of "the precise moment that each aboriginal group had first contact with European culture," acknowledges the difficulty of establishing when that moment is, and cites that difficulty as one reason for its decision to use the date of Crown sovereignty, instead of the date of first contact, as the historical anchor for claims of aboriginal title: see *ibid.*, at 1098-1099 (¶145). See note 28 below and the text accompanying it. In no case, however, has the court made clear what contact amounts to.

It is also open to doubt, of course, what relevance the moment of contact could possibly have for purposes of ascertaining the legal rights of those already here. "[G]iven the generally poor state in which Aboriginal people found the first European explorers to Canada," Jonathan Rudin points out, "it is certainly questionable as to what degree of significance they attached to contact with a rag tag group of men in danger of dying of starvation or freezing to death": "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's decisions in *R. v. Sparrow*, *R. v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 J. L. & Social Pol'y. 67 at 73. See generally *ibid.* at 72-76; Borrows, "Frozen Rights," note 23 above, at 49-50.

²⁸ *Delgamuukw*, *ibid.* at 1083-1088 (¶¶117-124), 1097-1107 (¶¶143-159). The court gave three reasons for adopting a different historical anchor for aboriginal title claims: because aboriginal title is a burden on Crown title, and Crown title did not exist until the moment of sovereignty; because issues arising from European arrival and influence are much less important to the disposition of aboriginal title claims, and because the moment of sovereignty is generally easier to identify with precision than the moment of first contact (*ibid.* at 1097-1099 (¶¶144-145)).

There is, of course, also room for dispute about what should count as the moment the Crown asserted sovereignty: the day the King executed the charter of the Hudson's Bay Company? The day the first explorer arrived and planted a flag in the name of the King? The day the Crown established effective authority over the area? The day -- if there was one -- on which the ancestors of the relevant aboriginal peoples acknowledged the sovereignty of the Crown? That issue, to say the least, awaits clarification.

Even so, my own view is that the moment of sovereignty -- whenever that is -- is the more appropriate historical referent for all claims of aboriginal right. Whatever its shortcomings, it has

In neither instance, however, need one prove affirmatively what was really in place before European settlers arrived or assumed authority; often that will now be impossible.²⁹ In the absence of better evidence to the contrary, evidence from more recent times -- including oral histories,³⁰ elders' recollections of community life,³¹ and evidence of a custom's key role³² (or, for land, of substantial connection)³³ in community life today -- will support an inference that the relevant tradition, custom or relationship is of sufficient antiquity.

3. Continuity

Aboriginal rights protect contemporary versions of constitutive ancestral traditions, customs and relationships. Proof of continuity is what shows that the contemporary observance is a version of the ancestral custom or connection with land, not something different resulting from European influence or otherwise of more recent (thus, ineligible) origin.³⁴ One need not, however, establish "an unbroken chain of continuity" from ancestral times;³⁵ communities

the benefit of some legal relevance. Aboriginal rights are rights preserved in and by the common law (see, e.g., Van der Peet, *ibid.* at 538 (¶28)) and the common law could have no effect unless and until the Crown acquired sovereignty. Until then, the presence of Europeans here had no mainstream legal significance.

We shall have to await the Supreme Court's next decision on aboriginal rights to see whether the Delgamuukw decision has led it to reconsider its earlier reliance on the moment of contact.

²⁹ "It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right": Van der Peet, *ibid.* at 555 (¶62). See also Delgamuukw, *ibid.* at 1069 (¶87), 1102 (¶152); Simon v. The Queen, [1985] 2 S.C.R. 387 ("Simon") at 408.

³⁰ Delgamuukw, *ibid.* at 1071-1074 (¶¶93-98).

³¹ *ibid.* at 1075-1076 (¶¶99-101).

³² Van der Peet, note 5 above, at 555-556 (¶¶62-63).

³³ Delgamuukw, note 12 above, at 1102-1103 (¶¶152-154).

³⁴ See, e.g., Van der Peet, note 5 above, at 556-557 (¶¶63-64), 561-562 (¶73); Delgamuukw, *ibid.* at 1102-1103 (¶152).

³⁵ See Van der Peet, *ibid.* at 557 (¶65) (aboriginal rights generally); Delgamuukw, *ibid.* at 1103 (¶153) (aboriginal title).

that take up ancestral customs or lands again do not forfeit their aboriginal interests in them merely because they ceased to engage in, or occupy, them for an extended period.³⁶

It is here, in the operation of the continuity requirement, that the emerging law of aboriginal title in Canada departs most substantially from Canadian aboriginal rights law generally.

As a general rule, the Canadian doctrine of aboriginal rights displays its insistence on keeping faith with the ancestral traditions that define a community by requiring affirmative proof in contemporary practice of vital, ongoing connection with those traditions. The customs, traditions and practices constitutive of a culture must be construed with sufficient generality,³⁷ and with sufficient regard for the aboriginal perspective,³⁸ to allow for ongoing adaptation and development, in response to European arrival and influence³⁹ or to other relevant circumstances; there is no expectation that they survive unchanged from pre-contact times.⁴⁰ Contemporary practices or customs qualify for constitutional protection, however, only if one can demonstrate that they existed in pre-contact⁴¹ versions, that they were of central significance to the pre-contact culture, and that they remain so today.⁴² Customs or practices that "arose solely as a response to European influences,"⁴³ or that, for whatever reason, originated after a culture's first contact with Europeans, do not qualify, even if they

³⁶ Van der Peet, *ibid.* at 557 (¶65); Delgamuukw, *ibid.* at 1103 (¶¶153-154).

³⁷ Van der Peet, *ibid.* at 553 (¶54).

³⁸ *Ibid.* esp. at 550-551 (¶¶49-50).

³⁹ *Ibid.* at 561-562 (¶73).

⁴⁰ *Ibid.* at 553 (¶54), 556-557 (¶64), 561-562 (¶73).

⁴¹ See note 27 above and the text accompanying it.

⁴² Van der Peet, note 5 above, at 553-558 (¶¶55-67).

⁴³ *Ibid.* at 562 (¶73).

are now integral parts of community culture.⁴⁴ And activities or practices not themselves constitutive of the culture, but merely incidental to those that are, may not qualify, either.⁴⁵

⁴⁴ But see notes 29-33 above and the text accompanying them. There is, of course, no clear or easy distinction between those customs or practices that are contemporary versions of pre-contact equivalents and those customs or practices that are just contemporary; courts can treat almost anything in the one way or the other, depending on the degree of particularity they bring to the task of characterization. The outcomes of particular cases often turn precisely on these choices of aspect and of level of generality. Supreme Court decisions applying this general approach to aboriginal rights -- especially Van der Peet, ibid., and N.T.C. Smokehouse, note 21 above -- have already prompted extensive academic criticism for excessive particularity, and for insensitivity to aboriginal perspectives, in construing contemporary aboriginal practices within the context of dynamic indigenous cultures, legal systems and traditions: see, e.g., John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Const. Forum 29 (reprinted, in greatly expanded form, as Borrows, "Frozen Rights," note 23 above); L.I. Rotman, "Hunting for Answers in A Strange Kettle of Fish: Unilateralism, Paternalism, and Fiduciary Rhetoric in Badger and Van der Peet" (1997) 8 Const. Forum 40; Anna Zalewski, "From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights" (1997) 55 U.T. Fac. L.Rev. 435; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; Morse, "Permafrost Rights," note 23 above; Gallagher-Mackay, note 23 above, at 4-7; Rudin, note 27 above, esp. at 71-79. Compare Colin H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada" in N. Dyck & J.B. Waldram, eds., Anthropology, Public Policy, and Native Peoples in Canada (Montreal: McGill-Queen's University Press, 1993) 311 at 328.

I think much of this criticism has merit; it was, in my view, especially unfortunate that the Supreme Court elected to dismiss the appeals in Van der Peet, N.T.C. Smokehouse and Pamajewon on the basis of findings of fact and evidentiary records given at trial without the benefit of its reasons in Van der Peet, instead of sending those cases back for retrial in accordance with its conclusions of law, as it had done in Sparrow, note 5 above, and was to do in Gladstone, note 18 above and in Delgamuukw, note 12 above. I agree, too, with some commentators that it might have been better for courts defining and identifying aboriginal rights to take their cues from the legal arrangements and determinations internal to the relevant aboriginal communities themselves: see, e.g., Van der Peet at 627-648 (¶¶229-275) McLachlin J. (dissenting).

Strictly speaking, though, the Supreme Court's framework in Van der Peet does not compel such narrowness of approach to particular instances of contemporary activity: see, e.g., Zalewski, ibid. at 454-455. And there would, I think, be substantial room for interpretive discretion no matter how mainstream judges tried to determine, having regard to laws and customs so different from their own, which aboriginal practices, relationships or activities were to qualify for mainstream constitutional protection. (For a sense of just how difficult these methodological problems can be, see, e.g., Roger F. McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities" (1992) 34 Can. J. Crim. 299 at 309-313.) In these circumstances, there is some advantage in trying to work with the framework prescribed -- in continuing to insist, for example, on the authority of the community's own perspective on its history and its traditions, even though the Supreme Court, in practice, has sometimes underemphasized that -- in the interest of optimizing the manner of its deployment.

⁴⁵ Van der Peet, ibid. at 559-560 (¶70). Here too, there is plenty of scope for interpretive choice: when is something a functioning part of a constitutive custom, and when is it separate from, and merely "incidental to", it? In Van der Peet, a majority of the Supreme Court accepted (ibid. at

In respect of aboriginal title, however, the faithfulness standard operates not as an affirmative requirement, but negatively, as a limitation on the range of otherwise protected activity. Aboriginal title is a community's right to continue engaging in exclusive use and occupation of any lands it occupied exclusively when the Crown asserted sovereignty over them.⁴⁶ A community can prove that its occupation was exclusive by showing either that it met the common law's tests for exclusive possession at the relevant time or that it had some other collective connection with the relevant lands -- traditional legal arrangements for their governance, use or allocation, for instance -- that would have equipped and entitled it, given the times and the relevant cultures, to exclude others from them.⁴⁷ Aboriginal title includes the community's right to decide collectively how, and by whom, the relevant lands may and may not be used.⁴⁸ Generally speaking, it protects any uses of those lands that the community may authorize, whether or not such uses, when considered individually, are themselves integral to the community's identity as a culture,⁴⁹ and whether or not those uses

568-569 (¶¶86-87)) trial court findings that exchanges of salmon in Sto:lo culture before contact "were only 'incidental' to fishing for food purposes," and that the role of such exchanges in kinship and family interactions had insufficient independent significance in that culture to ground a claim of aboriginal right to engage in fish exchange. In Côté, note 23 above, on the other hand, the court concluded unanimously (at 176 (¶56)), and without the benefit of a supportive finding at trial, that "a substantive aboriginal right" -- here again, the right to fish for food -- "will normally include the incidental [!] right to teach such a practice, custom and tradition to a younger generation." There is no obvious principled basis for this difference in result: see, e.g., Barsh & Henderson, ibid. at 1004-1005; Borrows, "Frozen Rights," note 23 above, at 51. The approach in Côté is more consistent with previous treaty rights jurisprudence: see, e.g., Simon, note 29 above, at 403 (treaty rights protect "those activities reasonably incidental" to their exercise); Saanichton Marina Ltd. v. Claxton (1989), 36 B.C.L.R. (2d) 79 (C.A.) (treaty right to fish entails right to protection of fishing grounds).

⁴⁶ See note 28 above and the text accompanying it.

⁴⁷ Delgamuukw, note 12 above, at 1099-1101 (¶¶146-149), 1104-1107 (¶¶155-159). Although, in theory, a community claiming aboriginal title must also demonstrate that the relevant lands, and its relationships with them, help define its identity as a culture, the Supreme Court has said that proof of exclusive occupation at sovereignty, and of ongoing substantial connection with the lands since then, suffices as proof that the lands are of defining significance to the culture: ibid. at 1101-1102 (¶¶150-151).

⁴⁸ ibid. at 1082-1083 (¶115), 1100 (¶148), 1111 (¶166), 1112-1113 (¶168).

⁴⁹ ibid. at 1080 (¶111), 1083-1088 (¶¶117-124), 1095-1096 (¶140).

or forms of occupation have changed since the moment of sovereignty, "as long as a substantial connection between the people and the land is maintained."⁵⁰ The only restriction the doctrine imposes on a community's use of its aboriginal title lands is a prohibition on uses irreconcilable, in manner or in purpose, with the historic patterns of use and occupation -- the "special bond between the group and the land in question"⁵¹ -- that anchor its claim of aboriginal title.⁵² Aboriginal title, in other words, "allows for a full range of uses"⁵³ of the lands to which it applies, excluding only uses that would break faith with the ancestral traditions that constitute the community's relationship with the land.

B. Self-Government As An Aboriginal Right

As we have just seen, there are some important specifications that contemporary aboriginal arrangements and relationships must satisfy to qualify as aboriginal rights, and there are some important limits on their protected scope and exercise. If self-government rights are indeed to be measured "against the same standard" as other aboriginal rights,⁵⁴ it should be clear already that such rights will not equip self-appointed aboriginal groups, or even soundly established aboriginal communities, with constitutional mandates to do just whatever they want, in whatever random or capricious way they might want. At the same time, such rights most probably will equip the communities to which they belong to do, within mainstream Canadian law, some very important things in ways quite different from those familiar to most of the rest of us. We need now to consider a little more closely how self-government rights might look, and operate, within this general framework.

⁵⁰ Ibid. at 1103 (¶154).

⁵¹ Ibid. at 1089 (¶128).

⁵² Ibid. at 1080 (¶111), 1083 (¶117), 1088-1091 (¶¶125-132), 1103 (¶154).

⁵³ Ibid. at 1091 (¶132).

⁵⁴ See note 13 above and the text accompanying it.

1. The Nature of the Self-Government Right

Aboriginal rights are rights to continue engaging, in contemporary ways, in the customs, traditions and relationships that characterized particular aboriginal societies before and apart from European influence. Contemporary aboriginal rights of self-government will, therefore, be anchored in the customs, relationships and traditions of governance -- the institutions, the authority structures and the procedures for making decisions and dealing with internal disputes -- that were, along with other things, constitutive of the societies in place when Europeans arrived or when the Crown asserted sovereignty. More recent governance arrangements adopted because of European or mainstream influence -- those implemented pursuant to various federal Indian Acts, for instance -- will neither serve as a basis for, nor count as exercises of, aboriginal rights of self-government.⁵⁵

These conclusions already tell us two key things about aboriginal rights of self-government. First, it is not mere rhetorical flourish to speak of aboriginal peoples' self-government rights as "inherent" rights. We speak of certain rights as "inherent" to distinguish them from other rights that are "derivative" (or "created" or "contingent"). Derivative rights, by all accounts,⁵⁶ are rights that, from a legal standpoint, owe their existence entirely to some affirmative step by mainstream legislatures or governments: in the constitution itself, in legislation, or through executive or prerogative grant. Inherent rights, however, are rights that exist before and apart from any authority vested in, or conferred by, any of these sources of mainstream government power. By this standard, as we have seen,⁵⁷ all Canadian aboriginal

⁵⁵ See notes 43-44 above and the text accompanying them.

⁵⁶ For helpful discussions of this distinction, see, e.g., Canada, Report of the Royal Commission on Aboriginal Peoples, vol. 2 (Ottawa: Minister of Supply and Services, 1996) ("2 RCAP Final Report") at 192-193; Canada, Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution (Ottawa: Minister of Supply and Services, 1993) ("RCAP, Partners") at 36; Scott, note 44 above, at 318; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 ("Slattery, 'Question of Trust'") at 280-281; Asch & Macklem, note 5 above, at 501-503.

⁵⁷ See notes 16-53 above and the text accompanying them.

rights are inherent rights,⁵⁸ indeed, it is only because they are inherent, in this sense, that they can be aboriginal rights. No derivative right could possibly qualify.

Second, and as a consequence, the collectivities now entitled to exercise existing aboriginal rights of self-government will be those whose contemporary structure and identity derive from the same shared set of specific ancestral governance customs, relationships and traditions that give rise to those rights. This has at least three significant implications. It means that self-government rights will not reside in the individual bands constituted pursuant to the federal Indian Act,⁵⁹ because the bands, considered as such, derive their existence, their definition and their authority not from ancestral traditions or customs but from federal legislation. (It is difficult to imagine creatures of statute having inherent rights to do anything.)⁶⁰ It means that such rights will not reside, either, in aboriginal groupings or organizations that formed from different ancestral traditions after the moment of first contact, or sovereignty.⁶¹ And

⁵⁸ The Supreme Court has been careful to say that "s. 35(1) [of the Constitution Act, 1982] did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law": Van der Peet, note 5 above, at 538 (¶28). Compare Delgamuukw, note 12 above, at 1091-1092 (¶¶133-134).

⁵⁹ Indian Act, R.S.C. 1985, c. I-5 ("Indian Act").

⁶⁰ And the structure the Indian Act has imposed will not, for this purpose, pre-empt the aboriginal peoples' own ancestral organizational arrangements, because aboriginal rights are not to be "read so as to incorporate the specific manner in which [they were] regulated before 1982": Sparrow, note 5 above, at 1091.

⁶¹ Métis communities may prove to be an exception to this general proposition. In Van der Peet, note 5 above, each of the two dissenting judges observed, with justification, that the majority's approach to aboriginal rights, which focuses on customs, traditions and practices in place at the time of first contact (see notes 27-45 above and the text accompanying them), leaves little or no room for aboriginal rights claims from Métis: see ibid. at 598 (¶169), L'Heureux-Dubé], at 635 (¶248), McLachlin]. . In response to these criticisms, Lamer C.J.C., who wrote for the majority, specifically left open the possibility of approaching differently the aboriginal rights claims of Métis: ibid. at 557-558 (¶¶66-67).

It remains to be seen what, if anything, may come of this possibility. The principal concern I have about a special rule for Métis is that such a rule would make no difference unless it made it easier for the Métis to establish their claims of aboriginal right than it already is for aboriginal peoples who are not Métis. So far, at least, I can see no principled basis on which to say that Métis, as such, should be able to succeed in establishing claims of constitutional right in circumstances where other aboriginal peoples could not. And any such differentiation is almost certain to aggravate the

it strongly suggests that the collectivities bearing self-government rights today will be, at least at first instance, the contemporary incarnations of the tribes or nations constituted by shared observance of those traditions at the time of contact or sovereignty. Individuated settlements that spun off later from such collectivities will likely be unsuccessful in establishing separate aboriginal rights of self-government unless they can show that their separation was itself an outgrowth or adaptation of the larger collectivity's governance traditions and processes.

The Royal Commission on Aboriginal Peoples, in other words, appears to have been on strong legal ground when it concluded, primarily for policy reasons, that "the constitutional right of self-government is vested in the people that make up Aboriginal nations, not in local communities as such."⁶² This conclusion has several important policy implications for present purposes; if sound, it addresses a number of public misgivings about the structural consequences of constitutionalizing rights of self-government. Many of the concerns identified in Chapter 1 -- about the sufficiency of communities' human⁶³ and economic⁶⁴ resources to govern themselves, about community governments' accountability to their members and the potential dangers to vulnerable community members,⁶⁵ and about the potentially disruptive effect self-government could have on Canada's current, and fragile, intergovernmental arrangements⁶⁶ -- related in significant part to the size and the number of the aboriginal communities that it seemed might prove to have constitutional rights of self-

controversy that now exists about which aboriginal peoples can qualify as Métis.

⁶² 2 RCAP Final Report, note 56 above, at 236. See generally *ibid.* at 168, 178-179, 182, 234-236; Canada, Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Minister of Supply and Services, 1996) ("RCAP, Bridging") at 77, 248, 275-276.

⁶³ See Chapter 1, note 29 and the text accompanying it.

⁶⁴ See Chapter 1, note 33 and the text accompanying it.

⁶⁵ See Chapter 1, notes 32-34 and the text accompanying them.

⁶⁶ See Chapter 1, notes 50-53, 55 and the text accompanying them.

government. Consolidating the powers and the resources of self-government, at least initially, in the substantially smaller number of larger collectivities whose members share common ancestral traditions and customs of governance should, as the Royal Commission suggests, promote greater internal consistency, capacity and coherence within those communities.⁶⁷

2. The Scope of the Self-Government Right

If aboriginal rights of self-government are, as I have suggested above,⁶⁸ rights to continue engaging in contemporary versions of the ancestral governance traditions, customs and relationships on which a community's cultural integrity depends, then the current scope of a given community's self-government right -- the kinds of matters that it can determine with authority, and the kinds of procedures and other arrangements that make community decisions authoritative -- is going to depend, at first instance at least, on the relationships and traditions that happen to be constitutive within that community. In principle, therefore, different communities may very well turn out to have different aboriginal rights of self-government. To ascertain what those rights are and how far they may extend, we have little choice⁶⁹

⁶⁷ See especially RCAP, Bridging, note 62 above, at 77, 275-276; 2 RCAP Final Report, note 56 above, at 179, 182, 234-236.

⁶⁸ See note 55 above and the text accompanying it.

⁶⁹ "Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal people claiming the right": Pamajewon, note 12 above, at 834 (¶27). Compare Gladstone, note 18 above, at 769 (¶65).

It follows, I think, that it is very probably inaccurate, and unhelpful even if true, to say, as some commentators have, that "the Aboriginal sphere of authority under section 35 is co-extensive with the Federal head of power recognized in section 91(24) of the Constitution Act, 1867": Slattery, "Question of Trust," note 56 above, at 282-283. Compare RCAP, Partners, note 56 above, at 38; 2 RCAP Final Report, note 56 above, esp. at 216. Inaccurate because, as we have just seen, the contemporary self-government rights of different aboriginal communities may very well turn out to be configured quite differently from one another, and because at least some of the powers the federal government has pursuant to s. 91(24) of the Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) ("Constitution Act, 1867") -- the power to regulate the labour relations of Indian Act band councils (see, e.g., Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan, [1982] 3 W.W.R. 554 (Sask. C.A.)), for instance, or the power to make laws that govern all Indians in Canada -- seem clearly to be beyond the reach of any community exercising

except to proceed with constant reference to those constitutive ancestral traditions and to the ways in which they have developed and adapted through the intervening generations.⁷⁰ Other things equal, this inquiry must ascertain and honor the community's own authoritative perspective on these traditions and developments.⁷¹

It does seem quite clear, though, that any community's current efforts to govern itself will not come within the protected scope of its right of self-government unless those efforts keep faith -- and, if need be, demonstrably so -- with the constitutive customs, traditions and relationships that give that right its anchorage and protection in mainstream law. This means that the activities of community governments, like those of mainstream governments, must proceed and emerge in accordance with the most authoritative contemporary versions of their own ancestral governance customs: they must, in other words, have the force of law within the community. And it means that the laws, arrangements and decisions that emerge from such activities must, at a minimum,⁷² be compatible with the community's own constitutive

existing aboriginal rights of self-government. Unhelpful because we do not yet have a very clear understanding of the full dimensions of the powers (exclusive or extended) that s. 91(24) confers on the federal government and because, like it or not, we shall have, in any event, to carry out the case-by-case inquiry into the scope of particular communities' rights of self-government.

⁷⁰ For illuminating accounts of different aboriginal peoples' efforts to preserve, adapt and restore ancestral laws and forms of authority, especially in response to non-native suppression of traditional ways and contemporary community aspirations to self-government, see James Youngblood Henderson, First Nations' Legal Inheritance, Working Paper No. 91-5, University of Manitoba Canadian Legal History Project (1991) (Mi'kmaq); E.J. Dickson-Gilmore, "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems" (1992) 34 Can. J. Crim. 479 (Mohawks of Kahnawake) and John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 (Anishnabek).

⁷¹ See, e.g., Sparrow, note 5 above, at 1112; Van der Peet, note 5 above, at 550-551 (¶¶49-50); Delgamuukw, note 12 above, at 1100-1101 (¶¶148-149).

⁷² Earlier, we saw the two different ways in which the Canadian law of aboriginal rights enforces fidelity to the ancestral traditions and customs on which a right is based. Most aboriginal rights protect contemporary conduct only where it can be shown to exemplify, in modern terms, such a custom, tradition or practice. Community-authorized uses of aboriginal title lands, however, need only be consistent with the relationships that give rise to that right. See notes 27-53 above and the text accompanying them. We still do not know whether courts will treat aboriginal rights of self-government as they treat aboriginal title or as they treat other aboriginal rights. (See, e.g.,

governance traditions and relationships.

The Canadian law of aboriginal rights, in other words, already gives our courts sufficient basis on which to withhold the constitution's protection, on a case-by-case basis, from arbitrary measures promulgated in a community's name that do not meet, at the relevant time, the community's own criteria for legality.⁷³

Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 60, 71.) In "Aboriginal Rights in Canada: From Title to Land to Aboriginal Sovereignty" January 1998 [unpublished], Kent McNeill argues cogently that the less restrictive, aboriginal title approach is the more appropriate, in part because aboriginal title itself includes collective powers of governance over use of the relevant territory. (See notes 47-50 above and the text accompanying them.) I agree. My own initial hunch, though, is that courts may use the more generous "reconcilability" test when construing the substantive scope of a self-government right but insist on affirmative continuity with ancestral formalities and procedures.

⁷³ Friends who read this chapter in draft expressed two strong reservations about this discussion. One is that it seems to leave no room for change or development in a community's own legality criteria. If mainstream law insists on freezing communities' permissible decision-making arrangements and legal systems at the moment of contact, this argument continues, inherent right communities today will find it practically impossible ever to exercise their self-government rights in a way that engages the mainstream law's protection. Contemporary communities will find it difficult enough, in the best of circumstances, to demonstrate continuity with their ancestral forms of organization, because of the cataclysmic disruptions that have resulted from their engagement with the settler peoples. The other is that this paragraph makes some questionable assumptions about both the authority and the competence of mainstream courts to determine for an inherent right community what its own law is. These are serious issues, and they deserve reply.

To the first objection, I have three responses. First, it is not part of my argument -- or of Canadian aboriginal rights law, as I understand it -- that self-government rights would freeze inherent right communities' laws, procedures, or forms of organization as they stood at the moment of contact or sovereignty. (See notes 37-40 above and the text accompanying them.) What the law requires, of governance forms and of the other relationships and customs that give rise to existing aboriginal rights, is that they change and evolve in ways that maintain a thread of continuity -- at a minimum, consistency, but perhaps, as well, an orderly course of development that acknowledges ongoing connection -- with the essential ancestral arrangements of which the right is based. Second, there are strong indications (in, for example, the sources cited at note 70 above) that significant numbers of aboriginal communities have maintained, through dedication, adaptation and strategic compromise, contemporary versions of their ancestral laws and forms of organization. According to Colin Scott, for example,

all forms of corporate organization referred to in the late nineteenth- and early twentieth-century 'classical' ethnography on aboriginal people in Canada -- families, clans, bands, tribes, and tribal confederacies -- are active in some capacity in the political life of aboriginal societies in Canada today. . . . Despite adverse state policies, these forms have frequently not disappeared . . . Even if some institutional forms of traditional government have been undermined, it remains the case that indigenous premises shape everyday life. It is likely, then,

The converse of this, however, is that the community may exercise its self-government right, on its own initiative, as it sees fit, as freely as it might exercise any other aboriginal right,⁷⁴ as long as it operates in good faith in accordance with, and pursuant to, its own essential (and evolving) constraints and traditions of governance.⁷⁵ And as we all know, the defining

that given the opportunity, aboriginal communities will know how to reconstruct self-government institutions that are coherent with their cultural premises:

Scott, note 44 above, at 326 (emphasis in original). Finally, the Supreme Court of Canada has repeatedly emphasized that treaty and aboriginal rights are not to be defined in ways that preclude anyone from ever succeeding in establishing or invoking them: see the sources cited at note 29 above. If the Supreme Court accredits aboriginal rights of self-government, therefore, there is reason to expect it not to apply the continuity requirement in a way that made the exercise of such rights, as a practical matter, impossible.

Now for the second concern. On the issue of authority, there is, in my view, little doubt that the provincial superior courts have inherent jurisdiction to determine constitutional questions raised before them, including questions about the scope and application of aboriginal rights. For purposes of Canadian law, such determinations are authoritative; they establish which forms and examples of aboriginal self-government the constitution of Canada can protect. (For purposes of internal Anishnabek or Mohawk law, of course, they are not necessarily dispositive, except to the extent that those communities need or want the protection of mainstream law.) The fact that mainstream courts have the power themselves to determine, at least for mainstream law purposes, what is consistent with Anishnabek standards of legality, however, does not mean that they should look for occasions to substitute their judgment on such matters for the judgment of the Anishnabek authorities. Like issues of foreign law generally, these are not matters that come within the mainstream courts' ordinary expertise. When dealing with the internal rules of self-governing minority groups, it is often appropriate, as Denise Réaume has observed, for a mainstream court to defer to the dispositions of a group's own adjudicators, once it is satisfied of their authority under group rules: see Denise G. Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles" (1997) [unpublished] esp. at 3-4, 8-10, 19-21. Within domestic law generally, issues of foreign law are treated as questions of fact, to be proved by expert evidence. When all else fails, though, mainstream judges must do their best and decide such issues, if mainstream law is to give effect to communities' own laws and arrangements: *ibid.*, at 3-4; *Mabo*, note 5 above, at 58, 62, Brennan]. (for the plurality); *Lakeside Hutterian Colony v. Hofer*, [1992] 3 S.C.R. 165 at 191-192.

⁷⁴ Like other aboriginal rights, self-government rights will be subject to justified external limits imposed by the federal, and perhaps by provincial, governments: see notes 97-146 below and the text accompanying them. Such external limits, however, do not affect the scope and definition of the right itself: only the circumstances in which one may engage in the kinds of activity that the right protects. See, e.g., *Sparrow*, note 5 above, at 1091-1093.

⁷⁵ This is not the view of the Royal Commission on Aboriginal Peoples. The Royal Commission's view is that the "sphere of inherent [aboriginal] jurisdiction" – the scope of an existing aboriginal right of self-government – "is divided into two sectors: a core and a periphery": 2 RCAP Final Report, note 56 above, at 167. Core matters are those that "(1) are vital to the life and welfare of a particular Aboriginal people, its culture and identity; (2) do not have a major impact on adjacent jurisdictions; and (3) are not otherwise the object of transcendent federal or provincial

features of aboriginal legal culture are often very different from those of our own.

C. Preliminary Overview

We can now begin to assess the impact self-government rights might have on the coherence and the integrity of the mainstream legal order if they emerge as aboriginal rights protected by section 35(1) of the Constitution Act, 1982.

Because its focus is on protecting continuity with, and fidelity to, ancestral customs, traditions and relationships, Canadian aboriginal rights law limits in two important ways any harmful impact such rights might have on our legal order's key arrangements and values.

concern"; all other relevant matters comprise the periphery: ibid. Only in respect of "core" matters, the Royal Commission, continues, could an aboriginal community exercise its self-government right on its own initiative; its jurisdiction over matters on the periphery, though also inherent [!], "remains in abeyance," and unavailable to it, until it concludes a self-government treaty or agreement with the Crown that provides for the exercise of this jurisdiction: ibid. at 167-168. Compare ibid. at 214-219; RCAP, Bridging, note 62 above, at 246-248; RCAP, Partners, note 56 above, at 38.

The Royal Commission's analysis preceded, and could not take account of, the Supreme Court of Canada's recent decisions on aboriginal rights. Those decisions, as we have seen, confirm that aboriginal rights are rights to engage in contemporary versions of ancestral traditions, customs and relationships: see, e.g., notes 27-53 above and the text accompanying them; nothing in their analysis suggests that the exercise of such rights today depends on obtaining prior agreement from the Crown. Indeed, the Crown must justify any meaningful interference with the exercise of such rights: see, e.g., Sparrow, note 5 above, at 1109-1111. So if aboriginal rights of self-government are indeed "no different from other claims to the enjoyment of aboriginal rights" (Pamalewon, note 12 above, at 832-833 (¶24), quoted in text above at note 13), then there is, I think, no basis in law for suggesting that full use of such rights is conditional on successful conclusion of prior enabling agreements. (Whether it would be prudent for aboriginal communities to exercise self-government rights unilaterally, without prior arrangement, is, of course, a separate issue.)

From a policy standpoint, I see at least three problems with dividing the scope of self-government rights into an available core and an inchoate periphery. First, it is, at a minimum, odd to say that self-government rights are "inherent" if a substantial part of their exercise is, by nature, contingent on the Crown's cooperation. Second, the Royal Commission's delineation of the "core" appears to give the federal and provincial governments leverage to control the available scope of communities' self-government rights by determining, or declaring, from time to time that certain matters are of "transcendent . . . concern" to them. (But see RCAP, Bridging at 248: "[d]etermining what is core and what is peripheral is a matter for each Aboriginal nation to decide.") Finally, the very imposition of such a distinction – especially one founded on such malleable criteria – would itself very likely have a chilling effect on the use of such rights, by introducing such uncertainty about when and how communities could exercise them unilaterally.

First, it limits the kinds of aboriginal collectivities that can exercise, at least at first instance, inherent rights of self-government to those whose existence and internal structure derive from the same shared set of ancestral governance customs and traditions. In doing so, it vests self-government rights in the collectivities that are at once best positioned to preserve ancestral traditions in contemporary versions and most likely to have enough "critical mass" to function effectively as more autonomous units.⁷⁶

Second, as we just saw, it limits the kinds of measures that will qualify for protection as exercises of aboriginal rights of self-government to those that comport with the community's own authoritative standards of legality and that are, at a minimum, reconcilable with the community's own defining customs and traditions. No indigenous governance measure will have effect in Canadian law unless it is itself consistent with the fundamental values, and fully authorized according to the internal standards, of the community responsible for it.⁷⁷

Canadian courts, in other words, already have capacity, within existing doctrine, to protect, on a case-by-case basis, the values and institutions constitutive of our legal order from any risks that self-government rights may pose to them except, perhaps, such risks as may emerge from genuine differences between aboriginal and mainstream cultures and traditions.

This exception, of course, is hardly trivial. There are some profound differences between the mainstream and the various aboriginal ways of understanding and preserving social order;⁷⁸

⁷⁶ See notes 59-67 above and the text accompanying them.

⁷⁷ See note 72 above and the text accompanying it.

⁷⁸ For useful background, see, e.g., Menno Boldt & J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Quest for Justice, note 7 above, 165; Lyon, "Essay," note 9 above; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90), 6 Can. Hum. Rts. Y.B. 3; Patrick Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" [1992] U.B.C. L. Rev. (Sp. Ed.) 280; Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds. Continuing Poundmaker and Riel's

we'll consider some examples in Chapter 3.⁷⁹ Because of those differences, it remains possible that pursuit of authentic aboriginal ways and values will challenge structures and principles at the foundation of the mainstream legal order. (And vice versa, as we all know from the past several centuries.)

It is, however, very helpful to grasp that this is the problem we need to address. We are now in a better position to consider what to do about it. In doing so, we will want to remember that this is precisely the tension that section 35(1) of the Constitution Act, 1982, in the Supreme Court of Canada's view, exists to address and to reconcile.⁸⁰

The principal way in which courts so far have sought to reconcile the integrity of the pre-existing aboriginal cultures, as expressed in the exercise of aboriginal rights, with the fact of Crown sovereignty is by considering when, and to what extent, the mainstream orders of government may impose external constraints on the exercise of such rights. We now need to focus that inquiry on aboriginal rights of self-government. To do so, we must understand the relationships among the federal, provincial and aboriginal spheres of authority.

II. FEDERAL, PROVINCIAL AND ABORIGINAL AUTHORITY

A. Federal and Provincial Authority

Although it has often been difficult to apply in particular cases, the relationship, in our constitution, between the federal and provincial orders of government is by now quite clear.

Quest (Saskatoon: Purich Publishing, 1994) 173; J. Anthony Long & Katherine Beaty Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" (1994) 18 Am. Ind. Culture & Rsch. J. 91.

⁷⁹ See Chapter 3, notes 115-153 and the text accompanying them.

⁸⁰ See, e.g., Van der Peet, note 5 above, esp. at 538-539 (¶¶30-32), 547-548 (¶¶42-43); Gladstone, note 18 above, at 774-775 (¶¶72-73); Delgamuukw, note 12 above, at 1107-1108 (¶161).

Sections 91-101 of the Constitution Act, 1867 distribute all the powers that pertain to the governance of Canada between the federal and the provincial orders of government.⁸¹ In addition to being exhaustive, the constitution's distribution of governance powers is, with rare and specific exceptions,⁸² exclusive: each subject matter of governance belongs either to the federal or to the provincial cohort of powers, but not to both. Generally speaking, all subjects not assigned exclusively to the provinces belong exclusively to the federal order of government,⁸³ and all matters that properly fit within the classes of subjects assigned to the federal government are, as such, outside provincial capacity,⁸⁴ even if they also happen to fit within a class of subjects assigned exclusively to the provinces.⁸⁵

As a result, neither level of government may regulate, either directly or indirectly, matters that the constitution has assigned exclusively to the other. Provincial laws enacted to regulate banking, navigation, "Indians, and Lands reserved for the Indians," or any other subject assigned exclusively to the federal order,⁸⁶ and federal laws enacted to regulate provincial

⁸¹ See A.G. Ontario v. A.G. Canada (Reference Appeal), [1912] A.C. 571 (P.C.) at 581.

⁸² Constitution Act, 1867, ss. 92A(2),(3), 94A and 95 provide for concurrent federal and provincial powers in relation to non-renewable natural resources, electrical energy, old age pensions and supplementary benefits, and agriculture and immigration, respectively.

⁸³ Constitution Act, 1867, s. 91, preamble. See, e.g., Munro v. National Capital Commission, [1966] S.C.R. 663 at 670; Jones v. A.G.N.B., [1975] 2 S.C.R. 182 at 189.

⁸⁴ See Constitution Act, 1867, s. 91, closing words.

⁸⁵ See, e.g., C.P.R. v. A.G.B.C., [1950] A.C. 122 (P.C.) at 140; A.G. Canada v. C.P.R. and C.N.R., [1958] S.C.R. 285 at 290, 301; A.G. Canada v. C.N. Transportation Ltd., [1983] 2 S.C.R. 206.

Though this is the general proposition, courts take a different approach to those enumerated heads of federal authority – ss. 91(2), 91(3) and 91(26) are examples – that are drawn so broadly as to leave little, if any, room for the exercise of narrower, related heads of provincial power (e.g., ss. 92(13), 92(2) and 92(12)). In those instances, courts treat the narrower provincial powers as exceptions from the broader enumerated federal powers. See, e.g., Citizens Insurance Co. of Canada v. Parsons (1882), 7 App. Cas. 96 (P.C.) at 108-109; In re Marriage Legislation in Canada, [1912] A.C. 880 (P.C.).

⁸⁶ See Constitution Act, 1867, s. 91.

appointments, municipal institutions, property and civil rights in the province, or any other subjects assigned exclusively to the provinces,⁸⁷ are invalid, without force or effect. Likewise, although provincial laws may, and often do, validly affect the persons, places, undertakings or things that are subject to exclusive federal authority, they cannot have the effect of regulating them "in what makes them specifically of federal jurisdiction."⁸⁸ Valid provincial legislation whose incidental effects include regulation of, for instance, intellectual property rights, banking activity or the use of "Lands reserved for the Indians" have no legal force or effect, as such,⁸⁹ as regards those subjects or activities, even though they continue to apply as before, according to their terms, to other matters.⁹⁰ The federal and provincial orders of government, in other words, have "interjurisdictional immunity" as against one another. Provinces have no power to regulate matters assigned exclusively to the federal government, whether or not the federal government ever elects to use its own power to do so.⁹¹ And federal authorities may not, except in emergencies,⁹² exercise powers assigned exclusively to the provinces, whether or not any province chooses to use them.

⁸⁷ See Constitution Act, 1867, ss. 92, 92A(1), 93.

⁸⁸ Bell Canada v. Quebec (CSST), [1989] 1 S.C.R. 749 ("Bell 88") at 762.

⁸⁹ Parliament may, of course, if it chooses, enact legislation incorporating such laws by reference and applying them, as federal law, to persons, places, undertakings or things that are subject to exclusive federal authority. See Dick v. The Queen, [1985] 1 S.C.R. 322 ("Dick 85") at 328. Section 88 of the Indian Act -- the federal provision at issue in Dick 85 -- is the best-known example to people familiar with aboriginal issues. See note 146 below for brief discussion of s. 88 and its relevance to the present work.

⁹⁰ Strictly speaking, the same restriction applies to the federal government, but the situation rarely arises because the enumerated heads of federal authority are understood, generally speaking, as exceptions from provincial authority: see notes 84-85 above and the text accompanying them. One case where federal law was "read down" to accommodate core provincial subjects is C.N.R. v. Clark, [1988] 2 S.C.R. 680.

⁹¹ See, e.g., Union Colliery Co. of B.C. v. Bryden, [1899] A.C. 580 (P.C.) at 588; Natural Parents v. Superintendent of Child Welfare, [1976] 2 S.C.R. 751 at 759-760, Laskin C.J.C. (for the plurality); Bell 88, note 88 above, at 835.

⁹² See, e.g., Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373.

Finally, it is settled that valid federal laws take precedence over valid provincial laws whenever⁹³ both apply and the two conflict.⁹⁴

Neither the federal nor the provincial order of government, therefore, has power, through mandatory measures, to control the activities of the other.⁹⁵ When the federal government has wanted to ensure provincial compliance with federal standards, it has sought to achieve that result by using its spending power⁹⁶ or other financial incentives.

B. Federal and Aboriginal Authority

If self-government rights are of a piece with other aboriginal rights,⁹⁷ then they stand in the same relation, other things equal, to federal and provincial laws and activity as do other aboriginal rights. We need to understand those relationships, and to see how they differ from the relationship between federal and provincial authority. This section relates self-government rights to federal authority; the next one relates them to provincial authority.

There is, to begin with, good reason to doubt that either federal or "inherent right" governments have interjurisdictional immunity -- mutually exclusive powers -- as against one

⁹³ The one exception is s. 94A of the Constitution Act, 1867, which appear to give precedence to provincial legislation in respect of old age pensions and supplementary benefits.

⁹⁴ See, e.g., Tennant v. Union Bank of Canada, [1894] A.C. 31 (P.C.) at 45; Bank of Montreal v. Hall, [1990] 1 S.C.R. 121; Reference re Provincial Court Judges, [1997] 3 S.C.R. 3 at 71 (1998).

⁹⁵ Even s. 94 of the Constitution Act, 1867, which authorizes Parliament to enact legislation providing for uniformity of legal arrangements in the common law provinces and to assume exclusive legislative authority over matters included in such uniformity legislation, makes the efficacy of such legislation in any province contingent upon the approval of that province's legislature.

⁹⁶ For discussion of the spending power, see, e.g., Reference re Canada Assistance Plan, [1991] 2 S.C.R. 525; Brown v. YMHA Jewish Community Centre of Winnipeg Inc., [1989] 1 S.C.R. 1532.

⁹⁷ See note 13 above and the text accompanying it.

another, in the way that the federal and provincial orders of government do routinely.⁹⁸ The mere existence of federal legislative authority (over, for instance, "Indians, and Lands reserved for the Indians")⁹⁹ is, in itself, no bar to the exercise of an aboriginal right;¹⁰⁰ inherent right communities, therefore, acting within the protected scope of their rights of self-government, may exercise power over matters that the constitution elsewhere assigns to the federal government.¹⁰¹ At the same time, federal laws and arrangements do not cease to apply in or to a given community merely because it has a particular aboriginal right. "Federal legislative powers continue"¹⁰² in respect of such communities; federal measures continue to apply within them except when and as they interfere with the exercise of the aboriginal right.¹⁰³ The burden of proving that a measure infringes an aboriginal right rests on those relying on the right.¹⁰⁴ Unless, therefore, a particular federal measure restricts an inherent right community's capacity¹⁰⁵ to exercise its aboriginal right of self-government, it will

⁹⁸ See notes 81-92 above and the text accompanying them.

⁹⁹ Constitution Act, 1867, s. 91(24).

¹⁰⁰ See, e.g., Sparrow, note 5 above, at 1109.

¹⁰¹ Compare, e.g., 2 RCAP Final Report, note 56 above, at 216; RCAP, Bridging, note 62 above, at 247; RCAP, Partners, note 56 above, at 38; Slattery, "Question of Trust," note 56 above, at 282. Again, I do not share Slattery's, and the Royal Commission's, view that the protected scope of inherent right communities' aboriginal rights of self-government is congruent with the scope of federal authority under s. 91(24) of the Constitution Act, 1867: see note 69 above. We do all agree, though, that federal and aboriginal powers, whatever their relevant scope, are concurrent.

¹⁰² Sparrow, note 5 above, at 1109.

¹⁰³ Ibid. at 1109-1110.

¹⁰⁴ Ibid. at 1112, 1120-1121; Gladstone, note 18 above, at 761 (153).

¹⁰⁵ Restrictions on "capacity," as I use the term here, include external restrictions on the manner, form or substantive scope of governance in an inherent right community. In calling attention to this exception, I do not mean to suggest that federal capacity restrictions would not, or could not, apply at all to inherent right communities. My point is that federal laws whose subject matter is aboriginal governance are unique in that, as such, they will almost always interfere with the exercise of self-government rights; as a result, they will almost always stand in need of justification. Federal measures dealing with fisheries or criminal law, on the other hand, will generally not interfere with the exercise of self-government rights unless a community uses such rights to establish arrangements with which such measures are incompatible.

almost certainly continue to apply there unless and until it conflicts somehow with community legal arrangements made in the exercise of the right.¹⁰⁶

If this is so, then constitutional accreditation of existing aboriginal rights of self-government poses no meaningful risk of a "legal vacuum" in communities having such rights. For one thing, such communities are likely to have already in place at least some authoritative legal arrangements of their own, whose force derives from ancestral traditions, customs and relationships.¹⁰⁷ Even if they do not, however, federal (and probably some provincial) measures will continue to govern there until the community makes arrangements of its own that leave no room for them.

The other significant difference between the federal order's relationships with provincial and with aboriginal authority is that the precedence rule when federal and aboriginal laws conflict is much less straightforward than the rule for federal-provincial conflicts. When federal and provincial laws conflict, the federal arrangement just prevails, no questions asked.¹⁰⁸ When federal arrangements interfere with the exercise of existing aboriginal rights -- including, we must assume, aboriginal rights of self-government --, it is the aboriginal arrangements that prevail, except when and as the federal government can justify the interference.¹⁰⁹ The justification inquiry is a case-by-case determination, because the circumstances, the rights

¹⁰⁶ For similar views, see, e.g., 2 RCAP Final Report, note 56 above, at 167, 217; Slattery, "Question of Trust," note 56 above, at 283.

¹⁰⁷ See, e.g., McNeil, "Constitutional Space," note 1 above, at 124-125; John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 at 646-657.

¹⁰⁸ See notes 93-94 above and the text accompanying them. But note the exception mentioned in note 93.

¹⁰⁹ See, e.g., Sparrow, note 5 above, at 1110, 1121; Nikal v. The Queen, [1996] 1 S.C.R. 1013 ("Nikal") at 1065 (¶111); Gladstone, note 18 above, at 762 (¶54). Compare 2 RCAP Final Report, note 56 above, at 167, 216; Slattery, "Question of Trust," note 56 above, at 282.

themselves and the measures infringing them all differ from case to case.¹¹⁰

According initial priority to self-government rights over the federal laws and arrangements that interfere with them is essential if such rights are to receive any meaningful protection within the mainstream legal order. Unless inherent right communities have the power, recognized and enforceable within the mainstream system, to follow procedures and make arrangements in respect of their members and lands that differ from those in the general law, and to insist on those differences despite the general law, they have no effective way of giving contemporary expression to the values, traditions and relationships that define and animate their understanding of themselves, and of governance. And that is what self-government rights exist to ensure their capacity to do.

Acknowledging that inherent right communities have such power within the mainstream legal system, however, creates a risk that their use of that power might sometimes conflict with, or jeopardize, Canada's own defining values and arrangements. The question is whether federal authorities have effective means of containing those dangers.

The short answer, it seems to me, is yes. For one thing, they may have recourse to the same arsenal of financial incentives that have so often led provinces to use, or not to use, their own authority in particular ways.¹¹¹ Inherent right communities, which typically have far fewer resources to meet their members' needs and expectations than do provinces, might well find such incentives comparably impelling.¹¹² More important, federal authorities may impose

¹¹⁰ See, e.g., Sparrow, ibid. at 1111; Gladstone, ibid. at 763-775 (1956-75), esp. 156.

¹¹¹ See note 96 above and the text accompanying it.

¹¹² See, e.g., Roger Gibbins & J. Rick Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in Alan Cairns & Cynthia Williams, eds., The Politics of Gender, Ethnicity and Language in Canada (Toronto: University of Toronto Press, 1986) 171 at 233-234; David C. Hawkes & Allan M. Maslove, "Fiscal Arrangements for Aboriginal Self-Government" in David C. Hawkes, ed., Aboriginal Peoples and Government Responsibility: Exploring Federal and

mandatory constraints on the use of such rights, or simply enforce federal law at the expense of community arrangements, when they can justify the interference with self-government rights that results. The justification formula the Supreme Court has designed assures the federal government, despite aboriginal rights and difference, of a way of doing the things it really has to do, as long as it can show in so doing that such rights "are taken seriously."¹¹³

To justify a given infringement of an aboriginal right, federal authorities must prove two things. They must show that "there is no underlying unconstitutional objective"¹¹⁴ behind the measure infringing the right; only "compelling and substantial"¹¹⁵ objectives can justify interference. Then they must show that the means they have chosen to achieve their objective are, despite the interference, in keeping with the Crown's honor and consistent with its fiduciary obligations to aboriginal peoples.¹¹⁶

According to recent Supreme Court of Canada jurisprudence, a government objective will be

Provincial Roles (Ottawa: Carleton University Press, 1989) 93 at 123.

