TRACKING TRAJECTORIES: ABORIGINAL GOVERNANCE AS AN ABORIGINAL RIGHT

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I. INTRODUCTION

This article tracks the trajectory of the development of Aboriginal governance as an Aboriginal right in Canadian law. It simultaneously tracks the companion trajectory of Professor Ken Lysyk's scholarship as it relates to Aboriginal Governance. Professor Lysyk was a careful scholar.[1] He had a long-standing interest in Aboriginal legal issues. His work was innovative and enduring. In examining his articles one is struck by his concern for Aboriginal peoples and the injustices they encounter within the Canadian state.[2] He was particularly interested in the legal basis for the existence of unique rights of Aboriginal peoples in Canadian law. He wanted to ensure these differences were not used to their disadvantage. His work was subtle and perceptive. He

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[1] I will refer to Ken Lysyk as Professor throughout this article though I acknowledge his substantial contributions as Judge, Public Servant, University Administrator (Dean), Father and Husband. I have chosen to focus on his role as Professor because I believe his writings continue to teach us many important legal principles, including issues related to Aboriginal Rights.

[2] Notable articles include the following: K. Lysyk, "Indian Hunting Rights: Constitutional Considerations and the Role of Indian Treaties in British Columbia" (1966) 2 U.B.C. L. Rev. 401; Kenneth M. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 [Lysyk, "Unique Constitional Position"]; K. Lysyk, "*Regina v. Drybones*" Case Comment (1968) 46 Can. Bar Rev. 141; K. Lysyk, "Human Rights and the Native Peoples of Canada" Comment (1968) 46 Can. Bar Rev. 695; Kenneth Lysyk, "The United States Indian Claims Commission" in Peter Cumming & Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: Indian-Eskimo Association of Canada, 1972) 243; Kenneth Lysyk, "Approaches to Settlement of Indian Title Claims: The Alaskan Model" (1973) 8 U.B.C. L. Rev. 321; K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973) 51 Can. Bar. Rev. 450 [Lysyk, "Indian Title Question"]; Kenneth M. Lysyk, Edith E. Bohmer & Willard L. Phelps, *Alaska Highway Pipeline Inquiry* (Ottawa: Minister of Supply and Services Canada, 1977); K. M. Lysyk, "Constitutional Developments Relating to Indians and Indian Lands: An Overview" (1978) L.S.U.C. Special Lectures 201; Kenneth M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in Walter S. Tarnopolsky & Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) 467 [Lysyk, "Rights and Freedoms"].

foreshadowed many subsequent developments in the field. His writings were influential in many circles, from policy development,[3] through legal education[4] and the courts.[5] His insights provided hope and a measure of protection for Aboriginal peoples in their interactions with the State. They formed part of a body of work which helped revolutionize thinking about Aboriginal rights in the late 1960's and 1970's to bring this issue out of legal obscurity. He wrote during a transformative time in Canada's constitutional history. The ideas he tackled were changing our understanding about the place of First Peoples in this country. This paper suggests the trajectory of his writings may yet help further transform understandings about the unique constitutional position of Aboriginal peoples and thereby guide future resolution of issues relating to their rights, specifically in the area of Aboriginal governance.

However, before examining the substance of his scholarly writings a more general comment is in order. Professor Lysyk's most important contribution to the resolution of Crown/Aboriginal issues may lie in his life's example. Students sometimes ask me about whether they should work in the field of Aboriginal rights. If they are non-Aboriginal they are concerned about their place in this field. They wonder about the appropriateness of their involvement, and don't want to be seen as intruding in someone else's business. They seem careful to ensure that they do not replicate past problems of non-Aboriginal control of Aboriginal affairs. On the other hand, Aboriginal students will also express concerns about working in the field of Aboriginal law. They don't want to be stereotyped or ghettoized as only being interested in Aboriginal law. They don't want to limit their contributions to the world. Furthermore, some Aboriginal students feel it is not their place to get involved

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[3] Alan Cairns, "Kenneth Lysyk, *The Hawthorn Report* and 'The Unique Constitutional Position of the Canadian Indian'" (2005) 38 U.B.C. L. Rev. 275.

[4] Michael Jackson, "A Model of Scholarship" (2005) 38 U.B.C. L. Rev. 315.