There may well be some restrictions on the use of federal financial incentives to structure the exercise of aboriginal rights of self-government. Because aboriginal rights protect only conduct and arrangements that keep faith with constitutive ancestral traditions and customs (see notes 22-53 above and the text accompanying them), inherent right governments, acting as such, could not agree to conditions attached to federal financial incentives if those conditions required them to break faith with those traditions and customs. (I owe this observation to Jonathan Rudin.) And there may well be times, apart from that, when the federal government would have to justify its use of such measures. Conditioning discretionary government benefits to a community on its agreement to restrict the use of its self-government rights may itself be a contravention of such rights. See, e.g., Nikal, note 109 above, at 1059-1064; R. v. Bob, [1991] 2 C.N.L.R. 104 (Sask. C.A.). (In the United States, such requirements are sometimes called "unconstitutional conditions": see, e.g., Kathleen M. Sullivan, "Unconstitutional Conditions" (1989), 102 Harv. L.Rev. 1413.) Alternatively, it is conceivable, as Kent McNeil has suggested to me, that certain kinds of uses of conditional financial incentives might contravene federal fiduciary duties to inherent right communities.

¹¹³ Sparrow, note 5 above, at 1119.

¹¹⁴ Ibid. at 1121.

¹¹⁵ Ibid. at 1113.

¹¹⁶ Ibid. at 1114.

"compelling and substantial" enough to justify interfering with an aboriginal right if it promotes either of the goals that, to the court, underlie the entrenchment of such rights in the constitution: recognition and protection of the "critical and integral aspects" of pre-existing aboriginal societies, or reconciliation of those pre-existing societies with the Crown's sovereignty over Canada. (Most often, measures imposing restrictions on aboriginal rights will contribute only to the goal of reconciliation.)¹¹⁷ In the court's view, however, objectives that "are of sufficient importance to the broader community as a whole" are as essential to the task of reconciliation as the aboriginal rights themselves¹¹⁸ and can anchor efforts to justify interference with such rights.¹¹⁹ Measures designed to preserve institutions and values that the courts consider essential to the Canadian legal and constitutional order seem all but certain to satisfy this requirement. Existing federal measures, invoked today for that purpose but enacted originally to accomplish other objectives, might or might not.¹²⁰

Where interference does result from pursuit of compelling, substantial objectives, the courts must determine whether the interfering measures themselves promote those objectives with

¹¹⁷ Gladstone, note 18 above, at 773-775 (¶¶70-73); Delgamuukw, note 12 above, at 1111 (¶165).

¹¹⁸ Gladstone, ibid. at 774-775 (¶73); Delgamuukw, ibid. at 1107-1108 (¶161).

¹¹⁹ For criticism of this conclusion, and of other aspects of the Supreme Court's recent jurisprudence on justification under s. 35 of the Constitution Act, 1982, see Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8 Const. Forum 33.

¹²⁰ In dealing with similar issues under s. 1 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 ("Charter of Rights," or just "Charter"), the Supreme Court of Canada has said that "[i]n showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert post facto a purpose which did not animate the legislation in the first place": A.G. Quebec v. Irwin Toy Ltd., [1989] 1 S.C.R. 927 ("Irwin Toy") at 984. See also ibid. at 973; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 335, 352-353. On the other hand, it has also acknowledged "that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances": Irwin Toy, at 984; Edmonton Journal v. A.G. Alberta, [1989] 2 S.C.R. 1326 at 1342-1345.

sufficient "sensitivity to and respect for the rights of aboriginal peoples":¹²¹ whether, that is, they have given sufficient priority, in design or in execution, to the aboriginal interests that the relevant aboriginal right exists to protect.¹²² In making that determination, courts have considered: how important the measure is to fulfillment of the approved objectives,¹²³ and what other, less intrusive options may have been available;¹²⁴ how extensively (if at all) the aboriginal community and its members were involved in the measure's design or implementation;¹²⁵ whether compensation is available to the community for economic loss it suffers because of the interference,¹²⁶ and what other significant interests (aboriginal and non-aboriginal) also need taking into account outside the community whose right is infringed.¹²⁷

The standard of care that the courts enforce in weighing these (and any other relevant) considerations depends from case to case upon, perhaps among other things, the nature and configuration of the right infringed, the seriousness and severity of the measure's interference with it, the importance of the objective the measure exists to serve and the urgency of the situation that prompted the measure. Other things equal, for example, a narrowly focused right that contains its own "inherent limitation," such as an aboriginal right to fish or to hunt

¹²¹ Sparrow, note 5 above, at 1119.

¹²² See ibid. at 1114-1116; Gladstone, note 18 above, at 766-769 (¶¶161-64). In Delgamuukw, note 12 above, the Supreme Court suggests (at 1108-1109 (¶162), 1112-1113 (¶¶167-168)) that justification analysis of aboriginal title infringements need not proceed on the basis of priority, at least in the sense, closely related to resource allocation, in which that notion arose in Sparrow and again in Gladstone. I use the word "priority" here in a somewhat broader sense that, I think, incorporates and addresses the court's concerns about it in Delgamuukw.

¹²³ See e.g., Sparrow, ibid. at 1121 (federal government "would have to show that the regulation sought to be imposed was required to accomplish the needed limitation").

¹²⁴ ibid. at 1119; Nikal, note 109 above, at 1064-1065 (¶¶109-110); Gladstone, note 18 above, at 767-768 (¶63).

¹²⁵ Sparrow, ibid. at 1119; Gladstone, ibid. at 768 (¶64); Delgamuukw, note 12 above, at 1113 (¶168).

¹²⁶ Sparrow, ibid. at 1119; Delgamuukw, ibid. at 1113-1114 (¶169).

¹²⁷ See, e.g., Gladstone, note 18 above, at 768 (¶64), 770-771 (¶¶67-68).

for subsistence, will command greater priority, and attract a higher standard of care, than a more expansive right, such as aboriginal title or a commercial harvesting right, that contains no such internal restrictions and that, taken on its own, would confer a virtual monopoly.¹²⁸ Similarly, measures prompted by situations of urgency may attract a somewhat lower standard of care than would otherwise apply.¹²⁹

These indications suggest that courts might well be rather generous in appraising federal restrictions on the use of aboriginal rights of self-government, especially in circumstances where an exercise of such rights would pose a genuine, imminent threat to values or arrangements on which the mainstream legal order depended. Whether any given federal interference with such rights would meet the justification test, even assuming the legitimacy of its own objectives, would depend on the considerations identified just above.¹³⁰

C. Provincial and Aboriginal Authority

We saw in passing above that "Indians, and Lands reserved for the Indians" are among the subjects within exclusive federal (as opposed to provincial) authority.¹³¹ This does not mean, again, that no provincial law can affect, or apply to, Indians or Indian lands; it does mean, though, that the provinces have no power to regulate these subjects "in what makes them specifically of federal jurisdiction."¹³² Provincial measures that set out to do so are invalid, and have no effect; valid provincial measures that would have the effect of regulating

¹²⁸ Compare, e.g., Sparrow, note 5 above, at 1113-1119 (absolute priority for aboriginal food fishing rights, after conservation needs are taken into account) with Gladstone, *ibid.* at 764-775 (¶¶57-75) (lesser priority for aboriginal right to fish to supply a commercial market) and Delgamuukw, note 12 above, at 1111-1114 (¶¶165-169) (lesser degree of protection for aboriginal title, which confers an exclusive right to use and occupy lands).

¹²⁹ See, e.g., Nikal, note 109 above, at 1065 (¶110).

¹³⁰ See notes 121-127 above and the text accompanying them.

¹³¹ Constitution Act, 1867, s. 91¶24. See notes 86, 99 above and the text accompanying them.

¹³² Bell 88, note 88 above, at 762.

them have no application, as such, to them, though they operate normally otherwise.¹³³

We now know that "aboriginal rights are part of the core of Indianness at the heart of s. 91(24)."¹³⁴ This must also be true of self-government rights that qualify as aboriginal rights. According to generally accepted constitutional principles, it follows that the provinces have no independent authority to restrict or otherwise to interfere with their exercise.

If this is so, then there ought to be some important differences in inherent right communities' relationships with federal and with provincial authority. But we need to proceed with some care, in order not to overstate them. It may be best to begin with the similarities.

First, there is still no reason to worry about a "legal vacuum."¹³⁵ On the one hand, if federal authority cannot, by its mere existence, reduce the protected scope of aboriginal rights of self-government,¹³⁶ then provincial authority surely cannot do so, either. On the other hand, the mere existence of aboriginal rights of self-government does not further reduce the reach of provincial measures into inherent right communities, except, again, where such measures might limit such communities' capacity to exercise such rights.¹³⁷ Inherent right communities, of course, already benefit from the interjurisdictional immunity that results from exclusive federal authority over Indians and Indian lands; that in itself restricts somewhat the scope of provincial power over them. Provincial laws that would otherwise apply in such

¹³³ See notes 81-91 above and the text accompanying them.

¹³⁴ Delgamuukw, note 12 above, at 1121 (¶181). See generally ibid. at 1116-1121 (¶¶173-181); Van der Peet, note 5 above, esp. at 534-535 (¶¶19-20).

¹³⁵ See notes 102-107 above and the text accompanying them.

¹³⁶ See notes 99-101 above and the text accompanying them.

¹³⁷ See note 105 above. If, as I believe, matters related to Indian governance are within the exclusive authority of the federal (as opposed to the provincial) order of government, then the provinces have no power, directly or indirectly, to limit an inherent right community's capacity to exercise aboriginal rights of self-government.

communities, however, will continue to do so, unless and until they interfere with indigenous legal arrangements that arise from the exercise of self-government rights. In this respect, too, the provincial authority is in the same position as the federal.

Second, from a legal standpoint, a province, like the federal government, may offer financial incentives to inherent right communities in an effort to structure the uses of their self-government powers.¹³⁸ This option, however, will hardly matter to provinces with too few resources to offer meaningful financial incentives. If those provinces want to try to limit the use of self-government rights, they need the capacity to resort to mandatory measures. The difficult question is whether they have any such capacity. That is where the potential difference from federal authority lies.

This much one can say with confidence. Provincial measures that interfere with the exercise of self-government rights can stand in no better position than federal measures as against such rights. In cases of conflict, proper and authorized use of a self-government right will have at least initial priority over provincial arrangements.¹³⁹ And if provinces are in a position by justifying their measures to overcome that initial priority, the justification standards will almost certainly be the same as those that already apply to the federal government.¹⁴⁰ The unanswered question is whether justification is an option open to the provinces at all.

¹³⁸ See notes 111-112 above and the text accompanying them. Restrictions similar to some of those identified in respect of federal financial incentives (see note 112 above) would apply. For judicial confirmation of a provincial spending power, even to accomplish objectives that are beyond their regulatory capacity, see, e.g., Re Lovelace and the Queen in right of Ontario (1997), 33 O.R. (3d) 735 (C.A.) at 765; Dunbar v. A.G. Saskatchewan (1984), 11 D.L.R. (4th) 374 (Sask. Q.B.).

¹³⁹ See notes 109-111 above and the text accompanying them.

¹⁴⁰ Compare Côté, note 23 above, at 185 (174). For discussion of the standards for justifying federal interference with aboriginal rights, see notes 113-129 above and the text accompanying them.

Twice now the Supreme Court has said, in cases where the issue had no bearing on the outcome, that provinces may restrict the use of aboriginal rights when they are able to justify the restrictions.¹⁴¹ Ordinarily, such observations might well be conclusive; the problem here is that the court has yet to reconcile them with its determination, in a situation where the issue was dispositive, that "aboriginal rights are part of the core of Indianness at the heart of s. 91(24)" and that, as a consequence, "[p]rovincial governments are prevented from legislating in relation to" them.¹⁴² If provinces simply have no independent authority to regulate the exercise of aboriginal rights,¹⁴³ it is difficult to understand how the issue of justification can even arise.¹⁴⁴ Until the Supreme Court resolves this tension within its own jurisprudence,¹⁴⁵ we cannot say what power, if any, the provinces have to control the use of aboriginal rights of self-government.¹⁴⁶

¹⁴¹ Côté, *ibid.* at 185 (¶74); Delgamuukw, note 12 above, at 1107 (¶160). In Côté, the Supreme Court held (at 187-189 (¶¶77-80)) that the relevant provincial law did not interfere with the aboriginal right; in Delgamuukw, the court decided (at 1063 (¶¶76-77), 1079 (¶108)) to return the claim of aboriginal title back to trial on its merits.

¹⁴² Delgamuukw, *ibid.* at 1121 (¶181), 1119 (¶178), respectively. The court held (at 1115-1123 (¶¶172-183)) that the provinces have no power to extinguish aboriginal rights because such rights "are part of the core of Indianness" and therefore subject exclusively to federal authority.

¹⁴³ See notes 131-134 above and the text accompanying them.

¹⁴⁴ See, e.g., Slattery, "Question of Trust," note 56 above, at 285; Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall L.J. 61 at 75-76, n.44; Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 ("McNeil, 'Rethinking Jurisdiction'") esp. at 449-450, 463-464.

¹⁴⁵ "With all due respect, it seems to me that in Delgamuukw [Lamer C.J.C. did not really have his own views on exclusive federal jurisdiction in mind when he wrote the part of his judgment dealing with infringement of Aboriginal title": McNeil, "Rethinking Jurisdiction," *ibid.* at 453.

¹⁴⁶ Some have suggested s. 88 of the Indian Act as a solution. Section 88 incorporates by reference, and, subject to some restrictions, applies as federal law to Indians in a province, provincial laws of general application that, though valid, cannot apply to them of their own force: see, e.g., Dick 85, note 89 above, at 326-327; Delgamuukw, note 12 above, at 1121-1122 (¶182). Although s. 88 expressly protects treaty rights and provisions from the effects of the provincial laws it incorporates, it confers no special protection on aboriginal rights: Kruger & Manuel, note 20 above, at 114-115. (But see Badger v. The Queen, [1996] 1 S.C.R. 771 at 809 (¶69) which, in passing, suggests the contrary.) The argument is that provincial laws whose effect is to limit the exercise of aboriginal rights will apply to such rights, not of their own force, but pursuant to s. 88,

III. SUMMARY AND CONCLUSION

Part I of this chapter suggested that existing law already gives Canadian courts the capacity to protect the mainstream legal order's most fundamental arrangements and values from risks brought about by departures from the ancestral traditions and customs whose contemporary versions define inherent right communities. Collectivities whose existence as such does not somehow derive from shared ancestral governance customs and relationships will not even qualify as bearers of aboriginal rights of self-government; they are just subject to the general law. And particular governance measures of inherent right governments will not qualify as protected uses of self-government rights unless, at a minimum, they are compatible with those defining customs, traditions and relationships: with the community's own fundamental values. If constitutional accreditation of self-government rights is going to pose uncontainable threats to our fundamental arrangements or values, such threats, it appears, can arise only from genuine differences between aboriginal peoples' defining values and our own.¹⁴⁷

so long as those limits themselves can be justified in accordance with the standards developed pursuant to s. 35(1) of the Constitution Act, 1982: see, e.g., R. v. Alphonse, [1993] 5 W.W.R. 401 (B.C.C.A.) at 421-423 (¶¶62-65); R. v. Dick, [1993] 5 W.W.R. 446 (B.C.C.A.) at 453 (¶¶17-18); R. v. Sundown, [1997] 8 W.W.R. 379 (Sask. C.A.) at 400 (¶61).

Among several problems with this view, two deserve mention here. First, s. 88 itself is limited in range. It applies incorporated laws only to "Indians" as defined within the Indian Act, not, for example, to the Inuit: compare Re Eskimos, [1939] S.C.R. 104 with Indian Act, s. 4(1). It incorporates only provincial laws "of general application," not, for example, laws that apply differentially within provincial territory: see, e.g., Kruger & Manuel, at 110. And the most common view is that s. 88 does not incorporate and apply provincial measures that govern the occupation, use or disposition of land: see, e.g., McNell, "Rethinking Jurisdiction," ibid. at 458-462 and the sources cited there. So there will be situations in which the relevant provincial measures cannot apply, for these technical reasons, pursuant to s. 88.

Second, this approach overlooks the fact that aboriginal rights infringements that result from incorporation of provincial law are possible exclusively because of s. 88: the provincial measures themselves, on this view, are powerless to restrict the use of such rights. If this is so, however, then s. 88 itself is what stands in need of justification under s. 35 of the Constitution Act, 1982. And because s. 88 has legislative objectives of its own, distinct from those of the various provincial measures it incorporates, it cannot be the case that it will be justified just whenever those incorporated measures themselves would be. My own view, which I cannot pause to substantiate here, is that s. 88 itself is not a justified means of restricting the exercise of aboriginal rights.

¹⁴⁷ See notes 76-78 above and the text accompanying them.

In Part II, we examined the capacity of Canada's (other) two orders of government, provincial and federal, to manage the risks that remain through external incentives and constraints. Let's review the reasons we have for reassurance.

First, any risks self-government rights may pose to our defining values will come, at least initially, from what inherent right communities choose to do with those rights, not from what they fail to do with them. Federal and provincial laws that now govern such communities will continue to do so, at least unless and until they interfere with specific results of, or efforts at, community governance. Accreditation poses no meaningful risk of a legal vacuum.¹⁴⁸

Second, provincial and federal governments all may encourage inherent right communities to comply voluntarily with specified mainstream standards by offering new financial incentives conditional on such compliance, subject only to resource availability and to federal paramountcy in case of conflict between provincial and federal incentive schemes.¹⁴⁹

Finally, the federal government, which possesses broad and exclusive mainstream authority to make legal arrangements for Indians and Indian lands,¹⁵⁰ almost certainly has enough power to avert or to neutralize any genuine threat to essential mainstream values that might result from aboriginal governance measures or practice. It will have to justify any measures that operate to restrain the use, or to override specific effects, of self-government rights; the courts, however, already have a doctrinal mandate to be tolerant -- especially in situations of genuine danger or urgency -- of limits the federal government imposes in good faith on such

¹⁴⁸ See notes 102-107, 135 above and the text accompanying them.

¹⁴⁹ See notes 111-112, 138 above and the text accompanying them. But see, again, the potential restrictions noted in note 112 above.

¹⁵⁰ See notes 131-133 above and the text accompanying them.

rights, because of their unusual substantive scope.¹⁵¹ There is good reason to suppose that federal authorities, if they proceed with sufficient forethought, care and sensitivity to aboriginal interests and perspectives, will be able to justify almost any new measures they implement to ensure protection of our most basic values.

The existing Canadian constitutional framework, in other words, already gives mainstream governments substantial capacity to contain and manage, in advance or from time to time, any genuine risks that inherent right communities will use their self-government rights in ways, or for purposes, that compromise or threaten the foundations of the mainstream legal order.

The protection such capacity affords, though, is far from complete. Conditional financial incentives are effective only when those offering them have sufficient resources to make the package attractive; competing claims on scarce resources may sometimes make it impracticable to offer them. Provinces have no authority to make it their business to regulate the exercise of any aboriginal rights, including rights of self-government. Any power they have to control the exercise of such rights derives from the incidental effects of measures enacted for other purposes; there is good reason to doubt their power to do so even then.¹⁵² And the fact that the federal government may restrain, in ways it can justify, particular excesses in the use of self-government rights does not ensure that it will choose to do so in any given instance, or that it will do so successfully. It is easy enough to imagine some self-government crisis arising in circumstances where no federal measure exists to address it. Federal authorities may believe they have compelling political or policy reasons for not responding in some such situations, or they may simply lack the resources to respond in a timely way. It is equally possible that they will sometimes have proceeded in ways they cannot justify. No matter how urgent the situation or how broad the self-government right, there will always be some

¹⁵¹ See notes 113-129 above and the text accompanying them.

¹⁵² See notes 131-134, 139-146 above and the text accompanying them.

minimum standard of care for them to meet if they are to justify their measure or activity. Most existing federal statutes, for instance (including, I suspect, most Criminal Code prohibitions), came into force without any prior deliberation or consultation about their potential impacts on communities with aboriginal rights. External constraints are of no use in protecting essential values unless they are in place and are enforceable when it matters.

If all this is so, there is, I think, much less reason than some have suggested to be apprehensive about the consequences of providing the constitution's protection to inherent rights of aboriginal self-government. Existing doctrine addresses and reduces much of the risk to fundamental mainstream institutions and values. At least some meaningful risk, however, remains. Inherent right communities, acting authoritatively from within their own defining traditions, may sometimes adopt procedures, make decisions or take other steps that seem repugnant to the foundations of the mainstream legal order, in circumstances where there is no enforceable statutory restriction upon them. Providing constitutional protection to self-government rights without a satisfactory way of addressing such predicaments individually, as they arise, would still, as Ian Binnie had suggested in 1990, "leave the courts with inadequate mechanisms to regulate the overlapping interests of communities occupying contiguous territory."¹⁵³ Faced with that prospect, Canadian courts, as I argued in Chapter 1, are most unlikely to take responsibility for giving such rights constitutional protection.¹⁵⁴

The next two chapters consider two different ways of managing, case by case, that residual concern. Chapter 3 appraises the popular view that inherent right communities are, and ought to be, subject to the Charter of Rights. Chapter 4 articulates an alternative approach that I think works better.

¹⁵³ See W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 *Queen's L.J.* 217 at 218, quoted at greater length in Chapter 1 at note 75. See also ibid. at 225, 234.

¹⁵⁴ See Chapter 1, notes 71-77, 88 and the text accompanying them.

CHAPTER THREE: WHAT ABOUT THE CHARTER?

When Canadians reflect on the consequences of aboriginal difference, on the prospect of constitutionally protected rights of self-government, and on the impact such rights might have on mainstream practice, values and arrangements, their first thoughts, very often, are about the Canadian Charter of Rights and Freedoms.¹ According to a substantial body of informed Canadian public opinion, constitutional accreditation of inherent self-government rights is acceptable, if at all, only if aboriginal governments exercising such rights are subject to the discipline of the Charter. This is the view, for example, of widely read journalists,² of recognized scholars in Canadian law³ and politics,⁴ and of such diverse and influential organizations as Canada's Royal Commission on the Economic Union⁵ and the Native

¹ Canadian Charter of Rights and Freedoms ("Charter of Rights," or just "Charter"), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11 ("Constitution Act, 1982").

² See, e.g., William Johnson, "Native Self-government: Let's Pay Attention" The [Montreal] Gazette (12 May 1992) B3; William Johnson, "Why Native Leaders Don't Want Charter of Rights in Their Government" The [Montreal] Gazette (10 October 1992) B5; "Native Groups Need Strategy to Achieve Self-government" Calgary Herald (26 May 1994) A5.

³ See, e.g., Bryan Schwartz, First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal: Institute for Research on Public Policy, 1986) ("Schwartz, Second Thoughts") at 394-396. But see also Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall L.J. 61 ("McNeil, 'Aboriginal Governments'").

⁴ See, e.g., Roger Gibbins & J. Rick Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada" in Alan Cairns & Cynthia Williams, eds., The Politics of Gender, Ethnicity and Language in Canada (Toronto: University of Toronto Press, 1986) 171 at 218-219; Roger Gibbins, "Citizenship, Political and Intergovernmental Problems with Indian Self-Government" in J. Rick Ponting, ed., Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland & Stewart, 1986) 369 ("Gibbins, 'Problems'") at 374-375; Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 Const. Forum 110 at 115.

⁵ See Report of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 3 (Ottawa: Minister of Supply and Services, 1985) ("3 Macdonald Report") at 371.

Women's Association of Canada⁶ and its affiliates.⁷ Former Chief Justice Brian Dickson, co-author, while Chief Justice, of the Supreme Court's decision in Sparrow,⁸ said in 1992 that explicit constitutional entrenchment of self-government rights would be "chaotic" and a "disaster" unless aboriginal governments were subject, at a minimum, to the Charter.⁹ The Charlottetown Accord would have included specific provision for the Charter's application to such governments exercising such rights.¹⁰ And current federal policy, which recognizes the existence of inherent self-government rights, requires that all agreements implementing such rights provide for the Charter's application to participating aboriginal governments.¹¹

One task of this chapter is to appraise this popular and widely-held view from within the normative framework developed in Chapter 1 and summarized at the very beginning of

⁶ See, e.g., Susan Delacourt, "Natives Divided Over Charter" [Toronto] Globe & Mail (14 March 1992) A4; Peter O'Neil, "Native Women Push for Human Rights" Vancouver Sun (14 March 1992) A3; John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics" (1994) 43 U.N.B.L.J. 19 ("Borrows, 'Equality'") at 41-46.

⁷ See, e.g., Ruth Teichroeb, "Democracy on the Reserve: Limits Sought on Powers of Chiefs" Winnipeg Free Press (6 April 1992) B13; "Native Fights for Charter" Calgary Herald (23 April 1992) A12; Michele Rouleau, "Proposal for Native Self-government Could Deny Fundamental Human Rights to Women" The [Montreal] Gazette (23 October p. B3; Karina Byrne, "Indian Women Want Protection" Winnipeg Free Press (27 March 1994) A3.

⁸ Sparrow v. The Queen, [1990] 1 S.C.R. 1075 ("Sparrow"), the first Supreme Court of Canada decision to consider s. 35(1) of the Constitution Act, 1982, ensured that that provision would give meaningful constitutional protection to aboriginal rights.

⁹ See Joan Bryden, "Native Demand Confusing: Tough Questions Surround Meaning of Indian Self-rule" Calgary Herald (21 March 1992) A5; Ted Byfield, "Native Self-government Goes Beyond What Canadians Think" Financial Post (21-23 March 1992) S3.

¹⁰ See Canada, Consensus Report on the Constitution: Charlottetown: Draft Legal Text (9 October 1992) ("Draft Legal Text"), ss. 26 (amending s. 32(1) of the Charter to include aboriginal legislative bodies and governments) and 27 (creating a new s. 33.1, which would have given aboriginal governments "notwithstanding" privileges).

¹¹ See Canada, Department of Indian Affairs and Northern Development, Federal Policy Guide: Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (Ottawa: Minister of Public Works and Government Services Canada, 1995) ("Federal Policy Guide") at 4. See also "Charter Covers Natives, Irwin Says" Vancouver Sun (6 May 1994) A4; Joan Bryden, "Charter Will Apply to Natives, Rock Says" Vancouver Sun (13 May 1994) A9; Susan Delacourt, "Natives Offered Limited Powers" [Toronto] Globe & Mail (11 August 1995) A1 at A6; Jim Bronskill, "Liberals Wavered on Promise: Native Self-government Memorandum" Calgary Herald (6 May 1996) A8.

Chapter 2:¹² to examine, that is, whether the Charter, if it applied to inherent right governments exercising existing aboriginal rights of self-government, would assure our courts of the means to protect the coherence and the integrity of the mainstream legal order, while keeping to a minimum the mainstream order's interference with the integrity of the evolving ancestral governance arrangements that the aboriginal right exists to preserve and protect.

From a legal standpoint, however, the prior question is whether, in the absence of explicit constitutional amendment, the Charter, as written, would (or could) govern the exercise of such rights. If the Charter turns out to be unavailable for this purpose, then any normative virtues it has will be of little comfort or assistance. The Royal Commission on Aboriginal Peoples¹³ and such eminent constitutional scholars as Brian Slattery,¹⁴ Peter Hogg and Mary Ellen Turpel¹⁵ all have argued recently that the Charter would apply to inherent right governments.¹⁶ It makes sense to begin with this issue, and those arguments.

I. DOES THE CHARTER APPLY?

A. Background and Overview

Discussion of the Charter's reach begins with section 32(1) of the Charter. According to

¹² See Chapter 2, notes 1-3 and the text accompanying them.

¹³ See Canada, Report of the Royal Commission on Aboriginal Peoples, vol. 2 (Ottawa: Minister of Supply and Services, 1996 ("2 RCAP Final Report") at 168, 226-236; Canada, Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Minister of Supply and Services, 1996) ("RCAP, Bridging") esp. at 257-264; Canada, Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution (Ottawa: Minister of Supply and Services, 1993) ("RCAP, Partners") at 39-41.

¹⁴ Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 ("Slattery, 'Question of Trust'") at 286-287.

¹⁵ Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187 at 199, 213-215.

¹⁶ For a contrary view, see McNeil, "Aboriginal Governments," note 3 above.

section 32(1),¹⁷ the Charter applies to federal, provincial and territorial¹⁸ legislation and government action generally.¹⁹ There is every reason to suppose that aboriginal individuals are entitled to the Charter's protection, on essentially the same terms²⁰ as anyone else, in

¹⁷ Section 32(1) reads as follows:

32.(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

¹⁸ References in the Charter to provinces and provincial legislatures are understood to include reference to the two territories and their legislatures: see Charter, s. 30.

¹⁹ So far, the Supreme Court of Canada has identified only two exceptions to this general proposition. Section 15 of the Charter does not operate to restrict the exercise of the provinces' exclusive legislative authority, conferred by s. 93 of the Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) ("Constitution Act, 1867") to make provision for separate and dissentient schools (see Reference re Bill 30, An Act to Amend the Education Act (Ontario), [1987] 1 S.C.R. 1148 ("Bill 30 Reference"); Adler v. The Queen in right of Ontario, [1996] 3 S.C.R. 609 ("Adler")), and nothing in the Charter can restrict the exercise by federal or provincial legislatures of their inherent privilege, implicit in the preamble to the Constitution Act, 1982, of taking measures necessary to control their own internal procedures (see Donahoe v. Canadian Broadcasting Corporation, [1993] 1 S.C.R. 319 ("Donahoe")). In each case, the application of the Charter has been constrained "on the principle that one part of the Constitution cannot abrogate another part of the Constitution" (Donahoe, per McLachlin J. at 390). See also note 20 below.

²⁰ This qualification is meant to acknowledge that there may be a third, and more relevant, constraint on the Charter's application, comparable to those mentioned above at note 19. Section 91(24) of the Constitution Act, 1867 confers exclusive authority on the federal government to make laws in relation to "Indians, and Lands reserved for the Indians." In A.G. Canada v. Canard, [1976] 1 S.C.R. 170, a pre-Charter case about the Canadian Bill of Rights, R.S.C. 1970, Appendix III, the Supreme Court of Canada said (at 187) that s. 91(24) "necessarily contemplates legislation respecting the status and rights of a particular class of persons. If the words 'equality before the law' in s. 1(b) of the Bill of Rights were to be construed as precluding legislation of this kind it would prevent Parliament from exercising the power entrusted to it by s. 91(24)." Left to its own devices, s. 15's much more robust equality rights guarantee could hardly fail to have the same effect. In both the Bill 30 Reference, ibid. and Donahoe, ibid., however, the Supreme Court concluded that Charter provisions cannot operate "to diminish or abrogate the very power which the Constitution conferred," in this case, on the federal government (Donahoe, at 392). Courts may well be tempted, therefore, to conclude that section 91(24), like section 93, of the Constitution Act, 1867, operates free of section 15 constraints. See, e.g., R. v. Campbell (1996), 112 C.C.C. (3d) 107 (Man. C.A.) ("Campbell") at 110-113. Compare Peter W. Hogg, Constitutional Law of Canada, 4th ed., abridged (Toronto: Carswell, 1997) ("Hogg, Constitutional Law") at 563. In Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs), [1997] 3 C.N.L.R. 21 ("Batchewana"), however, the Federal Court of Appeal

their dealings with federal, provincial and territorial governments.²¹ In two kinds of circumstances, however, the Charter also applies to other statutory entities exercising powers conferred upon them by federal, provincial or territorial legislation.²² La Forest J., in Eldridge, identifies these two kinds of circumstances.

First, it may be determined that the entity is itself 'government' for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged Charter breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as 'government' within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the Charter, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as 'private'.²³

held that s. 77(1) of the federal Indian Act, R.S.C. 1985, c. I-5 ("Indian Act") contravened s. 15 of the Charter by distinguishing invidiously between resident and non-resident members of the Batchewana Band.

Some have argued that s. 91(24), considered in light of s. 15, "does not authorize legislative discrimination which harms Indians, only that which is preferential to them": see, e.g., Alan Pratt, "Federalism in the Era of Aboriginal Self-Government" in David C. Hawkes, ed., Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles (Ottawa: Carleton University Press, 1989) ("Government Responsibility") 19 at 41 (emphasis in original); David C. Hawkes & Allan M. Maslove, "Fiscal Arrangements for Aboriginal Self-Government" in Government Responsibility, 93 at 98-99. I see little merit in this argument. It is the specificity and exclusivity of the federal power under s. 91(24) that will determine whether its use is subject to s. 15 of the Charter, not whether the federal government happens to use that power in Indians' favor or to their detriment. This is true in U.S. law, as well: see U.S. v. Antelope, 430 U.S. 641, 97 S.Ct. 1395 (1977).

²¹ See, e.g., 2 RCAP Final Report, note 13 above, at 226; McNeil, "Aboriginal Governments," note 3 above, at 62-63, and the sources cited there.

²² This is so because

[a]ction taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority:

Hogg, Constitutional Law, note 20 above, at 668, quoted with approval (from earlier editions) in Eldridge v. A.G.B.C., [1997] 3 S.C.R. 624 ("Eldridge") at 644 (¶21) and Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038 ("Slaight Communications") at 1078-1079.

²³ Eldridge, ibid. at 661-662 (¶44).

Statutory entities will qualify as "governmental," in other words, where the powers conferred upon them are "inherently governmental in nature"²⁴ or where their activities are subject to the "routine or regular" (not merely the "ultimate or extraordinary") control of a federal, provincial or territorial government.²⁵ The first of these prescriptions probably means that the Charter governs Indian Act band councils in the exercise of the self-government powers that Act confers on them, because band councils' bylaws and other decisions are, within their territorial scope, binding on the public generally.²⁶ It makes sense to assume, as well, that

²⁴ See, e.g., Slaight Communications, note 22 above, at 1077-1079; Eldridge, *ibid.* at 659-660 (¶42); McKinney v. University of Guelph, [1990] 3 S.C.R. 229 ("McKinney") at 270. Compare Ramsden v. City of Peterborough, [1993] 2 S.C.R. 1084, where the Supreme Court applied the Charter to a municipality and its bylaws without reference to s. 32. It is not enough that a statutory entity exist to provide a public service or to serve some other public purpose, or that it be subject to judicial review: McKinney, at 267-270; Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483 ("Stoffman") at 511-512; Eldridge, at 658-659 (¶41).

²⁵ Stoffman, *ibid.*, at 513-514; Harrison v. U.B.C., [1990] 3 S.C.R. 451 ("Harrison") at 463; Douglas College v. Douglas/Kwantlen Faculty Association, [1990] 3 S.C.R. 570 ("Douglas College") at 584-585; Lavigne v. O.P.S.E.U., [1991] 2 S.C.R. 211 ("Lavigne") at 311-312; Eldridge, *ibid.* at 657 (¶39). It is not necessarily enough that the entity is heavily dependent on funding from the government (McKinney, *ibid.* at 271-275; Stoffman, at 512-513; Harrison, at 463), that the government appoints a majority of the members of the entity's board of directors or governors (Stoffman, at 514-515; Harrison, at 463), that a minister of the Crown must approve all regulations the entity makes (Stoffman, at 507-511), or that the government has authority, in extraordinary circumstances, to assume direct control of the entity or of the services it provides (Stoffman, at 512-514).

²⁶ See, e.g., 2 RCAP Final Report, note 13 above, at 226; Bruce Wildsmith, Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 51. For cases in which the courts have applied the Charter to bylaws enacted pursuant to the Indian Act, see, e.g., Campbell, note 20 above; Six Nations of the Grand River Band v. Henderson, [1997] 1 C.N.L.R. 202 (Ont. (G.D.)); R. v. Laforme, [1996] 1 C.N.L.R. 193 (Ont. (Prov. D.)); Nakochee v. Linklater (29 April 1993), (Ont. (G.D.)) [unreported]. In R. v. Hatchard, [1993] 1 C.N.L.R. 96 (Ont. (G.D.)) and Crow v. Blood Band (1996), 107 F.T.R. 270 (F.C.T.D.), the courts assumed without deciding that the Charter applied to Indian Act band councils.

Not everyone agrees that Indian Act band councils are subject to the Charter. Kent McNeil, for example, has argued that band councils "may not be within the scope of section 32(1)" of the Charter, because, in his view, they "are not mere delegates of Parliament": see McNeil, "Aboriginal Governments," note 3 above, at 88, and generally *ibid.* at 79-90. McNeil's conclusion that band councils "are not mere delegates of Parliament" appears to be based principally on the fact that s. 74 of the Indian Act contemplates selection of band councillors in accordance with band custom, and on authority that appears to acknowledge that such councils have some power, not expressly conferred by Parliament in the Indian Act, to make internal rules articulating the customary selection procedures. This view, though ingenious, does not take

the Charter will govern the use of any additional self-government powers that the federal government may confer on such governments by treaty or agreement.²⁷ The cases suggest that the Charter's application will depend, other things equal, on the nature of the powers conferred and on the nature of the statutory entity on which they are conferred, not on the mechanism used to confer or delegate those powers.

Second [La Forest]. continues], an entity may be found to attract Charter scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly 'governmental' in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities.²⁸

Even in this second kind of circumstance, however,

while it is a private actor that actually implements the program, it is govern-

account of much of the Supreme Court of Canada jurisprudence on s. 32 of the Charter and requires great dexterity to reconcile with the bulk of the existing case law on band councils and the Indian Act, including Public Service Alliance of Canada v. St. Regis Indian Band, [1982] 2 S.C.R. 72. I agree with McNeil, though, that powers conferred, and restrictions imposed, on band councils by the Indian Act do not necessarily preclude or constrain the exercise of inherent powers that aboriginal communities possess in other capacities.

A separate, and more interesting, suggestion is the extent to which s. 25 of the Charter may insulate band councils from Charter review: see Wildsmith, ibid., esp. at 38; McNeil, "Aboriginal Governments," at 89. It will do so only if, and to the extent that, the statutory powers the Indian Act confers on band councils qualify as "other rights or freedoms of the aboriginal peoples of Canada" for purposes of s. 25. In Batchewana, note 20 above, the Federal Court of Appeal observed (at 32) that "[s]ome Indian Act provisions enacted to assist in the accommodation and implementation of [aboriginal difference] may well be suitable for s.25 protection," but that the Act's provisions for democratic elections, which were not enacted for that purpose, are not among them. For further discussion of s. 25 generally, see notes 94, 194-235 below and the text accompanying them.

²⁷ See, e.g., Schwartz, Second Thoughts, note 3 above, at 391-392; Dan Russell & Jonathan Rudin, Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past (Toronto: Ontario Native Council on Justice, 1992?) at 157-159. I argue below that there is an important difference in this respect between agreements or treaties that confer self-government rights and those that confirm or acknowledge that such rights already exist independently. See notes 70-80 below and the text accompanying them.

²⁸ Eldridge, note 22 above, at 661-662 (¶44). See generally, ibid. at 654-666 (¶¶35-52) and the sources cited there.

ment that retains responsibility for it. . . . Just as governments are not permitted to escape Charter scrutiny by entering into commercial contracts or other 'private' arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.²⁹

It now seems clear, therefore, that the federal government itself will remain responsible for any Charter consequences that result from the exercise of self-government powers it confers on aboriginal bodies or organizations not themselves subject to the Charter.³⁰ This will be so, again, whether it confers such powers by statute,³¹ contract, treaty or agreement,³² and even where it confers such powers exclusively at the behest of the aboriginal party.³³

Briefly, then, the Charter applies generally to the federal, provincial and territorial governments and to certain statutory entities on which they confer certain kinds of authority. Other entities may also sometimes attract Charter scrutiny, but only insofar as they are engaged in the implementation of government policy. These arrangements probably mean that the Charter will govern the exercise by aboriginal governments of most, if not all, self-government powers that originate from the federal, provincial or territorial governments.

B. The Problem

Our concern here, though, is not with the Charter's application to self-government powers

²⁹ Ibid. at 659-660 (¶42). As a result, although private entities, not the B.C. government itself, were primarily responsible, in Eldridge, for implementing the government's policy on health insurance, the Supreme Court directed the Charter remedy at the government, not at the private entities. See ibid. at 691-692 (¶¶95-96).

³⁰ See Wildsmith, note 26 above, at 51-52; Russell & Rudin, note 27 above, at 157-159. This may well explain, in part, why it is federal policy to require that all self-government agreements negotiated with aboriginal communities contain provisions subjecting signatory aboriginal governments to the Charter. See Federal Policy Guide, note 11 above, at 4.

³¹ Eldridge, note 22 above, at 654-666 (¶¶35-52); Russell & Rudin, ibid. at 158.

³² See, e.g., McKinney, note 24 above, at 277; Douglas College, note 25 above, at 585-586; Lavigne, note 25 above, at 312-314; Russell & Rudin, ibid. at 159.

³³ See Lavigne, note 25 above, esp. at 313.

that originate from federal, provincial or territorial governments but with aboriginal communities exercising inherent self-government rights or powers. To say that a right is "inherent," as we saw in Chapter 2, is just to say that it does not owe its existence, as "derivative" or "contingent" rights do, to federal, provincial, territorial -- or, before that, Imperial -- authority: that it existed before and apart from those sources of mainstream power.³⁴ Our interest is in inherent rights for two compelling reasons.

First, the self-government rights that matter most to aboriginal peoples are those that they themselves represent as inherent. Derivative rights of self-government are, by nature, dependent on the largesse of settler governments; as such, they are less secure, because they are always at risk of withdrawal when the interests of settler governments require it. More important, representation of their self-government rights as derivative would falsify aboriginal peoples' own best sense of the nature and source of such rights: in their relationships with, and their responsibilities to, the Creator.³⁵ It is inherent self-government rights for which they seek protection within the mainstream constitutional order, so inherent self-government rights are the ones we ought to be discussing.

³⁴ See Chapter 2, note 56 and the text accompanying it.

³⁵ This paragraph too reflects my own best sense of things from the outside, as a non-aboriginal person. Aboriginal peoples themselves are much better placed to report their own understandings. For sources that support the approximations in this paragraph, see, e.g., Assembly of First Nations, First Nations Circle on the Constitution, To the Source (1992) esp. at 16-20; Colin H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada" in N. Dyck & J.B. Waldram, eds., Anthropology, Public Policy, and Native Peoples in Canada (Montreal: McGill-Queen's University Press, 1993) 311 at 318; 2 RCAP Final Report, note 13 above, at 108-113, 139-141. After acknowledging the wide diversity of viewpoints among aboriginal peoples on governance issues, the Royal Commission described the "common core" of aboriginal visions (ibid. at 139) as follows:

Ultimately, Aboriginal people want greater control over their lives. They want freedoms from external interference. They do not want to be dependent on others. They want to realize their own visions of government. Aboriginal people affirm that they have the inherent right to determine their own future within Canada and to govern themselves under institutions of their own choice and design. No one can give them this right, they say, and no one can take it away.

Second, as Chapter 2 explained, any self-government rights that qualify for the constitution's protection as aboriginal rights will, of necessity, be inherent rights. There is simply no room within the Canadian law of aboriginal rights for rights that are derivative.³⁶

For those who would have the Charter apply to the use of inherent self-government rights, the problem should now be obvious. Although section 32 of the Charter, and the case law interpreting it, make clear provision for the Charter's application to the "legislative, executive and administrative branches"³⁷ of federal, provincial and territorial governments, it makes no provision for the Charter's application to governance powers that, by their nature, did not and could not have derived from one or more of those governments.³⁸ Their challenge now is to find some plausible legal basis on which to apply the Charter, despite that fact. The next section considers the arguments offered so far in response to that challenge.

C. The Arguments in Favor of the Charter's Application

One finds three distinct lines of argument offered to support the view that the Charter applies, despite section 32's phrasing, to the exercise of existing aboriginal rights of self-government. Each is independent enough to deserve individual consideration.

1. "Nonexhaustiveness" Arguments

The simplest and most obvious response to this predicament is that section 32(1) says only that the Charter applies to federal and provincial legislatures and governments; it nowhere says that the Charter, as such, has no other application. On this view, it is not necessary, despite the interpretive maxim expressio unius est exclusio alterius (or, more properly here, expressum

³⁶ See Chapter 2, notes 55-58 and the text accompanying them.

³⁷ This description, in this context, originated in R.W.D.S.U. Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 ("Dolphin Delivery") at 598.

³⁸ See notes 19-33 above and the text accompanying them.

facit cessare tacitum), to infer, from the Charter's mention of just these specific entities, that the Charter applies to them alone; there may well have been other drafting reasons for making explicit the Charter's application to these legislatures and governments.³⁹ If this is so, section 32(1) is no impediment to the conclusion that the Charter applies to other persons and entities, including aboriginal governments exercising inherent powers, because section 32(1) does not purport to prescribe exhaustively the Charter's application.

This approach had a certain vogue in the mid-1980s among those who urged the universality of the Charter's application: not just to self-governing aboriginal communities, but to public and private activity generally.⁴⁰ The short answer to it, whatever its merits,⁴¹ is that Supreme Court of Canada jurisprudence now precludes it. In the court's first decision on the Charter's application, Dolphin Delivery, McIntyre J., writing for a unanimous court, said:

In my view, s. 32 of the Charter, specifically dealing with the question of Charter application, is conclusive on this issue. . . . Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. . . .

It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government.⁴²

³⁹ Dale Gibson has suggested, for instance, that s. 32(1) was a prudent precaution to ensure the Charter's application to federal, provincial and territorial legislatures in light of the well-entrenched principle of legislative supremacy, and to ensure its application to federal, provincial and territorial governments in light of the common law understanding that no legislation can bind the Crown unless it does so expressly or by necessary implication. See Dale Gibson, The Law of the Charter: General Principles (Toronto: Carswell, 1986) at 111-113.

⁴⁰ See generally ibid., at 110-119; Dale Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man. L.J. 213; Brian Slattery, "Charter of Rights and Freedoms -- Does It Bind Private Persons?" (1985) 63 Can. Bar Rev. 148. Compare David Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183.

⁴¹ For criticisms of this approach, see Schwartz, Second Thoughts, note 3 above, esp. at 380-384; McKinney, note 24 above, at 334-335, Wilson J. (dissenting on other grounds).

⁴² Dolphin Delivery, note 37 above, at 597-598.

In McKinney, the court reaffirmed this conclusion expressly;⁴³ it has continued, in almost every majority judgment on Charter application since, to link the application inquiry explicitly to section 32.⁴⁴ Given this phalanx of precedent, the option of basing the Charter's application on anything other than section 32 seems clearly to be no longer available.

Despite this development, some still rely on this general approach to support their view that the Charter governs the exercise of inherent self-government rights. In doing so, they rely on a narrower version of the nonexhaustiveness thesis. This variant acknowledges that section 32 is indeed conclusive on the issue of Charter application, but urges us to read it as an indication of the kinds of entities -- governments -- to which the Charter is meant to apply, not as an exhaustive list of the entities that the Charter governs. Inherent right governments, on this view, are just as "governmental" as the entities designated in section 32, so one ought to infer that the Charter also applies to them. According to Brian Slattery, for example,

[i]t is possible to argue that section 32(1) of the Charter, which states that the Charter applies to the Federal and Provincial legislatures and governments, exempts Aboriginal governments from any form of Charter review by failing to mention them. However, the better view is that the section does not provide an exhaustive list of governments subject to the Charter.⁴⁵

This has been the consistent position of the Royal Commission on Aboriginal Peoples. Its early study Partners in Confederation sets out most fully the legal basis for this argument:

⁴³ See McKinney, note 24 above, at 261, ("The application of the Charter is set forth in s. 32(1) . . ."), 263 ("the Charter was by s. 32 limited in its application to Parliament and the legislatures, and to the executive and administrative branches of government"), La Forest J. (for the majority), at 320-342, Wilson J. (dissenting on other grounds).

⁴⁴ See Stoffman, note 24 above, at 505, 507-508, 510, 516; Douglas College, note 25 above, at 584-585; Lavigne, note 25 above, at 308; Donahoe, note 19 above, at 370; Young v. Young, [1993] 4 S.C.R. 3 ("Young"), at 90, L'Heureux-Dubé J. (for the majority on this issue, dissented in the result); D.P. v. C.S., [1993] 4 S.C.R. 141 at 181; Eldridge, note 22 above, at 654-656 (¶¶35-37), 660-662 (¶¶43-44). The one exception is Harrison, note 25 above, where the majority (at 463-464, La Forest J.) simply adopted the reasons it had given contemporaneously in McKinney, *ibid.* and in Stoffman.

⁴⁵ Slattery, "Question of Trust," note 14 above, at 286, n. 82.

While Aboriginal governments are not specifically mentioned in section 32(1) of the Charter, which lists governmental authorities to which the Charter applies, this list does not seem to be comprehensive. In the case of . . . Dolphin Delivery . . . , the Supreme Court of Canada held that the Charter does not apply in litigation between private parties and that section 32 was conclusive on the point; see McIntyre J. at p. 597. Justice McIntyre went on to state at p. 598: 'It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government.' This holding suggests that the purpose of section 32 is to draw the dividing line between private and governmental actors, rather than to list in a comprehensive fashion the governmental bodies to which the Charter applies.⁴⁶

I find this argument, and this approach, unpersuasive for several reasons. First, it is not the approach that makes the best sense of the text of section 32(1). Section 32(1) does not say -- as it surely could have said, and more briefly -- that the Charter is to apply to "legislative and government action" generically; instead, its drafters took the trouble to itemize with some care which legislatures and governments were to be subject to the Charter and the matters in respect of which the Charter was to govern them. Section 30 takes additional care to provide for the inclusion of the two territories and their legislatures. Such fastidiousness in drafting would be unusual, other things equal, if its sole purpose were to offer examples of the kinds

⁴⁶ RCAP, Partners, note 13 above, at 65, n. 139 (supporting text at 39). Compare RCAP, Bridging, note 13 above, at 263:

section 32(1), rather than exhaustively cataloguing the governments covered by the Charter, can be seen as standing for the broader principle that the Charter applies to the acts of governments rather than to the acts of private individuals. According to this view, which the Commission shares, the fact that section 32 does not state that it applies to Aboriginal governments is not necessarily determinative of the matter;

and 2 RCAP Final Report, note 13 above, at 231:

We agree that the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter. The wording of the section is not exhaustive. It allows for the possibility that government bodies not specifically named in the section are subject to the Charter's provisions.

of entities to which the Charter was meant to apply.⁴⁷ Wilson J., commenting on the reasoning in Dolphin Delivery, made a similar point:

if court orders constitute government action for purposes of s. 32(1), then, since virtually all disputes before the court end in a court order of some kind, all litigation would be subject to Charter scrutiny. McIntyre J. obviously thought that this would be a very convoluted way of making the Charter applicable to private action. Why would s. 32(1) restrict the application of the Charter to legislatures and governments if it was meant to apply to private action as well? Why not simply say so?⁴⁸

Why, one might ask with equal force, would sections 30 and 32(1) provide with such specificity for the Charter's application to federal, provincial and territorial legislatures and governments if it was meant to apply to government action generally?

Second, it is not the approach that makes the best sense of the reasoning in Dolphin Delivery. Taken on its own, the Dolphin passage that the Commission cited in Partners in Confederation might indeed support a contention that s. 32 provides for the Charter's application to "government" generally. Viewed in the context of the paragraph just preceding it, however, such a reading is difficult to sustain. Here is the relevant text of that earlier paragraph:

In my view, s. 32 of the Charter, specifically dealing with the question of Charter application, is conclusive on th[e] issue [of the Charter's application to private litigation]. . . . Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word 'government' is used in s. 32 it refers not to government in its generic sense -- meaning the whole of the governmental apparatus of the state -- but to a branch of government. The word 'government', following as it does the words 'Parliament' and 'Legislature', must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word

⁴⁷ See Schwartz, Second Thoughts, note 3 above, at 385; McNeil, "Aboriginal Governments," note 3 above, at 69.

⁴⁸ McKinney, note 24 above, at 332, Wilson J. (concurring on the issue, dissenting in the result). For the original, see Dolphin Delivery, note 37 above, at 600-601.

'government' is used in s. 32 of the Charter in the sense of the executive government of Canada and the Provinces. This is the sense in which the words 'Government of Canada' are ordinarily employed in other sections of the Constitution Act, 1867. Sections 12, 16 and 132 all refer to the Parliament and the Government of Canada as separate entities. The words 'Government of Canada', particularly where they follow a reference to the word 'Parliament', almost always refer to the executive government.⁴⁹

This passage begins by itemizing the entities to which section 32(1) makes specific reference -- the federal and provincial legislatures and governments -- then adds expressly that the word "government" in section 32(1) refers not to "government in its generic sense," but to a branch of government. It then defines the word "government" in section 32(1) specifically as "the executive government of Canada and the Provinces," and supports this definition with detailed references to usage in the Constitution Act, 1867,⁵⁰ an instrument silent about internal aboriginal government and concerned with prescribing the structure of the governments it was creating, not with expressing the nature of government generally. Viewed in this context, it seems clear that the "governments" whose "legislative, executive and administrative branches" are "the actors to whom the Charter will apply" are not just any governments, but the governments of Canada, the provinces and the territories.⁵¹

⁴⁹ Dolphin Delivery, *ibid.* at 597-598 (emphasis, except "Charter" and "Constitution Act, 1867," added).

⁵⁰ Compare McKinney, note 24 above, at 263-264, where the court, citing with approval the last half of the passage quoted in the text above at note 49, attributes particular significance to McIntyre J.'s reliance on the Constitution Act, 1867 in construing the meaning of "government" for purposes of s. 32(1).

⁵¹ It is arguable that the subsequent decisions on Charter application dilute the force of this objection, because their analysis focuses almost exclusively on the presence or absence of sufficient "government action" and rarely, if ever, pauses to say that only the actions of "s. 32" governments and their emanations trigger Charter scrutiny. (This is substantially true, for example, of Stoffman, note 24 above; Douglas College, note 25 above; Lavigne, note 25 above; Young, note 44 above; D.P., note 44 above and Eldridge, note 22 above.) The short answer here is that the court had no reason to revisit an issue it had already decided, unanimously, in Dolphin Delivery, note 37 above, in a series of cases (about the line between "government" and "private" activity) that did not raise it. Besides, other cases do apply Dolphin Delivery to restrict the range of governments to which the Charter applies. See notes 54-57 below and the text accompanying them.

Third, the Royal Commission's approach is difficult to reconcile with other acknowledged limitations that section 32 imposes on the Charter's reach. Peter Hogg has identified one such constraint. Laws enacted by pre-Confederation legislatures, and still in force pursuant to section 129 of the Constitution Act, 1867, "would be outside the scope of the Charter," despite restricting rights or freedoms that the Charter guarantees, because "s. 32 is not satisfied: there has been no action by 'the Parliament and government of Canada' or by 'the legislature and government of [a] province.'"⁵² This conclusion is consistent with the Supreme Court jurisprudence on section 32.⁵³ Unlike inherent right governments, pre-Confederation legislatures derived their authority from the same ultimate source as the legislatures and governments mentioned in section 32. If section 32 precludes the Charter's application to them, it seems unlikely that the Charter can reach inherent right governments.

It is in the cases involving the conduct of foreign officials, however, that the Supreme Court has articulated most explicitly the constraints that section 32 imposes on the Charter's application. In three extradition cases decided together in 1987,⁵⁴ each about foreign

⁵² Peter W. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Walter S. Tarnopolsky & Gérald-A. Beaudoin eds., Canadian Charter of Rights and Freedoms: Commentary (Toronto: Carswell, 1982) 1 at 7. The Charter would, in all likelihood, govern the conduct of "s. 32" governments engaged today in enforcing, or acting pursuant to, such laws. See also note 53 below.

⁵³ The Supreme Court's recent decision in Vriend v. The Queen in right of Alberta, [1998] 1 S.C.R. 493 ("Vriend"), however, raises the possibility that a contemporary legislature would face Charter liability for failing to rectify pre-Confederation arrangements whose effect was to infringe Charter rights. Vriend itself deals only with a discriminatory omission in an underinclusive statute; the court expressly stopped short of deciding whether a legislative body "could properly be subjected to a challenge under s. 15 of the Charter for failing to act at all" (*ibid.* at 533 (¶63)), let alone whether it would have an obligation to rectify laws inherited from before the province entered Confederation. And nothing in Vriend affects the conclusion that pre-Confederation legislation is not subject as such to Charter discipline.

⁵⁴ Canada v. Schmidt, [1987] 1 S.C.R. 500 ("Schmidt"); Argentina v. Mellino, [1987] 1 S.C.R. 536 ("Mellino"); United States of America v. Allard & Charette, [1987] 1 S.C.R. 564 ("Allard").

proceedings that would have infringed the Charter if they were taking place in Canada,⁵⁵ the court concluded that the relevant Charter rights had no application in the appraisal of those proceedings; they governed only the conduct of the Canadian authorities. Harrer,⁵⁶ in 1995, concerned the admissibility in a Canadian criminal case of evidence obtained by U.S. authorities in the United States in a manner that, in Canada, would have contravened the accused's right to counsel (Charter, s. 10(b)). The Supreme Court held unanimously that there was no domestic basis on which to exclude the evidence, because, in these circumstances, the Charter did not apply to the conduct of the U.S. officials.

It is, of course, hardly surprising that the court did not apply the Charter full strength -- or, in these cases, at all -- to the conduct of the foreign governments on their own territory. What makes these decisions interesting here is the reasoning the court used to reach that conclusion. It would have been easy, and unremarkable, for the court to conclude, without explicit reference to section 32, that the Charter had no application because foreign governments, acting at home, are not subject to domestic Canadian law; that, in fact, was the basis for McLachlin J.'s concurring reasons in Harrer. It was not the basis on which the majority proceeded. Instead, in each case, it anchored its reasoning in its understanding of the meaning of section 32. In each case, it held that the Charter applies exclusively to "the governments mentioned in s. 32."⁵⁷ It was, in these cases, not because foreign governments

⁵⁵ In Schmidt, note 54 above, the accused faced prosecution in the state of Ohio in respect of a transaction for which she had already been tried and acquitted in the U.S. federal courts; in Mellino and Allard, both note 54 above, the primary issue was the length of time that had elapsed before the home jurisdiction sought the fugitives' extradition to face the charges.

⁵⁶ Harrer v. The Queen, [1995] 3 S.C.R. 562 ("Harrer").

⁵⁷ See, e.g., Schmidt, note 54 above, at 518 (Charter, s. 11 has no application to domestic extradition proceedings -- even though all such proceedings involve persons "charged with an offence" -- because it "was intended to govern trials conducted by governments of this country mentioned in s. 32"), 519; Allard, note 54 above, at 571 (it is "obvious . . . that the Charter can only apply to the activities of the governments mentioned in s. 32"); Harrer, *ibid.* at 571 ("governments of Canada, the provinces [and] the territories [are] the state actors to which, by virtue of s. 32(1), the application of the Charter is confined; see . . . Dolphin Delivery"). See also Mellino, note 54 above, at 550 (involvement of "officials of the Canadian government . . . a

were involved, but because no "governments mentioned in s. 32" were implicated in their conduct, that the Charter had no application.⁵⁸ It was as if the Supreme Court, having an easy way of avoiding the issue, made a point of underscoring section 32's exhaustiveness on the subject of Charter application. These authorities make it extremely difficult to adopt the Royal Commission's interpretation of section 32.

Even if none of this were so, the most an argument based on nonexhaustiveness could establish is that section 32(1) does not preclude the Charter's application to the use of inherent rights of aboriginal self-government; it cannot suffice to establish that the Charter does indeed apply.⁵⁹ (No one has argued that section 32 provides for the Charter's application to aboriginal governments exercising inherent powers.) Even if such an argument succeeded fully, therefore, all it could do is clear a path for some other legal argument to try to establish affirmatively that the Charter indeed applies to inherent right governments. It makes sense, therefore, to consider, just in case, the other arguments now available.

2. "Ongoing Federal Involvement" Arguments

In an important recent work on self-government's implementation,⁶⁰ Peter Hogg and Mary Ellen Turpel consider the Charter's application to aboriginal governments. They acknowledge

prerequisite to the application of the Charter by virtue of s. 32: see . . . Dolphin Delivery"), and Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 ("Kindler") at 846-847, where McLachlin J., relying on these pages from Schmidt, reaches the same conclusion about the reach of s. 12 of the Charter.

⁵⁸ See especially Allard, ibid. at 571; Harrer, ibid. at 571 ("It follows that the Charter simply has no direct application to the interrogations in the United States because the governments mentioned in s. 32(1) were not implicated in these activities").

⁵⁹ The Royal Commission itself appears to have acknowledged this. See, e.g., RCAP, Bridging, note 13 above, at 263 ("the fact that section 32 does not state that it applies to Aboriginal governments is not necessarily determinative of the matter"), and 2 RCAP Final Report, note 13 above, at 231 ("The wording of [section 32] . . . allows for the possibility that government bodies not specifically named in the section are subject to the Charter's provisions") (emphasis added throughout).

⁶⁰ Hogg & Turpel, note 15 above.

there that "Section 32 does not contemplate the existence of an Aboriginal order of government" and, citing Dolphin Delivery, that the Supreme Court regards section 32 as "an exhaustive statement of the bodies that are bound by the Charter."⁶¹ They point out, as well, that the drafters of the Charlottetown Draft Legal Text thought it wise to amend section 32 to make explicit Charter's application to aboriginal governments and legislative bodies.⁶²

Even so, Hogg and Turpel conclude that "it is probable that a court would hold that Aboriginal governments are bound by the Charter." "This would be so," they explain, "where self-government institutions have been created by statute, because the Charter applies to all bodies exercising statutory powers."⁶³ This observation seems generally sound, given the discussion above of powers delegated to statutory entities,⁶⁴ but it does not engage communities exercising inherent powers. Hogg and Turpel continue, however, as follows:

Where self-government institutions have been created by an Aboriginal people and empowered by a self-government agreement, the source of the self-government powers is probably a treaty right (if the self-government agreement has treaty status) or an aboriginal right (the inherent right of self-government) or both. Even here, the self-government agreement requires the aid of a statute to make clear that the agreement is binding on third parties. The statute implementing the self-government agreement probably constitutes a sufficient involvement by the Parliament of Canada to make the Charter applicable.⁶⁵

⁶¹ Ibid. at 214.

⁶² Ibid. See Draft Legal Text, note 10 above, s. 26.

⁶³ Hogg & Turpel, note 15 above, at 214. See also ibid. at 199 ("the Canadian Charter of Rights and Freedoms would probably apply to the exercise by an Aboriginal government of its personal (as well as its territorial) jurisdiction").

⁶⁴ See notes 22-27 above and the text accompanying them. Strictly speaking, it overstates somewhat to say that the Charter applies to all bodies exercising statutory powers: see, e.g., McKinney, note 24 above (Ontario universities); Stoffman, note 24 above (B.C. public hospitals); Harrison, note 25 above (B.C. universities).

⁶⁵ Hogg & Turpel, note 15 above, at 214.

The Royal Commission on Aboriginal Peoples has endorsed these conclusions.⁶⁶

What matters most about this passage for present purposes is that it deals exclusively with self-government activity that takes place pursuant to a prior agreement between an aboriginal community and the federal government. It does not consider whether the Charter applies when such a community exercises inherent rights of self-government unilaterally, without resort to prior federal agreement or enabling legislation. (The history of the Delgamuukw⁶⁷ and Pamajewon⁶⁸ litigation demonstrates that at least some aboriginal communities are prepared to exercise self-government rights unilaterally, without prior arrangement for federal or provincial cooperation.) As a result, it does not support the conclusion that the Charter applies automatically to the unilateral exercise of such powers.⁶⁹

⁶⁶ See 2 RCAP Final Report, note 13 above, at 232.

⁶⁷ Delgamuukw v. The Queen in right of B.C., [1997] 3 S.C.R. 1010 ("Delgamuukw"), rev'g. [1993] 5 W.W.R. 97 (B.C.C.A.), aff'g. (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

⁶⁸ Pamajewon v. The Queen, [1996] 2 S.C.R. 821, aff'g. (1994), 95 C.C.C. (3d) 97 (Ont. C.A.), aff'g. [1993] 3 C.N.L.R. 209 (Ont. (Prov.D.)).

⁶⁹ One could, of course, attempt to close this circle -- though Hogg and Turpel themselves do not, at least in this article -- by arguing either that self-government rights depend for their legal efficacy on some prior federal act of implementation (an agreement or an enabling statute, for instance, or both) or that inherent self-government rights, like self-government agreements, require enabling legislation to be "binding on third parties" (see quotation above at note 65). Such arguments, if successful, would make unilateral exercise of self-government rights all but pointless, either altogether or within a substantial portion of their potential range. Their practical impact, therefore, might well be to compel communities seeking to exercise such rights to enter into enabling agreements with the federal government.

All the first of these arguments does, though, is to insist that self-government rights, as such, cannot be inherent but must be derivative. So understood, its principal impact is merely to change the subject. See notes 34-36, above and the text accompanying them. As for the second, there is, at this stage, no reason just to assume that inherent self-government rights, exercised unilaterally by those to whom they belong, cannot be effective or enforceable against third parties. These issues remain to be determined in the course of articulating the protected scope of such rights within mainstream law. In its final report, for example, the Royal Commission on Aboriginal Peoples identifies certain "core areas of jurisdiction," in which "an Aboriginal people is free to implement its inherent right of self-government by self-starting initiatives, without the need for agreements with the federal and provincial governments . . .": 2 RCAP Final Report, note 13 above, at 215; see generally ibid. at 213-225. And in the United States, the courts have recognized that Indian nations' inherent self-government powers extend to non-member third

There may very well be situations, of course, in which aboriginal communities agree to exercise their inherent self-government rights in accordance with the terms of treaties or other formal agreements they conclude with federal, and perhaps provincial, governments.⁷⁰ Where that is so, there is every reason to say, with Hogg and Turpel,⁷¹ that Charter relief will be available when conduct pursuant to such agreements results in unjustified Charter infringements; it is now well-established that the Charter governs federal and provincial government activity generally,⁷² including any arrangements such governments make with non-governmental third parties.⁷³

Even where such agreements, backed by enabling federal legislation, exist, though, there is reason to doubt the Charter's application, as such,⁷⁴ to the communities exercising inherent

parties in a wide range of circumstances: see, e.g., Williams v. Lee, 358 U.S. 217 (1959) ("Williams") (jurisdiction over contracts entered into on reservations between non-Indians and Indians); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) ("Merrion") (tribal authority to tax oil and gas production on reservation land); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (exclusive tribal regulatory authority over members' and non-members hunting and fishing activities on reservation land); Kerr-McGee Corporation v Navajo Tribe, 471 U.S. 195 (1987) (tribe may tax business activities on its land without first obtaining federal permission); Brendale v. Confederated Bands and Tribes of Yakima Indian Nation, 109 S.Ct. 2994 (1989) (tribe has some zoning authority over reservation lands owned by non-members).

⁷⁰ It is arguable, though, that federal and provincial governments would contravene a community's aboriginal rights of self-government if they made other rights or discretionary benefits to that community conditional on its agreement to restrict in particular ways the exercise of those rights. If so, such conditions might well not be enforceable. See, e.g., Nikal v. The Queen, [1996] 1 S.C.R. 1013 at 1059-1064; R. v. Bob, [1991] 2 C.N.L.R. 104 (Sask. C.A.). Compare the United States jurisprudence on "unconstitutional conditions," discussed in, e.g., Kathleen M. Sullivan, "Unconstitutional Conditions" (1989), 102 Harv. L.Rev. 1413.

⁷¹ See Hogg & Turpel, note 15 above, at 214, quoted above in the text accompanying note 65.

⁷² But see notes 19-20 above and the text accompanying them.

⁷³ See Eldridge, note 22 above, at 28-29 (144), quoted in text above between notes 23 and 24; Lavigne, note 25 above, at 311-316; Douglas College, note 25 above, at 585-586; McKinney, note 24 above, at 276-277. See generally notes 19-27 above and the text accompanying them.

⁷⁴ Self-government agreements may, of course, themselves contain terms requiring Charter compliance from participating aboriginal communities. Current federal policy requires inclusion of such terms in all such agreements, including treaties: see Federal Policy Guide, note 11 above, at 4. In such circumstances, though, it would be the agreement itself, not the constitution, that

self-government rights in accordance with them. The assumption, remember, is that the aboriginal parties to these agreements are independently constituted entities -- "self-government institutions created by an Aboriginal people,"⁷⁵ not statutory creations such as Indian Act band councils -- exercising independently constituted rights. In these circumstances, the purpose of the relevant agreements (and any enabling legislation) is not to confer self-government rights on the aboriginal parties, but to confirm the independent existence of such rights and to manage and harmonize their exercise. Nothing in the existing law on Charter application suggests that participation in such arrangements would itself be enough to bring self-governing aboriginal communities under the Charter's governance.⁷⁶ Public sector labor unions, whose representation rights are neither inherent nor constitutionally guaranteed, routinely enter collective agreements with the federal or provincial governments as employers, under the auspices of legislation that makes such agreements "binding on third parties,"⁷⁷ but no one has ever suggested that the Charter applies to them because they have done so.⁷⁸ Even creatures of legislation such as universities and public hospitals are not subject to the Charter, despite the degree of control that provincial governments are in a position, by

brought the aboriginal governments under Charter discipline. Such discipline would continue, other things equal, only while the agreement continued, and only parties to the agreement -- not, for example, individuals, whether community members or not -- could enforce the Charter discipline against the participating aboriginal governments. And there may be constitutional limits on federal (and provincial) power to impose such terms in such agreements, at least where enforcement of Charter rights would constrain the exercise of the self-government rights themselves: see note 70 above and the sources cited there.

⁷⁵ Hogg & Turpel, note 15 above, at 214, quoted above in the text at note 65.

⁷⁶ Agreements and statutory arrangements that conferred self-government powers on statutory aboriginal governments, on the other hand, probably would, again, ensure the Charter's application to such governments. See notes 26-27 above and the text accompanying them.

⁷⁷ Hogg & Turpel, note 15 above, at 214, quoted in the text above at note 65. See, e.g., McKinney, note 24 above, at 266.

⁷⁸ See, e.g., Douglas College, note 25 above, at 584-586; Lavigne, note 25 above, at 310-316. Compare Re Bhindi and B.C. Projectionists (1986), 29 D.L.R. (4th) 47 (B.C.C.A.), cited with approval in McKinney, *ibid.* at 262, 266.

agreement and by statute, to exercise over their funding and their operations.⁷⁹ If enabling legislation and legally binding agreements with federal or provincial governments are not enough to bring hospitals, universities and labor unions under the Charter's discipline, there is no good reason to suppose they would be enough, on their own, to make the Charter apply to communities exercising inherent self-government rights.⁸⁰

If, therefore, communities contemplating such agreements are not subject to the Charter already, their decision to participate in them will not make them so.⁸¹ Charter relief will be available, on the other hand, against the federal and provincial parties to such agreements because they are among the governments mentioned in section 32 of the Charter.

3. "Constitutional Balance" Arguments

The final strand of argument offered to demonstrate that the Charter applies to inherent right governments appears most clearly in the Royal Commission's report on justice issues:

. . . it would be anomalous to see the Constitution Act, 1982 recognizing, through section 35(1), the inherent right of Aboriginal self-government in other than express language, yet require the presence of express language to ensure that the Charter applies to such governments.

The tacit recognition of an Aboriginal order of government in section 35(1) leads us to take a broad view of section 32(1). If section 35(1) is interpreted as recognizing an inherent right of Aboriginal self-government, we think that section 32(1) should be read in a way that takes this recognition into account. If this were not the case, there would be a serious imbalance in the application of the Charter, one that should be avoided in the absence of explicit language to the contrary. In other words, the progressive unpacking of the broad rights referred to in section 35(1) should be achieved in a manner that takes into

⁷⁹ See, e.g., McKinney, *ibid.* at 261-276; Stoffman, note 24 above, at 505-516; Harrison, note 25 above, at 463-464.

⁸⁰ See Kenneth J. Tyler, "Another Opinion: A Critique of the Paper Presented by the Royal Commission on Aboriginal Peoples Entitled: Partners in Confederation" in The Inherent Right of Aboriginal Self-Government, papers presented to Canadian Bar Association, Continuing Legal Education Program, Annual Meeting, 1994, vol. 2, at 23, esp. n. 70.

⁸¹ See, e.g., Wildsmith, note 26 above, at 50-51.

account the central position of the Charter in Canada's overall constitutional scheme.

This argument is bolstered by the fact that the creation of Charter-free zones, where individuals would lose Charter protections against governmental violations of protected rights only to regain those rights when they left the territory, would trivialize the declaration, in section 52, that the constitution, including the Charter, is the supreme law of the country and that all laws that are inconsistent with its provisions are of no force or effect.⁸²

This argument errs, in my view, by confusing the Charter's supremacy with the range of its application. The Charter is a part of the "the supreme law of Canada"⁸³; it is also, for better or worse, a document of specified and limited application.⁸⁴ So understood, it is no less supreme because it does not generally govern the conduct of universities⁸⁵ or public hospitals,⁸⁶ the corporations that exercise effective control over life in one-industry towns, or the exercise by other private persons of common law rights.⁸⁷ (Newfoundland's terms

⁸² RCAP, Bridging, note 13 above, at 263-264. Similar phrasing appears in the Royal Commission's final report: see 2 RCAP Final Report, note 13 above, at 231.

⁸³ Constitution Act, 1982, s. 52(1).

⁸⁴ See, e.g., Hill v. Church of Scientology, [1995] 2 S.C.R. 1130 ("Hill") at 1170 (195): "[t]he party challenging the common law cannot allege that the common law violates a Charter right because, quite simply, Charter rights do not exist in the absence of state action." (Emphasis on "right" deleted.)

⁸⁵ See McKinney, note 24 above, at 276; Harrison, note 25 above, at 463-464.

⁸⁶ See Stoffman, note 24 above, at 505-516. But see Eldridge, note 22 above, at 654-666 (1935-52), which says that the Charter can apply to private entities, including public hospitals, "in so far as they act in furtherance of a specific governmental program or policy": ibid. at 660 (142). See notes 22-33 above and the text accompanying them.

⁸⁷ In Dolphin Delivery, note 37 above, the Supreme Court held (at 593), on the basis of s. 52(1) of the Constitution Act, 1982, that the common law, as such, is subject to the Charter, but (at 598) that this is so "only in so far as the common law is the basis of some governmental action" as defined in accordance with s. 32(1). (See notes 49-57 above and the text accompanying them.) It has since reaffirmed those conclusions in Tremblay v. Daigle, [1989] 2 S.C.R. 530 at 571, and Young, note 44 above, at 90-92. Compare Hill, note 84 above, at 1169-1171 (1993-95).

of union too are part of Canada's "supreme law,"⁸⁸ despite having no application in Ontario.) It remains supreme within the proper sphere of its application, and will continue to do so whether or not it applies to inherent right governments. For this reason, inherent right communities will not be "Charter-free zones" even if the Charter does not apply to their governments; the Charter will continue to govern, throughout Canada, those legislatures and governments to which it is held to apply. Such communities are no more "Charter-free" than are university campuses or one-industry towns.

At the heart of this argument, though, is the Royal Commission's strong sense that it would not be fair or reasonable to expect the courts to include inherent self-government rights within the constitution's protection if they did not or could not concomitantly apply the Charter to the aboriginal governments exercising any such rights. In a way, this amounts to an invitation to the courts to overlook the substantial doctrinal impediments that section 32 of the Charter and its jurisprudence have imposed,⁸⁹ in the interest of reaching (what the Commission considers) a fair and sensible result.

The Supreme Court has received, and declined, such invitations before. "Care must be taken," it said in Hill, "not to expand the application of the Charter beyond that established by s. 32(1)."⁹⁰ In Terry, it put much the same point in this way:

The argument amounts to a plea that this Court should, in the name of fairness, treat conduct which is not governed by the Charter as a 'constructive' breach of the rights it protects. In short, we are asked to rewrite the Charter. That, in my view, is something this Court cannot and should not do.⁹¹

⁸⁸ Constitution Act, 1982, s. 52(2)(b); Schedule, Item 21.

⁸⁹ See notes 39-80 above and the text accompanying them.

⁹⁰ Hill, note 84 above, at 1170 (1995).

⁹¹ R. v. Terry, [1996] 2 S.C.R. 207 at 218.

This is the answer our law now prescribes to suggestions that the Charter govern the exercise of inherent self-government rights. Adoption of a contrary view would, at a minimum, cut very sharply against the grain of established Supreme Court precedent on the meaning and function of section 32.⁹² Making an exception now for self-governing aboriginal communities, whose own internal authorities are neither among the "governments mentioned in s. 32"⁹³ nor, as a matter of law, controlled or empowered by any such governments, would risk reviving issues about the Charter's application that the Supreme Court has worked hard to put to rest. Courts now will not revisit those issues without compelling reasons.⁹⁴

Still, it seems unwise to dismiss the Royal Commission's considered sense of the Charter's importance to the realization of self-government rights. As Chapter 1 argues in detail, the prospect that the constitution might protect self-government rights gives rise to some deep, and widely shared, apprehensions.⁹⁵ The Commission's concern, despite everything, to show

⁹² See notes 19-33, 39-80 above and the text accompanying them.

⁹³ See, e.g., Allard, note 54 above, at 571, quoted in text above at note 57.

⁹⁴ One suggestion I have heard in support of the Charter's application to inherent right governments is that s. 25 of the Charter contemplates and anticipates it. Section 25 says 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 . . ." If s. 32 precluded the Charter from applying to such governments, this argument runs, then s. 25 would have no meaningful work left to do, because Charter rights and freedoms would never be in a position, as such, to "abrogate or derogate from" such rights.

This argument, in my view, overlooks the fact that aboriginal peoples have aboriginal, treaty and "other" rights besides self-government rights and that there are other ways, besides direct application to them, in which, but for s. 25, the Charter might abrogate or derogate from them. Suppose, for example, that federal law exempted aboriginal peoples possessing treaty rights to hunt from its regulations restricting the hunting of migratory birds, and that a non-aboriginal person claimed that the exemption contravened s. 15 of the Charter, the equality rights guarantee, because it discriminated on the basis of race or national origin. In such a case, s. 25 proscribes any use of s. 15 to cut down or dilute the treaty right. Such instances -- and it is not difficult to think of others -- ensure a role for s. 25 in the life of the Charter whether or not aboriginal peoples have rights of self-government, and whether or not, if they do, the Charter, as such, applies to the use of those rights. I doubt, for that reason, that s. 25 is either sufficient reason or sufficient basis for reopening s. 32 to make room for inherent right governments. For my own view of s. 25 and the difference it makes to self government rights, see notes 194-235 below.

⁹⁵ See Chapter 1, notes 26-58 and the text accompanying them.

that the Charter applies is a conscientious attempt to respond to such apprehensions.

Some such response may very well be the price of constitutional accreditation, and of public acceptance, of aboriginal peoples' inherent rights of self-government.⁹⁶ If subjecting such rights to the Charter were the only way of protecting those essential arrangements and values that must survive alongside such rights, there would be strong incentive to support the Royal Commission's efforts, despite the legal odds against their success.

In Chapter 4, I suggest a different way of securing Canada's most fundamental values: a way I find more compatible with established legal and constitutional doctrine. The mere existence of such alternatives does not, on its own, preclude there being sufficient reason for insisting on the Charter's application to inherent right communities; to deserve to prevail despite them, though, the Charter would have to prove demonstrably better, both at protecting those values and at minimizing unnecessary interference with aboriginal difference.⁹⁷

To make that determination, we need to understand better what it would mean for the Charter to govern the exercise of inherent self-government rights, and how well it would satisfy these two imperatives if it did apply. The next task is to consider these questions.

II. SHOULD THE CHARTER APPLY?

A. Why Try to Apply the Charter?

Even if the Charter does govern inherent right communities, it is, at best, a partial answer to the challenge of preserving the mainstream legal order's essential values and arrangements. The Charter alone, for example, can do nothing to ease any structural, logistical or protocol complications that may arise in trying to accommodate such governments within the executive

⁹⁶ See Chapter 1, notes 65-77 and the text accompanying them.

⁹⁷ See note 12 above and the text accompanying it.

frameworks needed for the ongoing maintenance of Canadian federalism.⁹⁸ By the same token, nothing in the Charter could prevent an inherent right community, acting authoritatively from within its own traditions, from raising an army, creating tax shelters, issuing currency, chartering banks, developing and seeking to implement foreign policies, refusing to hand over fugitives, or establishing frameworks for duty-free international trade.⁹⁹ If these prospects seem troubling, one must look outside the Charter for ways of protecting the mainstream order against them.

This, of course, is hardly front-page news. The Charter does not exist, or purport, to deal with issues of intergovernmental cooperation, with the distribution of substantive governmental authority or with a host of other matters on which Canada's legal and constitutional identity might depend; it focuses, exclusively and deliberately, on a limited range of issues. In most contexts, this obvious fact would not be a basis for criticism. What it shows here, however, is that reliance on the Charter, even at its best, cannot be sufficient to address the full range of apprehensions that our courts must be able to manage if they are to find room within our constitutional order for aboriginal rights of self-government. Whether or not the Charter applied to the exercise of such rights, the courts would have to find and rely on alternative doctrinal measures to fulfill their responsibilities to our legal order as a whole. If such alternatives also prove able, as I argue in Chapter 4, to address the concerns that lie within the Charter's reach, then it is not necessary, either, to impose the Charter on inherent right governments. In such circumstances, it is much more difficult, from a policy standpoint, to

⁹⁸ For articulation of this concern, see Chapter 1, notes 47-55 and the text accompanying them. In Chapter 2, I argue that Canadian aboriginal rights law already has the capacity to reduce its impact substantially by locating aboriginal rights of self-government, at first instance, in the contemporary incarnations of the aboriginal tribes and nations in place at the time of European contact or British sovereignty. See Chapter 2, notes 59-67 and the text accompanying them.

⁹⁹ For one very small-scale example of (what Canada would consider) international trade aspirations, see Mitchell v. Minister of National Revenue, [1997] 4 C.N.L.R. 103 (F.C.T.D.) (Mohawks of Akwesasne have an existing aboriginal right, but not a treaty right, to bring personal and community goods duty-free across the U.S.-Canada border and to trade in such goods with other First Nations across that border).

justify insisting that the Charter apply, or, from a legal standpoint, to justify manipulating established doctrine on Charter application to make it possible for it to do so. With this in mind, we need to understand better why it matters, to those to whom it matters, that the Charter govern the use of inherent self-government rights.

Those who insist that the Charter apply to inherent rights communities usually do so for either of two reasons. One is that vulnerable individuals may be in special need of protection from the concentration and misuse of power in self-governing aboriginal communities;¹⁰⁰ the Charter, on this view, assures mainstream courts of the power to protect such interests as necessary. The other is that differential access to Charter rights would compromise the character of Canadian citizenship by denying a substantial part of its benefit to aboriginal Canadians. "If the Charter is considered purely an operational definition of Canadian citizenship, and it can be seen in no other light," say Gibbins and Ponting, "then to place aboriginal communities outside the Charter is to diminish fundamentally the citizenship of aboriginal Canadians."¹⁰¹

The first of these desiderata, protection of the vulnerable, seems easy enough to understand; the second seems a little more obscure. As we saw above, it is a conceptual error to describe inherent right communities as "outside the Charter," whether or not the Charter applies to inherent right governments. The members of such communities already have the same Charter

¹⁰⁰ See Chapter 1, notes 35-46 and the text accompanying them.

¹⁰¹ Gibbins & Ponting, note 4 above, at 218-219. See also *ibid.* at 205; 3 Macdonald Report, note 5 above, at 371; Brian Schwartz, "The General Sense of Things: Delgamuukw and the Courts" in Frank Cassidy, ed., Aboriginal Title in British Columbia: Delgamuukw v. The Queen (Lantzville, B.C.: Oolichan Books, 1992) 161 at 172; "Inherent But Unclear" [editorial] Winnipeg Free Press (11 April 1992) A6. This may also be what the Royal Commission on Aboriginal Peoples meant when it said that "there would be a serious imbalance in the application of the Charter" if the Charter were held not to apply to aboriginal communities exercising inherent powers of self-government: see 2 RCAP Final Report, note 13 above, at 231.

rights, against the same range of organizations, as do other Canadians.¹⁰² If no Canadian citizens have Charter rights against inherent right governments, it is difficult to argue that these Canadians' citizenship, alone, is "diminish[ed] fundamentally" because of that. Hardly anyone would go so far as to argue that the Supreme Court's decisions in Stoffman or McKinney¹⁰³ "diminish fundamentally" the citizenship of staff physicians or university professors by depriving Canadians generally of Charter recourse against public hospitals or against universities. Neither would anyone argue that everyone's Canadian citizenship has been so diminished by the results of those decisions.

The argument, then, can only be that inherent right governments are, as such, the kinds of entities that engage the very nature of Canadian citizenship: that any coherent notion of Canadian citizenship requires that every government operating under our constitution be subject, alike, to the rules in the Charter in its dealings with private persons.

The first problem here is that the Charter itself does not prescribe a set of standards that operates with complete uniformity.¹⁰⁴ Sections 16-20, for instance, which provide for official language use, apply, by their own terms, exclusively to the governments of Canada and New Brunswick; Quebec, alone, has authority to determine whether parts of section 23 of the Charter (minority language education rights) will come into force there.¹⁰⁵ Both sections 3 and 4 of the Charter have been held to apply uniquely to representation in the House of Commons and in provincial¹⁰⁶ legislatures;¹⁰⁷ nothing in the Charter, therefore,

¹⁰² See notes 83-87 above and the text accompanying them.

¹⁰³ Both note 24 above.

¹⁰⁴ See, e.g., 2 RCAP Final Report, note 13 above, at 226.

¹⁰⁵ See Constitution Act, 1982, s. 59.

¹⁰⁶ But see s. 30 of the Charter, which deems all references to provinces or provincial legislatures to include the two territories and their legislative bodies.

would require that inherent right communities hold elections to choose their leaders or, if they did, that they ensure that all adult community members could vote in them. All but one of the other rights that the Charter guarantees are subject, at the option of the relevant legislature, to explicit legislative override at any time, and from time to time, in five year increments.¹⁰⁸ Do these variegations "diminish fundamentally" the nature of anyone's Canadian citizenship? If not, then we need, and must await, some criterion other than mere inclusion in the Charter to identify those minimum standards of governmental conduct on which the meaningful content of Canadian citizenship is said to depend.

On the other hand, certain Charter provisions that, on their face, might very well apply to inherent right governments would have anomalous and disproportionate impacts on them if they did. Section 23, for instance, imposes affirmative obligations on government to provide programs and, where numbers warrant, separate facilities for the instruction of eligible community children in whichever of English or French is the minority language in the province where they reside.¹⁰⁹ Inherent right communities subject to this requirement would likely

¹⁰⁷ On s. 3, see Haig v. Chief Electoral Officer, [1992] 3 S.C.R. 995 ("Haig") at 1033 ("Section 3 of the Charter is clear and unambiguous as is its purpose: it is limited to the elections of provincial and federal representatives"); Crow v. Blood Band, note 26 above (applying Haig to hold that s. 3 does not apply to Indian Act band councils); Jones v. A.G. Ontario; Rheume v. A.G. Ontario (1992), 7 O.R. (3d) 22 (C.A.); Berke v. City of Calgary (1989), 98 A.R. 157 (Q.B.); R. v. McKitka (5 November 1986) (B.C. Prov. Ct.) [unreported] (s.3 does not apply to municipal councils). On s. 4, see Atkins v. City of Calgary (1994), 16 Alta. L.R. (3d) 429 (Q.B.) at 434-437 (¶¶15-22), aff'd. 25 Alta. L.R. (3d) 365 (C.A.) (municipal councils not "legislative assemblies" for purposes of s. 4, but otherwise subject to Charter).

The Charlottetown Accord amendments would have confirmed that s. 3 was not to apply to inherent right governments: see Draft Legal Text, note 10 above, s. 24.

¹⁰⁸ See Charter, s. 33; Ford v. A.G. Quebec, [1988] 2 S.C.R. 712 ("Ford") esp. at 740-743. The exception is s. 6 (mobility rights): see s. 33(1).

¹⁰⁹ See e.g., Mahe v. The Queen in right of Alberta, [1990] 1 S.C.R. 342 ("Mahe"). The Supreme Court said there (at 384-385) that "numbers warrant" requirements could be determined only by examining each case on its merits, taking into account the number of students involved, the costs of the contemplated services, and the fact that s. 23 is remedial, and does not merely guarantee the status quo. Although the province is the territorial unit used to determine whether English or French is the minority language, s. 23 nowhere says that the rights it prescribes are available only as against provincial governments.

find it prohibitively expensive and inconvenient to conduct the education of community children in their own traditional languages. And section 6 -- which, the Supreme Court has said, "must be interpreted generously to achieve its purpose to secure to all Canadians and permanent residents the rights that flow from membership and permanent residency in a united country"¹¹⁰ -- could give to any Canadian citizen or permanent resident the constitutional right to take up residency and work at any time in any inherent right community, subject only to general community rules and reasonable residency requirements.¹¹¹ This rule would expose such communities' unique and fragile traditions to still further pressures from the mainstream cultures that most new residents would bring with them when they took up residence there.¹¹² Although it makes perfect sense to include both these provisions in a package of constitutional rights available against Canada's mainstream governments, it is far from clear what fundamental incidents of Canadian citizenship we protect by imposing either standard on inherent right communities.¹¹³

It may be that the substance and coherence of Canadian citizenship depends on the uniform application of certain essential standards of government conduct. If so, however, those

¹¹⁰ Black v. Law Society of Alberta, [1989] 1 S.C.R. 591 ("Black") at 612.

¹¹¹ See Charter, ss. 6(2),(3). According to Black, ibid. at 617-618, s. 6(2)(b) "guarantees not simply the right to pursue a livelihood, but more specifically, the right to pursue the livelihood of choice to the extent and subject to the same conditions as residents."

¹¹² See Gibbins & Ponting, note 4 above, at 220-221 for discussion of the special challenges that mobility issues pose for aboriginal communities.

¹¹³ It is true, of course, that inherent right communities subject to these rights would have the opportunity, pursuant to s. 1 of the Charter, to justify any contraventions of them. It is true, as well, that they might often succeed at doing so, given the fragility of their cultures and their often reduced financial circumstances. In my view, neither fact weakens the point in the text. Section 1 does indeed permit departures, on an exceptional basis, from the rights set out in the Charter; those rights themselves, however, prescribe the ordinary standards of constitutional behavior for the legislatures and governments to which they apply. It seems to me essential that we select and apply such standards with care. No government would have trouble, either, justifying contravention of a right that entitled every Canadian to \$10,000 monthly, but that is hardly sufficient reason to include such a right in the constitution. For further discussion of s. 1, see notes 169-193 below and the text accompanying them.

standards themselves stand in need of further identification and explication. Till then, we must try to take at face value the two reasons generally offered for insisting that the Charter apply to inherent right communities -- protection of the vulnerable and consistency of citizenship¹¹⁴ -- and see whether the Charter, in practice, satisfies them well enough to warrant its impact on aboriginal difference. To do so, we need to understand that impact.

B. The Charter's Impact on Aboriginal Difference

According to many commentators, aboriginal¹¹⁵ and non-aboriginal,¹¹⁶ there is profound incongruity between the rights regime in the Charter and the various traditions and shared understandings that Canada's aboriginal peoples regard as constitutive. In testimony before a House of Commons subcommittee in 1982, for example, the Assembly of First Nations is reported to have said: "We could not accept the Charter of Rights as it is written because that

¹¹⁴ See notes 100-101 above and the text accompanying them.

¹¹⁵ See, e.g., Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 ("Turpel, 'Interpretive Monopolies'"); Harry S. LaForme, "Indian Sovereignty: What Does It Mean?" (1991) 11 Can. J. Native Studies 253 esp. at 260-261; P.A. Monture-OKanee & M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 239 ("Monture & Turpel, 'Rethinking Justice'"); Leroy Little Bear, "What's Einstein Got to Do With It?" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., Continuing Poundmaker and Riel's Quest (Saskatoon: Purich Publishing, 1994) ("Poundmaker") 69; Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in Poundmaker, 173.

¹¹⁶ See, e.g., Menno Boldt & J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Menno Boldt & J. Anthony Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) ("Quest for Justice") 165 ("Boldt & Long, 'Tribal Philosophies'"); Menno Boldt & J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" in Quest for Justice 333 ("Boldt & Long, 'Tribal Traditions'"); Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 ("Lyon, 'Essay'"); Patrick Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" [1992] U.B.C. L.Rev. (Sp. Ed.) 280 ("Macklem, 'Criminal Justice Initiatives'"), esp. at 288-289; Noel Lyon, "A Perspective on the Application of the Criminal Code to Aboriginal Peoples in Light of the Judgment of the Supreme Court of Canada in R. v. Sparrow" [1992] U.B.C. L.Rev. (Sp. Ed.) 306 ("Lyon, 'Perspective'"); Russell & Rudin, note 27 above, at 159-171; J. Anthony Long & Katherine Beaty Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" (1994) 18 Am. Ind. Culture & Rsch. J. 91; Leon E. Trakman, "Native Cultures in a Rights Empire: Ending the Dominion" (1997) 45 Buffalo L. Rev. 189 esp. at 196-209.

would be contrary to our own system of existence and government."¹¹⁷ We need to pause briefly to understand the discomfort so many aboriginal peoples feel about the Charter and about the legal and political assumptions it exemplifies.

Natural as it is for us in the mainstream tradition to think of the rights the Charter protects as universal norms, "[t]he Charter is not," as the Royal Commission on Aboriginal Peoples acknowledges in its justice report, "a value-free document[. It] represents a particular vision of the relationship between the individual and governments, a vision that looks primarily to western legal traditions for its justification."¹¹⁸ To illustrate that particular vision, the Commission cites the words of Wilson J., concurring, in Morgentaler: "the rights in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."¹¹⁹ So understood, rights, like fences generally, serve no useful purpose except to set off something important that would, but for the barrier, be at meaningful risk of danger or harm. Otherwise, they too just get in the way.

Within the European tradition, where social relations are thoroughly -- and, some say, necessarily -- adversarial, any concentration of political power poses meaningful risks of danger to those who do not share in it: the greater the concentration, the greater the risk. For precisely that reason, and because political power, in concentration, enhances the capacity for

¹¹⁷ Quoted in Boldt & Long, "Tribal Philosophies," ibid. at 171, and in RCAP Bridging, note 13 above, at 258-259. Compare Sinclair, note 115 above, at 175:

The starting point is a difficult one for people raised with the liberal ideas of 'civil rights' and 'equality'; it requires one to accept the possibility that being Aboriginal and being non-Aboriginal involves being different. It requires one to come to terms with the concept that the Aboriginal Peoples of North America, for the most part, hold world views and life philosophies fundamentally different from those of the dominant Euro-Canadian society, and that these belief systems and approaches are so fundamentally different as to be inherently in conflict.

¹¹⁸ RCAP, Bridging, ibid. at 258.

¹¹⁹ ibid. at 258, citing Morgentaler v. The Queen, [1988] 1 S.C.R. 30 at 164.

efficient resource exploitation, its arrogation, despite the dangers it poses, has proved to be irresistibly attractive. Within a shared history shaped by these imperatives and assumptions, it makes perfect sense that fences (again, metaphorically speaking) should even now continue to be a technology of choice. Our legal tradition is filled with them: the rule of law, to keep the exercise of power within certain channels; the separation of powers, to disaggregate certain government functions; various rights, again, to keep it presumptively out of other specified places. Good fences make good neighbors.

Nowhere is this clearer than in the mainstream justice system's way of dealing with persons suspected of wrongdoing. In Canada, as in other societies in the European tradition, the ultimate question is whether and how the state may use its coercive power to punish a person said to have done something wrong. This inquiry too is by nature adversarial: a contest between the state and the person accused. Everyone recognizes the inequality of the contest, the clear potential within it for abuse of the state's coercive power and the need somehow to manage that risk while still maintaining public order. Over time, our law has sought to meet this challenge by developing safeguards -- rights -- to fence out the abuses that have seemed to be most tempting or most troubling. Some of those safeguards now have constitutional protection in sections 7-14 of the Charter. If, as Noel Lyon has said, "the formulations [in the Charter] reflect the European experience, which was a long struggle against tyrants, large and small, against the view that personhood and rights are the privileges of a few, not the birthright of all,"¹²⁰ that is neither surprising nor grounds for criticism.

"The North American experience," however, as Lyon himself goes on to say, "was different, at least until the Europeans arrived."¹²¹ The evidence is that many North American native traditions, understood on their own terms, have not shared these assumptions or this

¹²⁰ Lyon, "Essay," note 116 above, at 104.

¹²¹ ibid.

orientation. Here is how Menno Boldt and Anthony Long describe some of the differences:

North American Indian tribes . . . did not have the experience of feudalism. Moreover, unlike European states, the foundation of their 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. The tribal community performed all governmental functions in an undifferentiated fashion. Although highly organized, the tribes did not undergo the separation of state and church from the community. Social order was based on spiritual solidarity derived from the moral integration that came from acquiescence to tribal customs. 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. Because no state and no rulers existed, individuals had no need for protection from the authority of others.

Custom not only offered a well-elaborated system of individual duties and responsibilities, but was designed to protect human dignity. If all members of the tribe obeyed the sacred customs, then as a logical outcome each member would be assured of equality, self-worth, personal autonomy, justice, and fraternity -- that is, human dignity. Dignity was protected by a system of unwritten, positively stated mutual duties rather than negatively stated individual legal rights. With the exception of his obligation to impersonal custom, the individual was unrestrained in his autonomy and freedom. Anything not proscribed by custom was 'permitted.'¹²²

Such societies, in other words, have maintained their social harmony by inculcating in their individual members, through generations, sufficient conviction about the wisdom of the group's defining customs and sufficient internal discipline to ensure that those customs are routinely respected and observed.¹²³ Because, as societies, they have relied much less extensively on the technology of 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.¹²⁴

¹²² Boldt & Long, "Tribal Philosophies," note 116 above, at 168-169. Compare Long & Chiste, note 116 above, at 99-100.

¹²³ See also Monture-OKanee & Turpel, "Rethinking Justice," note 115 above, at 246-247, 256.

¹²⁴ Aboriginal peoples live with a basic connection to the natural order, which we see as the natural law. This means that family connections, i.e., natural connections, are more important in controlling anti-social behaviour. The lessons offered by a family member, particularly if that person is an Elder, are more

Traditional aboriginal approaches to justice help confirm this pattern. As Associate Chief Judge Sinclair explains, in traditional aboriginal cultures, as a general rule, "[t]he primary meaning of 'justice' . . . would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that is wronged."¹²⁵ Within such traditions,

the guilt of the accused would be secondary to the main issue. The issue that arises immediately upon an allegation of wrongdoing is that 'something is wrong and it has to be fixed.' If the accused, when confronted, admits the allegation, then the focus becomes 'What should be done to repair the damage done by the misdeed?' If the accused denies the allegation, there is still a problem and the relationship between the parties must still be repaired. Because punishment is not the ultimate focus of the process, those accused of wrongdoing are more likely to admit having done something wrong.¹²⁶

This whole approach, as Long and Chiste note, "rests on a principle quite different from the primacy of individual rights and individual self-interest." Its focus is on restoring community harmony, on reintegrating the individual into the community and on "restoring to an offender an appropriate perspective" on his or her place within, and obligations to, the community.

significant than any other type of correctional interaction. The personal, familial interaction is the consensual social fabric of aboriginal communities. It is this which makes aboriginal communities distinct culturally and politically from Canadian social institutions:

Ibid. at 256. See also Boldt & Long, "Tribal Traditions," note 116 above, at 337-339.