[5] While Judge of the British Columbia Supreme Court, Professor Lysyk wrote judgements for: *Campbell v. Unitow Services (1978) Ltd.* (1983), 43 B.C.L.R. 231, 4 C.C.C. (3d) 375 (S.C.); *Cheslatta Carrier Nation v. British Columbia*, [1999] B.C.J. No. 2639 (S.C.) (QL), aff'd (2000), 193 D.L.R. (4th) 344, 2000 BCCA 539, leave to appeal dismissed [2000] S.C.C.A. No. 625 (QL); *Hagwilget Indian Band v. Roman Catholic Episcopal Corp. of Prince Rupert*, [1997] B.C.J. No. 1969 (S.C.) (QL); *R. v. James*, 2001 YKSC 54; *Stoney Creek Indian Band v. British Columbia*, [1998] B.C.J. No. 2468 (S.C.) (QL), rev'd (1999), D.L.R. (4th) 174, 1999 BCCA 527; *Supernault v. Hey-Way 'Noqu' Healing Circle For Addictions Society*, [1996] B.C.J. No. 1280 (S.C) (QL). Professor Lysyk's academic writings were cited by the Supreme Court of Canada in *Dick v. The Queen*, [1985] 2 S.C.R. 309 at para. 41, 3 C.C.C. (3d) 481 [*Dick* cited to S.C.R.]; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at para. 36, 26 D.L.R. (4th) 175 [*Derrickson* cited to S.C.R.]; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 125, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.].

in the field of Aboriginal law. They might say something like, "we didn't create this mess, why should we have to clean it up, that's Canada's problem."

In answering these questions it should go without saying that non-Aboriginal people have an important role to play in the field of Aboriginal law. Furthermore, it should also be apparent that Aboriginal issues are not an inferior field of study but a vital part of Canada's legal fabric. Aboriginal rights are not purely an Aboriginal issue, and they have a great impact on many people's lives.

In thinking about these questions, the example of someone like Professor Lysyk looms large. His interest in and contribution to the field at a scholarly level demonstrates the necessity of not limiting engagement with the issue. Furthermore, at a personal level, his approach to these issues was most exemplary. In dealing with him one could not help but be impressed by his peaceful demeanor. He epitomized the principles of friendship and respect as he dealt with Aboriginal peoples and others. I felt these qualities in our brief interactions and have heard, read, and observed them in his dealings with others. I believe the most important steps in resolving outstanding issues between Aboriginal peoples and the Crown are found in cultivation and application of these traits, abundant in Professor Lysyk's life. The collective resolution of outstanding issues between Aboriginal peoples and the Crown is best sustained by individuals relating to one another in accordance with these larger principles of peace, friendship, and respect.[6]

Of course, recognition of Professor Lysyk's personal qualities should not preclude serious scrutiny of his scholarly contributions. There is much to commend in his writings and a few aspects to critique. Commendation should be generous, as he accurately stated and predicted the state and development of the law. Critique should be muted, given that he was breaking new ground in his work. Professor Lysyk was one of the first academics in Canadian history to examine the constitutional basis on which Aboriginal law rests.[7] His opinion and insights have been remarkably accurate. His reasoning stands the test of time.

II. PROFESSOR LYSYK ON ABORIGINAL ISSUES

One theme that occupied much of Professor Lysyk's attention in dealing with Aboriginal issues was their distinctiveness in Canadian law. He argued that

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[6] For a discussion of the legal basis of "peace, friendship, and respect" as guiding constitutional principles, see John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Differences* (Vancouver:U.B.C. Press, 1997) 155 [Borrows, "Wampum at Niagara"].

[7] Lysyk, "Unique Constitutional Position", *supra* note 2 at 513.

Aboriginal rights pre-existed and survived the creation of the Canadian state unless clearly extinguished by the Crown. During his scholarly career, which spanned the 1960s and 1970s, most of his attention in this field was devoted to the distinctiveness of Aboriginal land rights and federalism issues. His last article before going to the bench was published in 1982, the year Aboriginal and Treaty Rights were recognized in the Canadian Constitution.[8]

In 1967 Professor Lysyk wrote a groundbreaking article, "The Unique Constitutional Position of the Canadian Indian",[9] in which he identified many potential reasons for the differential treatment of Indians. These ideas have been largely sustained, including the notions that (1) section 91(24) gives the Dominion government power to legislate specifically for Indians;[10] (2) the Natural Resources Transfer Agreements of 1930 constitutionalized provincial obligations to assure Indians the rights to hunt, fish and trap for food on the prairies;[11] (3) the thirteenth article of British Columbia's Terms of Union obligated the Dominion to treat Indians with the same liberality they enjoyed in the Colony of British Columbia prior to union;[12] (4) the *Canadian Bill of Rights* provided that rights to equality were available to prevent discrimination;[13] (5) grants and guarantees found in Indian treaties rendered Indian treaties paramount to provincial legislation through section 87 (now 88) of the *Indian Act*;[14] (6) section 87 referentially incorporated provincial laws of general application that do not interfere with treaties, other Acts of Parliament, and the *Indian Act*;[15] and (7) the Royal Proclamation of 1763 represented a

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[8] *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[9] Lysyk, "Unique Constitutional Position", *supra* note 2.