¹²⁵ Sinclair, note 115 above, at 178.

¹²⁶ Ibid. at 182. See also Monture-OKanee & Turpel, "Rethinking Justice," note 115 above, at 245-248, 256, 258.

This is not to say, however, that punishment does not occur in such traditions. In some traditions, repeated failure to respect one's ties and fulfill one's obligations to the community could lead to permanent banishment from the community: a penalty that, in aboriginal times, very often resulted in death. See, e.g., RCAP, Bridging, note 13 above, at 259-260, esp. n. 409; Russell & Rudin, note 27 above, at 165-169. And where the wrongdoing resulted in death or serious harm to an individual, restoration of community harmony could require very serious punishment, including torture or death: see Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed., Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference (Vancouver: UBC Press, 1997) 75 at 83-84. Individual "safety and dignity was, as a rule, not sacrificed for the collectivity": ibid. at 83.

"[A]dversarial technologies of justice would have been antithetical to" these goals.¹²⁷

One reason why the kinds of rights set out in the Charter seem foreign to many aboriginal peoples, therefore, is probably that they exist to solve problems that simply did not arise within those peoples' collective traditional experience. Within those traditions, Trish Monture has said in a related context, such mechanisms did not emerge because they were not needed.¹²⁸ Aboriginal traditions offered other ways of addressing the needs of the vulnerable and of cultivating a sense of inclusion. From this perspective, "the Charter's particulars of fundamental justice . . . look too much like a catalogue of human rights violations drawn from the European experience"¹²⁹ to have much application or utility.

From a policy standpoint, this in itself is a very strong reason for caution about imposing the Charter on inherent right communities, especially if there is some other, less intrusive way of ensuring protection of the mainstream order's essential values. There is reason to believe, however, not only that Charter rights are foreign and unhelpful to many traditional aboriginal societies, but that insistence on their enforcement, at least within those societies and those proceedings that fit the description above, would operate to undermine the authority and effectiveness of their customary arrangements.

One disadvantage of rights, like fences (and for that matter technology) generally, is that they can reinforce, even in the mainstream system, the very conditions that lead to the problems they are intended to solve: imposing divisions where no divisions may have been necessary and

¹²⁷ Long & Chiste, note 116 above, at 97-98.

¹²⁸ Patricia Monture-OKanee, "Thinking About Aboriginal Justice: Myths and Revolution" in Poundmaker, note 115 above, 222 at 227. Compare Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 338 at 339-340, 344-348.

¹²⁹ Lyon, "Essay," note 116 above, at 106-107.

creating substitutes for, and disincentives to engage in, the internal discipline on which cooperation and civil society often depend. In traditional aboriginal societies, whose integrity depends on perpetuating an ancestral sense of integration and personal discipline, introduction of such measures has potential to dissolve their very foundations.¹³⁰ Here is one example.

In many traditional aboriginal cultures, as we have seen, incidents of alleged wrongdoing present as problems of community harmony and integration and call for solutions in service of these ends. Sometimes some punishment may turn out to be appropriate,¹³¹ but the purpose of the inquiry is to restore and maintain the community's health and integrity. Finding appropriate solutions to such challenges requires an appreciation not only of the details of the specific incident, but of the reasons for it (what Leroy Little Bear calls "the 'but' story"),¹³² of the histories and personal circumstances of the alleged perpetrator, the victims and their families, of the relationships among these individuals and families, and of the way the participants and incidents are situated within the life of the larger community. Community elders speak with authority in such situations only because of their extended personal experience with community life and customs, their personal acquaintance with the participants and the circumstances, the respect they have already earned from everyone involved and the

¹³⁰

It is difficult for a culturally distinct people to define the trajectory of its own development if individuals from within or outside the culture can challenge collective decisions on the basis that they infringe their individual rights under the Charter in the Canadian legal system which does not understand, or give priority to collective goals. Some people view this subjugation of Aboriginal peoples as the triumph of democracy, but it makes the preservation of a different culture and the pursuit of collective political goals almost impossible:

Turpel, "Interpretive Monopolies," note 115 above, at 40. Compare Boldt & Long, "Tribal Philosophies," note 116 above, at 170-177; Long & Chiste, note 116 above, at 102; Trakman, note 116 above, at 205.

¹³¹

See, e.g., note 126 above.

¹³²

See Little Bear, note 115 above, at 72-73.

evident fact that they care about how those involved turn out.¹³³

The Charter, however, guarantees a right to independent and impartial adjudication, explicitly to every person charged with an offence¹³⁴ and implicitly to every individual whose life, liberty or personal security is threatened by legislation or government action.¹³⁵ The impartiality guarantee disqualifies, among others, any adjudicator whose personal interest in a proceeding,¹³⁶ or whose personal relationships with any participants in it,¹³⁷ might reasonably be thought to affect the outcome. The independence guarantee exists to preserve enough institutional distance between adjudicators (acting as such) and everyone else to eliminate any reasonable risk of external influence or interference.¹³⁸

Within the mainstream system, such guarantees are absolutely essential. Adjudications in our system are contests among adversaries who have opposing interests and contrary points of view. Our system's reputation for fairness in dealing with such contests depends on its promise to judge them exclusively on the basis of facts that affect the legal merits of the issues in dispute. Its integrity depends, therefore, on ensuring that adjudicators are insulated completely from any reasonable risk of influence by anyone or anything other than the facts

¹³³ See, e.g., Boldt & Long, "Tribal Traditions," note 116 above, at 338-339; Monture-OKanee & Turpel, "Rethinking Justice," note 115 above, at 245-246; RCAP, Bridging, note 13 above, at 276-277.

¹³⁴ Charter, s. 11(d).

¹³⁵ Charter, s. 7. See, e.g., Pearlman v. Manitoba Law Society, [1991] 2 S.C.R. 869 ("Pearlman") at 882-883.

¹³⁶ Généreux v. The Queen, [1992] 1 S.C.R. 259 ("Généreux") at 283.

¹³⁷ Pearlman, note 135 above, at 883.

¹³⁸ See, e.g., Valente v. The Queen, [1985] 2 S.C.R. 673; Généreux, note 136 above; Reference re Provincial Court Judges, [1997] 3 S.C.R. 3. The three essential conditions of judicial independence, at least for purposes of s. 11(d) of the Charter, are sufficient security of tenure, sufficient security from reductions in remuneration, and sufficient internal administrative independence.

and legal arguments offered within the proceeding.¹³⁹ From this standpoint, the ideal adjudicator, other things equal, is one who has no personal acquaintance or connection whatever with any of the participants and one on whose position and personal circumstances the outcome of the dispute will have no effect.

From the standpoint of traditional aboriginal justice, however, such attributes would disqualify someone from making any useful or authoritative contribution to the task of solving the problem posed by the incident.¹⁴⁰ Conscientious enforcement in such communities of this one Charter right would very probably undermine and transform the entire basis of internal community discipline. To conform to the independence and impartiality standards articulated in Charter cases, traditional self-governing communities would have to learn: to reconceive, along mainstream lines, the nature and meaning of the wrongs and disputes that occur within

¹³⁹

I emphasize that the principles of independence and impartiality embraced by s. 11(d) seek to achieve a twofold objective: first, to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute. Secondly, however, irrespective of any actual bias on the part of the tribunal, s. 11(d) seeks to maintain the integrity of the judicial system by preventing any reasonable apprehensions of such bias:

Généreux, *ibid.* at 282-283.

¹⁴⁰

Another 'alien' norm of the Canadian criminal justice system, is the requirement that judges decide matters 'impartially.' This so-called 'impartiality' is the basis for the institutional authority of criminal justice officials acting on behalf of the Canadian system. In aboriginal cultures, impartiality is not the essential ingredient when we think of relations of justice. Aboriginal communities are closely-knit kinship communities. . . . The person with authority to resolve conflicts among aboriginal peoples in their communities must be someone known to them who can look at all aspects of a problem, not an unknown person set apart from the community in an 'impartial' way. A 'judge' from a non-aboriginal context is simply an outsider without authority:

Monture-OKanee & Turpel, "Rethinking Justice," note 115 above, at 245-246. See also RCAP, Bridging, note 13 above, at 231, 277. For a similar perspective on customary tribal justice in colonial British West Africa, see W. C. Ekow Daniels, "The Influence of Equity in West African Law" (1962) 11 I.C.L.Q. 31 at 43-45.

their communities; to acknowledge the weight and legitimacy of individual and parochial interests apart from, and in opposition to, the collective interest, and to professionalize and surround with institutional distance the business of disposing of such disputes. In short, they would pretty much have to become a different kind of community altogether. Comparable transformations would result from imposition of at least some other Charter rights.¹⁴¹ Such expectations seem deeply troubling, from a number of standpoints.

Considered from a legal standpoint, they contradict the very foundations of aboriginal rights of self-government. As we saw in detail in Chapter 2, successful claims of aboriginal right, including self-government claims, require anchorage in, and ongoing faithfulness to, ancestral traditions, customs or relationships constitutive of the relevant aboriginal society before and apart from European influence. Practices, customs or traditions that "arose solely as a response to European influences . . . will not meet the standard for recognition of an aboriginal right."¹⁴² A community that decided voluntarily to abandon its traditional governance customs and to replace them with different institutions to accommodate mainstream tastes would, for these reasons, run serious risk, under current law, of forfeiting any claim it may have had to an aboriginal right of self-government.¹⁴³ Imposing on that same community Charter obligations incompatible with those same customs -- compelling it, in other words, to do what it could not do voluntarily without jeopardizing the right -- is no less repugnant to the Supreme Court's insistence that aboriginal rights "be rooted in the

¹⁴¹ See, e.g., Russell & Rudin, note 27 above, at 163-171; RCAP, Bridging, note 13 above, at 259-261; Sinclair, note 115 above, at 179-181; Lyon, "Essay," note 116 above, at 103-107. For criticism in similar vein of the Supreme Court's imposition (in Lakeside Hutterian Colony v. Hofer, [1992] 3 S.C.R. 165) of natural justice notice requirements on the internal affairs of self-governing Hutterite communities, see Denise G. Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles" (1997) [unpublished].

¹⁴² Van der Peet v. The Queen, [1996] 2 S.C.R. 507 ("Van der Peet") at 562 (¶73).

¹⁴³ See Chapter 2, notes 16-75 and the text accompanying them.

historical presence -- the ancestry -- of aboriginal peoples in North America."¹⁴⁴

Considered from a policy standpoint, such expectations seem distasteful and inconsistent with good faith recognition of aboriginal difference.¹⁴⁵ As Associate Chief Judge Sinclair has said, "[t]o require people to act in ways contrary to their most basic beliefs is not only a potential infringement of their rights; it is also, potentially, a deeply discriminatory act."¹⁴⁶ And as Patrick Macklem points out, "subjecting the rich diversity of aspects of Aboriginal societies to the rigid analytic grid of individual rights and obligations embodied in the Charter potentially represents legal assimilation disguised as constitutional interpretation."¹⁴⁷ These are consequences our legal system ought to try very hard to avoid.

Considered from a sociological standpoint, finally, such expectations may well contribute to further destabilization of life in Canada's aboriginal communities, and to the social consequences we all shall have to face because of it. As the discussion so far suggests,¹⁴⁸ there is good reason to believe that enforcement of Charter rights within traditional aboriginal communities would discourage and marginalize the kinds of convictions, commitments and

¹⁴⁴ Van der Peet, note 142 above, at 539 (¶32).

¹⁴⁵ "The result of this liberal conception of rights is the displacement of Native stewardship over land in favor of individual ownership, a disruption in the cultural, linguistic and family values among Native Peoples, a breakdown in relations between Native communities, and ultimately, a threat to a distinct Native way of life": Trakman, note 116 above, at 209. See also ibid. at 205.

Even many of those who support the Charter's application to the exercise of self-government rights acknowledge its potential for disruption of traditional aboriginal ways. See, e.g., RCAP, Bridging, note 13 above, at 267 ("The unmodified application of the Charter to Aboriginal nations might well make development of Aboriginal justice systems that are responsive to the needs of the people difficult if not impossible"), 258-261; Hogg & Turpel, note 15 above, at 213.

¹⁴⁶ Sinclair, note 115 above, at 184. I take this to be the force, as well, of Kent McNeil's assertion that "[t]he Aboriginal peoples should not only be consulted, but their consent should be a prerequisite to the application of the Charter to their governments": McNeil, "Aboriginal Governments," note 3 above, at 70.

¹⁴⁷ Macklem, "Criminal Justice Initiatives," note 116 above, at 289.

¹⁴⁸ See especially notes 128-141 above and the text accompanying them.

personal discipline on which such communities' coherence and integrity depend. As marginalization proceeds, these traditional forms of authority lose their capacity to preserve and cultivate social order.¹⁴⁹ This in itself might not be a problem if, when it happened, community members recognized as authoritative and observed the alternative mechanisms at work in the mainstream society. Evidence suggests, however, that this does not generally happen.¹⁵⁰ Leroy Little Bear calls our attention to Clyde Kluckhohn's work on this issue in the Navajo culture of the 1940s:

The pressure of such double standards is highly disruptive. Just as rats that have been trained to associate a circle with food and a rectangle with electric shock become neurotic when the circle is changed by almost imperceptible gradations into an ellipse, so human beings faced with a conflict set of standards and punishments tend to cut loose from all moorings to float adrift and become irresponsible. The younger generation of the Navajo are more and more coming to laugh at the old or pay them only lip service. The younger escape the control of their elders, not to accept white controls but to rebel in newly found patterns of unrestraint.

. . .

The Navajo are torn between their own ancient standards and those which are urged upon them by their teachers, missionaries and other whites. An appreciable number of Navajos are so confused by the conflicting precepts of their elders and their white models that they tend in effect to reject the whole

¹⁴⁹ See, e.g., Long & Chiste, note 116 above, at 104.

¹⁵⁰ Even in those Indian societies where Indian Act political structures constitute the primary organizational forms, normative ideas congruent with these structures have not taken hold, and the resultant governmental processes are often problematic. Underlying premises and concepts change more slowly than overt behavior; the extent of acceptance of the charter values underlying the band elective system remains an open question.

. . . although there appears to be a convergence of modern Indian values and those of Western liberalism around such individual rights as personal entitlements and a paralleling belief in the equality of persons, the strength of these concepts as guides to individual and collective behavior depends very much on perceptions of their origin. After decades of failed government policies aimed at enhancing the welfare of Indians through cultural assimilation and political control, Indian peoples are understandably reluctant to accept externally imposed standards to guide their conduct. To be meaningful, such standards must emerge or reemerge from within their own societies:

ibid. at 112. Compare Sinclair, note 115 above, at 174.

problem of morality as meaningless. For longer or shorter periods in their life their only guide is the expedience of the immediate situation.¹⁵¹

"One cannot play a game according to rules," Little Bear himself adds, "if there are sharp disagreements as to what those rules are. The incipient breakdown of any culture brings with it a loss of predictability, and hence of dependability, in personal relations. The absence of generally accepted standards of behaviour among individuals constitutes a definition of social disorganization."¹⁵² These are risks it makes sense to seek to minimize.¹⁵³

Taken full strength, these concerns suggest strongly that imposition of the Charter would interfere substantially, in conception and in particular, with the foundations of aboriginal difference within Canada. They cast doubt, as well, on the Charter's efficacy at achieving the purposes that those who support its imposition on inherent right governments seek to achieve. Indications are that enforcement of at least some Charter rights against inherent right communities would further erode their own traditional ways of protecting the vulnerable without necessarily promoting among community members themselves any stronger, clearer notion of their Canadian citizenship.

One possible response, of course, is to insist that the Charter must govern the exercise of inherent rights of self-government, despite any corrosive impact it may have on aboriginal governance traditions, because its provisions just are the minimum standards of justice that governments are required to meet for purposes of Canadian law. If such standards are

¹⁵¹ Clyde Kluckhohn, The Philosophy of the Navajo (1946), quoted in Little Bear, note 115 above, at 74.

¹⁵² Little Bear, ibid. at 74.

¹⁵³ "The international experience is now extensive enough to allow us to see that the worst problems result from the suppression of local laws and customs and from the imposition on indigenous peoples of a legal system that grew out of a very different culture": Lyon, "Perspective," note 116 above, at 310.

inconsistent with traditional aboriginal governance, this response might continue, then, put bluntly, so much the worse for traditional aboriginal governance. Left to themselves, those traditions -- and the practice of contemporary aboriginal governments -- pose just too much risk of abuse and injustice to be allowed to operate free of Charter discipline.

It is common ground that we cannot expect our constitutional order to accommodate existing aboriginal rights of self-government unless it has ways of protecting itself, and all of us, against serious risks of harm or injustice that may result from the exercise of such rights. And there sometimes are real risks of abuse and injustice within such traditional governance frameworks, especially when those in authority there, enticed by mainstream incentives, find themselves tempted to mistake, or substitute, their own interests for those of the community as a whole. Even so, I do not think this argument has earned the right to prevail.

In the first place, as Chapter 2 argues, our courts already have the capacity, even without resort to the Charter, to address any occasions on which inherent right governments purport to act in ways that are inconsistent with their communities' own evolving standards of legality or that break faith with their own defining ancestral traditions of governance. Such measures lie outside the constitutionally protected scope of aboriginal rights of self-government.¹⁵⁴

Second, it is simply not true that Charter rights are minimum standards of justice that Canadian law requires governments to meet in all circumstances. The Supreme Court of Canada has been consistent in its refusal, in deciding domestic issues, to insist that governments not subject to the Charter comply with its terms.¹⁵⁵ In Schmidt, for example,

¹⁵⁴ See Chapter 2, notes 68-73, 77 and the text accompanying them.

¹⁵⁵ And compare Hill, note 84 above, where the court concludes (at 1171 (198)), in respect of cases involving no s. 32 governments, that "the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified.

the court approved a Canadian citizen's extradition to the United States -- beyond the reach of Canadian justice -- to face charges in circumstances that, if brought by a section 32 government, would have violated Charter double jeopardy guarantees (section 11(h)). According to La Forest J., who wrote for the majority,

A person who is accused of violating the laws of a foreign country within its jurisdiction cannot, it seems to me, rightly complain that she has been deprived of her liberty and security in a manner inconsistent with the principles of fundamental justice simply because she is to be surrendered to that country for trial in accordance with its traditional procedures, even though those procedures may not meet the specific constitutional requirements for trial in this country.¹⁵⁶

"A judicial system," he added,

is not, for example, fundamentally unjust -- indeed it may in its practical workings be as just as ours -- because it functions on the basis of an investigatorial system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.

What has to be determined is whether . . . surrender of a fugitive for trial offends against the basic demands of justice. . . . In a word, judicial intervention must be limited to cases of real substance.¹⁵⁷

It has persevered in this approach to extradition cases since,¹⁵⁸ even where those resisting extradition were apt to face the death penalty.¹⁵⁹ And in Harrer, the court held that the standard for excluding evidence obtained by foreign authorities in a domestic criminal trial is not whether it was obtained in a way that fully complied with the Charter, but whether its

¹⁵⁶ Schmidt, note 54 above, at 527. Compare ibid. at 523-524: "A decision to surrender a fugitive for trial in a foreign country cannot be faulted as fundamentally unjust because the operation of the foreign law in the particular circumstances has not been subjected to scrutiny to see if it will conform to the standards of our system of justice."

¹⁵⁷ ibid. at 522-523.

¹⁵⁸ See, e.g., Mellino, note 54 above, Allard, note 54 above, and the cases listed below at note 159.

¹⁵⁹ See, e.g., Kindler, note 57 above; Reference re Ng Extradition, [1991] 2 S.C.R. 858.

admission would deprive the accused of a fair trial.¹⁶⁰

These cases interest us here for two reasons. In all of them, the court declined the invitation to extend, for policy reasons, the reach of section 32 of the Charter.¹⁶¹ And having done so, it refused, in determining the Charter rights of Canadian citizens and other residents, to apply Charter standards in appraising the conduct of "non section 32" governments. Instead, it applied much more general standards of basic fairness.

If this is so, then one cannot infer that aboriginal governments based on traditional forms are unjust per se from the mere fact that those forms do not comply with, or accommodate, Charter rights. Neither can one infer systemic injustice from the fact that abuse or injustice has sometimes occurred within them, unless one is ready to do the same with the mainstream system. To me, it makes much more sense to deal case by case with allegations of real abuse and injustice in the exercise of inherent self-government rights than to begin by demanding compliance with a rights regime that threatens the very traditions on which such rights are based.¹⁶² Insistence in these circumstances that the Charter is the only real protection

¹⁶⁰ In Harrer, note 56 above, American authorities had obtained evidence from the accused without giving her the additional warning of her right to counsel that the Charter requires when interrogation turns to another, more serious offence. According to La Forest J., who wrote for the majority (ibid. at 576-577):

While no new warning was given when the interrogation moved to the more serious offence under Canadian law, I do not think this was unfair in the circumstances of this case. . . . While this Court has required the further warning described in fleshing out the protection accorded by s. 10(b) [of the Charter], it by no means follows that the admission of evidence obtained under a lesser standard in another country would make a trial automatically unfair. Our more stringent rule . . . exists for systemic reasons and is not addressed to determining the fairness of a single situation taking place in another country.

¹⁶¹ See notes 54-59, 90-91 above and the text accompanying them.

¹⁶² Compare Boldt & Long, "Tribal Philosophies," note 116 above, at 176:

Where irreconcilable conflict exists between an individual's rights and the group's right to survive, the individual can make a choice between leaving the group or submitting to it. Indians who wish to give priority to individual rights over group

against abuse in aboriginal communities is difficult to distinguish from ethnocentrism.¹⁶³

C. Possible Ways of Alleviating That Impact

The previous section strongly suggests that imposing the Charter on the exercise of self-government rights would interfere extensively with aboriginal difference. If, as Chapters 4 and 5 argue, there is a less intrusive way of protecting crucial mainstream values from potentially unacceptable uses of such rights, then it is, from a policy standpoint, inappropriate to insist on engaging in such interference. Left unanswered, this argument leaves no credible basis on which to expect that courts reopen section 32 of the Charter to make room within it for inherent right governments.

We have not yet taken account, however, of certain Charter provisions whose operation might well reduce its negative impact on inherent right communities. We must do so now.

rights have a ready alternative -- they can integrate with Canadian society. But if the Charter is imposed on all Indians, then those who want to express and practice their cultural values and customs will no longer have a space in which to do so.

This approach requires, of course, that all community members retain a meaningful opportunity to leave.

¹⁶³

The imposition of the Charter's provisions on Indians is being justified by the Canadian government as a means of enhancing their quality of life. The same justification was given for forcing Christianity on Indians; for enacting the racist provisions in the Indian Act; for imposing an elective system and a hierarchical structure of government; and for legislating a policy of assimilation. Implied in all of this is a deeply embedded ethnocent[ri]c assumption that Indian culture is inferior to European culture. Ethnocentrism is evident also in the government's contention that its version of human rights is the morally correct and best version for Indian people. To insist on imposing western-liberal conceptions of human rights on Indians is no less questionable than earlier initiatives to impose religious conformity to Christian beliefs:

Ibid. at 173. Compare Scott, note 35 above, at 327.

1. Section 33: The "Notwithstanding" Clause

Section 33 of the Charter authorizes the legislative bodies to which it applies to exempt their arrangements, for up to five years at a time, from the application of sections 2 and 7-15 of the Charter by enacting provisions expressly declaring that those arrangements "operate notwithstanding" any or all of the rights set out in those sections.

There is room for dispute about whether inherent right governments would be entitled to exercise the override power conferred in section 33 if the Charter applied to them otherwise; sections 33(1) and (4) speak only of "Parliament or the legislature of a province" having that authority.¹⁶⁴ If section 33 is not available to the governments of inherent right communities, then, of course, it cannot help them avoid the Charter's intrusive impacts. My own view, however, is that inherent right governments most probably would have the use of the notwithstanding clause if the Charter applied to them at all. The legislatures mentioned expressly in section 33, after all, are the same as the legislatures and governments mentioned in section 32, the other provision that appears in the part of the Charter called "Application of Charter." If courts are to read section 32 expansively enough to find room within it somehow for inherent right communities, it is hard to imagine a principled basis on which they could deny such communities access to the override provision.¹⁶⁵

¹⁶⁴ Charter, s. 30, however, extends its reach to the legislative bodies in the Yukon and Northwest Territories.

¹⁶⁵ This is, for example, the view of the Royal Commission on Aboriginal Peoples and was the compromise reflected in the draft legal text of the Charlottetown Accord. See 2 RCAP Final Report, note 13 above, at 231; RCAP, *Bridging*, note 13 above, at 267-269 and Draft Legal Text, note 10 above, s. 27. The Royal Commission was careful to add, though, that the "power to pass notwithstanding clauses belongs only to an Aboriginal nation and, in the absence of self-government treaties, can be exercised only in relation to matters falling within the core areas of Aboriginal jurisdiction": 2 RCAP Final Report at 231. For explanation of these references to "Aboriginal nations" and to "core areas of Aboriginal jurisdiction," see *ibid.* at 234-240 and 215-225, respectively. See also Chapter 2, notes 59-67, 75, respectively, and the text accompanying them.

If section 33 is available to inherent right governments, it equips them to protect their communities from a good many of the intrusive effects that the rights regime in the Charter might have on their traditional forms of social organization. It does, however, have some peculiar and unsettling consequences. On one hand, the rights set out in sections 6 (mobility rights) and 23 (minority language education rights) of the Charter -- rights, as we saw in more detail above, whose application to inherent right communities serves no clear public policy purpose, but whose effects could disrupt severely community efforts to preserve and restore their traditional social arrangements, languages and cultures¹⁶⁶ -- are among the rights not subject to the override provision. On the other hand, the Charter rights to which the override can apply -- the fundamental freedoms and the legal and equality rights -- are precisely those that Charter proponents want to ensure are available as against aboriginal governments. Section 33 has clear potential to render the Charter almost useless in its application to such governments for that purpose. Pursuant to it, each inherent right government would be able, by enacting a single properly framed provision, to immunize all the legal arrangements for which it is responsible from the operation of just those rights.¹⁶⁷ It was precisely that prospect that led the Native Women's Association of Canada and its affiliates to withhold their support from the Charlottetown Accord.¹⁶⁸ Others who insist that the Charter apply to such communities in order to protect the vulnerable people living within them are bound to find it no more comforting.

2. Section 1: The Justified Limits Clause

Another possible answer to concerns about the Charter's effects on aboriginal difference emphasizes the role and importance of section 1 of the Charter. Section 1 guarantees all

¹⁶⁶ See notes 109-113 above and the text accompanying them.

¹⁶⁷ See, e.g., Ford, note 108 above, at 740-743 (upholding Quebec legislation that had done exactly that).

¹⁶⁸ See Rouleau, note 7 above; Green, note 4 above, at 113-114; Borrows, "Equality," note 6 above, at 44-47; The Queen v. Native Women's Association of Canada, [1994] 3 S.C.R. 627.

Charter rights "subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society." On this view, section 1 would protect inherent right communities from the worst consequences of mainstream Charter enforcement by permitting their governments to justify, in appropriate cases, departures from usual Charter standards when such departures are necessary to preserve essential cultural values.¹⁶⁹

Because section 1 is both the guarantee of the rights in the Charter and the source of the limits on the scope of that guarantee,¹⁷⁰ it is indeed available to any inherent right governments to which the Charter applies. As long as they could meet, each time, the standards for justification articulated pursuant to section 1, they, like any other governments subject to the Charter, would be able to infringe the rights in the Charter as necessary.

The analytical framework used in section 1 analysis has grown in recent years to accommodate a host of exceptions, distinctions, qualifications and contextualizations;¹⁷¹ the starting point, however, remains the test first set out in Oakes. Briefly, anyone seeking to justify a Charter infringement must show two things: that the objectives the infringement aims to serve are "of sufficient importance to warrant overriding a constitutionally protected right or freedom," and, at a minimum, pressing and substantial,¹⁷² and that the impact on the Charter right

¹⁶⁹ The Charter is a flexible instrument, one that gives governments a significant measure of latitude in implementing its terms. In particular, section 1 enables governments to enact reasonable limits on charter rights so long as these 'can be demonstrably justified in a free and democratic society.' This section is, of course, available to Aboriginal governments:

2 RCAP Final Report, note 13 above, at 232.

¹⁷⁰ See R. v. Oakes, [1986] 1 S.C.R. 103 ("Oakes") at 135-136.

¹⁷¹ For a handy summary of many of the most important adjustments, linked to the Supreme Court judgments from which they have arisen, see Eldridge, note 22 above, at 685-686 (¶¶85-86).

¹⁷² Oakes, note 170 above, at 138-139, quoting R. v. Big M Drug Mart Ltd., [1985] 2 S.C.R. 295 ("Big M") at 352.

of the measures used to achieve those aims is not disproportionate. The inquiry into proportionality focuses on three things: how carefully the measures have been designed to achieve the specified ends; what other means, less intrusive on the relevant Charter rights, were available to the legislature or government to achieve them, and how serious and severe the particular Charter infringement is, relative to the importance and urgency of the relevant government ends.¹⁷³ It is, in effect, a standard of care analysis.¹⁷⁴ Despite the high threshold suggested by the phrase "pressing and substantial," the courts, in practice, have rarely concluded that a section 32 legislature or government has acted for reasons incapable of sustaining any justification of a Charter infringement.¹⁷⁵ They prefer almost always to weigh the importance of the government's reasons for acting, together with the gravity of the Charter infringement that results, in the course of the inquiry into proportionality.

Viewed from one angle, section 1, so understood, can look like a plausible means of rounding off the Charter's rough edges in its application to inherent right communities. It is reasonable to suppose, after all, that such communities and their governments are as concerned as anyone

¹⁷³ Oakes, ibid. at 139-140.

¹⁷⁴ "The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society": ibid. at 140: and, by extension, the higher will be the expectations of careful design and minimal impairment. This understanding of the Oakes test accounts, I think, for most, if not all, of the qualifications that have since been introduced into it.

¹⁷⁵ See, e.g., Edwards Books & Art Ltd. v. The Queen, [1986] 2 S.C.R. 713 at 770, where Dickson C.J.C. concluded, for a majority of the judges addressing the s. 1 issue, that it was sufficient that the relevant legislation had objectives that were "not . . . unimportant or trivial."

The few occasions on which the courts have found that the government's objectives themselves could not be justified include A.G. Québec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66 ("Protestant School Boards"); Big M, note 172 above; Re Zylberberg and Sudbury Board of Education (1988), 65 O.R. (2d) 641 (C.A.); Canadian Civil Liberties Association v. Minister of Education (1990), 71 O.R. (2d) 341 (C.A.); Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139; Zundel v. The Queen, [1992] 2 S.C.R. 731 ("Zundel"), and Vriend, note 53 above. In Edmonton Journal v. A.G. Alberta, [1989] 2 S.C.R. 1326, the court concluded that two of the three objectives advanced in support of the legislation were insufficient to support any possible justification, but proceeded to the proportionality test on the strength of the third.

else, albeit perhaps in different ways, to preserve public order, promote social welfare, establish economic self-sufficiency, conserve scarce resources and generally to achieve other, similar generic communal ends. Mainstream courts are well-practiced at accommodating such objectives within section 1 analysis; accordingly, one might well suppose that they could apply the same general sort of proportionality calculus, other things equal, in appraising the Charter infringements of inherent right governments.

Attractive as this conclusion is, my own instinct is to be cautious of it. There are, in my view, several ways in which "other things" are not "equal" about section 1's application to inherent right communities; together they give us reason to doubt its capacity to reconcile, on a case-by-case basis, respect for aboriginal difference with protection of crucial mainstream values.

We must, to begin with, remember that the section 1 inquiry is not, at first instance, about the beneficial consequences of a measure that infringes the Charter, but about the sufficiency, by contemporary standards,¹⁷⁶ of the original purposes that the legislature or government actually sought to achieve when it enacted or implemented the measure. This is a matter of proof, and the burden of proof, here and throughout the inquiry, is on those seeking to justify the measure.¹⁷⁷ In attempting to establish what its objectives really were, "it is not open to the government to assert post facto a purpose which did not animate the legislation in the first place";¹⁷⁸ in attempting to ascertain the real objectives of a measure, "the Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the

¹⁷⁶ See, e.g., A.G. Quebec v. Irwin Toy Ltd., [1989] 1 S.C.R. 927 ("Irwin Toy") at 973; R. v. Butler, [1992] 1 S.C.R. 452 at 494-496.

¹⁷⁷ See, e.g., Oakes, note 170 above, at 136-137.

¹⁷⁸ Irwin Toy, note 176 above, at 984. Compare ibid. at 973; Big M, note 172 above, at 335, 352-353.

impugned provision . . . ¹⁷⁹

As a result, it would not be enough, for purposes of section 1, to be able to say, of a given traditional aboriginal measure, that it has the effect of promoting social welfare or public order in the community, that it is a measure that we, with our mainstream lenses, would characterize as a public order (or social welfare) measure, or even that it is the kind of measure that a mainstream government might implement in the interest of promoting one of these goals. For that matter, it is not enough to demonstrate why the inherent right government did not do something else (or nothing) instead; explanations, as the court held unanimously in Vriend, are not objectives.¹⁸⁰ What stands first in need of proof and appraisal is what the community understood itself to be trying to do. The task of proving, by mainstream standards, the objectives of an age-old aboriginal governance custom, even in an authoritative contemporary version, would not necessarily be easy for a community whose learning and history are based on oral tradition. And even if the community succeeded in establishing what its objectives, from its own standpoint, were, there is good reason to suspect that mainstream courts would be much more cautious than usual -- if only for reasons of unfamiliarity -- about declaring that those objectives were "pressing and substantial." In these respects, at least, the section 1 exercise burdens inherent right governments more, and differently, than it burdens mainstream governments and legislatures.

Suppose, however, that an inherent right community were to establish that promotion of public order and social harmony were indeed among the objectives of its distinctive approach to, say, allegations of individual wrongdoing.¹⁸¹ How would the proportionality inquiry

¹⁷⁹ Zundel, note 175 above, at 761. Compare ibid. at 771 ("None of these decisions stands for the proposition that an age-old provision whose aim and scope was created pre-Charter can, as of 1982, be redefined by reference to a present-day perception of utility").

¹⁸⁰ Vriend, note 53 above, at 556-557 (¶¶113-114).

¹⁸¹ See, e.g., notes 125-127, 131-141 above and the text accompanying them.

unfold when the community sought, for instance, to justify ignoring mainstream expectations of independent, impartial adjudication?¹⁸²

Here too, the inherent right government would face a distinct disadvantage, especially in trying to show that its approach to these objectives interfered as little as possible with the Charter right to an independent, impartial tribunal. We know, of course, that they need not show that their approach is the least intrusive imaginable; as long as it is "within a range of reasonable alternatives" given the right, the infringement and the importance of the objective, the courts would very probably be satisfied.¹⁸³ Even this relaxed expectation, however, would be difficult for an inherent right government to meet. For one thing, communities following their traditional means of dispute resolution might well have made no effort at all to achieve the institutional distance and personal disconnection that characterize mainstream notions of independence and impartiality; as we saw above, they might very well regard such expectations themselves as artificial, and even counterproductive. For another, it is notorious, at least from a mainstream standpoint, that there are less intrusive ways of pursuing those common objectives: namely, the arrangements in place in mainstream society.

This result invites us to choose between two most unhappy conclusions. It is, on the one hand, difficult to imagine a mainstream government succeeding under section 1 in similar circumstances; if it could, the rights in the Charter would have very little, if any, protection left. If this is so, on the other hand, then section 1 seems unlikely to be of much use to inherent right governments unless they and their communities are prepared to become a good deal more like the rest of us.

¹⁸² See notes 134-139 above and the text accompanying them.

¹⁸³ RJR-MacDonald Inc. v. A.G. Canada, [1995] 3 S.C.R. 199 ("RJR") at 342 (¶160), McLachlin J. (for herself and two others). Compare ibid. at 305-306 (¶96), La Forest J. (for himself and three others).

One way of avoiding this predicament may be to suggest that common objectives such as public order or social welfare mean, or require, something different in traditional aboriginal cultures than they do within mainstream society. We saw above, for instance, that mainstream standards of independent and impartial adjudication conduce to public order within mainstream society; enforcement of those standards in traditional aboriginal societies, on the other hand, risks eroding the foundations of order and authority in those societies.¹⁸⁴ Accordingly, one might argue, there should be room for some flexibility in appraising traditional aboriginal approaches to these ends, taking account of the different social and historical context in which they operate.

In making this move, we abandon the attractive earlier notion that section 1 can accommodate, with equal facility and equal felicity, the measures of mainstream and inherent right governments. In making this move, we introduce the fact of aboriginal difference into the justification inquiry under section 1. An appreciation of aboriginal difference, as we saw above, includes the realization that at least some of the rights in the Charter are foreign to, and disruptive of, the traditions and customs that organize inherent right communities and anchor their aboriginal rights of self-government. When such societies do not observe or acknowledge the rights in the Charter, they are probably often acting pursuant to their own constitutional imperatives. Their controlling objective on such occasions may well be to preserve a heritage within which the Charter does not fit. The question is how to integrate that phenomenon into section 1 analysis.

We can be quite sure that no mainstream legislature or government could succeed under section 1 on the strength of such an objective. It is simply not open to federal, provincial or territorial governments, or to their delegates, to justify their activities pursuant to section 1 on the basis that certain Charter rights are, as such, irrelevant, illegitimate or dangerous to

¹⁸⁴ See notes 131-141 above and the text accompanying them.

civic life within those jurisdictions.¹⁸⁵ When the objective of a measure is itself inconsistent with the Charter, the section 1 inquiry ends abruptly; the question of proportionality then does not arise.¹⁸⁶ No one who supports the guarantee of constitutional rights could want it to be otherwise. If we want to preserve a consistency of approach in applying section 1, then aboriginal difference will be useless, if not detrimental, to inherent right communities on the very occasions when they need it most in the section 1 inquiry.

There is, however, a basis on which we might distinguish mainstream from inherent right governments with respect to section 1's operation. The reason the Charter exists at all, and takes the particular shape it does, is because Canada's federal and provincial governments worked together to design it and agreed in sufficient numbers to give it constitutional effect. In doing so, they took care to ensure there was no essential disharmony between the rights in the Charter and the other imperatives of mainstream governance.¹⁸⁷ The Charter, therefore, articulates the ordinary standards of constitutional behavior by which our mainstream governments agreed to be bound, and against which they agreed that their conduct ought to be appraised, in the exercise of their authority under the constitution. Accordingly, mainstream governments have no basis on which to challenge the relevance, or

¹⁸⁵ "Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter": RJR, note 183 above, at 346 (¶168), McLachlin J. (for herself and two others). Imagine, for instance, a government seeking now to justify reinstatement of a Lord's Day Act on the basis that Canadian public order depended on observance of traditional Christian values, or a law authorizing lengthy incarceration without trial on the basis that due process was a frill that society could no longer afford.

¹⁸⁶ See Protestant School Boards, note 175 above, esp. at 88 (restricting instruction in languages other than French); Big M, note 172 above, esp. at 352-353 (legislating Christian sabbath observance). In both, the laws struck down were aimed at promoting distinctive cultural values.

¹⁸⁷ Sections 1, 24, 32, 33 and 52 of the Constitution Act, 1982 explicitly address the tension, and define the relationship, between the constitutional bill of rights and the prior notion of legislative supremacy. In subsequent years, it has always been the Charter that has given way when there has been potential disharmony between it and other constitutional imperatives. See note 19 above and the sources cited there.

the legitimacy, of the standards the Charter applies to them. With one exception,¹⁸⁸ they undertook them voluntarily.

Inherent right communities, of course, stand in a very different position. Not only were the amendments that included the Charter implemented without the consent, and despite the objections,¹⁸⁹ of Canada's aboriginal peoples; aboriginal peoples and organizations had very little involvement in the Charter's design or implementation.¹⁹⁰ The conflict between some rights in the Charter and the principles underlying traditional aboriginal social organization, therefore, is hardly surprising. Such principles were simply not important to the process that

¹⁸⁸ The exception, of course, is Quebec, which is bound by the Charter, despite not having signified its approval of the Constitution Act, 1982, because Quebec's consent was not required for constitutional amendments before 1982 (see Reference re Objection to a Resolution to Amend the Constitution of Canada, [1982] 2 S.C.R. 793) as long as such amendments had substantial assent from the provinces generally (see Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753).

Quebec's situation complicates somewhat the neat distinction I want to draw, for purposes of s. 1, between mainstream and inherent right governments. There are, however, at least three respects in which Quebec's situation differs from that of the inherent right communities. First, Quebec was a voluntary partner to Confederation itself, in a way, and to a degree, that the inherent right communities were not. Second, Quebec, for that reason, participated fully throughout the lengthy process of designing the Charter; its concerns were considered and addressed, even if not always to its full satisfaction. Finally, Quebec's subsequent resistance to the force of the Charter was not because of the rights it contained -- most of those already appeared in Quebec's own Charter of Human Rights and Freedoms, R.S.Q. c. C-12 -- but because of the manner in which it came into force in Canada and the impact Québécois leaders believed it would have on Quebec's autonomy within Canada: see, e.g., Daniel Latouche, "The Constitutional Misfire of 1982" in Keith Banting & Richard Simeon, eds., And No One Cheered: Federalism, Democracy and the Constitution Act (Toronto: Methuen, 1983) ("And No One Cheered") 96.

¹⁸⁹ British courts held that Canada's Indians had no legal basis on which to object to the patriation of the constitution of Canada: see R. v. Secretary of State for Foreign & Commonwealth Affairs, ex p. Indian Association of Alberta, [1982] 1 Q.B. 892 (C.A.); Manuel v. A.G., [1983] 1 Ch. 77 (C.A.). See text accompanying note 117 above for the Assembly of First Nations' position on the Charter in 1982.

¹⁹⁰ See generally Douglas Sanders, "The Indian Lobby" in And No One Cheered, note 188 above, 301; Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Stanley M. Beck & Ivan Bernier, eds. Canada and the New Constitution: The Unfinished Agenda, vol. 1 (Montreal: Institute for Research on Public Policy, 1983) 225 ("Sanders, 'Prior Claims'") at 229-237; McNeil, "Aboriginal Governments," note 3 above, at 70-71, 98-99.

led to the Charter's entrenchment.¹⁹¹ The Charter was designed to meet the needs and concerns of mainstream society, not those of inherent right communities and their members.

For all these reasons, inherent right communities stand in a different relation to the rights guaranteed in the Charter than do mainstream governments. If the Charter does not (even purport to) reflect aboriginal custom or traditional governance experience, and if inherent right communities have not agreed to be judged in accordance with it, then it seems artificial, at best, to treat the rights in the Charter, as such, as appropriate standards of ordinary constitutional behavior for such communities or for their governments.¹⁹² This, of course, is another compelling reason to question the wisdom of imposing the Charter upon them at all; if Charter standards are inappropriate standards by which to measure government action in such communities, they do not become more appropriate just because the Charter also provides a justification opportunity. At a minimum, though, it gives the courts some reason to be more generous than usual when inherent right communities are the ones engaged in the justification exercise.

My problem is in understanding what form such latitude could take within the section 1 inquiry and still provide for meaningful adjudication of individual cases. For communities seeking to defend indigenous forms of life from the Charter's corrosive impact, section 1 will not be helpful unless it permits them to deny the relevance or the legitimacy, at least in relation to their affairs, of the Charter rights that erode those forms. If mainstream courts, despite everything, were disposed to apply the Charter to inherent right communities, one might well expect them to be most reluctant to grant such broad permission, given that the

¹⁹¹ Except, perhaps, insofar as they prompted inclusion of s. 25 in the Charter. See notes 194-235 below for discussion of s. 25.

¹⁹² Unless, again, one is willing to say that Charter standards are simply minimum standards, no matter what. For discussion of that argument, see notes 154-162 above and the text accompanying them.

burden of justification is on the community. Once they did, however, the outcome of future cases would be all but foreordained. If preservation of authentic aboriginal difference is ever a strong enough objective to excuse a community from compliance with the Charter rights that threaten it, then it seems almost certain always to be a good enough reason in matters concerning such rights. This is not the kind of determination that one would expect to vary much from right to right, from community to community, or from time to time. And once the courts had concluded that a community was entitled to be excused from complying with a particular Charter right, then questions of proportionality would cease to have much meaning in respect of that right and that community. (What is the least intrusive means of comporting oneself in respect of a right that one has no obligation to observe?) And if that is the situation, it is hard to see what useful purpose it serves to insist that the Charter apply to such communities,¹⁹³ let alone to insist that the courts go back to work on section 32 to make room for them there.

Despite its initial promise, therefore, section 1 seems poorly designed to harmonize, in particular cases, protection of essential mainstream values with preservation of aboriginal difference. Instead, there is meaningful risk that it will give one of these imperatives almost complete ascendancy over the other.

¹⁹³ One might, of course, reply that this conclusion strengthens the argument for applying the Charter to such communities because, under these conditions, it could pose no real threat to their cultural integrity. I disagree with this viewpoint for three reasons. First, as the law now stands, the Charter would not apply to inherent right communities acting as such. The burden, in these circumstances, is on those who would reopen the issue of the Charter's application for the sake of extending its reach to inherent right communities. If the Charter would offer little protection to fundamental mainstream values even if it did apply to such communities, then there is much less reason to reconsider existing law. Second, these conditions result from a recognition that Charter standards are probably not appropriate standards to apply, as such, in appraising the conduct of inherent right communities. If the Charter applied, those standards would nonetheless govern, at least until such communities could demonstrate -- likely to a judge unfamiliar with their traditions and ways of life (see, e.g., Russell & Rudin, note 27 above, at 171-172) -- that enforcement of the relevant rights would indeed do them lasting harm. Finally, there is, of course, no assurance that the courts would indeed excuse them from compliance with certain rights for the sake of preserving aboriginal difference. If they did not, s. 1, again, would offer them little protection from the threat the Charter poses to their cultural integrity.

Practically speaking, however, section 1 may make little difference, given the operation of section 25 of the Charter. It is time to turn in detail to that provision.

3. Section 25: Reading the Charter Down

Section 25 of the Charter provides, in relevant part, that "[t]he 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 . . ." A final response to concerns about the Charter's effects on aboriginal difference is that section 25 exists to moderate such effects. According to the Royal Commission on Aboriginal Peoples, for instance, section 25

clearly rules out any interpretation of the Charter that would attack the existence of aboriginal governments or undermine their basic powers. It also ensures that the Charter will receive a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government. Section 25 prevents distinctive Aboriginal understandings and approaches from being washed away in a flood of undifferentiated Charter interpretation.¹⁹⁴

Here, finally, is anchorage, within the text of the Charter itself, for some recognition and accommodation of aboriginal difference. For those who favor the Charter's application to inherent right governments, though, section 25 raises some serious issues of law and policy.

From a policy standpoint, section 25 -- as even this quotation from the Royal Commission makes clear -- compels one to abandon any notion that uniform Charter standards govern both "section 32" and "inherent right" governments. If, as the Royal Commission suggests, the rights in the Charter, in their application to inherent right communities, are going to require reinterpretation in every case to take account of legitimate aboriginal cultural differences, what sense does it make -- again, from a policy standpoint -- to say that it is still "the Charter" that we are applying to such communities? And what do we gain, in these circumstances, by

¹⁹⁴ 2 RCAP Final Report, note 13 above, at 231-233. See generally *ibid.* at 231-233; RCAP, *Bridging*, note 13 above, at 264-267; Hogg & Turpel, note 15 above, at 214-215.

insisting on making room in section 32 of the Charter for such communities, beyond the rhetorical advantage of being able to say that "the Charter" applies?

The problem from a legal standpoint is that section 25 itself appears to go much farther than this view of it acknowledges. Section 25, remember, proscribes interpretations of the rights the Charter guarantees that would "abrogate or derogate from . . . aboriginal rights . . ." On its face, this strongly suggests that courts are to "read down" the Charter's rights and guarantees when necessary to avoid reducing the scope of an aboriginal right. In his 1988 monograph on section 25, Bruce Wildsmith concluded, after a careful review of the relevant Charter provisions, their drafting history and the available academic literature, that

the weight of evidence . . . indicates that the effect of section 25 is to maintain the native rights referred to in section 25 unaffected by the Charter of Rights. . . . The proper view seems to be that section 25 maintains the rights and freedoms referred to it unabridged by Charter rights and freedoms. In the event of an irreconcilable conflict between Charter rights or freedoms and section 25 rights or freedoms, section 25 rights and freedoms prevail.¹⁹⁵

This view has also received support from subsequent commentators¹⁹⁶ and from the few

¹⁹⁵ Wildsmith, note 26 above, at 23. See generally *ibid.* at 9-23. For similar views, see, e.g., Kenneth M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in Tarnopolsky & Beaudoin, note 52 above, 467 at 472 ("The legal effect of s. 25, then, is simply to make it clear that the guarantees of rights and freedoms contained in the Charter are not to be read as subtracting from any of the other rights and freedoms pertaining to aboriginal peoples"); Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Sup. Ct. L. Rev. 255 at 262 (s. 25's "obvious purpose is to prevent the Charter from being interpreted in a way that infringes on any rights or freedoms the aboriginal peoples may have"); Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8 Queen's L.J. 232 ("Slattery, 'Constitutional Guarantee'") at 239 ("This rule of construction [in s. 25] is mandatory. Where a Charter right impinges on a section 25 right, the latter must prevail"). For a different view, see Schwartz, Second Thoughts, note 3 above, at 333, 392-393.

¹⁹⁶ See, e.g., William Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982, Part I: The Interpretive Prism of Section 25" (1988) 22 U.B.C. L.Rev. 21 at 29 ("s. 25 is intended to prevent any diminution, impairment or infringement of the rights and freedoms that pertain to the aboriginal peoples of Canada. It will apply even if there is no absolute denial of these rights"); Mackdem, "Criminal Justice Initiatives," note 116 above, at 290 ("s. 25 will serve to shield rights that attach to Aboriginal peoples from Charter scrutiny by requiring the judiciary to interpret constitutional guarantees in a manner that ensures this result").

judicial decisions that have considered section 25.¹⁹⁷

If, however, section 25 gives aboriginal rights priority over rights guaranteed in the Charter, then aboriginal rights of self-government qualify to share in that priority. Nothing in section 25 itself or its jurisprudence suggests that it applies any differently to some aboriginal rights, or to some Charter rights, than it does to others. Wildsmith draws the evident conclusion:

Whatever rights to self-government exist, whether derived from aboriginal, treaty, contractual or statutory sources, they are section 25 rights or freedoms. Thus the Charter cannot abrogate or derogate from the right to govern. Since the whole thrust of the Charter is to place limitations on government powers, it must be that applying the Charter would limit and so derogate from the powers of aboriginal governments, and thus offend section 25. The conflict between section 25 and the Charter must be resolved in favour of section 25.¹⁹⁸

Section 25, in other words, not only "prevents distinctive Aboriginal understandings and approaches from being washed away in a flood of undifferentiated Charter interpretation";¹⁹⁹ it appears to prevent the Charter from interfering with the exercise of self-government rights at all.²⁰⁰ The distinctiveness of traditional aboriginal forms of govern-

¹⁹⁷ The function of s. 25 . . . is to act 'as a shield which protects Aboriginal, treaty and other rights from being adversely affected by other Charter rights' [citing Pentney, note 196 above, at 2[8]]. If the right to limit voting to on-reserve members of the Band were recognized as an Aboriginal right under s-s.35(1), then s.25 would operate to ensure that the right was not weakened by the operation of s-s.15(1):

Batchewana, note 20 above, at 31-32. See also R. v. Nicholas and Bear, [1989] 2 C.N.L.R. 131 (N.B.Q.B.).

¹⁹⁸ Wildsmith, note 26 above, at 51. Compare McNeil, "Aboriginal Governments," note 3 above, at 73-75.

¹⁹⁹ 2 RCAP Final Report, note 13 above, at 232, quoted above at note 194.

²⁰⁰ Subject only, perhaps, to s. 28 of the Charter: the provision that guarantees all rights and freedoms "referred to" in the Charter equally to male and female persons, "[n]otwithstanding anything in this Charter." A surprising number of commentators have written about the relationship between ss. 25 and 28, and about which has priority over the other. This seems the appropriate place to address that issue.

According to one commentator, Douglas Sanders, "[b]y regular norms of statutory interpretation,

ance, and their vulnerability to disruption and transformation under the discipline of the Charter, only strengthen that inference.

Not everyone shares this understanding of section 25. Peter Hogg and Mary Ellen Turpel "believe that it is unlikely that a court would regard section 25 as providing a blanket immunity from the Charter to Aboriginal governments, even though the governments were exercising powers of self-government derived from a treaty or from an aboriginal right (the inherent right)."²⁰¹ The Royal Commission on Aboriginal Peoples shares their view.²⁰² Neither source, unfortunately, cites authority to support its position or addresses the arguments and judicial decisions that suggest otherwise. They do, however, suggest a couple

section 25, as the specific provision, would prevail over section 28, the more general provision": see "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314 at 327. The overwhelming majority of commentators, however, argue that s. 28 prevails despite s. 25, usually for two reasons. First, s. 28 operates "[n]otwithstanding anything in this Charter"; section 25 does not. Second, the rights identified in s. 25, though not "guaranteed" in the Charter itself, are nonetheless "referred to" there, and that is all the text of s. 28 requires. See, e.g., Slattery, "Constitutional Guarantee," note 195 above, at 240-241; Wildsmith, note 26 above, at 23-24; McNeil, "Aboriginal Governments," note 3 above, at 75-78; RCAP, Bridging, note 13 above, at 268; 2 RCAP Final Report, note 13 above, at 233, and, more guardedly, Macklem, "Criminal Justice Initiatives," note 116 above, at 290, n. 38.

I have two concerns about this prevailing view. First, it may not take sufficient account of s. 26 of the Charter, which says that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." If we are going to say that s. 28 guarantees equally to male and female persons the rights in s. 25 because s. 25 has "referred to" them, we must, I think, say the same of the rights "referred to" in s. 26: i.e., "any other rights and freedoms that exist in Canada." The result is that all rights and freedoms that exist in Canada are, by virtue of s. 28, guaranteed equally to male and female persons. Personally, I have no difficulty with that result, but s. 28 seems a peculiarly indirect way of announcing it, if that was the intent. Second, it seems to me arguable, on the text of both provisions, that s. 25 should prevail over s. 28, because s. 28 is clearly a "guaranteeing" provision and s. 25 is telling us how to construe Charter guarantees.

I doubt that this controversy really makes much difference here. Section 35(4) of the Constitution Act, 1982, a provision outside the reach of s. 25 of the Charter, itself guarantees, equally to male and female persons, "[n]otwithstanding any other provision in this Act," all existing aboriginal and treaty rights. In the present context, in other words, s. 28 adds nothing to the protection that s. 35(4) provides.

²⁰¹ Hogg & Turpel, note 15 above, at 215.

²⁰² See 2 RCAP Final Report, note 13 above, at 232.

of other views of section 25 that, if accepted, would make its impact less absolute. These approaches deserve review on their merits.

One such approach, which originated in an influential paper by Brian Slattery,²⁰³ appears in the Royal Commission's early discussion paper Partners in Confederation:

This approach distinguishes between the right of self-government proper and the exercise of governmental powers flowing from that right. Insofar as the right of self-government is an Aboriginal right, section 25 protects it from suppression or amputation at the hands of the Charter. However, individual members of Aboriginal groups, like other Canadians, enjoy Charter rights in their relations with governments, and this protection extends to Aboriginal governments. In this view, then, the Charter regulates the manner in which Aboriginal governments exercise their powers, but it does not have the effect of abrogating the right of self-government proper.²⁰⁴

From a political standpoint, this reading of section 25 is appealing because, as Kenneth Tyler has said, "it gives the impression of granting both pro- and anti-Charter partisans half a loaf."²⁰⁵ From a policy standpoint, however, it fails to acknowledge the full extent of the threat the Charter poses to many aboriginal communities' governance traditions²⁰⁶ or the harm, well described in earlier work by Turpel herself,²⁰⁷ that can result from encouraging community members to look to the Charter as a resource for use in internal disputes. And from a legal standpoint, it seems extremely difficult to sustain.

To begin with, as Kent McNeil has said, "this argument does not take sufficient account of

²⁰³ See Slattery, "Question of Trust," note 14 above, at 286-287.

²⁰⁴ RCAP, Partners, note 13 above, at 39. Emphasis in original. Compare RCAP, Bridging, note 13 above, at 265, which describes this approach, again without citing authority, as "prevalent but not universally held."

²⁰⁵ Tyler, note 80 above, at 23, n. 70.

²⁰⁶ See esp. notes 128-153 above and the text accompanying them.

²⁰⁷ See Turpel, "Interpretive Monopolies," note 115 above, at 40-42.

the dual protection offered by section 25. In particular, it does not give the word 'derogate' adequate weight."²⁰⁸ In common usage, "derogation" from a right does not require suppression, amputation or abrogation; it also occurs when a right is diminished, impaired or infringed. Section 25, therefore, arises, as Pentney says, "even if there is no absolute denial of these rights."²⁰⁹ In the words of the Federal Court of Appeal, its function is to "protect[] Aboriginal, treaty and other rights from being adversely affected by other Charter rights'[:] . . . to ensure that the right was not weakened by the operation" of Charter rights.²¹⁰

"The question, then, which must be addressed," McNeil continues, "is this: would the application of the Charter to relations between Aboriginal individuals and their own governments amount to derogation from the right of self-government?"²¹¹ The Royal Commission's proposed approach to section 25 requires that we be able to answer that question in the negative. The supposition that we can do so assumes that one can, as a general matter, restrict the exercise of a right without necessarily weakening or diminishing the right itself: that restrictions imposed on the exercise of religious freedom, for instance, need not affect adversely anyone's freedom of religion.

²⁰⁸ McNeil, "Aboriginal Governments," note 3 above, at 74.

²⁰⁹ Pentney, note 196 above, at 29.

²¹⁰ Batchewana, note 20 above, at 31-32, quoted at greater length above at note 197. This reading of s. 25 draws strength, as Kenneth Lysyk observed very early in the life of the Charter, from the difference in phrasing between ss. 25 and 26: see Lysyk, note 195 above, at 472. Both provisions begin with the words "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed . . ." Section 25, however, proscribes construing them "so as to abrogate or derogate from" the relevant rights; s. 26 proscribes only construing them "as denying the existence of any other rights and freedoms that exist in Canada." "The latter formulation," Lysyk points out (*ibid.*), "is open to the interpretation that a non-Charter right might be qualified or diminished in some way, without the existence of the right actually being denied. The phraseology employed in s. 25 (as in ss. 21 and 29) precludes diminution, as well as denial, of the non-Charter right." The fact that s. 25's drafters rejected an earlier version using the phrase "denying the existence" supports the inference that the difference in phrasing, and in meaning, was deliberate: see *ibid.* n. 16; Wildsmith, note 26 above, at 5-8, 12-16.

²¹¹ McNeil, "Aboriginal Governments," note 3 above, at 75.

I confess that I simply do not understand this supposition. To me, a right's scope and power are what define it and give it uniqueness. A right's scope consists of the kinds and range of conduct it protects; its power is the kind and degree of protection that it gives them. When a given activity comes within the protected scope of some particular right, then engaging in that activity just is a way of exercising that right. Imposing external restrictions on permissible engagement in it diminishes -- derogates from -- the scope or the power (or both) of the right itself and, by doing so, rearranges the right's defining coordinates.

None of this changes merely because the right at issue is an aboriginal right of self-government. If some particular conduct or practice comes within the intendment, properly understood, of such a right, then any external restrictions or prohibitions imposed on the conduct or practice -- including those imposed by the Charter -- would derogate from the right, because they would diminish the right's capacity to protect engagement in it.²¹² This is, as McNeil and others have said,²¹³ exactly the kind of impact that section 25 says the Charter must not be allowed to have on aboriginal rights.²¹⁴ Attempting to distinguish between self-government rights and their exercise, therefore, will not preclude section 25 from immunizing such rights from the Charter's impact.

The Royal Commission's other suggestion is that section 25 be understood as giving a community exercising aboriginal rights of self-government

an alternative way to justify its activities when these are challenged under the Charter. The section enables an Aboriginal government to argue that certain governmental rules or practices, which may seem unusual by general Canadian standards, are consistent with the particular culture, philosophical outlook and

²¹² See McNeil, "Aboriginal Governments," note 3 above, at 75.

²¹³ See notes 195-198 above and the text accompanying them.

²¹⁴ If, on the other hand, the relevant conduct does not come within the protected scope of the self-government right (or any other relevant right), then s. 25 has nothing to do with it, because no abrogation or derogation issues arise. Compare McNeil, "Aboriginal Governments," note 3 above, at 74, n. 41. In that case, the discipline of the general law applies. See Chapter 4.

traditions of the Aboriginal nation, and as such are justified.²¹⁵

At first blush, it is difficult to see how this suggestion relates to section 25. Section 25, again, appears to be instructing the courts not to construe Charter rights and guarantees in ways that would take away or diminish rights pertaining to the aboriginal peoples of Canada, including, one must assume, aboriginal rights of self-government. It is a rule of construction that applies of its own force. Nowhere does it say it requires communities that have such rights, as a condition precedent to invoking section 25, to defend or justify their interest in protecting these rights from abrogation or derogation.

The Royal Commission's argument, therefore, must be that section 25 protects self-government rights and other aboriginal rights only from "unreasonable" or "disproportionate" derogation at the hands of the Charter, and that the burden rests on the communities having such rights to show that any derogation would be disproportionate or unreasonable. I believe this view is open to three serious objections.

First, there is nothing in the text of section 25, its legislative history²¹⁶ or the limited case law applying it²¹⁷ that offers any support for this approach. This, of course, does not preclude adoption of the Royal Commission's suggestion;²¹⁸ it does, however, discourage

²¹⁵ 2 RCAP Final Report, note 13 above, at 232. See also RCAP, Bridging, note 13 above, at 264-267. Compare Hogg & Turpel, note 15 above, at 215 ("Section 25 allows an Aboriginal government to design programs and laws which are different for legitimate cultural reasons, and have these reasons considered as relevant should such differences invite judicial review under the Charter").

²¹⁶ See, e.g., Wildsmith, note 26 above, at 5-8, 12-14; Sanders, "Prior Claims," note 190 above, at 231-236, and the sources cited there.

²¹⁷ See, e.g., Batchewana, note 20 above, at 31-33; Nicholas, note 197 above; R. v. Augustine; R. v. Barlow (1986), 74 N.B.R. (2d) 156 (C.A.).

²¹⁸ See, e.g., Sparrow, note 8 above, at 1108-1111 (s. 35 rights subject to justified infringement even though s. 35 of Constitution Act, 1982 not subject to s. 1 of Charter and makes no provision itself for justification); Côté v. The Queen, [1996] 3 S.C.R. 139 at 191-192 (s. 88

the courts from adopting it without good reason.

Second, this suggestion for reading section 25 is difficult to reconcile with the text and interpretation of other Charter provisions that section 25 resembles. Besides section 25, there are three Charter sections that use very similar "abrogate/derogate" phrasing:²¹⁹ section 21 (preserving pre-existing constitutional rights and obligations with respect to English and French),²²⁰ section 22 (preserving pre-existing legal or customary rights or privileges with respect to other languages)²²¹ and section 29 (preserving pre-existing constitutional rights and privileges in respect of denominational schools).²²² There is every reason to suppose that this phrasing deserves, and will receive, consistent meaning throughout its four occurrences in the Charter.²²³ If we are to say, therefore, that section 25 controls only disproportionate derogation from aboriginal rights and that those who seek to invoke it must justify their assertions of disproportionality, we must first be sure we are ready to say the same thing in respect of the Charter's relation to pre-existing language rights and to the rights of denominational schools. On its face, it seems most unlikely that we would be.

of the Indian Act does not explicitly permit justified provincial treaty rights infringements but may accommodate an "implicit justification stage").

²¹⁹ For general discussion, see Lysyk, note 195 above, at 471-472; Wildsmith, note 26 above, at 14-17.

²²⁰ "21. Nothing in sections 16 to 20 [rights of official language use in Canada and New Brunswick] abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada."

²²¹ "22. Nothing in sections 16 to 20 [rights of official language use in Canada and New Brunswick] abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French."

²²² "29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

²²³ The alternative is to assert that the education and language rights conferred in sections 93 and 133 of the Constitution Act, 1867 somehow outrank the aboriginal and treaty rights recognized and affirmed in section 35(1) of the Constitution Act, 1982.

We must also ensure that this approach comports with existing judicial interpretations of those other three provisions. To the best of my knowledge, there are no judicial decisions considering or applying sections 21 or 22 of the Charter. The Supreme Court has, however, considered the impact of section 29.

At issue in Adler and the earlier Bill 30 Reference were Ontario's funding arrangements for elementary and secondary schools, which provide full public funding for Roman Catholic separate schools (in fulfillment, the court concluded, of pre-existing constitutional rights and privileges)²²⁴ but no public funding for schools of other faiths or denominations. In both decisions, the court observed that this arrangement "sits uncomfortably with the concept of equality embodied in the Charter because not available [sic] to other schools";²²⁵ as Estey J., concurring, said in the Bill 30 Reference, it was "axiomatic (and many counsel before this Court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the Charter of Rights."²²⁶

One might have supposed these were ideal cases in which to require Ontario, and this arrangement's other supporters, to justify their interest in relying on section 29 to protect these pre-existing rights and privileges from the Charter's operation. This is the approach that the Royal Commission's apparent view of section 25 would have led one to expect. Instead, the court held, in the Bill 30 Reference, that "s. 29 is there to render immune from Charter review rights or privileges which would otherwise, i.e., but for s. 29 be subject to such review";²²⁷ in Adler, citing that precedent, it held that section 29 "explicitly exempts from

²²⁴ Constitution Act, 1867, s. 93(1). See Bill 30 Reference, note 19 above, at 1176-1196.

²²⁵ Ibid. at 1197; Adler, note 19 above, at 641-642.

²²⁶ Bill 30 Reference, ibid. per Estey J. at 1206. Sections 2(a) and 15 of the Charter provide for freedom of religion and for equal protection and benefit on the basis of religion, respectively.

²²⁷ Ibid. at 1198. Compare ibid. at 1197 ("I have indicated that the rights or privileges protected by s. 93(1) are immune from Charter review under s. 29 of the Charter. I think this is clear").

Charter challenge all rights and privileges 'guaranteed' under the Constitution in respect of denominational, separate or dissentient schools."²²⁸

This reading of section 29, which replicates the reading that most commentators, and the few decided cases, have given to section 25,²²⁹ leaves little, if any, room for the Royal Commission's alternative. Applied to section 25, it will, again, preclude the Charter from interfering with arrangements or activities protected by aboriginal rights, including aboriginal rights of self-government. And this will be so, again, whether or not the courts find a way of bringing inherent right governments under the Charter, pursuant to section 32.

Suppose, however, that there were a plausible legal basis for treating section 25 as an alternative justification vehicle when inherent right governments contravene the Charter. My final objection to this suggestion is that, from a functional standpoint, it does not appear to make any meaningful difference. In particular, it does not seem to solve the problem we first encountered when we considered section 1 of the Charter.²³⁰ The Charter does not need two separate justification mechanisms unless they each do different useful work.

The Royal Commission's suggestion, again, is that section 25 equips communities exercising inherent self-government rights "to argue that certain [of their] governmental rules or

²²⁸ Adler, note 19 above, at 643. Compare Mahe, note 109 above, at 380-384, where the court felt compelled (at 381) to satisfy itself that its proposed interpretation of s. 23 of the Charter (minority language education rights) did not "infringe" a right or privilege protected by s. 29. See also Ford, note 108 above, at 740-741, where the court concluded unanimously that there is "no warrant in the terms of s. 33" -- the "notwithstanding" clause -- for a justification requirement.

²²⁹ Even the reasoning underlying this reading of s. 29 works equally well for s. 25. In Adler, *ibid.*, the court said (at 644) that it had "refused [in the Bill 30 Reference, note 19 above, at 1197] to use one part of the Constitution to interfere with rights protected by a different part of that same document." The reference there was to rights protected by s. 93(1) of the Constitution Act, 1867, but could just as easily be to the rights protected by s. 35(1) of the Constitution Act, 1982.

²³⁰ See notes 169-193 above and the text accompanying them.

practices, which may seem unusual by general Canadian standards, are consistent with the particular culture, philosophical outlook and traditions of the Aboriginal nation, and as such are justified."²³¹ Even without the benefit of section 25, however, such communities could make such arguments. Nothing in section 1 of the Charter or its judicial interpretation appears to preclude them from making precisely these submissions in court in the usual way. Mainstream governments (armed, for example, with strong electoral mandates to "restructure") might well sometimes offer, and often succeed with, similar arguments.

The deeper problem the Charter poses for such communities is, as we saw above, that acceptance of the Charter's legitimacy would threaten the integrity of, and undermine internal respect for, the customs, traditions and orientations that constitute many indigenous forms of government.²³² And ignoring the rights in the Charter because one denies their legitimacy is not the kind of justification that section 1, ordinarily, could countenance.²³³

This is the problem that section 25, as the Royal Commission conceives it, must solve to make any difference to the justification options of inherent right communities. Unless it permits such communities to defend their constitutive traditions against the systemic threat that the rights in the Charter represent, it offers no important advantage over the justification regime explicit in section 1. On the other hand, if it does authorize them to proceed in a given instance on the basis that Charter rights have no currency against governance measures based on traditional custom, it amounts -- again -- in practice to another form of blanket exemption from Charter discipline. For if this basis for justification succeeds in a single instance for a given community, it will have the same force in any subsequent case that involves the same reticulation of indigenous customs and traditions.

²³¹ See note 215 above and the text accompanying it.

²³² See, e.g., Long & Chiste, note 116 above, at 113.

²³³ See notes 185-186 above and the text accompanying them.

The challenge with which this discussion of aboriginal difference began was to reconcile with it, on a case-by-case basis, meaningful application and enforcement of the Charter in respect of inherent right governments. A justification scheme that always gives one priority over the other is, for this purpose, not especially helpful.

It is clear that this is not the solution the Royal Commission intended. In its final report, it said that section 25's effect would probably be "to exempt certain actions of Aboriginal governments from Charter scrutiny and to ensure that the Charter will be interpreted in a manner 'deferential to and consistent with Aboriginal culture and traditions.'"²³⁴ What it did not say, however, is how, when or why the Charter, so interpreted, would restrict the exercise of inherent self-government rights,²³⁵ or how we might distinguish such occasions from those in which the use of such rights is indeed "exempt . . . from Charter scrutiny."

Without the benefit of that more complete analysis, we have no basis for confidence that the Charter, in its application to the use of such rights, will either give sufficient protection to fundamental Canadian values or show sufficient respect for aboriginal difference. And if we cannot give the courts sufficient basis for confidence that the Charter assists in achieving these ends, we cannot give them sufficient reason to rearrange the established law on section 32 of the Charter to make room within it for inherent right communities.

III. SUMMARY AND CONCLUSION

Chapter 1 identified two competing imperatives that supporters of self-government rights must satisfy and reconcile to achieve judicial acceptance, under Canada's constitution, of meaningful

²³⁴ 2 RCAP Final Report, note 13 above, at 232. The internal quotation is from an earlier version of Hogg & Turpel, note 15 above, at 215.

²³⁵ Except to say that section 28 of the Charter -- the independent guarantee of gender equality -- always prevails over section 25: see 2 RCAP Final Report, note 13 above, at 233; RCAP, Bridging, note 13 above, at 268. See note 200 above for discussion of the relationship between ss. 25 and 28.

aboriginal rights of self-government. One is to ensure that our courts will be able -- and realize that they will be able -- to continue protecting our legal order's most fundamental arrangements and values even after self-government rights begin to operate under our constitution's protection. The other is to minimize the extent to which the mainstream order interferes with aboriginal difference. Chapter 2 documented the extent to which Canadian aboriginal rights law already equips our courts, and mainstream governments, to address concerns about the use of constitutional rights of self-government. Such rights, it argued, are entitled to the constitution's protection only so far as they are anchored in, and faithful to, the governance traditions and customs constitutive of the communities claiming them; even then, their exercise is subject to justified external constraints imposed by mainstream governments competent to enact such measures. The unanswered question is whether mainstream law can address, in the absence of competent legislative intervention, challenges to its defining values posed by inherent right governments acting authoritatively from within their ancestral traditions. Our task in this chapter has been to consider what help the Charter of Rights can provide in answering this question, and at what cost to the foundations of aboriginal difference.

From a legal standpoint, the better view is that the Charter has no application to inherent right communities in the exercise of their self-government rights. Section 32 of the Charter, as interpreted and applied in a series of Supreme Court decisions, militates very strongly against extending the Charter's reach to inherent right communities. If the courts are to find a principled basis for applying the Charter to such communities nonetheless, they will have to reconsider earlier decisions in which they sought to bring certainty to the law of Charter application. It would be unreasonable to expect them to do so without compelling reasons.

From a policy standpoint, applying the Charter to such communities turns out to have few, if any, practical advantages. The hope was that the Charter would ensure the courts of ways

of protecting vulnerable individuals living within such communities, and that its application would assure an essential consistency to the notion of Canadian citizenship. Applied full strength to inherent right communities, however, the Charter stands to endanger the traditional foundations of order and authority on which their own sense of integrity depends; in doing so, it most probably would disrupt their own traditional ways of protecting the vulnerable and frustrate and discourage their own traditional notions of citizenship. None of the Charter's own mechanisms for mitigating these effects is especially satisfactory. Section 33, the Charter's override provision, would allow inherent right governments to excuse themselves perpetually from all the Charter rights that matter most in mainstream discourse, but not to protect themselves against rights whose application to them makes little sense. In principle, section 1 of the Charter would permit such communities to justify, on a case-by-case basis, departures from particular Charter rights; in practice, however, section 1 seems incapable, except on an all-or-nothing basis, of addressing the conflict between such communities' own fundamental values and Charter rights whose application threatens to destroy them. And apart from all this, section 25 of the Charter, given its best and most authoritative interpretation, would exempt altogether from Charter review all conduct coming within the protected scope of aboriginal rights, including rights of self-government.

What does this mean for the project of obtaining the constitution's protection for inherent self-government rights? To me, it gives the project sharper focus. Even if the Charter were to govern the use of such rights, the mainstream order would need other ways of protecting some of its most essential values, because the Charter simply does not address them. We can now focus on that wider task. But if the Charter does not apply to inherent right communities, isn't the prospect of constitutional accreditation too frightening to consider any further?

Not necessarily. For over a century, the legal system in the United States has tolerated and

reaffirmed the fact of retained aboriginal sovereignty²³⁶ -- the rough American analogue to inherent self-government rights -- despite repeated confirmations by its Supreme Court and lower courts that provisions of its Bill of Rights have no application to tribal governments there.²³⁷ Throughout, the U.S. courts and Congress, in the course of managing the relationship between mainstream and tribal governments, have found, when they needed them, various means of protecting the interests and values they consider fundamental. No one there, to my knowledge, has thought it necessary to propose that tribal sovereignty be extinguished in the national interest. There is no good reason to assume, without inquiry, that essential Canadian values and institutions are more fragile, or aboriginal peoples living in Canada less responsible, than their counterparts in the United States.

Chapter 4 identifies one way that the U.S. courts have used to protect the mainstream system there from risks perceived to be posed by the use of aboriginal sovereignty. Another, worthy of brief mention here, is enactment of a statutory analogue to its constitutional bill of rights. The Indian Civil Rights Act,²³⁸ passed in 1968, gives members of tribal communities many of the same rights against their tribal governments that the Bill of Rights provides to U.S. residents generally against their state and federal governments. Since its inception, the ICRA has been, to many, a source of more controversy than protection;²³⁹ in principle, though, it is always open to improvement through statutory revision.

²³⁶ See, e.g., Williams, note 69 above; U.S. v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079 (1978) ("Wheeler"); Merrion, note 69 above.

²³⁷ See Talton v. Mayes, 163 U.S. 376 (1896) ("Talton") at 381-384; Santa Clara Pueblo v. Martinez, 436 U.S. 47, 98 S.Ct. 1670 (1978) ("Martinez") at 56 U.S., 1675-1676 S.Ct., esp. n. 7 (citing extensive lower federal court authority); Duro v. Reina, 110 S.Ct. 2053 (1990) at 2064. For useful background on, and discussion of, Talton, see Schwartz, Second Thoughts, note 3 above, at 366-370.

²³⁸ 25 U.S.C.A. §§1301-1303, as amended ("ICRA").

²³⁹ See, e.g., Martinez, note 237 above. For useful background on the ICRA, see Schwartz, Second Thoughts, note 3 above, at 370-379.

The Parliament of Canada has the same option. It could enact a statute incorporating and applying the Charter -- word for word, come to that -- to inherent right governments.²⁴⁰ Assuming it could justify imposing such restrictions on the exercise of their self-government rights,²⁴¹ the Charter's provisions, in this statutory form, would govern them.

I do not favor this option, at least in this form. It would solve none of the problems, already discussed in some detail above, that arise, from a policy standpoint, from imposing the Charter itself on the exercise of inherent self-government rights. It is, however, one possible way of addressing important mainstream legal interests with inherent right communities, even where the Charter, as such, does not govern such communities. It demonstrates, by example, that responsible discussion of aboriginal rights of self-government need not presuppose the Charter's availability, as such. And it offers some capacity to avoid the Charter's evident shortcomings for this purpose. After all, a substitute statute need not replicate the Charter exactly, or at all; it might focus more sensibly on the needs and circumstances in specific inherent right communities, ideally in cooperation with them and their members. Aboriginal charters of rights,²⁴² developed cooperatively and implemented by federal statute, would almost certainly be less disruptive, and more effectively authoritative, within such communities

²⁴⁰ It could also, again, with consent, include some or all of the Charter's provisions as terms in any self-government treaty or agreement with an aboriginal community and enforce them as such for the duration of the agreement. See note 74 above.

²⁴¹ One extremely important difference between U.S. and Canadian law in respect of aboriginal peoples is that the power of the U.S. Congress to limit -- and even extinguish -- tribal sovereignty is plenary (see, e.g., U.S. v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Wheeler, note 236 above, at 323 U.S., 1086 S.Ct.); South Dakota v. Yankton Sioux Tribe, 118 S.Ct. 789 (1998) at 798; the power of Canada's Parliament to limit the exercise of aboriginal rights, including rights of self-government, is not. See Chapter 2, notes 97-146 and the text accompanying them.

²⁴² Proposals to develop aboriginal charters of rights have, of course, been under study for years. For background and discussion, see, e.g., RCAP, Bridging, note 13 above, at 266-267; 2 RCAP Final Report, note 13 above, at 233-234.

than unilateral imposition of the Charter or a statutory Charter analogue.²⁴³

In Chapter 5, I return to consider the wisdom of demanding a code to govern the protected use, in mainstream law, of inherent self-government rights. Whatever their ultimate merits, however, such options depend on cooperation, or at least on affirmative federal initiatives, that have not yet taken place. Till then, we still need some other way of securing the mainstream order's most fundamental values and interests while leaving sufficient space for meaningful exercise of aboriginal rights of self-government. I try to meet that challenge in the next chapter.

²⁴³ See, e.g., note 150 above, and Lyon, "Essay," note 116 above, at 105-106. But see also Scott, note 35 above, at 325, who warns that the mainstream legal order's penchant for codification can have the effect of "fossilizing," at an arbitrary moment, the continuing development of authentic aboriginal customs, especially in cultures that have chosen deliberately to leave them unrecorded. I have my own reservations, as well, about moving too soon to codify a constitutive set of essential mainstream values: see Chapter 5, notes 50-78 and the text accompanying them.

CHAPTER FOUR: THE 'FUNDAMENTAL VALUES' HYPOTHESIS

Chapter 2 suggests strongly that Canadians have less reason than some may have thought to fear the consequences of judicial accreditation of aboriginal peoples' inherent rights of self-government. Even after such rights are acknowledged to have the constitution's protection, features already at work within Canadian aboriginal rights law will limit their capacity to be used in ways that compromise the mainstream legal order's moral or structural foundations. Essential mainstream arrangements and values are vulnerable in respect of such rights only in the absence of justified affirmative measures competently enacted by mainstream governments to protect them,¹ and even then only when inherent right communities are acting authoritatively from within their own defining governance traditions.²

The question remaining is whether our legal system has the capacity to protect its own foundations from that residual range of vulnerability: from the challenges posed by sometimes profoundly different cultural arrangements,³ even where elected mainstream governments have not intervened, or have not intervened effectively. As the Canadian Charter of Rights and Freedoms⁴ attests in a different way, our own most crucial arrangements and values are too important, and in a way too fragile, for us to feel confident resting their protection entirely on affirmative measures that fallible and often preoccupied mainstream governments

¹ See Chapter 2, notes 97-146, 150-152 and the text accompanying them.

² See Chapter 2, notes 16-80 and the text accompanying them.

³ For one illustration of the profundity of the differences, see Chapter 3, notes 118-153, the sources cited there, and the text accompanying them.

⁴ Canadian Charter of Rights and Freedoms ("Charter of Rights," or just "Charter"), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11 ("Constitution Act, 1982").

may or may not happen to introduce.⁵ But if, as Chapter 3 concludes, the Charter is not available for imposition on inherent right communities,⁶ and would be neither appropriate nor helpful if it were,⁷ how can we expect our courts to contemplate giving mainstream legal effect to self-government rights? If courts cannot protect our legal order against these risks by enforcing the Charter, what are we going to suggest that they do instead?

One sound and obvious suggestion is that they take full advantage of constitutional provisions that clearly do govern the exercise of self-government, and other aboriginal (and treaty), rights. Chief among these is surely section 35(4) of the Constitution Act, 1982, which guarantees all constitutionally protected treaty and aboriginal rights "equally to male and female persons," "[n]otwithstanding any other provision" of the Constitution Act, 1982. Section 35(4) gives important protection against arbitrary gender distinctions that might affect participation in section 35 rights; it is still too early, however, to say what restrictions it might, or ought to,⁸ impose on the exercise of such rights.⁹ And section 35(4), by its terms, purports to protect only one of our legal order's basic values. If we want more comprehensive protection, we need an approach that looks beyond the specific provisions now in the constitution. This chapter suggests and defends one such approach.

⁵ "When we choose to constitutionalize a value, to treat it as a constitutional right, we are in effect saying both that there is a deeply shared consensus about the importance of that value and that we think that value is at risk, that the same people who value it are likely to violate it through their ordinary political processes": Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev. Const. Stud. 1 at 20. Emphasis in original.

⁶ See Chapter 3, notes 18-97 and the text accompanying them.

⁷ See Chapter 3, notes 98-235 and the text accompanying them.

⁸ Consider, for instance, the Haudenosaunee tradition that only men may be chiefs but that the chiefs are chosen, and may be deposed, exclusively by the clan mothers. Is this an arrangement that s. 35(4) would, or ought to, prohibit?

⁹ At least one court has held that s. 35(4) precludes communities exercising aboriginal rights from distinguishing on the basis of sex in determining community membership. See Sawridge Band v. The Queen, [1996] 1 F.C. 3 (T.D.) at 32-34, rev'd. on other grounds [1997] 3 F.C. 580 (C.A.).

I. INTRODUCING THE "FUNDAMENTAL VALUES" HYPOTHESIS

The challenge is to find a way of protecting inherent self-government rights within the mainstream legal order without exposing its foundations or its thematic integrity to any genuine hazards that may result from conscientious exercise of such rights. The easiest, most straightforward way of meeting that challenge is to define such rights -- considered as rights within the mainstream order -- in a way that eliminates that risk. If we understand such rights from the outset not to entitle inherent right communities to govern in ways or for purposes that compromise the integrity of the mainstream legal order, then putative aboriginal governance measures that have that effect will not qualify for mainstream protection or legitimacy, because they lie outside the constitutionally protected scope of the community's right of self-government. And if that is so, such measures are subject routinely to the strictures and discipline of the general law, just as they would be if there were no such right.

I propose, therefore, that our legal order's truly essential imperatives be part of the definition of -- operate as internal limits on -- the self-government rights it incorporates,¹⁰ in much the same way as communities' defining ancestral traditions and customs already limit and constitute their aboriginal rights. On this proposal, an aboriginal governance measure or arrangement would not qualify for protection under a self-government right -- for enforcement through the mainstream courts and for at least initial priority over conflicting provincial or federal schemes -- if it were demonstrably incompatible with the defining traditions and values

¹⁰ Compare Bruce H. Wildsmith, Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 27-28, 51-52; Dan Russell & Jonathan Rudin, Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past (Toronto: Ontario Native Council on Justice, 1992?) at 154. This proposal may have some kinship, as well, with Leon Trakman's recent efforts to articulate "a conception of rights limited internally by responsibilities that inhere in the values underlying those rights," not just "externally by the rights of others": see Leon Trakman, "Native Cultures in a Rights Empire: Ending the Dominion" (1997) 45 Buffalo L. Rev. 189 at 219 (emphasis in original); see also ibid. at 194. Trakman's primary concern, quite properly, is to reconceive mainstream property rights in ways that take more complete account of aboriginal interests; in my view, though, his suggestion here may have more general application.

of either the community's culture or the mainstream order.¹¹ I call this, for convenience, the "fundamental values" hypothesis.

From a practical standpoint, this approach addresses the present need: it acknowledges and gives real protection within mainstream law to authentic aboriginal governance activity, subject only to certain minimum compatibility conditions, while preserving, in respect of measures that do not meet those conditions, the same full range of case-by-case response and remedy as would be available if the constitution did not protect self-government rights at all.

II. SUBSTANTIATING THE "FUNDAMENTAL VALUES" HYPOTHESIS

It is one thing to say that it makes good sense for our courts to adopt the fundamental values hypothesis; it is something else to show that they have a defensible legal basis on which to do so. (As Chapter 3 showed, there are legal reasons why the Charter would not apply to inherent right governments, quite apart from the question of its desirability.)¹² If we want our courts to take fundamental mainstream values into account in defining and applying aboriginal rights of self-government, we need to provide a strong doctrinal foundation. Such a foundation depends on two propositions: that courts may take account of fundamental mainstream values and coherence imperatives in determining issues of aboriginal right, and that

¹¹ The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. . . . In other words, a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives:

Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992) 17 Queen's L.J. 350 ("Walters, 'Comment on Delgamuukw'") at 412-413, quoted with approval in Van der Peet v. The Queen, [1996] 2 S.C.R. 507 ("Van der Peet") at 547 (¶42), 551 (¶49), Lamer C.J.C. (for the majority), at 629 (¶232), McLachlin J. (dissenting). See also Peter W. Hutchins, Carol Hilling & 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 ("Ghost in the Machine") at 293-294.

¹² See Chapter 3, notes 18-97 and the text accompanying them.

they may do so on a case-by-case basis in dealing with the claims based on such rights.

The first of these two propositions seems sound on its face. There is general agreement that the inherent right of self-government, understood as an aboriginal right seeking protection under section 35(1) of the Constitution Act, 1982, must find its bearings and definition within the Canadian constitutional order, no differently than any other aboriginal right.¹³ We know already that section 35 rights "must be defined in light of [section 35's] purpose,"¹⁴ that that dual purpose is to acknowledge the pre-existence here of aboriginal societies and to reconcile it with the sovereignty of the Crown,¹⁵ and that it is appropriate in contemplating such reconciliation to take account of "the broader social, political and economic community, over which the Crown is sovereign" and of which the aboriginal communities themselves also form part.¹⁶ This means, as the Supreme Court has said, that

[t]he definition of aboriginal rights must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal

¹³ The Aboriginal right of self-government is recognized by the Canadian legal system, under the constitutional common law of Canada and also under section 35(1). So, while the section 35(1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that, while Aboriginal peoples have the inherent legal right to govern themselves under section 35(1), this constitutional right is exercisable only within the framework of Canada. Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution:

Canada, Report of the Royal Commission on Aboriginal Peoples, vol. 2 (Ottawa: Ministry of Supply and Services, 1996) ("2 RCAP Final Report") at 214. Compare Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 ("Slattery, 'Question of Trust'") at 281; "Ghost in the Machine," note 11 above, at 293-294, 298, 300.

¹⁴ Van der Peet, note 11 above, at 539 (¶31).

¹⁵ Ibid. at 539 (¶31), 543 (¶36), 547 (¶42); Gladstone v. The Queen, [1996] 2 S.C.R. 723 ("Gladstone") at 774 (¶73).

¹⁶ Gladstone, ibid. at 774-775 (¶73); Delgamuukw v. The Queen in right of B.C., [1997] 3 S.C.R. 1010 ("Delgamuukw") at 1111 (¶165).

perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.¹⁷

It seems to me almost inconceivable that a Canadian court could follow these instructions responsibly without paying full attention to our legal order's defining imperatives.

Consider, as an example, the inquiry that Brennan J., of the High Court of Australia, undertook in writing that court's principal judgment in Mabo.¹⁸ At issue there was whether Australian law left room for recognition of claims of aboriginal title; to resolve that issue, the court had to determine whether terra nullius¹⁹ was still good law in Australia. It took Brennan J. no time at all to conclude that the terra nullius doctrine, "[j]udged by any civilised standard, . . . is unjust" and that "its claim to be part of the common law to be applied in contemporary Australia must be questioned."²⁰ He quickly added, however, that

[i]n discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. . . . The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. . . . If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an

¹⁷ Van der Peet, note 11 above, at 551 (149). Emphasis added. Even some commentators who have criticized the Supreme Court's approach to aboriginal rights acknowledge the necessity of "incorporat[ing] . . . some elements of the common law in the interpretation of [aboriginal] rights": see, e.g., John Borrows & Leonard I. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 *Alta. L. Rev.* 9 at 38.

¹⁸ Mabo v. Queensland (1992), 175 C.L.R. 1 (H.C.A.) ("Mabo"). Brennan J. wrote for three of the seven members of the panel, but none of the other four judges disagreed expressly with the observations or the approach discussed in the text.

¹⁹ Terra nullius, very briefly, is the doctrine that the Crown acquired title upon discovery of vacant lands. The accepted corollary was that lands occupied at discovery exclusively by aboriginal peoples were, for legal purposes, vacant: that indigenous peoples, despite the fact of their prior occupation of particular lands, had no legally cognizable interests in those lands. See, e.g., ibid. at 31-38; compare note 85 below and the text accompanying it.

²⁰ Ibid. at 29.

essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.²¹

In the end, he concluded (as did a strong majority of Australia's High Court)²² that Australian law could accommodate and recognize claims of aboriginal title, but only after demonstrating that the terra nullius doctrine was not among its defining principles.

This is the kind of inquiry, and these are some of the kinds of considerations, that, I suggest, our courts may undertake in adjudicating matters arising from self-government claims. There is one relevant difference, though, between the inquiry undertaken in this passage from Mabo and the fundamental values hypothesis. This part of the Mabo inquiry looked to fundamental systemic values only to determine whether a particular kind of aboriginal right -- there, aboriginal title -- could cross the threshold of acceptance into domestic law. The fundamental values hypothesis suggests, in addition, that courts may look to such values in the ongoing course of defining and applying such rights once they do become part of domestic law.²³

This brings us to the second proposition on which the legal soundness of the fundamental values hypothesis depends: the supposition that courts may indeed take such values and imperatives into account on a case-by-case basis when asked to determine particular claims based on inherent self-government rights. This proposition is at the heart of the approach I am proposing. If our courts have ongoing capacity to scrutinize conduct invoking such rights for compatibility with the values that constitute the mainstream order, the threshold question

²¹ ibid. at 29-30. Compare ibid. at 43, 45.

²² For a brief summary of the findings and results in Mabo, see ibid. per Mason C.J. and McHugh J. at 15-16.

²³ In fact, Brennan J.'s judgment in Mabo does contemplate ongoing judicial scrutiny of particular incidents and uses of aboriginal title, to ensure that the indigenous laws and customs on which such uses are based "are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld": ibid. at 61. For discussion, see notes 158-172 below and the text accompanying them.

-- whether our system, as such, can tolerate such rights -- becomes, at once, substantially less momentous. If they do not have to determine, winner take all, the fate of self-government rights, they need not be preoccupied or distracted by every problem or hazard imaginable from aboriginal governance.²⁴ When pruning is an available option, it makes little sense to uproot a sound and healthy hardwood tree merely because some of its branches may one day threaten the roof.²⁵

Fortunately, there is legal support for this second proposition, as well, even if we confine our attention to North American law about the rights of indigenous peoples. When the Supreme Court instructed us to attend to the aboriginal perspective "in terms which are cognizable to the non-aboriginal legal system," it was prescribing an approach to the task of defining aboriginal rights,²⁶ a task that is ongoing and incremental. Earlier, in Myran,²⁷ the court

²⁴ [Although t]here remain massive uncertainties about the powers to be exercised by aboriginal governments, . . . I do not see anything in the debate about aboriginal self-government that undermines my own sense of the fundamental values of Canada as a political community. On the contrary, my own conception of federalism, which welcomes and embraces cultural diversity and the positive contribution of multiple communities, combined with a strong sense of the need for sharing and redistribution, is enhanced rather than diminished by aboriginal self-government:

Richard Simeon, "Sharing Power: How Can First Nations Government Work?" in Frank Cassidy, ed., Aboriginal Self-Determination (Lantzville, B.C.: Oolichan Books, 1991) 99 at 106.

²⁵ Compare Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stanford L. Rev.* 1311 at 1345:.

The extent to which a multicultural, multiracial, and multinational society ought to be committed to ethical values that transcend cultural, racial, and national differences will continue to be germane in the context of particular decisions made by Indian governments that conflict with the beliefs and values of surrounding or adjacent non-Indian communities. Yet the debate between universalism and relativism should not speak to whether to recognize governmental structures. Instead, it becomes relevant if and when an Aboriginal community, through its political institutions, engages in an actual course of conduct or policy that threatens what is claimed to be a universal human value.

²⁶ See note 17 above and the text accompanying it. Compare the quotation at note 14 above.

had held that the express constitutional right to hunt conferred on Manitoba Indians by the Manitoba Natural Resources Transfer Agreement²⁸ did not protect them when they hunted in an unsafe manner. "Inherent in the right," the court said, adopting the words of the Manitoba Court of Appeal, "is the quality of restraint, that is to say that the right will be exercised reasonably."²⁹ Subsequent lower court decisions adopt this same approach in construing treaty rights to hunt and fish.³⁰ And the U.S. Supreme Court, while continuing to acknowledge that aboriginal nations there have retained a sphere of sovereignty outside the

²⁷ Myran v. The Queen, [1976] 2 S.C.R. 137 ("Myran").

²⁸ Manitoba Natural Resources Transfer Agreement, ¶13, given constitutional effect by the Constitution Act, 1930, 20-21 Geo. V., c. 26 (U.K.), s. 1.

²⁹ Myran, note 27 above, at 142. See also Simon v. The Queen, [1985] 2 S.C.R. 387 at 403 (treaty right to hunt includes right to possess gun and ammunition "in a safe manner" for hunting purposes), discussed in Wildsmith, note 10 above, at 27.

³⁰ See, e.g., R. v. Napoleon, [1985] 6 W.W.R. 302 (B.C.C.A.); R. v. McCoy (1993), 109 D.L.R. (4th) 433 (B.C.C.A.). Compare Ministry of Agriculture & Fisheries v. Campbell, [1989] D.C.R. 254 (N.Z. Dist. Ct.) at 272-274, which used similar reasoning to hold that fishing rights do not protect conduct inconsistent with conservation imperatives.

In Thomas v. Norris, [1992] 2 C.N.L.R. 139 ("Thomas"), the Supreme Court of British Columbia concluded (at 159-160) that the Coast Salish tradition of spirit dancing, understood as an aboriginal right, did not entitle the community or its members to subject unwilling individuals to the spirit dancing experience, which involved, in this instance at least, forcible confinement, food and water deprivation and ritual biting, whipping and other forms of physical discomfort. "[C]onstitutionally protected rights under s. 35(1)," the court said (at 161), "can only be exercised in accordance with those [criminal] laws, which prohibit certain kinds of conduct and, on the civil side, create civil rights in persons who may be injured by their exercise." Accordingly, these features of the spirit dancing experience "were contrary to English common law" and "did not survive the coming into force of that law": ibid. at 160.

I find it difficult to dispute the result in Thomas, but I believe the court went too far when it said that aboriginal rights must always give way when they conflict with mainstream civil or criminal law; see notes 143-149 below and the text accompanying them. Aboriginal rights are supposed to be exceptions from the general law: see Chapter 2, note 18 and the text accompanying it. For a similar view, see Denise G. Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles" (1997) [unpublished] at 25-26, 28-29. For further discussion of Thomas, see, e.g., Thomas Isaac, "Individual Versus Collective Rights: Aboriginal Peoples and the Significance of Thomas v. Norris" (1992) 21 Man. L.J. 618; "Ghost in the Machine," note 11 above, at 295.

U.S. Constitution,³¹ has always defined the scope of the retained aboriginal sovereignty in a way that ensures that it cannot interfere with the sovereignty of the United States.³²

In each of these instances, the courts have resorted to values or imperatives that they considered fundamental to restrict the scope of a right or power belonging to aboriginal peoples without either doubting or disturbing the existence of that right or power.

These are just the precedents specific to the rights and powers of North American aboriginal peoples. If we cast our gaze more broadly, we find that fundamental values and institutional

³¹ See, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1 (1831) ("Cherokee Nation") at 16; Worcester v. Georgia, 31 U.S. (6 Peters) 515 (1832) ("Worcester") esp. at 559-560; Talton v. Mayes, 163 U.S. 376 (1896) at 381-383; Williams v. Lee, 358 U.S. 218, 79 S.Ct. 269 (1959) at 219-220 U.S., 270-271 S.Ct.; U.S. v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079 (1978) at 322-323 U.S., 1086 S.Ct.

³² Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty:

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011 (1978) at 209 U.S., 1021 S.Ct. (no criminal jurisdiction in tribal courts over non-Indians);

Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights:

State of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069 (1980) at 153-154 U.S., 2081 S.Ct. See also Johnson v. M'Intosh, 21 U.S. (8 Wheaton) 543 (1823) at 574 ("rights to complete sovereignty, as independent nations . . . necessarily diminished"; restrictions on alienation of land); Cherokee Nation, ibid. at 17, Worcester, ibid. at 559 (no capacity to enter alliances with foreign nations); Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981) (no power to regulate hunting and fishing by non-members or reservation lands owned by non-members); Duro v. Reina, 110 S.Ct. 2053 (1990) at 2060-2061 (no criminal jurisdiction in tribal courts over non-member Indians).

For a brief Canadian discussion of some of these precedents, see Bryan Schwartz, First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal: Institute for Research on Public Policy, 1986) at 369. For discussion of analogous doctrine within British colonial jurisprudence, see notes 152-157 below and the text accompanying them.

imperatives are almost always available to courts as internal constraints and interpretive aids, especially in dealing with claims that, despite having some basis in law, are in some way idiosyncratic or unorthodox. Over the centuries, the courts within the British legal tradition have developed several related mechanisms, both at common law and under the constitution of Canada, for constraining the application of legally recognized rights and powers in the interest of maintaining the integrity of the legal order that protects and gives effect to them.

I want in the next several pages to review those mechanisms in detail. Most, if not all, apply, by their terms, to rights of self-government because such rights, like all other existing aboriginal rights, are at once constitutional rights and rights at common law. Even those mechanisms that may turn out, for technical reasons, not to apply per se to such rights serve as examples from similar contexts that courts may adopt and adapt to the task of harmonizing self-government rights with the truly essential features of the mainstream constitutional order.

A. Self-Government Rights as Common Law Rights

Section 35(1) of the Constitution Act, 1982 recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada" (emphasis added). It follows, as the Supreme Court has noted, that section 35(1) is not the source of aboriginal rights; "rather, it accorded constitutional status to those rights which were 'existing' in 1982."³³ Aboriginal rights had a life of their own, apart from the constitution, before 1982;³⁴ they "existed and were recognized under the common law,"³⁵ or, at the very least, were entitled to receive

³³ Delgamuukw, note 16 above, at 1091 (¶133). See generally ibid. at 1091-1093 (¶¶133-136); Van der Peet, note 11 above, at 538 (¶¶28-29).

³⁴ See, e.g., Slattery, "Question of Trust," note 13 above, at 280-281; 2 RCAP Final Report, note 13 above, at 213.

³⁵ Van der Peet, note 11 above, at 538 (¶28); Delgamuukw, note 16 above, at 1091-1092 (¶133).

such recognition, whether or not they happened by then already to have received it.³⁶ In considering the mechanisms available to our courts for harmonizing self-government rights with the mainstream system's imperatives, therefore, it makes some sense to begin with those available in respect of common law rights generally. Other things equal, such mechanisms ought to be able to discipline the exercise of rights and powers of self-government, just as they discipline other rights and powers that have effect at common law.

1. Charter Values

It was, as we saw in Chapter 3,³⁷ in Dolphin Delivery³⁸ that the Supreme Court of Canada first defined and circumscribed the enforceable reach of the Charter. Section 32 of the Charter, it said, which "specifies the actors to whom the Charter will apply," "is conclusive on th[e] issue" of Charter application.³⁹ As a result, as we now know, the Charter applies, as such, exclusively to federal, provincial and territorial legislatures and governments, to certain statutory entities on which they confer certain kinds of authority, and occasionally in respect of other kinds of entities when and as they are engaged in the implementation of federal, provincial or territorial policy.⁴⁰ In part for this reason, as Chapter 3 argues, the

³⁶ In Côté v. The Queen, [1996] 3 S.C.R. 139 ("Côté") at 174 (¶52), and again in Delgamuukw, note 16 above at 1093 (¶136), the Supreme Court emphasized that s. 35's protection was not limited to "those defining features [of aboriginal societies] which were fortunate enough to have received the legal recognition and approval of European colonizers." In Delgamuukw, the court went further, adding (ibid.) that "the existence of a particular aboriginal right at common law is not a sine qua non for the proof of an aboriginal right that is recognized and affirmed by s. 35(1)." To me this can mean only that aboriginal arrangements are not to be disqualified from being aboriginal rights merely because they happened not to arise, to be recognized, or to have been advanced for recognition, at common law before 1982: see Côté, at 174-175 (¶52). Any suggestion that something might be an aboriginal right despite not qualifying as a common law right seems to me inconsistent with the court's earlier observations on aboriginal rights and with the limitation of section 35's protection to "existing" aboriginal rights.

³⁷ See Chapter 3, notes 42-51 and the text accompanying them.

³⁸ R.W.D.S.U. Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 ("Dolphin Delivery").

³⁹ Ibid. at 598, 597, respectively.

⁴⁰ See generally Chapter 3, notes 18-33 and the text accompanying them.

Charter, as such, does not govern aboriginal communities in the exercise of their existing aboriginal rights of self-government: such rights are by their nature inherent and do not, and cannot, derive from federal, provincial or territorial authority.⁴¹

In addition to being a catalogue of particular rights enforceable against section 32 governments, though, the Charter is an expression of some of the fundamental values that animate the mainstream legal order.⁴² Later on in Dolphin Delivery, the court emphasized that the Charter, so understood, has an important, though different, role to play in the disposition of legal disputes that do not involve legislation or section 32 governments. Even though the Charter does not govern the parties to such disputes, it is "far from irrelevant" to them, because "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."⁴³

Our courts, in other words, may and should take "Charter values" into account in the usual course of construing and applying common law principles, irrespective of the restrictions in section 32. The Supreme Court reaffirmed this jurisdiction a few years later, in Swain:

it is not strictly necessary to invoke s. 52(1) of the Constitution Act, 1982 in order to challenge a common law, judge-made rule on the basis of the rights

⁴¹ See Chapter 3, notes 34-97 and the text accompanying them.

⁴² The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified:

R. v. Oakes, [1986] 1 S.C.R. 103 at 136.

⁴³ Dolphin Delivery, note 38 above, at 603. See also Hill v. Church of Scientology, [1995] 2 S.C.R. 1130 ("Hill") at 1169 (192):

The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.

and values guaranteed by the Charter -- if a common law rule can be reformulated so as to attain its objectives while removing any inconsistency with basic principles, a judge is entitled to undertake such a reformulation and is not obliged to seek jurisdiction for this action under s. 52(1).⁴⁴

"This obligation," it added in Hill, "is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."⁴⁵ Pursuant to that authority, the Supreme Court has restricted severely the Crown's discretion at common law to put the sanity of an accused in issue in criminal proceedings,⁴⁶ and has limited the scope of the common law rule precluding spouses from testifying against each other in penal matters.⁴⁷

It has been clear almost from the outset, however, that the "Charter values" doctrine was not meant to give the courts license to reconfigure the common law at will. Even as the Supreme Court has affirmed the courts' authority to construe and develop the common law with reference to Charter values, it has emphasized the importance of caution in doing so. The quotation from Swain, cited just above, acknowledges the importance of ensuring that the common law rule remains able, after reformulation, "to attain its objectives."⁴⁸ And in Salituro, the court took careful account of the limits on judges' institutional competence and legitimacy before embarking on Charter values review.⁴⁹ Although judges "can and should adapt the common law to reflect the changing social, moral and economic fabric of the country[, and] should not be quick to perpetuate rules whose social foundation has long since

⁴⁴ Swain v. The Queen, [1991] 1 S.C.R. 933 ("Swain") at 979. See also C.B.C. v. Dagenais, [1994] 3 S.C.R. 835 at 875-878.

⁴⁵ Hill, note 43 above, at 1169 (1991). See also Salituro v. The Queen, [1991] 3 S.C.R. 654 ("Salituro") at 666, 670, 678.

⁴⁶ See Swain, note 44 above.

⁴⁷ See Salituro, note 45 above.

⁴⁸ See note 44 above and the text accompanying it.

⁴⁹ Salituro, note 45 above, at 666-670.

disappeared," the Supreme Court concluded, they should nonetheless "confine [themselves] to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."⁵⁰

It was in Hill that the court consolidated the previous authorities and prescribed the proper approach to Charter values analysis. In doing so, it took pains to underline the difference between the Charter values inquiry and the justification inquiry that takes place pursuant to section 1 of the Charter. The issue in Charter values inquiry is not whether someone can justify having infringed a constitutional right; there is typically no one before the court in such cases against whom Charter rights are enforceable. Instead, the task is to reconcile, as economically as possible, any conflict between the relevant Charter values and the principles underlying the relevant common law rule, which has a legitimacy of its own on which at least one of the parties will have relied.⁵¹

This difference in orientation explains two other significant differences between the section 1 inquiry and Charter values analysis. First, the deliberation involved in Charter values analysis "must be more flexible than the traditional s. 1 analysis";⁵² the standards developed to scrutinize contraventions of Charter rights are not necessarily appropriate when the goal is to ensure, with as little dislocation as possible, the legal system's integrity and coherence. Second, and more important, "the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified."⁵³ This is so, the Supreme Court has said, because "[o]ne party will have brought

⁵⁰ Ibid. at 670.

⁵¹ Hill, note 43 above, at 1170-1172 (1995-98).

⁵² Ibid. at 1171 (1997).

⁵³ Ibid. at 1171 (1998).

the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it."⁵⁴

When the relevant common law rights in issue are aboriginal rights, "the community" within which they will have "a long history of acceptance" is, of course, the relevant aboriginal community whose customs and traditions provide the common law basis for such rights. In every other respect, however, the approach the Supreme Court prescribes in Hill to Charter values analysis seems, prima facie at least, to apply as well to common law rights of aboriginal self-government as it does to common law rules generally. On the one hand, it gives clear discretion to the mainstream courts to reformulate particular communities' self-government rights to ensure, as necessary, that they comport with Charter values. On the other hand, it extends a fair margin of appreciation to such rights within any such inquiry. The only aboriginal governance measures and arrangements that Canadian law can now attribute to aboriginal rights, after all, are those provably linked to traditions and customs that have "a long history of acceptance" within the relevant aboriginal communities.⁵⁵ If aboriginal rights exist, at least in part, to acknowledge and protect engagement in those traditions and customs,⁵⁶ then it makes good sense to say that the inherent right communities are entitled, as of right, to conduct themselves in accordance with them, except when and as they demonstrably conflict with Charter values that, demonstrably, deserve to constrain them.

2. Public Policy

Charter values analysis, as we saw above, is but one example of the mainstream courts' ongoing and inherent power to modify and reformulate the common law as necessary to

⁵⁴ Ibid. at 1172 (198).

⁵⁵ See, e.g., Chapter 2, notes 16-53 and the text accompanying them.

⁵⁶ See, e.g., note 15 above and the text accompanying it.

ensure its ongoing relevance.⁵⁷ Another, broader and more familiar form of that same authority is the power to deny effect in particular instances, on grounds of public policy, to common law rights and rules that are otherwise valid and enforceable domestically.⁵⁸ The Supreme Court of Canada has explained the operation of public policy doctrine in this way:

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It . . . is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates.⁵⁹

Courts operating within the broader British legal tradition have reserved similar powers of derogation on public policy grounds when asked to give domestic effect to rules from foreign law⁶⁰ or, in Britain's colonial possessions, to enforce as law indigenous customs.⁶¹

⁵⁷ See note 45 above and the text accompanying it.

⁵⁸ "Whether the point be described in the language of public policy, 'discretion,' or 'the conscience of the court,' an English court will refuse to apply a law which outrages its sense of justice and decency": Re Fuld (No. 3), [1968] P. 675 ("Fuld") at 698.

⁵⁹ Re Millar, [1937] S.C.R. 1 ("Millar") at 4. Compare Fender v. St. John Mildmay, [1938] A.C. 1 (H.L.(E.)) ("Fender") at 38, Lord Wright: "public policy in the narrower sense means that there are considerations of public interest which require the Courts to depart from their primary function of enforcing contracts, and exceptionally to refuse to enforce them. Public policy is in this sense disabling."

⁶⁰ Whenever the Courts of this country are called upon to decide as to the rights and liabilities of the parties to a [foreign] contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. . . . As has often been said, private international law is really a branch of municipal [i.e., domestic] law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored. . . . 'Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law':

Dynamit Actien Gesellschaft v. Rio Tinto Company, [1918] A.C. 260 (H.L.(E.)) at 302, Lord Parker, quoting Westlake, Private International Law, 4th ed. (London: Sweet & Maxwell, 1905) s. 215. See also ibid. at 293-294, Lord Dunedin, at 299, Lord Atkinson; Fuld, note 58 above, at 698 ("It is not, however, to be thought that blind adherence to foreign law can ever be required of an English court").

Implicit in our law's definitions of all such powers, rights and rules, in other words are constraints precluding inconsistency with public policy.⁶² Other things equal, it makes some sense to suppose that the same is true of aboriginal rights of self-government, whether we choose to regard them as common law rights, as expressions of customary law, or even as foreign legal arrangements in need of domestic enforcement.

What is the structure of judicial inquiry into public policy issues? Although one can find authority that public policy is a doctrine driven and confined by established precedent,⁶³ the better view, in my judgment, is that courts engaged in such inquiry are to "ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time."⁶⁴ (No other understanding can account easily for the emergence, or for the immediate judicial acceptance, of "Charter values" as internal constraints on the reach of common law rights in Canada.)⁶⁵ In these circumstances, precedent "cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal."⁶⁶ In 1990, for instance, the Ontario Court of Appeal struck down, on public policy

⁶¹ See, e.g., Akrofi v. Akrofi, [1965] G.L.R. 13 (H.C. Ghana) ("Akrofi") at 16; W.C. Ekow Daniels, "The Influence of Equity in West African Law" (1962) 11 I.C.L.Q. 31 at 47-48; Sir C.K. Allen, Law in the Making, 7th ed. (Oxford: Clarendon Press, 1964) at 158; A.N. Allott, New Essays in African Law (London: Butterworths, 1970) ("Allott, New Essays") at 173-175; L.C. Green, "'Civilized' Law and 'Primitive' Peoples" (1975) 13 Osgoode Hall L.J. 233 at 235.

⁶² See, e.g., Ertel Bieber & Co. v. Rio Tinto Company, [1918] A.C. 260 at 289-290, Lord Sumner.

⁶³ See, e.g., Janson v. Driefontein Consolidated Mines, [1902] A.C. 484 at 491, Lord Halsbury; Fender, note 59 above, at 38-40, Lord Wright, which argue that courts no longer have the power to identify new heads of public policy: that they may invoke the doctrine only in circumstances that fit clearly within the prescriptions of established precedents. In Millar, note 59 above, a majority of the Supreme Court expressed support for this view (at 8), but did not decide the issue.

⁶⁴ Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd., [1894] A.C. 535 (H.L.(E.)) ("Nordenfelt") at 554, Lord Watson. Compare Allen, note 61 above, at 155-156 ("[i]t is now generally recognized . . . that public policy is 'the policy of the day' – i.e. that its standards change from age to age in accordance with the prevailing notions and the social institutions of the time").

⁶⁵ See notes 37-55 above and the text accompanying them.

⁶⁶ Nordenfelt, note 64 above, at 553, Lord Watson.

grounds, trust provisions that restricted scholarship eligibility to individuals who were British Protestant Caucasians,⁶⁷ even though, as the court acknowledged, "when the trust property initially vested in 1923 the terms of the indenture would have been held to be certain, valid and not contrary to any public policy which rendered the trust void or illegal,"⁶⁸ and despite two earlier precedents⁶⁹ (one from the Supreme Court of Canada) holding that racial distinctions did not contravene public policy.⁷⁰

Again, though, it is well established that courts are not meant to have license, in the name of public policy, to withhold enforcement from common law rules or from foreign laws or judgments merely because they happen to disapprove of them, or of their invocation in particular circumstances.⁷¹ Even "taking the most liberal view of the jurisdiction of the courts," the Supreme Court has said, "there are at least two conditions which must be fulfilled to justify a refusal by the courts on grounds of public policy to give effect to a rule of law according to its proper application in the usual course":⁷² it must, at a minimum, operate in defence of "something in the body politic which every normally constituted citizen of

⁶⁷ See Canada Trust Co. v. Ontario Human Rights Commission (1990), 74 O.R. (2d) 481 (C.A.).

⁶⁸ Ibid. at 496-497.

⁶⁹ See Christie v. York Corporation, [1940] S.C.R. 139; Noble v. Alley, [1949] O.R. 503 (C.A.).

⁷⁰ Compare Akrofi, note 61 above, at 16: "If there by such a custom . . . whereby a person is discriminated against solely upon the ground of sex that custom has out-lived its usefulness and is at present not in conformity with public policy. Our customs if they are to survive the test of time must change with the times."

⁷¹ It is the province of the judge to expound the law only; . . . not to speculate upon what is best, in his opinion for the advantage of the community. Some decisions may have no doubt been founded upon the prevailing and just opinions of the public good; . . . but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise:

Millar, note 59 above, at 5, 12, quoting with approval Egerton v. Brownlow (1853), 4 H.L.C. 1 ("Egerton") at 123, Parke B.

⁷² Millar, ibid. at 7.

goodwill must, of necessity, desire to preserve,"⁷³ and it "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds."⁷⁴ "Substantial agreement within the judiciary" may be a precondition for recognition of any new head of public policy.⁷⁵

Public policy doctrine differs from Charter values analysis in offering courts a much broader -- indeed, an indefinite -- range of grounds on which to ensure that particular exercises of self-government rights are compatible with the integrity of the mainstream legal order. Within both kinds of inquiry, however, the mainstream courts are under instructions not to interfere unnecessarily with dispositions, transactions or rules that otherwise qualify for recognition and enforcement.⁷⁶ Only when the disharmony with fundamental values is demonstrable is it appropriate for them to intervene.

3. Constraints on the Reception of Aboriginal Laws

So far, this discussion has focused on generic measures available to the mainstream courts to constrain the permissible reach of particular common law rights and powers when those rights and powers are invoked in ways or for purposes inconsistent with the foundations of our legal

⁷³ ibid. at 7-8, citing In re Wallace; Champion v. Wallace, [1920] 2 Ch. 274 at 303, Younger L.]. Compare Block Bros. Realty Ltd. v. Mollard, [1981] 4 W.W.R. 65 (B.C.C.A.) at 74 ("we should bar an action on the ground of public policy only if we could say it was contrary to 'essential public or moral interest' or 'contrary to our conceptions of essential justice or morality'").

⁷⁴ Millar, ibid. at 8, citing Fender, note 59 above, at 11-12, Lord Atkin.

⁷⁵ See Millar, ibid. at 8, citing Fender, ibid. at 55, Lord Roche.

⁷⁶ Compare Egerton, note 71 above, at 197, Lord Truro:

Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation,

cited with approval in Millar, ibid. at 7, with Hill, note 43 above at 1171 (196): "Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking Charter values into account."

order. We have supposed, for the most part,⁷⁷ that these measures also govern the exercise of self-government rights, because such rights are existing aboriginal rights and aboriginal rights themselves are part of the common law.

There is good reason to think, however, that aboriginal rights in general, and perhaps self-government rights especially, are importantly different from most of the other rights and rules to which the common law has given effect, because aboriginal rights reflect and import pre-existing arrangements and customs that already had the force of law when the (rest of the) common law took hold in the various colonies in North America. "Although the doctrine [of aboriginal rights] was a species of unwritten British law," Brian Slattery argues,

it was not part of the English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.⁷⁸

For similar reasons, Mark Walters has characterized aboriginal rights as features of "imperial common law," as opposed to "municipal [or 'domestic'] common law."⁷⁹

It is impossible to be sure how much difference, if any, this difference makes for present purposes. Despite their dissimilarities from other common law rights and powers, self-

⁷⁷ But see notes 60-62 above and the text accompanying them, which suggest that considerations of public policy also affect domestic enforcement of foreign law and of customary arrangements.

⁷⁸ Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 ("Slattery, 'Understanding'") at 737-738. The Supreme Court of Canada has cited this passage with interest (see Côté, note 36 above, at 173 (¶49)), but not yet with approval. It preferred in that case to rest its decision on other reasoning: see ibid. at 174-175 (¶¶50-52).

⁷⁹ See Mark D. Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 ("Walters, 'Mohegan Indians'") esp. at 789-790; Mark D. Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 Queen's L.J. 301 ("Walters, 'Magna Carta'") esp. at 338-339. See also Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623; 2 RCAP Final Report, note 13 above, esp. at 190-192.

government and other aboriginal rights may very well turn out to be susceptible to Charter values analysis and to public policy doctrine; nothing related to either inquiry seems to turn on the origins of the various rights now given protection within the common law.⁸⁰

All the same, it seems imprudent to base the fundamental values hypothesis on the mere assumption that these measures will be available, despite aboriginal rights' distinctive provenance and character, to harmonize the use of such rights with the most essential features of the mainstream order. The argument is much stronger if it takes account of those differences and demonstrates a doctrinal basis for fundamental values review even in respect of laws and customs whose foundations predate the domestic reception of the common law.

We know that "the doctrine of aboriginal rights exists . . . because . . . aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" when the Europeans arrived in North America.⁸¹ Unfortunately, we do not yet have either clear consensus or authoritative judicial pronouncement about the precise domestic doctrinal significance of this fact: about precisely how and why authoritative pre-existing aboriginal customs and traditions have come to have enforceable effect within mainstream law. There are, in my view, two contending accounts that have plausibility.⁸² Both accommodate, though in different ways, the distinctiveness and the initial primacy of aboriginal rights within common law. According to one, our law recognizes aboriginal rights because it recognizes and enforces pre-existing customs generally.⁸³

⁸⁰ See again notes 60-62 above and the text accompanying them.

⁸¹ Van der Peet, note 11 above, at 538 (¶30). Emphasis in original. For discussion, see, e.g., Chapter 2, notes 16-53 and the text accompanying them.

⁸² See Walters, "Magna Carta," note 79 above, esp. at 343.

⁸³ See, e.g., Norman K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases," [1984] 4 C.N.L.R. 1; Bob Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in Delgamuukw v. British Columbia" (1994) 28 U.B.C. L. Rev. 49 at 80-81;

According to the other, our law recognizes aboriginal rights because of a principle of imperial constitutional law known as the doctrine of continuity. The continuity doctrine provides that the laws and legal arrangements in force in a territory when the Crown acquires sovereignty remain presumptively in force, subject to certain conditions, unless and until the Crown or the legislature takes valid and effective steps to extinguish them.⁸⁴

A principled choice between these approaches requires acquaintance with intricacies of imperial constitutional law too complicated for us to work through here. It may be helpful, though, to try to summarize very briefly the relationship between them.

The traditional view of imperial law distinguishes sharply among the Crown's colonial possessions based on the method of their acquisition. When colonies were acquired from the local power by conquest or cession, the doctrine of continuity applied; the common law had no force there until it was introduced, either by Crown prerogative or by a duly constituted colonial legislature. Depending on the manner of the common law's introduction, and on subsequent valid colonial legislative activity, indigenous legal arrangements might or might not survive alongside mainstream law. Other colonies, however, the Crown presumed to acquire by the mere fact of English settlement (or "discovery"), either because the territory really was uninhabited, or (much more often) based on the fiction that there was no legal order already in place there. In colonies regarded as settled, imperial law took no notice of pre-existing indigenous legal arrangements; the common law took hold upon the arrival of the first English settler, because there was (by hypothesis) no other (suitable) legal regime available to govern inhabitants. In all settled colonies, therefore, and in ceded or conquered colonies that have

Walters, "Magna Carta," note 79 above, at 340-343. For very useful overviews of the English law of custom, see Halsbury's Laws of England, vol. 12, 4th ed. (London: Sweet & Maxwell, 1975) ("12 Hals. (4th)") ¶¶401-442; Allen, note 61 above, at 120-160.

⁸⁴ See, e.g., Slattery, "Understanding," note 78 above, at 736-741; Walters, "Comment on Delgamuukw," note 11 above, esp. at 351-352, 385-386; Walters, "Magna Carta," ibid. at 333-340.

replaced pre-existing arrangements with their own basic law, indigenous arrangements, on this traditional view, can survive and have legal force, if at all, only pursuant to some specific statutory accommodation or if they can qualify under domestic law as custom.⁸⁵

In recent years, this traditional view has faced some sustained criticism. Slattery argues that the imperial doctrine of aboriginal rights does not depend on the circumstances in which a colony received the English common law; instead,

it limits and molds the application of that law to native peoples, . . . The reason is that the doctrines governing the reception of English law in 'settled' colonies, and the reception of local law (such as French law) in 'conquered' colonies are themselves part of imperial constitutional law and are to be understood in light of other imperial principles, including the doctrine of aboriginal rights.⁸⁶

Walters, for his part, has identified several exceptions in mainstream law to the rigid rules for classifying British colonies: cases in which domestic colonial law accommodates pre-existing indigenous legal arrangements despite the absence of conquest or cession, and cases in which domestic and pre-existing legal arrangements coexist and apply to different populations within ceded and conquered colonies.⁸⁷ Both have argued effectively that the doctrine of continuity is a sound and sufficient basis for domestic acknowledgement and enforcement of

⁸⁵ See generally, e.g., Blankard v. Galdy (1693), 2 Salk. 411, 91 E.R. 356 ("Blankard (Salk.)") at 411-412 Salk., 357 E.R., (1693) Holt K.B. 341, 90 E.R. 1089 at 342 Holt, 1089 E.R. (slightly different reports); Anonymous (1722), 2 P. Wms. 75, 24 E.R. 646 ("Anonymous (1722)") at 75-76 P. Wms., 646 E.R.; Campbell v. Hall (1774), Lofft. 655, 98 E.R. 848 (K.B.) ("Campbell") at 741-742 Lofft., 895-896 E.R.; Sammut v. Strickland, [1938] A.C. 678 (P.C.) at 701; Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law (New York: Praeger, 1966) at 533, 541-542; Green, note 61 above, at 234-235; Australia, Law Reform Commission, The Recognition of Aboriginal Customary Law, vol. 1 (Canberra: Australian Government Publishing Service, 1986) ("1 Australian LRC Report") at 49-52 (¶¶60-64); Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989) ("McNeil, Aboriginal Title") at 108-133; Walters, "Comment on Delgamuukw," note 11 above, at 358-373; Mabo, note 18 above, per Brennan J. at 34-43; Walters, "Mohegan Indians," note 79 above, at 790-792; Walters, "Magna Carta," *ibid.* at 341-343.

⁸⁶ Slattery, "Understanding," note 78 above, at 738.

⁸⁷ See Walters, "Comment on Delgamuukw," note 11 above, at 362-366, 373-386. Compare McNeil, Aboriginal Title, note 85 above, at 117-132.

such pre-existing arrangements as aboriginal rights.⁸⁸

Pending an authoritative judicial determination of this issue,⁸⁹ it makes sense to examine both approaches for their compatibility with the fundamental values hypothesis. As it turns out, both involve screening mechanisms closely akin to the public policy doctrine.⁹⁰

a. custom: reasonableness

English law has long recognized that customs specific to identifiable groups of people in particular geographic areas can, if they meet certain criteria, operate and be enforced, in respect of those groups in those areas, as a kind of local common law.⁹¹ Rights that arise

⁸⁸ See Walters, "Comment on Delgamuukw," *ibid.* at 386 ("once indigenous people are recognized as having law -- whether the formal law of the European sort, or the custom-based law of aboriginal peoples -- the Doctrine of Continuity applies"); Slattery, "Understanding," note 78 above, at 738-739:

. . . the rule respecting native custom applies regardless of whether the territory is deemed to have been acquired by conquest, cession, peaceful settlement, or in some other way. It may be seen, then, that the doctrine of colonial law that supports the survival of native custom in Canada is distinct from the English rules concerning local custom in England and is governed by quite different consideration. The attempt to apply the tests governing custom in the English County of Kent to native customs in the Canadian Northwest Territories is misguided.

⁸⁹ In at least some important respects, the distinction between the "custom"- and "continuity"-based approaches closely resembles the difference between the approaches of Lamer C.J.C., who wrote for the majority, and McLachlin J., who dissented, in Van der Peet, note 11 above. To be fair, though, neither judgment addressed this very issue or framed the argument in precisely these terms.

⁹⁰ See, e.g., Allen, note 61 above, at 155-156 (custom); Green, note 61 above, at 234-235; Bennie Goldin & Michael Gelfand, African Law and Custom in Rhodesia (Cape Town: Juta & Co., 1975) at 65; J.C. Bekker, Seymour's Customary Law in Southern Africa, 5th ed. (Cape Town: Juta & Co., 1989) at 57-58 (continuity); Sebastian Poulter, "African Customs in an English Setting: Legal and Policy Aspects of Recognition" (1987) 31 J.A.L. 207 at 216-217 (both).

⁹¹ See, e.g., Filewood v. Marsh (1797), 1 Hag. Con. 478, 161 E.R. 623; Lockwood v. Wood (1844), 6 Q.B. 50, 112 E.R. 19 (Ex. Ch.) ("Lockwood"); Hammerton v. Honey (1876), 24 W.R. 603 ("Hammerton"); Anglo-Hellenic Steamship Co. v. Louis Dreyfus & Co. (1913), 29 T.L.R. 197.

from local custom belong collectively to the relevant cohort of individuals;⁹² they protect only special practices and arrangements that those in that collectivity "regard . . . as obligatory, not as merely facultative."⁹³ Observances qualifying as customs have "inherent validity[;] . . . the 'sanction' of the court is declaratory rather than constitutive".⁹⁴ Once established, they prevail, in case of conflict, over other rights or powers that flow from the common law generally.⁹⁵ Only an Act of Parliament can abolish or extinguish them.⁹⁶

There are, as the Australian Law Reform Commission has recognized, "no clear limits . . . to the customs that could be recognised in this way. . . . [T]he categories of customary rights are not, it seems, closed, and those that have been recognised do not fit into any defined class or classes."⁹⁷ Because customary rights are exceptions from the general law, however,⁹⁸

⁹² Wyld v. Silver, [1963] 1 Ch. 263 (C.A.) ("Wyld") at 255-256, Lord Denning M.R., at 263, Harman L.); New Windsor Corporation v. Mellor, [1975] 1 Ch. 380 (C.A.) ("New Windsor") at 395 Browne L.).

⁹³ Allen, note 61 above, at 137. "There is a difference," Allen adds (ibid.), "between a habit and a legal custom." See also ibid. at 83.

⁹⁴ ibid. at 130. Emphasis in original deleted.

⁹⁵ It is obvious that the custom may virtually deprive the owner of the land of any benefit of it: because he cannot use it in any way so as to hinder the villagers in their pastimes. But, nevertheless, the custom is good. . . . If anyone should disturb or hinder the exercise of that right, any one of the inhabitants can sue to enforce the right of all . . . He can stop any fences being erected, or any holes being dug, or pipes laid, if they would interfere unreasonably with the exercise by the villagers of their right:

New Windsor, note 92 above, at 387, Lord Denning M.R.

⁹⁶ ibid. at 387; Hammerton, note 91 above, at 603; 12 Hals. (4th) ¶¶441-442. Authorities differ on whether a statute can extinguish a custom "either by express provision or by the use of words which are inconsistent with the continued existence of the custom" (12 Hals. (4th) ¶¶441-442, citing authority), or "only . . . by express words" (New Windsor, note 92 above, at 387, citing Forbes v. Ecclesiastical Commissioners for England (1872), L.R. 15 Eq. 51).

⁹⁷ 1 Australian LRC Report, note 85 above, at 50 (¶62).

⁹⁸ Allen, note 61 above, at 130; J.N. Matson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth" (1993) 42 I.C.L.Q. 753 at 763.

entitlement to them must be specially proved. To have the force of law as such, a custom must satisfy four⁹⁹ criteria.¹⁰⁰ Three of these are questions of fact, designed to establish the custom's existence and authenticity; the fourth, a question of law, ensures that any custom that obtains and retains the force of law is compatible with the foundations of the legal order that is to house it. I want to focus first on the three criteria of fact.

To demonstrate a custom's existence under English law, one must prove three things.

Certainty (or ascertainability). Like all other exceptions from general law, customs are subject to limits as to locality, participation and subject matter. To recognize and enforce a custom, therefore, a court must be able to recognize, and apply in particular cases, the rule or principle giving rise to it:¹⁰¹ to ascertain with enough precision what it is and where and to whom it applies. A custom purporting to apply throughout the whole of England,¹⁰² or to embrace every member of the public,¹⁰³ could not be a custom at all, because it would be indistinguishable from the "common" law.¹⁰⁴ The more extensive the territory, and the broader the range of activities and participants, a practice or arrangement is said to encompass, the greater is the risk that the courts will consider it "too wide" to qualify as a cus-

⁹⁹ Enumerations sometimes vary. Allen, following Blackstone, identifies seven criteria, unpacking as separate tests three factors generally dealt with under the usual four: see Allen, *ibid.* at 132-140; in Wolstanton Ltd. v. Newcastle-under-Lyme Corp., [1940] A.C. 860 ("Wolstanton") at 876, on the other hand, the House of Lords lists only three, grouping together continuity and antiquity.

¹⁰⁰ See, e.g., Lockwood, note 91 above, at 64 Q.B., 24-25 E.R.; Hammerton, note 91 above, at 603-604.

¹⁰¹ Champneys v. Buchan (1857), 4 Drew. 104, 62 E.R. 41.

¹⁰² Anonymous (1543), Bro. N.C. 56, 73 E.R. 871.

¹⁰³ Fairly v. Roch (1686), 1 Lut. 891, 125 E.R. 489; Sherborn v. Bostock (1729), Fitz.-G. 51, 94 E.R. 648; Fitch v. Rawling (1795), 2 Hy. Bl. 393, 126 E.R. 614 (C.P.) ("Fitch"), at 398 Hy. Bl., 616 E.R..

¹⁰⁴ Co. Litt. 110b. See generally 12 Hals. (4th) ¶¶401-402, 415-417.

tom.¹⁰⁵ As long as a custom is and remains ascertainable in these respects, however, it can remain in force despite fluctuations in the constitution of its class of beneficiaries¹⁰⁶ and despite inclusion within it of some new operations, inventions¹⁰⁷ or even related activities.¹⁰⁸ "A custom is not uncertain because it is not invariable in every part."¹⁰⁹

Antiquity. "Local common law, like general common law, is the law of the country as it existed before the time of legal memory, which is generally considered the time of Richard I,"¹¹⁰ i.e., the year 1189.¹¹¹ It is not necessary, however, to prove affirmatively that the relevant practice or arrangement was in place in 1189;¹¹² if that were the requirement, no one now could ever authenticate a custom. Instead, the courts will infer a custom's

¹⁰⁵ See, e.g., Hammerton, note 91 above, at 604; 12 Hals. (4th) ¶¶415-416.

¹⁰⁶ 12 Hals. (4th) ¶417; New Windsor, note 92 above, at 387, Lord Denning M.R.

¹⁰⁷ Mercer v. Denne, [1905] 2 Ch. 539 (C.A.) ("Mercer (C.A.)") at 581, Stirling L.J., aff'g. [1904] Ch. 538 ("Mercer (Ch.)").

¹⁰⁸ See, e.g., Fitch, note 103 above, at 398 Hy. Bl., 616 E.R. (custom authorizing play at "all kinds of lawful games, sports and pastimes" held to include games of more recent invention); compare Slattery, "Understanding," note 78 above, at 746-747, n. 65.

¹⁰⁹ Mercer (Ch.), note 107 above, at 552.

¹¹⁰ Hammerton, note 91 above, at 603.

¹¹¹ It is something of a historical accident that 1189 was established as the limit of legal memory in England. Judicial practice at the time was to begin legal memory for common law purposes from the outer limit of the statutory limitation period for asserting writs of right for the recovery of real property. The Statute of Westminster, 1275, 3 Edw. I, c. 39, established 1189 – the beginning of the reign of Richard I – as the earliest possible year in respect of which such actions could be begun; before that, earlier statutes had established earlier dates. It was not until 1540, however, that Parliament next enacted a limitations statute. By then, 1189 had assumed a life of its own as the limit of legal memory, so the courts did not readjust it to continue the earlier practice, and have not done so since: see, e.g., Dalton v. Angus (1881), 6 App. Cas. 740 (H.L.) at 812, Lord Blackburn, aff'g. Angus v. Dalton (1877), 3 Q.B.D. 85 at 103-105, Cockburn C.J.; Henry J. Stephen, New Commentaries on the Laws of England, vol. 1 (London, Butterworths, 1908) at 28; Allen, note 61 above, at 133-134; Sir William Holdsworth, A History of English Law, vol. 3, 5th ed. (London: Sweet & Maxwell, 1973) ("Holdsworth, 5th ed.") at 8, 166; Holdsworth, 5th ed., vol. 7, 343-345.

¹¹² Bastard v. Smith (1837), 2 M. & Rob. 129, 174 E.R. 238 ("Bastard"), at 136 M. & Rob., 240 E.R.

existence from "proof . . . that user corresponding to the alleged custom in fact existed at some time past,"¹¹³ or from "a continuous, peaceable, and uninterrupted user of the custom . . . as far back as living memory goes,"¹¹⁴ unless someone can prove on contrary evidence that it was not, or could not have been, in existence before the beginning of legal memory.¹¹⁵ Concrete proof of more recent origin would, of course, suffice.

Continuity. Proof of a custom requires proof of "long, continuous, habitual usage without interruption."¹¹⁶ This is a corollary of the requirement that customs be of immemorial origin; proof of continuity helps show that the contemporary observance is, in relevant ways, the same as the ancient one on which the custom is founded. One need not prove continuous engagement in the usage or practice down to the present day, but the longer it has been since anyone actually engaged in the practice, the harder it becomes to prove that it gives rise to a customary right.¹¹⁷ Once a custom is established on the evidence, though, subsequent interruptions in its exercise cannot destroy or undermine it.¹¹⁸ It "cannot be lost by disuse or abandonment," and it cannot be waived by some individuals on behalf of the group to which it belongs. And again, it does not cease to be the "same" custom merely because it comes to involve new operations, methods or kinds of instances.¹¹⁹

¹¹³ 12 Hals. (4th) ¶407.

¹¹⁴ Bastard, note 112 above, at 136 M. & Rob., 240 E.R.; Mercer (Ch.), note 107 above, at 556; Wolstanton, note 99 above, at 876-877.

¹¹⁵ See, e.g., Hammerton, note 91 above, at 604; Mercer (Ch.), ibid. at 555; Allen, note 61 above, at 134; 12 Hals. (4th) ¶¶408, 421.

¹¹⁶ Hammerton, ibid. at 603.

¹¹⁷ Wyld, note 92, 117 above, per Lord Denning M.R. at 255; 12 Hals. (4th) ¶419. Compare Allen, note 61 above, at 136.

¹¹⁸ See, e.g., Scales v. Key (1840), 11 Ad. & E. 819, 113 E.R. 625 ("The finding of the jury, that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished"). Compare Mercer, note 107 above; Wyld, note 92, 117 above; New Windsor, note 92 above.

¹¹⁹ See notes 107-109 above and the text accompanying them.

When indigenous peoples in Great Britain's colonial possessions have asserted rights or claims based on pre-existing custom, the courts have applied "substantially the same" approach in adjudicating them,¹²⁰ subject to some allowances for the differences in circumstances.¹²¹

Such allowances include a different approach to the "time immemorial" requirement: the expectation that customary rights be anchored, at least notionally, in practices already in place by 1189.¹²² The 1189 problem has proved a real obstacle to settler peoples asserting customary rights (or prescriptive rights, which face the same requirement) in current or former British colonies,¹²³ including those in Canada.¹²⁴ As a general rule,¹²⁵ however, colo-

¹²⁰ See Allen, note 61 above, at 157, citing Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar (1872), 14 Moo. I.A. 570.

¹²¹ See, e.g., A.N. Allott, "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 *Modern L. Rev.* 244 ("Allott, 'Judicial Ascertainment'") at 246:

as far as the Africans who are members of that tribe are concerned, their customary law is not an occasional variant from the general law applicable to them; it is their general law *prima facie* applicable in civil and criminal matters. The tests for its application, and the method by which its rules are ascertained, should not be blindly borrowed from the English law relating to local custom. After a period of uncertainty, colonial courts have recognised as much . . .

¹²² See notes 110-115 above and the text accompanying them.

¹²³ See, e.g., Angullia v. Ong Boon Tat (1921), 15 S.S.L.R. 190 (Singapore) ("Plaintiff's claim . . . based . . . upon common law prescription must fail. The history of Singapore began in 1819, more than 600 years after 1189, and that in itself concludes the matter"). See also Walters, "Magna Carta," note 79 above, at 342, n. 137.

¹²⁴ See, e.g., Grand Hotel Co. v. Cross (1879), 44 U.C.Q.B. 153 ("Grand Hotel") at 263, Armour J. (custom unavailable as a source of rights in Canada "because there is here no time immemorial on which to found it"), at 171, Hagarty C.); Burrowes v. Cairns (1846), 2 U.C.Q.B. 288 at 290-291; Abell v. Village of Woodbridge and County of York (1917), 39 O.L.R. 382 (H.C.) at 388 ("prescription may be defeated by shewing that it first arose since the time of legal memory, that is, since 1189; and the Court may take judicial notice of the fact that America was discovered in 1492"). But see Gibbs v. Village of Grand Bend (1989), 71 O.R. (2d) 70 (H.C.), rev'd. without reference to the point (1995), 26 O.R. (3d) 644 (C.A.), which suggests (at 109) that "[n]ow, a hundred and ten years [after Grand Hotel], perhaps the law of custom in Ontario could be looked at afresh" as regards the issue of immemoriality. That suggestion could draw some support from the House of Lords' acknowledgement, in Wolstanton, note 99 above, at 876-877, that "the presumption [of antiquity based on living memory] itself in most cases is little more than a fiction" and that "in most cases no one supposed that the enjoyment really went back to the year 1189."

nial courts have recognized that 1189 is an utterly artificial measure of antiquity in pre-existing cultures,¹²⁶ and have adopted different, more convenient tests for measuring it.¹²⁷ Addressing issues of aboriginal custom in the Northwest Territories, one Canadian court relied entirely upon the presumption of antiquity that arises on proof of continuous engagement "as far back as living memory goes";¹²⁸ another held that "in this context, 'time immemorial' runs back from the date of assertion of English sovereignty over the territory . . ."¹²⁹ "In essence," Mark Walters has suggested, "the continuity of law from a preceding legal system displaced the need for immemorial usage."¹³⁰

Other ways in which colonial courts have allowed for indigenous difference in accrediting pre-existing customs include reliance on distinctive local rules of evidence,¹³¹ acknowledgement that indigenous customs can modify "under the influences of civilization . . . without losing their essential character of custom,"¹³² and recognition that this body of law, as applied to

¹²⁵ For an exception, see Welbeck v. Brown, [1882] Sarbah F.C.L. 185 (Gold Coast).

¹²⁶ See, e.g., Allott, "Judicial Ascertainment," note 121 above, at 246; Allen, note 61 above, at 159; 1 Australian LRC Report, note 85 above, at 50.

¹²⁷ See, e.g., Mensah v. Wiaboe (1925), Div. Ct. 1921-25 170 (Gold Coast Div. Ct.) at 172 (upholding customs in place before, but not those originating after, enactment of the Gold Coast Supreme Court Ordinance giving statutory effect to customary law); Garurudhwaja Parshad Singh v. Saparandhwaja Parshad Singh (1900), L.R. 27 I.A. 238 (P.C.) at 247 (eighty consecutive years from the time of British occupation sufficient). Allen, note 61 above, also cites, to similar effect (at 159, n. 1), Doe d. Jagomohan Rai v. Srimati Nimu Dasi, Montriou's Cases in Indian Law, 596.

¹²⁸ Re Kitchooalik and Tucktoo (1972), 28 D.L.R. (3d) 483 (N.W.T.C.A.) at 488, citing the passage quoted above at note 114; see generally, Zlotkin, note 83 above. Stephen, note 111 above, supports this approach to antiquity issues even within English law: see ibid., vol. 1, at 28-29.

¹²⁹ Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, [1980] 1 F.C. 518 (T.D.) at 562.

¹³⁰ Walters, "Magna Carta," note 79 above, at 342. See generally ibid. at 341-342.

¹³¹ Allen, note 61 above, at 159.

¹³² Eshugbayi Eleko v. Government of Nigeria, [1931] A.C. 662 (P.C.) ("Eleko") at 673.

indigenous tribes, can accommodate the deliberate alteration of local custom through the exercise of internal self-government.¹³³

The resemblance between the Canadian law of aboriginal rights and the common law that governs recognition of local custom is, though so far unacknowledged and perhaps inadvertent, truly remarkable, especially after one takes account of custom law's special adaptations to allow for indigenous circumstances.¹³⁴ The extent of that resemblance

¹³³

It may be that . . . the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi legislative internal authority which can modify it:

Arani v. Public Trustee of New Zealand, [1920] A.C. 198 (P.C.) at 204-205; McNeil, Aboriginal Title, note 85 above, at 183, n. 83. See also (arguably) Eleko, note 132 above, at 673; Kajubi v. Kabali (1944), 11 E.A.C.A. 34 at 37, discussed in Allott, "Judicial Ascertainment," note 121 above, at 255-256.

¹³⁴

Compare notes 101-133 above and the text accompanying them with Chapter 2, notes 16-53 and the text accompanying them.

There is at least one important difference between these two bodies of doctrine. So far, at least, Canadian law recognizes as aboriginal rights only those pre-existing customs, traditions or arrangements that were and remain "of central significance" to -- integral to the distinctive cultures of -- the aboriginal society claiming the particular right: see Chapter 2, notes 27-45 and the text accompanying them. There is, as far as I can tell, no similar requirement involved at common law in accreditation of a custom. As long as a practice or arrangement is regarded by those relying on it as "obligatory, not as merely facultative" (see note 93 above and the text accompanying it) and meets the other usual requirements, including the test of certainty (see notes 101-109 above and the text accompanying them), it qualifies at common law for enforcement as a custom, whether or not its observance also happens to be constitutive of the group or locality claiming its benefit. So far, at least, I have yet to find an instance outside Canada in which a colonial court, entertaining a claim of indigenous custom, has insisted on proof that the observance was integral to the constitution of the relevant aboriginal culture. For related commentary, and criticism on this basis of the Supreme Court's approach in Van der Peet, note 11 above, see Walters, "Magna Carta," note 79 above, at 338.

It is not clear, either, whether the law of custom is broad enough to accommodate the Canadian law of aboriginal title, discussed in Chapter 2, notes 22-53 and the text accompanying them. Both custom and aboriginal title must be specially proved, and both depend on proof of certainty, antiquity and continuity; aboriginal title, however, which "encompasses the right to exclusive use and occupation of the land held pursuant title for a variety of purposes" (Delgamuukw, note 16 above, at 1083 (¶117)) may turn out to be "too wide" a right to meet the traditional specifications of the law of custom: see note 105 above and the text accompanying it.

provides a strong basis on which to conclude that Canadian courts, in declaring and applying aboriginal rights,¹³⁵ may also rely on the fourth traditional test that the common law uses in identifying and enforcing customs.

That fourth test requires of candidate practices and arrangements that they be "reasonable." Inclusion of this standard confirms domestic courts' authority to ensure that the arrangements recognized and enforced as customs are compatible, at least at the margin, with the fundamentals of the mainstream legal system. C.K. Allen describes the situation in this way:

royal justice establishes approximate uniformity in essentials as against the bewildering diversity of local custom, and the supreme custom becomes the custom of the King's Court. There is still great variety of usages in manors, boroughs, and localities; but in what may be called the working basis of a general system of justice, the royal courts carry on, and have ever since continued, a perpetual process of reconciliation and harmonization, so that local divergences, though always respected and often jealously safeguarded, do not impair the symmetry of the main fabric.¹³⁶

To conclude that a practice or arrangement is unreasonable, therefore, is to conclude that, irrespective of the antiquity of its observance, it is not the kind of arrangement that domestic law can accommodate, protect and enforce.¹³⁷ In one sense, therefore, reasonableness

¹³⁵ One issue that may deserve further thought is whether the common law of custom can serve as a foundation for aboriginal rights in Quebec, given that the common law has not been part of the law of Quebec, at least in civil matters, since enactment of the Quebec Act, 1774, 14 Geo. III, c. 83 (U.K.), R.S.C. 1985, App. II, No. 2. One possible answer is that the problem does not arise in quite those terms, because the Canadian law of aboriginal title -- and, by implication, of aboriginal rights generally -- is federal common law (see Roberts v. Canada, [1989] 1 S.C.R. 322 at 340), unaffected by the civil regimes that happen to be in place in the various provinces. If this is so, then the law of custom, at least insofar as it might fairly pertain to aboriginal peoples, ought to be understood to be part of the federal common law, and ought therefore to be available as a foundation for aboriginal rights, even in Quebec.

¹³⁶ Allen, note 61 above, at 124-125. See also ibid. at 127-128 ("in the development of this fundamental law, interpretation by constituted authority plays an indispensable part").

¹³⁷ . . . when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom:

review precedes and prefigures the rest of the inquiry into a custom claim, "because it is clear that no custom bad in law is susceptible of proof. . . . On the other hand, it seems clear that a custom possible in law, because it is reasonable and otherwise fulfils the requisites of a good custom, may be established by very slender evidence."¹³⁸

Reasonableness, in other words, is part of the definition of every customary right,¹³⁹ and limits its protected scope from within. Such rights, so defined, cannot protect or give effect to measures that are themselves unreasonable, even when such measures otherwise conform to the custom.¹⁴⁰ In these respects, at least, this requirement operates identically to public policy analysis.¹⁴¹ Applied in Canada to the definition and implementation of self-government rights, it would give our courts ample authority to withhold domestic legal protection from measures or arrangements that compromised the structural or moral integrity of the mainstream order. There is clear precedent for its use in colonial courts adjudicating claims based on pre-existing native customs.¹⁴²

Marquis of Salisbury v. Gladstone (1861), 9 H.L. Cas. 692 at 701-702, Lord Cranworth. See also Tyson v. Smith (1838), 9 Ad. & E. 406, 112 E.R. 1265 ("Tyson"), at 422 Ad. & E., 1272 E.R.

¹³⁸ Johnson v. Clark, [1908] 1 Ch. 303 ("Johnson") at 309. Compare 12 Hals. (4th) ¶410 ("[u]ser to prove a custom must be such user as will prove a reasonable rule; no amount of user will establish an unreasonable local exception to the common law . . .").

¹³⁹ "Since every custom sanctioned by the courts must be reasonable, it follows that every case where a custom has been upheld by the courts is an example of a reasonable custom": 12 Hals. (4th) ¶412.

¹⁴⁰ See, e.g., Day v. Savadge (1615), Hob. 85, 80 E.R. 235, at 87 Hob., 237 E.R.; Mercer (Ch.), note 107 above, at 552; Mercer (C.A.), note 107 above, per Stirling L.J. at 581; Allen, note 61 above, at 622-624.

¹⁴¹ See, e.g. Allen, ibid. at 150-151, 155-156.

¹⁴² See note 120 above and the text accompanying it. See also Vanderpuye v. Botchway (1951), 13 W.A.C.A. 164 (Gold Coast) at 169 ("Native custom consists in the performance of the reasonable in the particular circumstances of the case"), citing Yerenchi v. Akuffo (1905), Renner 362 at 367; 1 Australian LRC Report, note 85 above, at 50; Gordon R. Woodman, "How State Courts Create Customary Law in Ghana and Nigeria" in Bradford W. Morse & Gordon R. Woodman, eds., Indigenous Law and the State (Dordrecht: Foris Publications, 1988) 181 at 199.

As with public policy review and Charter values analysis, though, there is throughout the law of custom real concern to ensure that the inquiry into reasonableness not interfere unnecessarily with the protection and enjoyment of genuine customary rights.¹⁴³ This is important because local customary arrangements are often quite different -- sometimes dramatically so -- from standard mainstream ways of doing things. C.K. Allen, for one, warns of the danger of mistaking unfamiliarity for irrationality, even in respect of English customs:

Often . . . the rational basis [for a custom] is extremely obscure. A custom may seem entirely arbit[r]ary, a mere freak or throwback, but this is usually because we have insufficient evidence of its origin; further investigation, or a chance discovery, may show that there is an excellent practical reason for what seemed at first entirely fortuitous. . . . We must be chary of characterizing any custom, however seemingly abnormal, as irrational unless we have all the evidence before us.¹⁴⁴

The law addresses this concern in its treatment of both the burden and the standard of proof in reasonableness review. The burden of proof is on the party challenging the custom to show that it is unreasonable; unless it demonstrably fails to meet the appropriate standard of

On the other hand, a court may not, on its own initiative, transform one custom into a different one, even in order to give it effect by rendering it "reasonable." "It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate": Eleko, note 132 above, at 673. If, as a matter of fact, the community does not assent to, or observe, a version of the custom that satisfies the test of reasonableness, the custom cannot stand in domestic law: ibid. But see Idewu Inasa v. Oshodi, [1934] A.C. 99 (P.C.) ("Inasa") at 105, where the Privy Council preferred a narrower version of a tribal custom, which did accord with appropriate standards, to a broader version, which by implication did not.

¹⁴³ It is not meant by [the reasonableness requirement] that the courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom, or whenever they think that a better rule could be formulated in the exercise of their own judgment. This would be to deprive custom of all authority, either absolute or conditional:

Glanville Williams, ed., Salmond on Jurisprudence, 11th ed. (London: Sweet & Maxwell, 1957) ("Salmond, 11th ed.") at 242.

¹⁴⁴ Allen, note 61 above, at 98. Compare Allott, New Essays, note 61 above, at 162 ("[a]s sociological knowledge of African peoples grows, and knowledge of the detailed rules of customary law becomes more ample and more accurate, there is less and less temptation to declare something that we do not understand to be repugnant to our ideas").

reasonableness, the courts will regard a custom, otherwise proved, as reasonable.¹⁴⁵ As for the standard of proof, there is general agreement that "[t]he words 'reasonable or not unreasonable' imply an appeal to some criterion higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with these rules or maxims";¹⁴⁶ the whole point, after all, of accrediting custom is to give legal effect to exceptions from the general law. Instead, "a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system."¹⁴⁷ A custom otherwise proved -- and a measure undertaken pursuant to it -- counts as good law, that is, unless it is demonstrably inconsistent with the most fundamental values of the mainstream legal order.¹⁴⁸ One could hardly ask for a clearer expression of the fundamental values hypothesis. Indications are, too, that courts take greater

¹⁴⁵ "The party who has proved the existence of a custom is not under the further necessity of proving its reasonableness; it is for the party disputing the custom to satisfy the court of its unreasonableness": Allen, *ibid.* at 140. See also *Johnson*, note 138 above, at 311; 12 Hals. (4th) ¶409.

¹⁴⁶ *Johnson*, note 138 above, at 311. See also *Tyson*, note 137 above, at 421 Ad. & E., 1271 E.R.; 12 Hals. (4th) ¶412.

¹⁴⁷ *Johnson*, note 138 above, at 311. One looks to "a trained lawyer" because the determination of reasonableness -- of consistency with the principles at the root of our legal system -- is a question of law, not a question of fact: *ibid.* See also *Bastard*, note 112 above, at 135 M. & Rob., 240 E.R.

¹⁴⁸ See, e.g., Allen, note 61 above, at 140 (citing authority basing the test on "fundamental principles of right and wrong"), 146 (custom disqualified only if it "not merely differs from but directly conflicts with an essential legal principle"), 155 (a custom "is not *malus* merely because it is an erratic exception to the general law, but only if it is so violent an exception, to the advantage of a small class of persons that it clashes irreconcilably with a principle which it is the policy of the law to apply to all persons whatever"); *Salmond*, 11th ed., note 143 above, at 242 ("The true rule is, or should be, that a custom, in order to be deprived of legal efficacy, must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity"). Compare *Mabo*, note 18 above, per Brennan J. at 29-30, quoted above in text accompanying note 21.

care not to intrude unnecessarily when entertaining the customs of a different civilization.¹⁴⁹

b. continuity: justice, equity and good conscience

The effect of the law of custom, as we have just seen, is to identify certain pre-existing arrangements, observances and activities and to incorporate them into the mainstream domestic law, despite their sometimes substantial differences from the "common" law. The effect of the doctrine of continuity, on the other hand, is to leave undisturbed the governance apparatus and the legal arrangements already in place in a territory at the time the Crown acquires sovereignty over it, until such time as, and except to the extent that, the Crown sees fit to displace them with other arrangements or otherwise to extinguish them. Whereas the pre-existing laws incorporated as customs operate within the domestic legal systems that accommodate them, the pre-existing legal arrangements perpetuated by the doctrine of continuity operate instead alongside and generally separate from such systems,¹⁵⁰ "within

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. . . it is clear that when a dominant people is dealing with the customs of a different civilization and of different religions, the tests of reasonableness, morality and public policy must be looked at from an angle somewhat different from that which would be appropriate in the conditions of English society. In general, British administration has endeavoured to leave indigenous customs intact [in its south Asian and African colonies], however alien they may be to Western and Christian nations; but where they are considered to violate elementary considerations of humanity and decency, they are . . . rejected . . . On the whole, the British courts have applied only those principles of morality which they consider to be common to all civilized peoples, without giving them a dogmatically Occidental -- and of course not necessarily a Christian -- colouring:

Allen, *ibid.* at 158. It is for this reason, and for the other reasons set out in this paragraph of text and the preceding one, that I believe the B.C. Supreme Court adopted too intrusive a test for accreditation when it considered the Sallish custom of spirit dancing in Thomas, note 30 above, at 160-161. See note 30 above.

¹⁵⁰

There is authority to the effect that the legal arrangements in place in a conquered or ceded colony -- whether those be the arrangements from before the Crown assumed sovereignty or any new arrangements prescribed under the Crown's authority -- apply uniformly to everyone there, settler or native, except where specific provision is made to the contrary: see, e.g., Campbell, note 85 above, at 741-742, 744 Lofft, 895-896, 897 E.R. Other cases, however, allow for exceptions: for situations where, of necessity, pre-existing law will continue to govern the affairs of the pre-existing inhabitants and more English arrangements will govern the affairs of the settlers: see, e.g., Ruding v. Smith (1821), 2 Hag. Con. 371, 161 E.R. 774 ("Ruding") esp. at 381-382 Hag.

the imperial constitutional order; the existing local system," as Mark Walters has said, "became one of the municipal legal systems of the empire parallel to the internal systems of England and England's other imperial possessions but subject to and deriving legitimacy from the overarching imperial constitution."¹⁵¹

The continuity doctrine itself, however, contains at least two internal constraints on the kinds of legal arrangements it can perpetuate. First, it is understood that pre-existing arrangements cannot survive to the extent that they interfere, or are inconsistent, with the Crown's sovereignty.¹⁵² "Even with respect to the ancient inhabitants," the court said in Ruding,

no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it -- the administration of the law in the sovereign, and appellate jurisdictions -- and all the laws connected with the exercise of the sovereign authority -- must undergo alterations adapted to the change.¹⁵³

As recently as 1970, the Privy Council affirmed, in a Ceylon appeal, that this reservation sufficed "to abrogate any rule of law previously in force there . . . if it was incompatible with the British concept of the exercise of sovereign authority by the Crown."¹⁵⁴

The sovereignty reservation limits the operation of the doctrine of continuity, but does not eclipse it entirely; subject to the second constraint, to be discussed below, all aspects of pre-

Con., 778-779 E.R., and, generally, Walters, "Comment on Delgamuukw," note 11 above, at 366-367, 373-375.

¹⁵¹ Walters, "Mohegan Indians," note 79 above, at 791. See also Slattery, "Understanding," note 78 above, at 738, Walters, "Magna Carta," note 79 above, at 338-339.

¹⁵² See, e.g., Re Process Into Wales (1668-1674), Vaughan 395, 124 E.R. 1130 ("Wales") at 400 Vaughan, 1132 E.R. (Wales' former laws might still obtain "excepting in point of sovereignty"); Slattery, "Understanding," ibid. at 738; Walters, "Mohegan Indians," ibid. at 791.

¹⁵³ Ruding, note 150 above, at 382 Hag. Con., 778 E.R.

¹⁵⁴ Kodeeswaran v. A. G. Ceylon, [1970] A.C. 1111 (P.C.) ("Kodeeswaran") at 1118.

existing governance in the territory that do not encroach on Crown sovereignty may continue,¹⁵⁵ and may continue to develop.¹⁵⁶ In principle, therefore, it leaves room for aboriginal rights of self-government. The incidents of Crown sovereignty, and their effects in particular situations on pre-existing legal systems, are matters for case-by-case determination. Incompatibility with them is something to be proved affirmatively. Those who have sought to rely upon the sovereignty reservation to oppose pre-existing rules and arrangements have on several occasions been unsuccessful.¹⁵⁷

The other kinds of arrangements that continuity doctrine precludes are those "which violated European ideas of justice and humanity."¹⁵⁸ Originally, the continuity principle did not apply at all to the legal systems of "infidels"; once the Crown assumed sovereignty, their laws were "ipso facto . . . abrogated [as being] not only against Christianity but against the law of

¹⁵⁵

Now, when the Sovereign agrees that the system of law prevailing in a conquered settlement shall continue in force thereafter, it would seem a necessary inference, in the absence of any stipulation to the contrary, that the rights of the State, with regard to the acquisition, alienation and disposition of property, are intended to be regulated by the legal principles which the Sovereign expressly sanctions. Such questions as whether the Crown is amenable to the jurisdiction of the courts, and its constitutional position in regard to matters of government stand on a different footing, and no inference affecting them could properly be drawn from the establishment of a system of law differing from that of England:

Union Government (Minister of Lands) v. Estate Whittaker, [1916] A.D. 194 (South Africa) at 203, quoted with approval in Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.) at 720. See also Walters, "Comment on Delgamuukw," note 11 above, at 388-392.

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See e.g., Kodeeswaran, note 154 above, at 1119-1120.

¹⁵⁷

See, e.g., Ruding, note 150 above, at 383-386 Hag. Con., 779 E.R. (local marriage laws survive assertion of Crown sovereignty); Lyons (Mayor of) v. East India Company, [1836] 1 Moo. P.C. 175, 12 E.R. 782 (P.C.), at 282-283 Moo., 821-822 E.R. (English law incapacitating aliens from owning property not an incident of Crown sovereignty); Kodeeswaran, *ibid.* at 1118-1119 (right of civil servant to sue for arrears of salary not incompatible with Crown sovereignty).

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Walters, "Comment on Delgamuukw," note 11 above, at 361. See generally *ibid.* at 360-361, 384; Slattery, "Understanding," note 78 above, at 738 ("except where they were unconscionable"); Walters, "Mohegan Indians," note 79 above, at 791, 796-797 ("malum in se").

God and of nature . . ."¹⁵⁹ In 1693, however, the Court of King's Bench held that "in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rules of natural equity."¹⁶⁰ In 1722, the Privy Council confirmed the case-by-case approach. Until the Crown introduces new laws, it said, "the laws and customs of the conquered country shall hold place, unless where these are contrary to our religion, or enact any thing that is malum in se, or are silent; for in all such cases the laws of the conquering country shall prevail."¹⁶¹ Later decisions confirmed that substantial departure from the rules of natural justice was one more specific basis on which to deny effect to certain foreign laws still in place in British possessions,¹⁶² but suggested, as well, that British courts engaged in such review should, except in very clear cases, give the benefit of the doubt to the surviving foreign arrangement.¹⁶³

We can gain some understanding of how this "natural equity" reservation might operate in relation to surviving indigenous legal systems by considering the colonial jurisdictions in British Africa, where it was codified in the statutory instruments that provided for reference to and application of customary law. Typically, such provisions authorized the courts with supervisory jurisdiction in the British African colonies to enforce existing native laws and customs that were not repugnant to "natural justice, equity and good conscience" ("repugnancy clauses") and to look to "natural justice, equity and good conscience" to fill any

¹⁵⁹ Calvin's Case (1608), 7 Co. Rep. 1a, 77 E.R. 377 (Ex. Chamb.) at 17b Co. Rep., 397-398 E.R., cited in Walters, "Comment on Delgamuukw," *ibid.* at 360. Compare Witrong v. Blany (1674), 3 Keble 401, 84 E.R. 789 at 402 Keble, 789 E.R.

¹⁶⁰ Blankard (Salk.), note 85 above, at 411 Salk., 357 E.R.

¹⁶¹ Anonymous (1722), note 85 above, at 76 P. Wms., 646 E.R.

¹⁶² See, e.g., Becquet v. MacCarthy (1831), 2 B. & Ad. 951, 109 E.R. 1396, at 958-959 B. & Ad., 1399 E.R.

¹⁶³ Ibid.

gaps in the operation of customary schemes ("residual clauses").¹⁶⁴ Decisions construing these statutory provisions have, in turn, served as authority in other Commonwealth jurisdictions, where there are no such statutes, for invoking this reservation to screen the indigenous laws and customs relied upon to give definition to aboriginal title.¹⁶⁵

Two by now familiar features emerge from accounts of the jurisprudence from British Africa. First, it is generally agreed that it was for the superior courts to give content to this reservation¹⁶⁶ and that their task in doing so was to identify and articulate appropriate standards. As Allott explains,

¹⁶⁴ The phrasing varied from one colonial instrument to the next, but the general idea remained the same. For a useful overview of these several "repugnancy" and "residual" clauses, and of their operation in colonial African law, see Allott, New Essays, note 61 above, at 158-173. See also Daniels, note 61 above. For more detailed discussion of the statutory schemes for custom in pre-independence Rhodesia and in South Africa, see Goldin & Gelfand, note 90 above, chs. 6-7 and Bekker, note 90 above, ch. 3, respectively.

Brian Slattery has described these imperial enactments as "constitutional in the accepted sense that they defined the powers and functions of local courts": see his note "Charter of Rights and Freedoms – Does It Bind Private Persons?" (1985) 63 Can. Bar Rev. 148 at 160.

¹⁶⁵ See Mabo, note 18 above, per Brennan J. at 61, citing Inasa, note 142 above, at 105. See also Delgamuukw v. The Queen in right of B.C., [1993] 5 W.W.R. 97 (B.C.C.A.), ("Delgamuukw (C.A.)"), rev'd. in part without reference to the point by Delgamuukw, note 16 above, where Lambert J.A., dissenting, cites this passage from Mabo with approval (at 272 (¶649)) and goes on (at 273-274 (¶¶654-655), 361-362 (¶1023), 372 (¶1076)) to reiterate and emphasize the point in his own words. See also Réaume, note 30 above, at 4-5, 7-8, 23-24, 28-29, which uses this notion of repugnancy in analyzing recent Canadian case law about aboriginal rights and about the internal governance of religious communities.

One probably should not make too much of the statutory nexus in the British African jurisprudence on "natural justice, equity and good conscience." (But see Delgamuukw (C.A.), at 210 (¶415), Wallace J.A. (concurring).) Gordon Woodman, for instance, concluded that "the principle would probably have been accepted to much the same degree if the [repugnancy and residual] clauses had not existed" in legislation, at least in Great Britain's West African colonies: see Woodman, note 142 above, at 199. One confirmation of his view is that at least some African courts have continued to apply this standard, either as such or under the rubric of public policy, even after the relevant statutory provisions have been repealed: see ibid. at 199, esp. n. 52; Allott, New Essays, note 61 above, at 173-175. Many other observers too have commented on the close doctrinal relationship between the British African courts' use of this statutory discretion and common law public policy review: see, e.g., the sources cited above at note 90.

¹⁶⁶ See, e.g., Daniels, note 61 above, at 48; Roberts-Wray, note 85 above, at 577; Allott, New Essays, ibid. at 162.

The repugnancy clause gives flexibility to the administration of justice, since it puts the extent of the operation of customary law ultimately into the hands of the judges. It is within the discretion of a judge (and previously was within the discretion of the administrative officer-magistrates to whom much of the work of supervising the operation of customary law fell) whether to allow a certain rule of customary law to operate or not; but this discretion is a judicial one, which should be exercised, so far as possible, on clear and satisfactory principles.¹⁶⁷

It was understood that the relevant standards were to be, at least in part, external to the society whose customary governance arrangements and laws were at issue.¹⁶⁸

Second, it was also accepted, at least at the appellate level, that the courts were to exercise this discretion with restraint. According to the Privy Council, appropriate standards of natural justice, equity and good conscience must take proper account of deeply grounded cultural differences.¹⁶⁹ Other African courts have concluded that the repugnancy reservation "should only apply to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence,"¹⁷⁰ and that customs may be repugnant, by this

¹⁶⁷ Allott, New Essays, *ibid.* at 162.

¹⁶⁸ It is, however, implied that European standards of justice and morality have been applied. This approach is fortified by the argument that if it was not intended to apply European concepts of justice and morality there would have been no need and no justification for such legislation. All systems of law, including customary law, are generally consistent with justice and morality as accepted and understood by the people among whom it was developed and applied:

Goldin & Gelfand, note 90 above, at 69. See also Woodman, note 142 above, at 193; Daniels, note 61 above, at 50-51; Roberts-Wray, note 85 above, at 578.

¹⁶⁹ See, e.g., Dawodu v. Danmole, [1962] 1 W.L.R. 1053 (P.C.) at 1060 ("the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not in a matter of this kind be readily equated with those applicable to a community governed by the rule of monogamy"). In the result, the Privy Council reversed the trial judge's conclusion that a particular customary Nigerian inheritance rule was void for repugnancy because it took polygamous arrangements into account. Compare Koykoy Jatta v. Menna Camara (1964) 8 J.A.L. 35, discussed in Green, note 61 above, at 236.

¹⁷⁰ Tabitha Chiduku v. Chidano, [1922] S.R. 55 (So. Rhodesia) at 58, discussed in Allott, New Essays, note 61 above, at 162 and in Goldin & Gelfand, note 90 above, at 66-67.

standard, in some applications without being repugnant altogether.¹⁷¹

In all these respects, the jurisprudence on the continuity doctrine corroborates the fundamental values hypothesis. Whatever other limitations may constrain mainstream courts' supervision of the legal systems that the continuity doctrine perpetuates,¹⁷² such courts have clear authority to ensure, on an ongoing basis, that such laws and arrangements do not compromise the Crown's sovereignty or those moral principles on which the mainstream legal order genuinely depends. Implicit in these judicial decisions, however, is an assumption that, other things equal, the previous legal systems and arrangements that the doctrine addresses do continue in force until someone demonstrates their inconsistency either with Crown sovereignty or with the mainstream system's own defining imperatives.

4. Summary

We have now examined four different doctrines, each of which authorizes our courts, in the ongoing course of defining and enforcing common law rights and rules, to ensure preservation of our legal order's most basic values.¹⁷³ Two of them -- Charter values analysis and the public policy doctrine -- discipline the operation of common law rights and rules generally; at a minimum, the mainstream courts have the option of invoking them while construing and applying common law rights of aboriginal self-government. The other two doctrines -- the "reasonableness" requirement in the law of custom and the two reservations built into the doctrine of continuity -- operate in the alternative, but also imperatively. To qualify as a special custom given effect within mainstream law, a pre-existing aboriginal governance

¹⁷¹ See, e.g., Vela v. Mankinika and Magutsa, [1936] S.R. 171 (So. Rhodesia), discussed in Goldin & Gelfand, ibid. at 66-67. Compare Inasa, note 142 above, at 105, where the Privy Council adopted a version of a tribal custom that it found it could uphold.

¹⁷² See, e.g., Wales, note 152 above, at 401-402 Vaughan, 1133 E.R.

¹⁷³ I do not pretend that this survey is exhaustive. I have not considered, for instance, the scope or impact of the superior courts' inherent parens patriae jurisdiction.

arrangement must be susceptible to definition, and must be defined, in a manner "consistent, or at any rate not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system."¹⁷⁴ Pre-existing aboriginal legal systems and arrangements can be acknowledged to continue alongside mainstream law only so far as they leave undisturbed Crown sovereignty and its incidents, and only so far as they do not transgress our legal system's most basic standards of justice and morality.

Despite having developed at different times, in different contexts, and in response to very different issues, these four doctrines display a remarkable symmetry of approach, captured in greatest generality in public policy doctrine. Three features they share are especially relevant here: a recognition of the paramount importance of preserving the structural and moral integrity of the mainstream legal order as it evolves from time to time; a determination to interfere no more, and no more often, than necessary with the integrity of the specific rights and rules that are otherwise entitled to common law recognition, and a capacity to "fine tune" the proper balance between these two imperatives as the circumstances of particular cases require. The first and the third of these features were exactly what we needed to substantiate the fundamental values hypothesis in respect of aboriginal rights of self-government;¹⁷⁵ the second keeps interference with aboriginal difference at a minimum.

B. Self-Government Rights as Constitutional Rights

If the analysis just concluded is sound, then there is indeed a firm legal basis on which to insist that self-government rights be defined and applied at common law with reference, as needed, to our legal order's most fundamental values. If this is so at common law, there is every reason to say it remains so once those rights are given constitutional effect pursuant to section 35(1) of the Constitution Act, 1982. Section 35(1) does not purport to change the

¹⁷⁴ Johnson, note 138 above, at 311, quoted at greater length in text accompanying note 147 above.

¹⁷⁵ See notes 12-13 above and the text accompanying them.

character, definition or scope of the aboriginal rights it protects; it merely gives a different status, and much greater protection, to certain rights already "existing" when it came into force.¹⁷⁶ Even in the worst case, therefore, aboriginal rights of self-government should be no less susceptible after, or because of, section 35's enactment to interpretation in light of the most fundamental mainstream values.

In my view, however, the fundamental values hypothesis need not depend entirely on the common law provenance of aboriginal rights. Even if section 35(1) were a source of novel self-government rights, there would be strong grounds on which to conclude that such rights, understood exclusively as constitutional rights, could, and almost certainly would, be kept from jeopardizing the integrity of the larger mainstream constitutional order.

We know, to begin with, that imposition of justified external limits on constitutional rights is not the only way of managing the interaction between such rights and our society's other compelling concerns and imperatives. Like section 35 rights, the rights guaranteed in the Charter are subject to justified external constraints; as the Charter jurisprudence demonstrates, however, such rights also stand in ongoing need of definition and interpretation. That process of definition can, and sometimes does, result in identification of internal constraints that limit the scope of such rights; the first question in a case about a constitutional right is very often whether it protects the relevant conduct. We recognize such internal constraints most readily in those Charter rights that contain explicit internal qualifiers: in those, for example, that prohibit "unreasonable" searches or seizures, "arbitrary" detention or imprisonment, or "cruel and unusual" treatment or punishment.¹⁷⁷ It is perfectly common, though, for the courts also to find internal constraints implicit in constitutional rights expressly conferred in the broadest possible terms. Everyone now knows, for example, that acts of violence are not

¹⁷⁶ See notes 33-36 above and the text accompanying them.

¹⁷⁷ See Charter, ss. 8, 9 and 12, respectively.

constitutionally protected forms of expression;¹⁷⁸ that freedom of association does not extend to lockouts, strikes, or collective bargaining generally,¹⁷⁹ and that section 15(1) of the Charter, the equality guarantee, "does not prevent the creation of an offence which, as a matter of biological fact, can only be committed by one of the sexes . . ." ¹⁸⁰ Commentators -- and judges -- have sometimes criticized, on the merits, the propensity to dispose of particular Charter claims "at the definitional stage, rather than by means of section 1," ¹⁸¹ but no one has questioned their authority to do so, where appropriate.

In this respect, self-government rights, understood as constitutional rights, stand in the same position as the rights guaranteed in the Charter. If anything, the courts will have even greater interpretive freedom in construing section 35 rights, because section 35, unlike the Charter's rights-conferring provisions, interposes no textual discipline on them.¹⁸² For purposes of Canadian law, at least, aboriginal rights, quite literally, are what the judges say they are.

¹⁷⁸ Charter, s. 2(b). See, e.g., Dolphin Delivery, note 38 above, at 588; Irwin Toy Ltd. v. A.G. Quebec, [1989] 1 S.C.R. 927 at 970; R. v. Keegstra, [1990] 3 S.C.R. 697 at 732, Dickson C.J.C. (for the majority), at 830-831, McLachlin J. (dissenting on other grounds).

¹⁷⁹ See, e.g., Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 390-391, Le Dain J. (for half the court), at 403-406, McIntyre J. (concurring); Professional Institute of the Public Service v. Commissioner of the Northwest Territories, [1990] 2 S.C.R. 367 esp. at 401-404.

¹⁸⁰ Hess v. The Queen, [1990] 2 S.C.R. 906 at 929.

¹⁸¹ Dale Gibson, "The Deferential Trojan Horse: A Decade of Charter Decisions" (1993) 72 Can. Bar Rev. 417 at 435. See generally ibid., at 435-437; Robin Elliot, "Developments in Constitutional Law: the 1989-90 Term" (1991) 2 S. Ct. L. Rev. (2d) 83 esp. at 101-129. Compare, e.g., Richard B. v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 374 (1987), 389 (19120-121), La Forest J. (for himself and three other judges).

¹⁸² It was arguable on standard interpretive principles, for example, that the text of the Charter clearly specified which rights were meant to be subject to internal constraints by making those constraints explicit in the provisions conferring those rights: ss. 8, 9 and 12, again, for example. By implication, those Charter rights conferred without explicit constraints ought instead, on this argument, to have been given full scope and to have been subject to limitation only externally, pursuant to s. 1. To impute internal constraints to the Charter rights to free expression, free association and equal benefit (see notes 178-180 above and the text accompanying them), the Supreme Court had to find a way to overcome this textual impediment. No such impediments arise within the constitution in respect of aboriginal rights.

It is, in my view, beyond question that our mainstream courts have a mandate, in exercising this inherent interpretive authority, to take full account of any truly fundamental mainstream values that self-government rights, as applied, may happen from time to time to put at risk. If there is one controlling imperative that governs the enterprise of constitutional adjudication in Canada, it is that our courts have both the power and the duty to preserve the integrity of our constitutional order.¹⁸³ "[T]he powers requisite for the protection of the constitution itself," as our highest courts have affirmed more than once, "arise by necessary implication from the British North America Act" -- or, as we would now say, from the constitution of Canada -- "as a whole."¹⁸⁴ "The duty" our courts have "to ensure that the constitutional law prevails"¹⁸⁵ derives in part, of course, from the explicit declaration that it is "the supreme law of Canada,"¹⁸⁶ but also, and more vitally, from the fact that a constitution, as such, "is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government."¹⁸⁷ Our constitution takes precedence, in other words, precisely because it is an expression, and a repository, of our own most fundamental values.

This, then, is the imperative that prescribes the structure and orientation within which all other issues of Canadian constitutional law are resolved, and from which the courts take their

¹⁸³ "In each case, the concern is with the preservation of the Constitution which is paramount": Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576 at 591. See also Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 ("Manitoba Language Reference") at 753.

¹⁸⁴ Reference re Alberta Statutes, [1938] S.C.R. 100 at 133-134, aff'd. on other issues (sub nom. A.G. Alberta v. A.G. Canada, [1939] A.C. 117 (P.C.)), quoted with approval in Saumur v. City of Quebec, [1953] 2 S.C.R. 299 at 331, Rand J., at 374, Locke J.

¹⁸⁵ Manitoba Language Reference, note 183 above, at 745.

¹⁸⁶ Constitution Act, 1982, s. 52(1).

¹⁸⁷ Manitoba Language Reference, note 183 above, at 745. See also Beauregard v. The Queen in right of Canada, [1986] 2 S.C.R. 56 at 70.

bearings in addressing novel constitutional issues.¹⁸⁸ Rand J. once put it this way:

To suggest that the constitutional legislative position of the provinces presents impediments and limitations to the overriding necessity of maintaining the foundation upon which it rests indicates a somewhat inadequate appreciation of the realities of organized society in the world of these times, as well as of the constitutional statute.¹⁸⁹

When courts give shape and application to the rights and powers for which our constitution provides, therefore, their overarching task is to make the best sense of the constitution as a whole.¹⁹⁰ Since at least 1882,¹⁹¹ our highest courts have affirmed the need for "mutual modification" in defining the legislative and executive powers conferred expressly in the Constitution Act, 1867.¹⁹² "In construing section 91 [of that Act]," the Supreme Court of Canada said in the Water-Powers Reference, "its provisions must be read in light of the

¹⁸⁸ New appreciations thrown up by new social conditions, or re-assessments of old appreciations which new or altered social conditions induce make it appropriate for this Court to re-examine a course of decision on the scope of the legislative power when fresh issues are presented to it, always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the British North America Act:

Zelensky v. The Queen, [1978] 2 S.C.R. 940 at 951 (emphasis added). See also Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 at 841, Dissent: Law: "on occasions, this Court has had to consider issues for which the B.N.A. Act offered no answer. In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution."

¹⁸⁹ Reference re the Validity of the Wartime Leasehold Regulations, [1950] S.C.R. 124 at 145.

¹⁹⁰ "Our Constitution has an internal architecture . . . 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": Reference re Secession of Quebec (20 August 1998) (S.C.C.) [unreported] ("Quebec Secession Reference") at 25 (¶50). Compare ibid. at 24 (¶49).

¹⁹¹ It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited:

Citizens Insurance Co. of Canada v. Parsons (1882), 7 App. Cas. 96 (P.C.) at 110. See also Russell v. The Queen (1882), 7 App. Cas. 829 (P.C.) at 839.

¹⁹² Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.).

enactments of section 92, and of the other sections of the Act, and . . . where necessary, the prima facie scope of the language may be modified to give effect to the Act as a whole."¹⁹³ In the same way, the Supreme Court, since the dawn of Charter interpretation, has insisted that Charter rights' scope and application be informed by, and reconciled with, not only the other rights in the Charter,¹⁹⁴ but other relevant principles and provisions anchored elsewhere in the constitution of Canada.¹⁹⁵

It is understood that this instruction sometimes requires courts to look beyond the constitution's written text: to recognize and affirm "unwritten postulates which form the very foundation of the Constitution of Canada."¹⁹⁶ Such fundamental, though unwritten, constitutional values, once named and distilled in particular cases, can operate not only "to fill out gaps in the express terms of the constitutional scheme,"¹⁹⁷ but also to limit the exercise -- or the availability -- of rights¹⁹⁸ and powers¹⁹⁹ that the constitution confers expressly.²⁰⁰

¹⁹³ Reference re Waters and Water-Powers, [1929] S.C.R. 200 at 216. See also, e.g., Switzman v. Elbling, [1957] S.C.R. 285 at 303, Rand J.; Ontario Hydro v. Ontario Labour Relations Board, [1993] 3 S.C.R. 327 at 403-404, Iacobucci J., at 340, Lamer C.J.C.

¹⁹⁴ See, e.g., Dubois v. The Queen, [1985] 2 S.C.R. 350 at 356-359; Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 500-503 and, especially, R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344.

¹⁹⁵ See, e.g., Reference re An Act to Amend the Education Act, [1987] 1 S.C.R. 1148 at 1197-1198, Wilson J. (for the majority), at 1206-1207, Estey J. (concurring); R. v. Sheldon S., [1990] 2 S.C.R. 254 at 287-290; Donahoe v. Canadian Broadcasting Corporation, [1993] 1 S.C.R. 319 ("Donahoe") at 375-378, 393.

¹⁹⁶ Manitoba Language Reference, note 183 above, at 752. Compare Quebec Secession Reference, note 190 above, at 25 (¶51): "[a]lthough these underlying principles are not explicitly made part of the Constitution by any written provision, . . . it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood"; Reference re Provincial Court Judges, [1997] 3 S.C.R. 3 ("Provincial Court Judges") at 68 (¶92). For recent substantive explications of some of those unwritten constitutive principles, see ibid. at 68-78 (¶¶94-109); Quebec Secession Reference at 24 (¶49), 27-41 (¶¶55-82).

¹⁹⁷ Provincial Court Judges, ibid. at 69 (¶95). Compare ibid. at 75 (¶104).

¹⁹⁸ See, e.g., Donahoe, note 195 above (Charter does not apply to provincial legislatures in the exercise of their inherent privilege to exclude strangers from the legislative chamber).

If even the powers and guarantees that the constitution expressly confers are subject to reconfiguration, as necessary, for the sake of preserving our constitutional framework's coherence and integrity and the fundamental (if sometimes unarticulated) values for which it stands, one is all but compelled to expect that existing aboriginal rights of self-government, whose own constitutional status is itself a matter of inference, will continue to be susceptible to interpretive adjustment in the service of those same imperatives. We already know that section 35(1) of the Constitution Act, 1982 -- the provision that would confer constitutional status on self-government rights -- is itself within that same interpretive horizon.²⁰¹

It would be a mistake, however, to conclude from this discussion that constitutional rights of aboriginal self-government are, or should be, uniquely malleable in the interest of overall constitutional harmony. Section 35(1) became a part of our constitution to recognize the fact and the legitimacy of the aboriginal presence in what we now call Canada, and to confer some protection within the mainstream constitutional order on aboriginal cultures' defining ancestral traditions and customs.²⁰² Because of that decision, respect for authentic aboriginal

¹⁹⁹ See, e.g., O.P.S.E.U. v. A.G. Ontario, [1987] 2 S.C.R. 2 at 57 (neither order of government "may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure"); Provincial Court Judges, note 196 above, at 77 (¶108) (provinces may not exercise their exclusive authority over the administration of justice in the province (Constitution Act, 1867, s. 92¶14) in ways that undermine the independence of the provincially appointed judiciary).

²⁰⁰ [Underlying constitutional] principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. . . . [They] may in some circumstances give rise to substantive legal obligations . . . , which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments:

Quebec Secession Reference, note 190 above, at 25 (¶52), 26-27 (¶54).

²⁰¹ See Sparrow v. The Queen, [1990] 1 S.C.R. 1075 ("Sparrow") at 1109 (s. 35(1) to be "read together with" the federal power over Indians and Indian lands conferred by s. 91¶24 of the Constitution Act, 1867).

²⁰² See note 15 above and the text accompanying it.

difference -- for fundamental aboriginal values, one might say -- is now itself a fundamental value that helps define the mainstream constitutional order.²⁰³ Like the other rights and powers for which our constitution provides, self-government rights prescribe a constitutional space with a force-field, and an integrity, of its own. Like other constitutional rights and powers, they are susceptible, in principle, to some implicit internal limitation, but only when and as such constraints are demonstrably essential to the structural or the moral integrity of the entire constitutional framework. As a general rule, they are to be construed and enforced according to their own terms. There is no reason, either, just to assume that it would, or should, always be the aboriginal right of self-government that gives way when its exercise proves irreconcilable with some other constitutional value.²⁰⁴ There probably will be occasions when the constitutional value expressed in and through the self-government right is the more compelling one, and takes precedence. Such determinations are almost certainly best made one at a time, in the presence of real situations, real facts and real people. The most we can say -- and the most we need say -- is that our courts are in a position to ensure that other fundamental mainstream values constrain the definition and exercise of self-government rights whenever those values deserve, on reflection, to do so.

III. APPRAISING THE "FUNDAMENTAL VALUES" HYPOTHESIS

At the beginning of Chapter 2, we identified two contending imperatives that self-government advocates would somehow have to satisfy to achieve accreditation within the existing Canadian constitution for meaningful rights of aboriginal self-government. One of them is to establish that the mainstream courts will have the capacity to contain any genuine threats that the use of such rights, once accredited, might pose to the most fundamental of mainstream values and institutions. The other is to resist unnecessary constraints on such rights, in order to maximize

²⁰³ See, e.g., Quebec Secession Reference, note 190 above, at 41 (182); Sparrow, note 201 above, at 1106, citing with approval Manitoba Language Reference, note 183 above, at 745, quoted in part in the text above at notes 185-187.

²⁰⁴ Compare "Ghost in the Machine," note 11 above, at 296-298.

the constitutional space available within the mainstream legal order for the expression of aboriginal difference.²⁰⁵

This chapter's principal focus has been on the first of these imperatives. If the arguments it offers are sound, there is little doubt that our courts have authority, in the usual course of adjudication about self-government rights, to define such rights in ways that preclude their use to threaten or jeopardize our legal order's most fundamental values. This is so, as we have just seen, whether we focus on aboriginal rights' constitutional status or on their anchorage and articulation in the common law. In either guise, self-government rights are subject to judicial interpretation and internal constraint to ensure their ongoing consistency with the deepest principles that define our legal order from time to time. Courts, therefore, need never enforce such rights on behalf of conduct or arrangements irreconcilable with the essentials of the mainstream order. They need not refuse altogether to give such rights the constitution's protection in order to secure the mainstream system against such risks.

As it happens, though, these same arguments also address the other imperative. Each of the constitutional and common law doctrines reviewed here confirms independently that the various rights and rules to which it pertains have the full force of law within the mainstream legal system, and that those who rely on them are entitled to their full benefit, except where their operation is demonstrably incompatible with the coherence or the integrity of the mainstream legal order as such. Self-government rights, exercised in accordance with the defining ancestral traditions, customs and values on which they are based,²⁰⁶ are therefore to be applied and enforced full strength unless someone can demonstrate both that some particular aspect or instance of their use is irreconcilable with some other fundamental mainstream value and that the competing value deserves, on that occasion, to prevail. Like

²⁰⁵ See Chapter 2, notes 1-3 and the text accompanying them.

²⁰⁶ See Chapter 2, notes 16-75 and the text accompanying them.

all the other rights protected by section 35(1) of the Constitution Act, 1982, such rights will be subject to justified external constraints imposed by competent mainstream governments. The only internal restrictions that the mainstream system imposes on the use of such rights, however, will be those that are demonstrably necessary.

The "fundamental values" hypothesis, therefore, appears to address -- as much as any purely legal solution ever can²⁰⁷ -- both of the problems facing advocates of inherent self-government rights. It prepares the ground for judicial confirmation that such rights are indeed section 35 rights by supplying a firm legal basis for their ongoing judicial management; the nature of that legal foundation, however, itself discourages strongly any unnecessary judicial interference with such rights' use or dimensions.

Even so, there are some possible criticisms of this proposal and, quite probably, some individuals who will find its case-by-case approach less appealing intuitively than enforcement of an external code of protections such as the Charter. I want in Chapter 5, the final chapter, to address some of these concerns and criticisms.

²⁰⁷ See Chapter 1, notes 66-67, 79-87 and the text accompanying them.

CHAPTER FIVE: SECOND THOUGHTS, FIRST PRINCIPLES¹

The aim of this work has been to help prepare the way for judicial confirmation, under section 35(1) of the Constitution Act, 1982,² of aboriginal peoples' inherent rights of self-government. It has sought to do so, not by appraising legal arguments about the status and survival of such rights within mainstream law, but by addressing the apprehensions that many Canadians, including some aboriginal people, share about the consequences of treating such rights as constitutional rights. I have argued that courts will be much more receptive to the legal and moral arguments that support accreditation of self-government rights if they have, and know they have, means to ensure that such rights, once accredited, pose no exceptional threat to the coherence or the integrity of the mainstream constitutional order as a whole.

Such apprehensions are understandable. There are, of course, profound differences between the various languages, histories, customs, authority structures and presuppositions of Canada's aboriginal peoples and those of the settler peoples, reflected in the mainstream legal order. Such substantial differences could give rise to uncertainty in the best of circumstances. And no one supposes that these are the best of circumstances. Generations of disadvantage, external disruption and dependency have compounded severalfold the tensions within, and the problems facing, many aboriginal communities. Few communities of any ancestry or nationality could abide or seek to address such conditions without sometimes disappointing the expectations of mainstream gentility. And the mainstream order faces threats and challenges of its own, quite apart from its interactions with the original peoples.

¹ With apologies to Bryan Schwartz, whose work First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal: Institute for Research on Public Policy, 1986) has made an important contribution to deliberations about aboriginal rights of self-government, especially during the 1980s.

² Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K., c. 11) ("Constitution Act, 1982").

Even so, my conviction is that self-government rights can coexist within the mainstream system. As I argued in Chapters 2 and 4, our law already contains sufficient mechanisms to ensure, in any given case, that the exercise of such rights does not compromise the arrangements and values fundamental to our legal order. The federal government, at least, may impose and enforce external constraints on the use of such rights, wherever such constraints serve compelling and substantial objectives in a manner sufficiently sensitive to the relevant aboriginal interests, rights and perspectives. Even in the absence of such external constraints, however, our courts may withhold protection from aboriginal arrangements inconsistent with the community's own ancestral governance customs or demonstrably incompatible either with Crown sovereignty or with the mainstream order's essential values.

None of these conclusions depends on the application of the Canadian Charter of Rights and Freedoms³ to aboriginal communities exercising inherent self-government rights. There is, as we saw in Chapter 3, good reason to doubt, as a matter of law, that such communities, exercising such rights, are even subject to the Charter. By comparison, the view I have proposed in Chapter 4 is much more solidly anchored in existing mainstream law.

If this were the only concern about reliance on the Charter, Parliament could address it tomorrow -- if it were prepared to assume the burden of justifying any limits such a measure would impose on the self-government right⁴ -- by enacting a statute requiring Charter compliance, in whole or in part, of inherent right governments. The United States, as Chapter 3 mentioned,⁵ enacted just such a statute, to ensure that a version of its own constitutional bill of rights would govern aboriginal peoples exercising tribal sovereignty.⁶ Chapter 3 also

³ Part I of the Constitution Act, 1982 ("Charter of Rights," or just "Charter").

⁴ See chapter 2, notes 113-130 and the text accompanying them.

⁵ See Chapter 3, notes 236-241 and the text accompanying them.

⁶ See Indian Civil Rights Act, 25 U.S.C.A. §§1301-1303 (1968), as amended ("ICRA").

concluded, however, that imposing the Charter on inherent right communities would be inappropriate from a policy standpoint, because the Charter satisfies neither of the rival imperatives -- protection of crucial mainstream values and respect for aboriginal difference -- by which we ought to measure advocacy for aboriginal rights of self-government. What protection the Charter offers to fundamental mainstream values is, at best, incomplete and inconsistent, and it comes at the cost of excessive intrusion on aboriginal difference.

These two imperatives ought, of course, to govern appraisal of my own approach to these issues, as well. I want in this chapter to undertake that appraisal, having special regard to certain objections that one might make, from a policy standpoint, to the fundamental values hypothesis, and to see whether resort to the Charter -- or to some other, modified canon of codified rights or limitations -- offers useful assistance in addressing them.

I. PROTECTING FUNDAMENTAL MAINSTREAM VALUES

Chapter 3 set out at least three different ways in which the Charter might fail to protect fundamental mainstream values, even if it governed the exercise of aboriginal rights of self-government. First, it is not comprehensive and does not pretend to be: it gives no protection to those values, arrangements or interests that it does not include.⁷ Second, inherent right communities could, in all likelihood, act at will to excuse themselves from the Charter rights that matter most to mainstream culture, by invoking section 33, the Charter's "notwithstanding" clause.⁸ Finally, and apart from all this, section 25 of the Charter appears to immunize such communities altogether from restrictions the Charter might seem to impose on the use of aboriginal rights of self-government.⁹ One might cure some of these problems, again, by drafting a new federal statute, based on the Charter, in a way that avoids them. First, though,

⁷ See Chapter 3, notes 98-99 and the text accompanying them.

⁸ See Chapter 3, notes 164-168 and the text accompanying them.

⁹ See Chapter 3, notes 195-229 and the text accompanying them.

it makes sense to consider what, if anything, we would gain by enacting such a statute, from the standpoint of ensuring protection for the essential mainstream values.

We do not appear to need such a statute to fill in the gaps in coverage we identified in the Charter. If Chapter 4 is sound, our courts already have the authority to deny effect to self-government rights whenever their exercise clearly conflicts with the sovereignty of the Crown or other principles or arrangements fundamental to our legal order. Because the task of identifying such circumstances when they occur is part of the enterprise of defining and applying aboriginal rights (and common law rights and rules generally), there is no artificial limit to the range of considerations that judges engaged in it might take into account, and there is no occasion to claim exemption or immunity from its results.

There are, however, three possible concerns that one might have about relying exclusively on this inherent judicial authority to secure the integrity of the mainstream legal order. One is that it may impose too heavy a burden on vulnerable individuals within inherent right communities seeking relief in the mainstream system from oppressive community rules or standards.¹⁰ As Ayelet Shachar has observed, such individuals are "potentially exposed to severe pressures to withdraw the legal claim in order to protect the group."¹¹ A second is

¹⁰ See, e.g., Ayelet Shachar, "Group Identity and Women's Rights In Family Law: the Perils of Multicultural Accommodation" (1997) [unpublished] (forthcoming in 6]. Political Philosophy) at 25-26. Shachar's is a generic concern with the "detrimental intra-group effects" on vulnerable members (especially women) of minority cultures that result from "legal arrangements that aim to relieve inter-group inequalities" by vesting in the minority group initial legal authority over matters, such as family law, that have special cultural significance to the group: ibid. at 8-9 (emphasis in original). For a somewhat more sanguine view of the normative scope for cultural pluralism, see Denise G. Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles" (1997) [unpublished]. For viewpoints on gender issues in aboriginal communities, see, e.g., Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 338 and the sources cited in chapter 1, notes 42-46 and the text accompanying them.

¹¹ Shachar, ibid. at 25. For a different view, see Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 ("Turpel, 'Interpretive Monopolies'") at 42 (even allowing internal disputes to go before Canadian courts is "particularly threatening, perhaps even ethnocidal" to cultures, because "it will seriously undermine the Aboriginal styles of dispute resolution . . . [by] encouraging people to go

that it may leave some real dangers unaddressed because the burden lies on those opposing application of the indigenous rule or arrangement to show its incompatibility with the foundations of the mainstream order.¹² The third is that it offers no assurance a priori that any particular values or arrangements we think of as fundamental -- or, indeed, any mainstream values or arrangements at all -- will turn out, on deliberation, to have enough systemic force to constrain the use or definition of any inherent self-government rights.

The first of these concerns highlights a real and difficult problem, one that deserves more thought and discussion than I can give it here. For now, I want to say just two things about it. First, it is not a problem we could solve by imposing the Charter, or a statutory Charter substitute, on inherent right communities. Where community members do face pressures not to take their disputes with the group "outside," the nature and scale of those pressures seem unlikely, other things equal, to depend very much on the legal grounds that the mainstream system makes available to them when they consider doing so. Making some such grounds stronger or more explicit may increase the chance of success in such a proceeding, but it will not necessarily reduce collective resistance to undertaking it. If anything, the resistance may increase if the mainstream norms invoked are perceived to have no resonance with the community's own traditions.¹³ Second, the fact that such pressures sometimes exist within identity groups with idiosyncratic rules has not dissuaded Canadian courts either from respecting such rules and enforcing them against those voluntarily taking part in such groups¹⁴ or from undoing group decisions found to conflict with essential mainstream

outside the community and its customs, to settle disputes").

¹² On the burden of proof, see Chapter 4, notes 51-54, 71-76, 143-145, 202-203, 206.

¹³ See, e.g., Assembly of First Nations, First Nations Circle on the Constitution, To the Source (1992) ("To the Source") at 62-63; Turpel, "Interpretive Monopolies," note 11 above, at 40-42, and chapter 3, notes 148-153 and the text accompanying them.

¹⁴ Hutterite cases seem apt examples here. See, e.g., Hofer v. Hofer, [1970] S.C.R. 958 (former colony members bound by articles of association, not entitled on expulsion to a divisible share of community property); Lakeside Hutterian Colony v. Hofer, [1992] 3 S.C.R. 165 ("Lakeside")

standards.¹⁵ There is no obvious reason for mainstream law to give greater weight to such pressures merely because they occur within self-governing aboriginal communities.

The second concern overlooks two important points. One is that respect for genuine aboriginal difference is now itself, for better or worse, among the fundamental values of the mainstream legal order;¹⁶ it is one of the purposes that animates the Canadian law of aboriginal rights.¹⁷ We give it no effect at all if we assume, until persuaded otherwise, that aboriginal customs or measures cannot coexist within the mainstream order merely because they differ -- even differ profoundly -- from mainstream practice.¹⁸ The other is that mainstream judges are, of all people, the ones best equipped -- by training, disposition and mandate -- to recognize, in the matters before them, genuine threats to the integrity of the legal order for which they are responsible.¹⁹ If governance measures shown to be consistent with an inherent right community's own defining traditions pose real and specific risks to

(courts should not intervene in such communities' internal disputes except to protect important legal rights or interests, and then only on such grounds as bad faith or failure of natural justice).

¹⁵ See Lakeside, *ibid.* (expulsion of dissident members invalid because decision made without proper notice). For criticism of this conclusion, see Réaume, note 10 above, at 14-15.

¹⁶ See Chapter 4, notes 202-204 and the text accompanying them.

¹⁷ See, e.g., Van der Peet v. The Queen, [1996] 2 S.C.R. 507 ("Van der Peet") at 538-539 (¶¶30-31).

¹⁸ See Chapter 2, text between notes 110-111. Compare John Borrows & Leonard I. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 *Alta. L. Rev.* 9 at 37-38.

¹⁹ Judges have, by the nature of their office, a particular concern with the normative structure of a community through time. The very means by which they justify their decisions require that they reflect upon the substance of previous judgments, that they care about consistency over time and across contemporaneous judgments, and that they seek to mould the law's evolution in a manner that takes seriously the law's claim to be a framework of justice -- part of the normative fabric of a society that cares about its claim to be a moral community:

Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo" (1995) 17 *Sydney L. Rev.* 5 ("Webber, 'Regret'") at 27-28.

fundamental mainstream values, it seems most unlikely that our courts will somehow fail to notice. Although the burden of proof in such cases resides with those alleging the conflict, the standard of proof seems likely to vary inversely with the significance of the other mainstream values that the aboriginal measure is said to jeopardize.

Even if that were not the case, though, resort to the Charter, or even to a more comprehensive statutory analogue, would offer at best only limited assistance. There is, after all, very little risk that our courts will overlook the values codified in the Charter when considering exercises of inherent self-government rights; the growing "Charter values" jurisprudence bears witness to that.²⁰ On the other hand, it would be rash to assume that the Charter does, or that any broader codification of key rights or interests can, provide an exhaustive list of the matters to be considered for the sake of conserving the essence of the mainstream order. Sometimes the most insidious dangers are those that have not yet occurred to us.

Where a Charter statute could help, of course, is in singling out for priority over inherent self-government rights certain mainstream values, arrangements or interests. The final concern identified above about relying wholly on fundamental values review is that such review, on its own, would not necessarily (be able to) do so. A more explicit priority framework would, of course, give more stability and certainty to the interaction between the mainstream and the various aboriginal legal orders.

Beneath this concern, and indeed all three concerns, however, are two key and controversial assumptions: that somehow we already know, even without the benefit of aboriginal insights, that some values and arrangements typical of the mainstream order deserve to limit the scope of aboriginal rights of self-government, and that we can identify fairly easily at least some of those that do. If these assumptions were clearly sound, it would indeed make good sense to

²⁰ See Chapter 4, notes 37-56 and the text accompanying them.

proceed on the basis of that shared understanding and to clarify straightaway the jurisdictional boundaries on the intercultural map. On the other hand, if they really were sound, I strongly suspect we could have executed that map already, without all the dithering.

I return at more length in Part III to some issues that these assumptions raise. First, though, I want to engage the other imperative of conscientious self-government advocacy: minimizing unnecessary interference with aboriginal difference.

II. MINIMIZING INTERFERENCE WITH ABORIGINAL DIFFERENCE

As we saw in detail in chapter 3, North American aboriginal cultures' characteristic ways of integrating social order with personal autonomy differ fundamentally from those derived from European tradition and experience. Traditional aboriginal societies, as a rule, have not sought to maintain order and focus among their members by resorting to mechanisms of hierarchy and coercive power more familiar from European experience; instead, they have relied much more on embedded notions of personal responsibility, on the disciplinary force of generations of observance of their cultures' defining traditions and customs, and on ideals of conservation and incremental change. As a result, the notion of rights to which our Charter gives expression is foreign and unhelpful in and to such societies, because it addresses conditions that do not arise within the normative horizons of their own self-understanding. Worse still, at least some of the rights in the Charter, if enforced (as we understand them) within such communities, would pose serious risks to those societies' stability and collective integrity. In these respects, the Charter -- if, and to the extent that, it could bind governance practice within inherent right communities -- would interfere profoundly with the preservation and realization of aboriginal difference.²¹

²¹ See Chapter 3, notes 115-153 and the text accompanying them. Even an effort to codify "aboriginal charters of rights" has potential -- especially if undertaken in response to external expectations -- to disrupt the fluidity and the authority of aboriginal legal arrangements perpetuated within an oral tradition by giving disproportionate weight to forms and concerns that obtain at an arbitrary historical moment and disproportionate significance to an expression of the law in written

The approach that chapter 4 proposes, on the other hand, intrudes much less deeply and automatically on contemporary versions of traditional aboriginal governance. It assumes that the arrangements or measures that otherwise qualify for protection under a self-government right are compatible with, and deserve enforcement within, the mainstream order except where and as they demonstrably conflict with essential mainstream values that, demonstrably, deserve priority over them. Such an approach, implemented conscientiously and in good faith, precludes, almost by definition, unnecessary interference with aboriginal difference.

In one respect, however, this approach may appear to be more intrusive on aboriginal difference than would the Charter. Unlike the Charter, which highlights a few key rights and gives them (alone) presumptive primacy over government action, the "fundamental values" approach accepts no preconceived limits on the range of mainstream arrangements or values that courts may consider for the sake of preserving the integrity of the mainstream order as a whole. In respect of matters outside the Charter, therefore, the approach I propose asserts and retains some capacity to constrain aboriginal practice, whereas the Charter, by definition, does not. This observation has led some thoughtful commentators to suggest that it might be less intrusive, after all, for the Charter, or something like it, to apply to the exercise of inherent self-government rights. That way, the argument suggests, the potential for judicial interference with the use of such rights, though substantially greater in degree within its limited reach, is at least confined altogether within that substantively ascertainable range.²²

form. See, e.g., Colin H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada" in N. Dyck & J.B. Waldram, eds., Anthropology, Public Policy, and Native Peoples in Canada (Montreal: McGill-Queen's University Press, 1993) 311 at 325. Compare P.A. Monture-OKanee & M. E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" [1992] U.B.C. L. Rev. (Sp. Ed.) 239 at 244-245; John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 ("Borrows, 'With or Without You'") at 646-649.

²² I am grateful to Ernie Weinrib, Jonathan Rudin and Mayo Moran, who each, quite independently, suggested versions of this argument to me.

The fatal problem with this suggestion is that the premise on which it rests is false. None of the arguments chapter 4 offers to anchor our courts' authority to safeguard essential mainstream values depends on the assumption that the Charter does not apply in or to inherent right communities. The powers our courts would derive from imposition of the Charter on such communities, therefore, would supplement, not substitute for, their existing, inherent authority to define and interpret aboriginal rights, including self-government rights, and to take account, in doing so, of the full range of fundamental mainstream arrangements and values.²³ Instead of constraining the allowable range of interference with aboriginal governance practice, enforcement of the Charter against inherent right communities would only intensify the degree of intrusion within a part of that range.²⁴

Despite its breadth, therefore, the "fundamental values" approach seems much less intrusive on aboriginal difference than any plausible arrangement that involving enforcement of Charter rights. The remaining question is whether even it is unacceptably intrusive. For one must concede, as John Borrows and Len Rotman recently pointed out in a closely related context, that it does, in an important sense, leave existing aboriginal rights of self-government "entirely dependent upon the goodwill of the judiciary."²⁵ There are at least two reasons why such dependency might seem problematic or inappropriate: because it attributes a semblance of

²³ I acknowledge that legislation, or even the constitution, could preclude the mainstream courts from considering anything other than Charter values in construing self-government rights, if it did so explicitly and with sufficient precision. But no such consequence would result routinely from the Charter's application, or from enactment in legislation of a Charter substitute; in Santa Clara Pueblo v. Martinez, 436 U.S. 47, 98 S.Ct. 1670 (1978), in fact, the United States Supreme Court concluded that the ICRA conferred no power on mainstream courts to enforce it, except in respect of applications for habeas corpus.

²⁴ For those concerned about the potential impact of self-government rights on mainstream society, it could be extremely upsetting if it were otherwise. The notion that courts might have no choice, in the absence of justified external limits imposed by competent legislation, except to give effect to aboriginal measures raising armies, establishing banks or engaging in foreign policy -- all matters that the Charter, as such, does not address at all -- might well give some pause even to those who propose this argument.

²⁵ See Borrows & Rotman, note 18 above, at 32-33.

authority and primacy to mainstream ways and values over indigenous ones, no matter how authentic and fundamental the latter may be, and because mainstream state involvement in the work of interpreting and enforcing indigenous norms exposes such norms to serious risk of ongoing systemic distortion. Let's consider both these concerns in turn, and in this order.

Several commentators have remarked on the arbitrariness, and the colonial arrogance, in mainstream courts' assumption of -- and assumption that they deserve -- authority to declare authentic aboriginal customs acceptable or unacceptable.²⁶ Jeff Richstone points out, for instance, that "[r]esort to a repugnancy test," such as the one colonial courts adopted to determine which indigenous laws could survive the Crown's assertion of sovereignty,²⁷ "involves a morally weighted discourse. This exercise is clearly question-begging: the choice of the set of values to be adopted determines the answer given. Once a non-indigenous standard is accepted to determine the validity of aboriginal norms, a conceptual trap has been set."²⁸ James Zion, discussing similar matters, describes it as "racist and discriminatory for one people to judge another and declare that a part of their culture is unacceptable."²⁹ And Kelly Gallagher-Mackay, writing with specific reference to self-government rights in Canada, concludes that mainstream courts do not "have the cultural authority to unilaterally define the

²⁶ See, e.g., Bradford W. Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility" in Bradford W. Morse & Gordon R. Woodman, eds., Indigenous Law and the State (Dordrecht: Foris Publications, 1988) ("Indigenous Law") 101 at 111; James W. Zion, "Searching for Indian Common Law" in Indigenous Law 121 at 137-138; Jeff Richstone, "The Inuit and Customary Law: Constitutional Perspectives" in Indigenous Law 239 at 246-248; Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 ("Lyon, 'Essay'") at 103; Turpel, "Interpretive Monopolies," note 11 above, esp. at 23-25; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991), 29 Alta. L. Rev. 498 esp. at 515-517; Scott, note 21 above, at 327; Kelly Gallagher-Mackay, "Interpreting Self-Government: Approaches to Building Cultural Authority," [1997] 4 C.N.L.R. 1.

²⁷ For discussion of this notion, see Chapter 4, notes 150-172 and the text accompanying them.

²⁸ Richstone, note 26 above, at 246.

²⁹ Zion, note 26 above, at 138. "The paternalism of the past," Zion goes on to say (ibid.), "where Indians were 'heathen savages to be punished and assimilated into a 'superior' culture, is clearly contrary to modern democratic thought . . ."

right of self-government for Aboriginal peoples" and attributes that lack of authority to "the imposition of Canadian law without consent of Aboriginal peoples."³⁰

The only appropriate way to begin a response to this concern is by acknowledging its force. I see no good reason to suppose that the moral standards invoked by mainstream judges, or those attributed to mainstream society generally, are sounder, as such, from an ethical standpoint than those that emerge from an understanding of the normative features of North America's indigenous cultures. I can think of no standard or standpoint I would trust on which to base a conclusive judgment on such matters. In my view, it just will not do to assume that aboriginal governance measures or arrangements must give way merely because they are aboriginal, because they are unfamiliar or because they are based on ethical premises different from those that animate reflection in mainstream culture.³¹

It is one thing, though, to recognize that mainstream standards, and their official interpreters, have no special claim to moral primacy; it is another to infer on the basis of that acknowledgement that mainstream judges have no business taking our system's most essential values into account in giving effect in mainstream law to inherent rights of aboriginal self-government. In my view, that inference is unsound, for at least two reasons.

First, the kinds of self-government rights under discussion here are rights that have full force and effect within mainstream -- that is, Canadian -- law. Once accepted as constitutionally protected rights, self-government rights, and arrangements and measures undertaken pursuant to them, will have at least initial priority over the conflicting arrangements of mainstream

³⁰ Gallagher-Mackay, note 26 above, at 2-3.

³¹ I mean to take no position here on the deeply difficult philosophical issues of moral and cultural relativism. For an excellent, well-balanced account of the current debates on such issues, see Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stanford L. Rev.* 1311 at 1335-1345.

governments.³² Not only is it extremely unlikely, from a strategic standpoint, that our courts would agree to treat such rights as constitutional rights without some ongoing capacity to ensure that the mainstream order can continue to abide them;³³ it is, from a structural standpoint, essential that they engage in such scrutiny. The quality, and the significance, of the protection Canadian law can offer to the self-government rights of inherent right communities ultimately depends on the coherence and the integrity of, and on ongoing public respect for, the legal order as a whole whose protection is sought and received.³⁴ The price of such protection, for better or worse, must almost certainly be toleration of some minimal threshold of harmony with the conditions that continue to make it possible to provide it.

My second reason for resisting the implication of illegitimate ethnocentrism is that imputations of moral inferiority or opprobrium to aboriginal practices -- or, a fortiori, to the cultures in which they serve -- need play no part in the relevant fundamental values inquiry, any more than they do in the ball and strike calls at home plate in a baseball game.³⁵ The arrangements and values, whatever they are, fundamental to the mainstream order are not fundamental (heaven knows) because they demonstrably satisfy best some absolute standard of rectitude but, in significant part, because they have emerged, so far, from our best efforts to make the best sense of our distinctive shared history: they are the ones that have come, for

³² See, e.g., Chapter 2, notes 97-146 and the text accompanying them.

³³ See Chapter 1, notes 67-79, 88 and the text accompanying them.

³⁴ To this extent, I disagree with Gallagher-Mackay's suggestion, quoted in the text above accompanying note 30, that mainstream courts have no cultural authority to interpret aboriginal peoples' self-government rights because the mainstream order was imposed on them without their consent. A great many things about mainstream law, including its judicial system, have indeed been imposed unilaterally on aboriginal peoples; the decision whether to seek accreditation and protection for such rights within the mainstream system is, however, theirs. See notes 50-51 below and the text accompanying them.

³⁵ I do not deny, of course, that individual judges sometimes get this wrong, or that they have done so in the past -- with profoundly unfortunate consequences for aboriginal peoples.

now, to define the framework within which Canada operates.³⁶ Moral judgments, of course, figure importantly in this conversation, but even they derive much of the shape and significance they have within it from the texture of the shared experience that elicits them.³⁷ Other, quite possibly better, ways of seeing and doing things may, despite their resonance within more venerable cultures, simply not work right now as part of the mainstream Canadian legal or constitutional mix. (One need not believe that electrons are morally better than positrons to recognize that bringing these two kinds of particles together in certain ways destroys them both.) If anything, such a determination might reflect badly on the mainstream system's own brittleness. The test that our courts are to apply in securing the mainstream system's ongoing integrity is -- to borrow a distinction from truth theory epistemologists -- one of coherence with the imperatives currently given within it, not one of correspondence with some ethnocentric external referent. Conclusions reached on this basis are exactly as arbitrary as the cultural frameworks within which they take place.

The other concern about mainstream involvement in the interpretation and enforcement of aboriginal peoples' inherent self-government rights is that such involvement almost always distorts its character and threatens its integrity. In the words of Gordon Woodman, who has studied the interaction of customary and mainstream systems in Ghana and Nigeria,

The modern state is rarely contradicted with success. Therefore, when state institutions act upon relationships which have previously been the concern of folk law, the effect on folk law is likely to be terminal. It might seem that a

³⁶ For a thoughtful, and quite persuasive, meditation on these themes, see Gerald J. Postema, "On the Moral Presence of Our Past" (1991) 36 McGill L.J. 1153.

³⁷ . . . we feel an obligation (though by no means absolute) to keep faith with commitments inherent in relationships that have been important to us, even if those relationships have not been chosen by us and even if the specific commitments are difficult to justify on independent grounds. The relationships demand a measure of respect simply because they have formed the basis for subsequent interaction -- they have entered into the constitution of our social life:

Webber, "Regret," note 19 above, at 18.

possibility of survival lies in an injunction by state law requiring state institutions to preserve or enforce portions of folk law. Hereby, it might appear, folk law will be perpetuated and even fortified by the authority of the state. The conclusion is false. State institutions, when instructed to apply folk law, in practice do not. They rather are apt to create a new body of law, which they misleadingly call folk or customary law.³⁸

. . .

. . . The experience of Ghana and Nigeria suggests that the social relations of a community will not be preserved by the adoption of its social norms as state law, and that rules which have previously operated independently of a modern state cannot be 'enforced' by the state. However, the creation of state power over a community necessarily changes social relations within it. The state cannot insulate a community from its own power, any more than from economic relations with other communities. There is, therefore, no immediately feasible policy.³⁹

This is so, Woodman argues, in part because the procedures that govern adjudication within the mainstream courts, and the remedies that they can offer, "cannot reproduce the circumstances in which social norms operated and by which they are enforced [within indigenous societies], and consequently they cannot simply 'apply' those norms."⁴⁰ "Experience in other jurisdictions (some in fact having overwhelming indigenous majorities)," Jeff Richstone adds, "has shown that, despite indigenization of the judiciary, training in the European legal tradition tends to cause custom to be interpreted through non-aboriginal filters. Indeed, this process inheres in the very structure of judicial decision-making."⁴¹ And Roger McDonnell reports, based on his studies of Cree societies in eastern Canada, that "[t]he most

³⁸ Gordon R. Woodman, "How State Courts Create Customary Law in Ghana and Nigeria" in Indigenous Law, note 26 above, 181 at 181. In a similar vein, Mary Ellen Turpel asks "Can a judge know a value which is part of an Aboriginal culture and not of her own?": Turpel, "Interpretive Monopolies," note 11 above, at 24 (double emphasis in original).

³⁹ Woodman, ibid. at 209.

⁴⁰ ibid. at 182. See generally ibid. at 182-190. For somewhat different perspectives, which nonetheless acknowledge the point, see A.N. Allott, "What Is to be Done with African Customary Law" (1984) 28 J.A.L. 56; Borrows, "With or Without You," note 21 above, at 648-654.

⁴¹ Richstone, note 26 above, at 247-248. For criticism on a similar basis of Supreme Court of Canada jurisprudence in Hutterite cases, see Réaume, note 10 above, at 14-15.

common basis" on which indigenous cultures determine how to characterize their thematic customs to the outside world

is strategic. . . . Rather than the culture group, it is the state that tends to establish the conditions and set forth the terms in which differences between the two are established. And it is from these terms that the group makes its selection and develops its strategies of influence and advantage with regard to the state. . . . However, it should be stressed that to negotiate for elbow-room with an external political opposition is not at all the same as providing an agreeable, comprehensible, or effective foundation for developing a community based, socially realistic, and culturally meaningful alternative to what now exists. Indeed, it does little more than provide a model for a solution that non-natives can understand. In no sense does it necessarily stem from custom, nor does it attempt to address the internal problems facing contemporary native communities.⁴²

Again, it makes sense . . . recognize the force of these criticisms; I, for one, am in no position to take serious issue with them, either as social science or as representations of aboriginal experience. Considered, however, as reasons to resist a role for the mainstream courts in situating self-government rights within the Canadian legal order, they may seem to some to have a certain artificiality. No responsible commentator on British North America can overlook the persistence, the pervasiveness or the scale of the impact that the settler society has already had on the foundations of aboriginal culture and social organization here, often quite deliberately and without any regard for aboriginal societies' own internal integrity.⁴³ One regrettable consequence of these centuries of interference is that North American aboriginal societies no longer have the option of preserving their pre-existing laws and forms of authority "in their primeval simplicity and vigour,"⁴⁴ wholly free from unwanted European

⁴² Roger F. McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities" (1992) 34 Can. J. Crim. 299 at 311-312. See also Zion, note 26 above, at 137.

⁴³ See Chapter 1, note 19 for an initial list of recent sources discussing and documenting that history.

⁴⁴ This phrase originated in Brian Slattery's authoritative article "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 782; it was quoted with approval, though to slightly different effect, in Sparrow v. The Queen, [1990] 1 S.C.R. 1075 at 1093.

influence;⁴⁵ there may be reason to doubt that they would choose to do so, even if they could. For better or worse, mainstream and aboriginal legal orders are going to have to reckon with each other for the indefinite future, as they have had to do since Europeans first arrived.⁴⁶ From a practical standpoint, then, the question for aboriginal cultures now is not whether to tolerate the fact of mainstream involvement, but how to minimize those of its effects that are unnecessary and unfortunate.⁴⁷ Their current choice is not between abiding and escaping some ongoing mainstream influence on traditional governance forms, but between having some protection for those forms in mainstream law and having none.

In these most imperfect circumstances, some inherent right communities may well elect to seek mainstream constitutional protection for their ancestral governance traditions and arrangements despite the unavoidable risks of (further) misunderstanding and distortion by mainstream courts. The fact that aboriginal societies have already survived, with as much

⁴⁵ See, e.g., Morse, note 26 above, at 114; Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., Continuing Poundmaker and Riel's Quest (Saskatoon: Purich Publishing, 1994) ("Poundmaker") 206 ("Turpel, 'Reflections'") at 208.

⁴⁶ See, e.g., Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 *Osgoode Hall L.J.* 623 ("Webber, 'Relations'") at 626-630 and throughout.

⁴⁷ It is impossible to speak in terms of absolute separation or duality of systems (Canadian and Aboriginal) when a considerable overlap between Aboriginal and non-Aboriginal ways of doing things and seeing the world has resulted in convergence at many levels. This is not necessarily convergence born of consent, but convergence born of colonialism and the terribly colonial nature of the history (and arguably ongoing politics) of Canada. . . .

Convergence is as important as difference. Understanding how to work with the other side requires some critical reflection, dialogue and creativity. One cannot erase the history of colonialism, but we must, as an imperative, undo it in a contemporary context:

Turpel, "Reflections," note 45 above, at 208. See also Menno Boldt & J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" in Menno Boldt & J. Anthony Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) ("Quest for Justice") 333 at 342-345; Borrows, "With or Without You," note 21 above, at 642; Borrows & Rotman, note 18 above, at 31-32, 37-38, 44-45.

integrity and determination as they have, much more extreme and deliberate manifestations of interference⁴⁸ offers at least some ground for hope that they will also survive judicial acceptance, interpretation and enforcement of their inherent self-government rights.⁴⁹

It is critical to remember, however, that the decision whether or not to assert or to exercise such rights within mainstream law rests exclusively with inherent right communities themselves. The protection the mainstream order affords aboriginal rights of self-government is, as the Royal Commission on Aboriginal Peoples took pains to emphasize, only one of the tools available to aboriginal peoples in their efforts to secure clear space to govern, and to be, themselves.⁵⁰ If particular inherent right communities conclude that the risks and pitfalls involved in invoking such protection outweigh the benefits of obtaining it, they may, at their option, instead seek greater respect or protection from other sources, or by other means.⁵¹

⁴⁸ See, e.g., Scott, note 21 above, at 312, 326-327; Zion, note 26 above, at 138; Borrows, "With or Without You," *ibid.* at 662-663.

⁴⁹ See, e.g., Borrows & Rotman, note 18 above, at 30. It may help a little to recall that mainstream judicial interpretations of indigenous law are authoritative only for purposes of the mainstream law. Inherent right communities need not treat them as internally binding except when and as those communities look to mainstream law to protect and enforce their self-government rights. Compare Chapter 2, note 73.

⁵⁰ Canada, Report of the Royal Commission on Aboriginal Peoples, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1996) esp. at 165-167, 184-185. The Royal Commission acknowledged, for example, that the treaties between aboriginal nations and the Crown may well be a separate source of entitlement to a form of legal autonomy (*ibid.* at 185), and concluded that the aboriginal nations located in what we now call Canada also have rights of self-determination deserving of recognition under the principles of international law: *ibid.* at 169-184. The Supreme Court of Canada's observation, in Reference re Secession of Quebec (20 August 1998) (S.C.C.) [unreported] ("Quebec Secession Reference") at 66 (¶ 132), that the "right of colonial peoples to exercise their right to self-determination by breaking away from the 'imperial' power is now undisputed," gives at least some doctrinal support to the Royal Commission's view, even though aboriginal peoples' rights at international law were not at issue in that proceeding.

⁵¹ See, e.g., Borrows, "With or Without You," note 21 above, at 662-663, esp. n. 170; Gallagher-Mackay, note 26 above, at 1-2, 23.

From the outside, though, there appear to be at least two clear advantages to inherent right communities in establishing and using aboriginal rights of self-government. One is that such rights need not come at the expense of such communities' other political options. They do not, for instance, preclude inherent right communities from engaging, either subsequently or at the same

This is not, however, the kind of conclusion that mainstream culture ought to want to encourage. For one thing, it would signify such communities' despair at the prospect of securing a fair measure of autonomy through cooperation with the mainstream legal order. Such despair could only complicate further the ongoing challenge of coexisting peaceably, and would spell the failure of Canadian aboriginal rights law to achieve its twin goals: protecting the integrity of the pre-existing aboriginal presence in North America, and reconciling that presence with the sovereignty of the Crown.⁵² For another, there is reason to doubt that some of the other options such communities might pursue would be to our liking, especially if the selection emerged from circumstances of such discouragement.⁵³

It is important for everyone, therefore, that inherent right communities be able to recognize themselves in -- and, generally speaking, that they be comfortable exercising -- the kinds of self-government rights that our constitutional order can receive and protect. The extent to

time, in treaty negotiations with the Crown about self-government, in efforts to enforce the terms of treaties already in place, or in efforts to achieve federal or international recognition of their sovereignty. The other is that successful accreditation and use of such rights may improve, to some extent, such communities' chances of success in pursuing political options. Establishment that such rights qualify for constitutional protection, and demonstration, in practice, that they can coexist with (often very different) mainstream arrangements, for instance, should both improve the climate for negotiation of formal self-government treaties with the Crown and improve such communities' bargaining power within such negotiations. Trying and failing to do so, however, could, of course, just as easily jeopardize both the negotiation climate and particular communities' bargaining positions within it: see, e.g., Gallagher-Mackay, at 21-22.

⁵² See, e.g., Van der Peet, note 17 above, at 538-539 (¶¶30-31) and chapter 2, notes 16-53 and the text accompanying them.

⁵³ At an influential conference in Saskatoon in 1993, for example, Chief Roland Crowe of the Federation of Saskatchewan Indian Nations, after emphasizing that "[w]e, as First Nations, want to continue to work with government and non-Indian people and continue to enjoy a peaceful co-existence in this beautiful country and this fine province," added this admonition:

It is extremely difficult for our First Nations leaders to ask our young people for patience. Patience is wearing thin. The leaders you see today are humble and honourable, but if we don't make those changes, you will see those leaders changed because of impatience and inactivity. I'm hoping we don't need to go that far:

Roland Crowe, "First Nations Perspective on Justice and Aboriginal Peoples" in Poundmaker, note 45 above, 34 at 36.

which they can are able to so will depend, most probably, on which mainstream arrangements and values turn out to be fundamental enough to constrain the definitions of mainstream self-government rights, and on how our courts make such determinations. I want now, finally, to consider those very difficult issues.

III. WHAT FUNDAMENTAL VALUES?

I have argued throughout that our courts need -- and have -- a way of ensuring that aboriginal rights of self-government operate compatibly with the most fundamental features of Canada's legal and constitutional order. I have, however, been vague -- some might say coy -- in my treatment of those essential features. It is time for me to try to explain that reticence.

It is not that we lack guidance about our legal order's foundations. In a series of decisions in the past twenty years, the Supreme Court has provided, a little at a time, increasing perspicuity about the themes and principles, both substantive and structural, that, from a constitutional standpoint, make Canada what it is. We know from Provincial Court Judges of the constitutive significance of the aspirations set out in the preamble to the Constitution Act, 1867 -- "to be federally united into One Dominion under the Crown of the United Kingdom . . . with a Constitution similar in Principle to that of the United Kingdom" -- and, in particular, of an independent judiciary.⁵⁴ We know from the Quebec Secession Reference that "it would be impossible to conceive of our constitutional structure without" the organizing principles of federalism, democracy, constitutionalism and the rule of law, and protection for minorities.⁵⁵ We know from Oakes that the Charter was enacted to ensure that "Canadian society is to be free and democratic," and that the "values and principles essential to a free and democratic society" include, "to name but a few, respect for the inherent dignity of the

⁵⁴ See Reference re Provincial Court Judges, [1997] 3 S.C.R. 3 at 63-78 (¶¶83-109).

⁵⁵ Quebec Secession Reference, note 50 above, at 25 (¶51), 24 (¶49). See generally ibid. at 15-16 (¶32), 27-41 (¶¶55-82).

human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."⁵⁶ And we know from Hunt that the federal structure that constitutes Canada requires minimum standards of order and fairness, including full faith and credit in the recognition and enforcement of judgments from other provinces, to coordinate the exercise of jurisdiction among the parties to Confederation.⁵⁷ Other judgments contribute other insights. And nothing in these judgments suggests that this catalogue is exhaustive.

None of these explications of the essence of the mainstream order occurred in a context that invited attention to aboriginal rights or interests. Because these themes and principles help define the mainstream order, however, it is all but certain that they (and, again, perhaps others, as well) will arise for careful consideration within the enterprise of defining the nature and scope within mainstream law of aboriginal peoples' inherent rights of self-government. When self-government issues arise that engage these principles, our courts have clear authority to invoke them. What we don't know yet is how, or whether, each of these defining features of the mainstream order will, or should, constrain the use within it of inherent self-government rights. That is the crucial question, and the one most difficult to answer.

In fact, I do have some idea, based on my own best current sense of what matters most about Canada, which of these mainstream fundamentals I would be disposed to treat as internal constraints on self-government rights if I were a judge facing such an issue today. Among them are threshold notions of fairness and equality and outer limits on the forms and degrees of permissible punishment. Actual mainstream judges, no doubt, have predispositions of their own, informed by their own experience, that would operate comparably. Such predispositions

⁵⁶ R. v. Oakes, [1986] 1 S.C.R. 103 at 136.

⁵⁷ See Hunt v. T & N, plc, [1993] 4 S.C.R. 289 at 321-327, esp. at 324.

are both unavoidable and indispensable: they are, in a sense, raw material from which we seek to develop mature and authoritative intuitions about "the way to live most nicely together," to borrow a wise and indelible phrase from Trish Monture.⁵⁸ They are, so to speak, the first words in the conversation we need to have about how to live together. They are the words that tell us where we stand.⁵⁹

We make a mistake, however, if we assume too readily that they show us more than that. I say this for two distinct but related reasons. First, any prescriptive intuitions that we in the mainstream currently have about how inherent right and settler communities ought to coexist, each according to its own laws, within the mainstream order's protection are almost certain -- whatever they are -- to be underripe and still unworthy of full conviction. Given the circumstances, it could hardly be otherwise. Probably the dominant theme in the past fifteen years of public discussion about the proper constitutional status for self-government rights has been a profound uncertainty about what they might mean, or how they might work, within the mainstream constitutional order. It is this sense of uncertainty, as much as anything, that has given rise to the numerous public expressions of apprehension about the consequences of constitutionalizing such rights.⁶⁰ I have sought in this work to address these apprehensions

⁵⁸ See Patricia Monture-OKanee, "Thinking about Aboriginal Justice: Myths and Revolution" in Poundmaker, note 45 above, 222 at 227. Monture reports that this phrase is the most accurate English translation of the word in the Mohawk language for law.

⁵⁹ See, e.g., Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev. Const. Stud. 1 ("Nedelsky, 'Relationship'") at 19, and "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91 ("Nedelsky, 'Diversity'") at 107-109. Compare Alan C. Cairns, "Why Is It So Difficult to Talk to Each Other?" (1997) 42 McGill L.J. 63.

⁶⁰ See, e.g., "Inherent But Unclear" [editorial] Winnipeg Free Press (11 April 1992) A6; Edison Stewart, "Questions Remain on Native Self-rule" Toronto Star (15 May 1992) A27; William Johnson, "Mercredi Has No Mandate, But That Doesn't Stop Him" The [Montreal] Gazette (26 June 1992) B3; "Native Self-rule Worries Provinces" Calgary Herald (6 July 1992) A1; William Johnson, "Modern Myths: Elements of Self-government Haven't Been Perpetuated" The [Montreal] Gazette (7 July 1992) B3; Miles Morrisseau, "Self-government: How Can We Accept a System That We Don't Understand?" The [Montreal] Gazette (21 July 1992) B3; Bryan Schwartz, "Bryan Schwartz Takes a Close Look at Aboriginal Self-government" [Toronto] Globe & Mail (4 August 1992) A12; "Go Slowly on Self-government: Canadians Deserve More Than Vague Concepts" [editorial] The [Montreal] Gazette (24 January 1994) B2; Karina Byrne, "Self

and uncertainties by suggesting a doctrinal framework within which to move toward certainty and predictability in the use of such rights, and by offering doctrinal assurance that our courts, no matter what, will be equipped to protect the mainstream order's most fundamental arrangements and values.⁶¹ I believe such work is essential and, when well done, a helpful beginning, but it cannot substitute for some actual lived experience with the ongoing interaction between the settler and self-governing aboriginal communities.⁶²

Lived experience with recognized inherent right communities, and the opportunity to reflect on such experience as it accumulates, are precisely what we have not had. In their absence, many non-natives feel more urgently the need to domesticate the exercise of inherent self-government rights: to house them from the beginning within a structure of rules and restrictions that neutralize their foreignness in the interest of achieving predictability and certainty. That very inexperience, however, almost guarantees that any efforts we might make now to craft and impose such a structure would be uninformed and premature. One finds hardly any core of agreement among conscientious commentators about which mainstream values should outrank and constrain the self-government rights of inherent right communities;⁶³ we don't, as a society, know what to say about such questions⁶⁴ because, in a very

Rule Goal Hard to Define" Winnipeg Free Press (27 March 1994) A3; Jim Bronskill, "Liberals Wavered on Promise: Native Self-government Memorandum" Calgary Herald (6 May 1996) A8; Tom Oleson, "Native Self-rule: Is It a Dead End? Know Sovereignty Before Building It" Winnipeg Free Press (14 July 1996) B2.

⁶¹ See especially Chapters 2 and 4.

⁶² See, e.g., Turpel, "Reflections," note 45 above, at 210.

⁶³ Once we get past, or unpack, the rhetoric that insists on applying the Charter to such communities, at least. See Chapter 3.

⁶⁴ Two examples help illustrate this point. Consider first the controversy surrounding the use of international human rights instruments to measure the governance practices of self-governing aboriginal peoples. To some commentators, such instruments have already achieved sufficient intercultural assent to qualify as neutral standards applicable to all peoples, including aboriginal peoples: see, e.g., Peter W. Hutchins, Carol Hilling & 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 294-298; Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and

real sense, we do not know what we are talking about. The danger in prescribing a normative framework in these circumstances is that, in our ignorance, we may get it badly, tragically, wrong. A sensible place to begin is by admitting that this is so.⁶⁵

Second, the burden of proof within the fundamental values inquiry is, as a matter of mainstream law, on those who claim that an aboriginal governance measure or arrangement is not compatible with the integrity of the mainstream order: that it conflicts with a fundamental mainstream value important enough to constrain it, despite the mainstream order's constitutional commitment to respect for aboriginal difference.⁶⁶ If we began by supposing we knew which essential mainstream values deserved to control the protected

Aboriginal Government" (1993) 4 Const. Forum 110 esp. at 115. Others distrust the application of such standards to aboriginal cultures, because aboriginal peoples, as such, played no part in their formulation and because they are based on individualistic norms that are foreign and detrimental to fundamental aboriginal values: see, e.g., Menno Boldt & J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in The Quest for Justice, note 47 above, 165 at 167, 177-179; Zion, note 26 above, at 133-134; Turpel, "Interpretive Monopolies," note 11 above, at 21-22; J. Anthony Long & Katherine Beaty Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" (1994) 18 Am. Ind. Culture & Rsch. J. 91 at 114.

Second, although there is widespread agreement that aboriginal women may be uniquely in need of protection in some inherent right communities, there is little, if any, agreement, among either aboriginal or mainstream commentators, about what role, if any, the mainstream order could or should play in providing it. For contrasting aboriginal viewpoints, compare To the Source, note 13 above, at 59-61 and Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993), 6 C.J.W.L. 174 with Green, ibid. and Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed., Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference (Vancouver: UBC Press, 1997) ("Aboriginal and Treaty Rights") 75; for contrasting non-aboriginal views, compare, e.g., Shachar, note 10 above with Greschner, note 10 above.

⁶⁵ For a judge, a situation of cultural difference should be and must be a situation of not knowing which direction to go, a situation involving choices about reasoning which may not be defensible or acceptable. It involves episodes of undecidability, self-judgment, and uncertainty. It would involve acknowledging the imperative of admitting mistakes and recognizing ignorance:

Turpel, "Interpretive Monopolies," note 11 above, at 45. Emphasis in original.

⁶⁶ See Chapter 4, notes 51-54, 71-76, 143-145, 202-203, 206.

exercise of self-government rights, we would enter the inquiry assuming what is supposed to be proved. Doing so deliberately would frustrate part of the purpose, and cast doubt upon the integrity, of the onus requirement, and, to that extent, of the inquiry as a whole.

This allocation of onus is not an empty formality; a principal reason for it, as we saw in chapter 4, is to protect against the danger that courts, when asked to enforce unusual pre-existing customs, will sometimes mistake unfamiliarity for repugnancy or irrationality.⁶⁷ Evidence from both English law and colonial African law suggests that domestic courts are much less likely to regard as repugnant unusual pre-existing customs when they understand the context and the reasons that have given rise to them.⁶⁸ One virtue of this onus, then, is that it forces the mainstream courts to become acquainted with a custom's history, nature and operation before they conclude that our legal order cannot countenance it.

Such caution is especially apposite here. The most obvious shortcoming in current mainstream preconceptions -- my own of course included -- about the potential impact of aboriginal self-government is that they draw so little on any real understanding of the nature and operation of aboriginal legal systems, or of the mischief that measures undertaken within such systems are intended to address.⁶⁹ It will take discipline, patience and some cultural humility for mainstream jurists and commentators to make this deficit good. Making some effort to do so is both a real opportunity and a functional necessity.

⁶⁷ See Chapter 4, notes 143-145 and the text accompanying them.

⁶⁸ See, e.g., Sir C.K. Allen, Law in the Making, 7th ed. (Oxford: Clarendon Press, 1964) at 98; A.N. Allott, New Essays in African Law (London: Butterworths, 1970) at 162. See also chapter 1, note 79.

⁶⁹ "One cannot take a strong position on the limits of a body of law unless that law is first understood. . . . [G]overnment policymakers should be prepared to take part in the search with an open mind and reach decisions on the use of or limitations to Indian common law after getting a feel for it": Zion, note 26 above, at 136-137. See also Lyon, "Essay," note 26 above, at 120-121.

Here, briefly, is why I see it as a necessity. Aboriginal peoples will continue to see the mainstream order as an attractive source of protection for their self-government rights only if, and only while, the outcomes of mainstream self-government jurisprudence seem acceptable, or at least rational, to them from their own perspectives.⁷⁰ Our courts are unlikely to meet this expectation in every case -- there will always be dissatisfied litigants -- but it is imperative that judges acknowledge as a controlling aspiration the task of doing so.⁷¹ They will rarely succeed in earning respect from inherent right communities unless they learn to care, and try to understand, what matters most within those communities.⁷²

Different commentators have suggested different ways in which mainstream law might expand its horizons to take more authentic account, and better advantage, of aboriginal understand-

⁷⁰ See, e.g., Borrows & Rotman, note 18 above, at 26-29.

⁷¹ The Supreme Court speaks [in *Van der Peet*, note 17 above, at, e.g., 539 (¶31)] of using Aboriginal rights to reconcile the prior presence of Aboriginal societies in North America with the Crown's assertion of sovereignty. Reconciliation, if that is not to be a code word for unilateral imposition, necessarily must imply outcomes that are reasonable by a standard that has received acceptance from Aboriginal societies as well as present government. In order to accomplish that kind of reconciliation, the Court must be willing to look outside of its own jurisprudence, which is necessarily culturally specific, to find standards against which they can measure the outcomes of their decisions:

Gallagher-Mackay, note 26 above, at 11-12. See also Webber, "Relations," note 46 above, at 659-660 ("The possibility of intercommunal normativity demands humility from jurists educated and functioning in an emphatically non-Aboriginal intellectual milieu"); Borrows & Rotman, note 18 above, esp. at 11-13.

⁷² . . . although there appears to be a convergence of modern Indian values and those of Western liberalism around such individual rights as personal entitlements and a paralleling belief in the equality of persons, the strength of these concepts as guides to individual and collective behavior depends very much on perceptions of their origin. After decades of failed government policies aimed at enhancing the welfare of Indians through cultural assimilation and political control, Indian peoples are understandably reluctant to accept externally imposed standards to guide their conduct. To be meaningful, such standards must emerge or reemerge from within their own societies:

Long & Chiste, note 64 above, at 112. Compare Noel Lyon, "A Perspective on the Application of the *Criminal Code* to Aboriginal Peoples in Light of the Judgment of the Supreme Court of Canada in *R. v. Sparrow* [1992] U.B.C. L. Rev. (Sp. Ed.) 306 ("Lyon, 'Perspective'") at 310.

ings,⁷³ such as looking to the intercultural norms that emerged between aboriginal and settler communities during the period shortly after European contact⁷⁴ or to the terms of the self-government agreements that some aboriginal peoples have already concluded with the Crown.⁷⁵ The general idea, however, is captured in the phrase "enlargement of mind," which Jennifer Nedelsky has adapted from Hannah Arendt:

What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an 'enlargement of mind.' We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective, whether through fear, anger or ignorance. It is this capacity for 'enlargement of mind' that makes autonomous, impartial judgment possible.⁷⁶

The opportunity -- the dividend -- available through this effort and from greater toleration of aboriginal difference is that we in the mainstream culture might well learn something useful that will improve our own approaches to governance. In his well-known treatise on Canadian labour law, Paul Weiler argued that the division of powers in Canada, which reposed in the provinces primary jurisdiction over labour relations, allowed them to operate as "laboratories for legal experimentation" in that subject area. This arrangement, Weiler suggested, both

⁷³ For a very helpful introduction and rationale for this effort, see Borrows, "With or Without You," note 21 above.

⁷⁴ See, e.g., Webber, "Relations," note 46 above.

⁷⁵ See, e.g., Gallagher-Mackay, note 26 above. My one reservation about this proposal is that it could serve to limit the scope of some communities' existing aboriginal rights of self-government because of the bargains that they (or even other communities) happened to conclude in the circumstances of the negotiations, quite possibly without having intended to affect any aboriginal rights of self-government that they might have. (Well-advised communities strive to ensure that such agreements operate "without prejudice" to any other self-government rights they may have.) Gallagher-Mackay is correct in pointing out, however, that existing self-government agreements typically leave more room for the meaningful exercise of self-government powers than the courts have yet acknowledged in the jurisprudence on aboriginal rights: see, e.g., *ibid.* at 18-20.

⁷⁶ Nedelsky, "Diversity," note 59 above, at 108. Such conscientious exposure to other viewpoints, Nedelsky adds (*ibid.* at 108-109), helps facilitate both critical reflection about, and transformation of, our own prereflective -- and often somatic -- responses to situations. Compare Borrows, "With or Without You," note 21 above, at 642.

maximized the range of collective experience with different approaches and minimized the reach of the harm if a province happened to enact an unsound measure.⁷⁷ It is, at a minimum, arguable that inherent right communities exercising constitutionally protected self-government rights can offer just such advantages to one another and to the mainstream order. The beneficial impact traditional aboriginal governance forms have already had on political theory and constitutional arrangements in the European tradition is well-known and documented.⁷⁸ As many commentators have said, there is good reason to suspect that some of those same traditions have insights, and perhaps solutions, that relate to predicaments of modern mainstream governance.⁷⁹ No sensible observer of Canadian public life today could pretend that existing mainstream arrangements and practices need no improvement. In these circumstances, it seems only prudent at least to be receptive to these sources of fresh perspective. We in the mainstream culture risk missing out on this opportunity if our courts and commentators are not open to instruction about the legal systems and forms of authority that operate within inherent right communities.

For all these reasons, I would discourage Canadians contemplating aboriginal rights of self-government from doing so with firm predetermined views about what is and is not fundamental to, or compatible with, Canada's own constitutional order. Instead, I would encourage courts reviewing such rights, or their exercise, on "fundamental values" grounds to do so with as few preconceptions, and as much flexibility, as possible.

The rights, and legal rules generally, that have currency in the mainstream system are, after

⁷⁷ See Paul Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: Carswell, 1980) at 10.

⁷⁸ See, e.g., the sources cited in Chapter 1, note 81.

⁷⁹ See, e.g., Zion, note 26 above, at 33-34; Lyon, "Essay," note 26 above, at 103-108; To the Source, note 13 above, at 20; Greschner, note 10 above, at 345-346; Lyon, "Perspective," note 72 above, at 310; Hon. Robert W. Mitchell, "Blazing the Trail" in Poundmaker, note 45 above, 303 at 311-313; Borrows, "With or Without You," note 21 above, esp. at 653-655, 662-663.

all, forms of shorthand -- what formal logicians sometimes call "well-formed abbreviations" -- that distill the results of much longer, though still ongoing, conversations about the values we care about and the kinds of relationships we want.⁸⁰ Those of us entirely within the mainstream system are able to deal with confidence with each other in that currency because such conversations have already taken place, or are well underway. When it comes to the governance of inherent right communities, though, we are in a very different position. The intercultural conversations with those in such communities, about the issues of value and relationship that arise between them and settler culture, are only beginning. Such conversations need time and structure to yield authoritative forms of currency such as rights and rules. The real need, as Robin Elliot has said of another subject of constitutional inquiry, "is not a rule that is designed . . . to provide a more or less ready answer to such questions, but a way of conceiving or thinking about such questions . . . that permits one to resolve them on the basis of an analysis of what is truly at stake."⁸¹ Bob Mitchell, at the time Saskatchewan's Attorney General, said much the same thing at a conference I attended in 1993:

I come from a culture where people like to be able to predict what the outcome is. That is the majority culture in this country. Before we get committed to an idea, we like to know how it's likely to come out. And so when we in the majority culture look at self-government, we ask ourselves, what does it mean? What's it going to look like? What are these new governments going to do? How are they going to work? How much will they cost? All those questions arise because we like to know as exactly as we can the shape of things to come. We spend a lot of time and dedicate a lot of resources to analysing what the outcome is likely to be.

What I think I learned from my Aboriginal friends during the Charlottetown process is that that is not so important. It's not possible to accurately predict these things. What is important is to set in place a process for getting us from here to there, from where we are to where we want to be. And if the process is sound, it is not a large leap of faith to predict that the outcome will also be

⁸⁰ See, e.g., R. Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) 29 Osgoode Hall L.J. 215, esp. at 238-239; Nedelsky, "Relationship," note 59 above, esp. at 4, 13-14, 17-19.

⁸¹ Elliot, *ibid.* at 239. Compare Nedelsky, "Relationship," *ibid.* at 9.

sound.⁸²

As it happens, we already have at least one such process ready to hand: the all too familiar mainstream procedure of dealing with important legal controversies, on their own facts and merits, case by case. This is a time, if ever there was one, to realize and take full advantage of the benefits of case-by-case adjudication in dealing with the "fundamental values" disputes that seem bound to arise occasionally with inherent right communities. It is a procedure designed to focus attention on the way disputes are embedded in real people's real lives, to ensure that efforts at justice are faithful to that particularity, and to discourage sweeping pronouncements until a broad enough shared understanding of individual instances accumulates to substantiate generalities. In doing so, it leaves room and time for attention to the way things work when they are working well, for resolution of, and reflection on, intermediate cases -- those "disputes of less operative proportions" that engage mainstream and indigenous cultures but do not necessarily bring them into potential collision⁸³ -- and, of course, for negotiated arrangements and, where necessary, legislative intervention.

Instead of circumscribing the conversation from the outset within a cage of rules and assumptions untested for this purpose, this incremental approach encourages us to look and see, in the crosslight cast by real situations and practical experience, which mainstream values really are fundamental, and to take our bearings and improve our intuitions accordingly. There is, of course, some chance in so doing that some arrangements and values now regarded as fundamental, to either the settler or the inherent right communities, will cease to seem so important as a result of the encounter. Such transformations, however, need be no more fearsome nor dramatic than the incremental adjustments always underway in all these societies

⁸² Mitchell, note 79 above, at 307.

⁸³ See Réaume, note 10 above, for an illuminating discussion of what such cases can tell us about the capacity of Canadian law to accommodate cultural pluralism. The phrase quoted in the text appears in *ibid.* at 3.

as circumstances change, perspectives shift and perceptions sharpen.⁸⁴

I favor this incremental approach to fundamental values issues, despite its promise of some initial indeterminacy,⁸⁵ because I believe it will lead, in the long run, to sounder, more trustworthy conclusions, and to a deeper harmony among the different systems of law and governance that will comprise Canadian law, once our courts acknowledge that the constitution already protects aboriginal rights of self-government. In the meantime, such an acknowledgement offers inherent right communities greater assurance than ever before that their efforts to preserve, express and restore their collective distinctiveness will not be subject to routine defeasance by mainstream legislation or for the sake of mainstream values. Settler communities, for their part, can take comfort from the fact that mainstream judges, trained in mainstream law, will continue to be able to ensure that the integrity of the Canadian constitutional order, and everything that proves, from time to time, to be essential to it, will remain intact.

⁸⁴ See, e.g., Richard Simeon, "Sharing Power: How Can First Nations Government Work?" in Frank Cassidy, ed., Aboriginal Self-Determination (Lantzville, B.C.: Oolichan Books, 1991) 99 at 106, quoted at Chapter 4, note 24. Compare Quebec Secession Reference, note 50 above, at 16 (¶33), 34 (¶68).

⁸⁵ There is good reason to expect that rules, understandings, compromises and protocols will, in time, emerge from this process to stabilize interactions between inherent right and settler communities, if only because relations of peace and stability are so important to everyone. In an insightful recent article, Jeremy Webber documents some of the normative intercultural arrangements that emerged -- and held -- between the aboriginal peoples and European settlers in eastern North America after first contact, despite inequalities and rapid changes in bargaining power, their almost incommensurable domestic legal systems, and occasional lapses by one side or the other, because both sides regarded stable relations as a practical necessity: see Webber, "Relations," note 46 above, throughout. (For an account with similar orientation of the treaty-making process in western Canada shortly after Confederation, see J. Edward Chamberlin, "Culture and Anarchy in Indian Country," in Aboriginal and Treaty Rights, note 64 above, 1.) Times and circumstances, of course, have changed a lot since then, but the practical importance of stable foundations for interaction between the two kinds of societies can hardly be said to have diminished. My point -- and Webber's -- is that working arrangements result in real stability only if they emerge, not from theorizing or from one side's domestic preferences, but from a joint and practical understanding of what is really going on.