[10] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[11] *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26.

[12] *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10.

[13] S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

[14] R.S.C. 1985, c. I-5.

[15] Lysyk makes the point that there is a problem with section 87 concerning " ... the judicially developed ban on delegation of legislative authority as between Parliament and the provincial legislature. ... The difficulty arises where the federal statute purports to be adoptive of (or is sought to be construed so as to be adoptive of) the *future* enactments of a province" in "Unique Constitutional Position", *supra* note 2 at 531 [emphasis in original]. Lysyk's argument was not dealt with in a satisfactory way in *Dick*, *supra* note 5. In *Dick* at 569, the Court merely said that *Nova Scotia (A.G.) v. Canada (A.G.)*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369; *Ontario (A.G.) v. Scott*, [1956] S.C.R. 137, 1 D.L.R. (2d) 433; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, 68 D.L.R. (2d) 384 "provide a complete answer to this objection". The cases do not provide the answer against future inter-delegation such as contemplated by

" ... clear government policy ... directed towards obtaining surrenders of Indian title prior to opening lands for settlement ... ."[16]

Professor Lysyk carried this theme of uniqueness further in his "Indian Title Question" article, written in 1973. In this piece he analyzed *Calder v. British Columbia (A.G.)* from the Supreme Court of Canada that recognized that Aboriginal rights were justiciable.[17] His review noted that differential, protected land rights were available to Indians because of the Royal Proclamation and a "legislative and administrative history" which " ... contemplated the extinguishment of Indian title through the negotiation of treaties with the Indians prior to the opening of a particular area for settlement."[18] If Indian title was not extinguished, he reasoned, the provinces did not have full beneficial title to their claimed lands.[19] With regard to *Calder* he noted the Court held that " ... until such surrender the Indian title forms a 'burden' on that of the Crown and is 'an interest other than that of the province' to which the title of the Crown (in right of the province) is subject within the meaning of section 109 of the British North America Act.[20]"[21] For Professor Lysyk: "The clear implication" of this rule was that " ... the beneficial interest in the lands was not available in the province *until* the Indian title was extinguished."[22]

As noted, the insertion of Aboriginal rights in the Constitution gave Professor Lysyk his final opportunity as a scholar to explore the special and unique treatment of Aboriginal peoples in Canada's constitutional order. In examining section 25 of the *Canadian Charter of Rights and Freedoms*[23] and sections 35 and 37 of Part II of the *Constitution Act, 1982* Professor Lysyk

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section 87 (now section 88) of the *Indian Act*. See Kerry Wilkins, "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alta. L. Rev. 458.

[16] Lysyk, "Indian Title Question", *supra* note 2 at 455.

[17] [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder* cited to S.C.R.].

[18] Lysyk, "Indian Title Question", *supra* note 2 at 459.

[19] In *Haida Nation v. British Columbia (Minister of Forests)* ([2004] 3 S.C.R. 511 at para. 59, 245 D.L.R. (4th) 33, 2004 SCC 73 [*Haida* cited to S.C.R.]), the Supreme Court of Canada re-emphasized the principle that provincial Crown lands may be held subject to Aboriginal title. Quoting *St. Catherine's Milling and Lumber Co. v. The Queen* ((1888), 14 A.C. 46 (P.C.)), the Supreme Court re-iterated that lands in the Province are " ... available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title." (footnote omitted).

[20] Now called the *Constitution Act, 1867*, *supra* note 10.

[21] Lysyk, "Indian Title Question", *supra* note 2 at 469.

[22] *Ibid.* at 473.

[23] *Constitutiona Act, 1982*, *supra* note 8.

made the point that Aboriginal uniqueness was further entrenched because of their newfound Constitutional status. He wrote that section 25 would protect Aboriginal rights from an over-zealous application of individual rights that might erode their collective rights, that section 35 would shield such rights against inconsistent federal and provincial action, and that section 37 would ensure that Aboriginal peoples would be able to participate in constitutional conferences.

While sitting as judge, Professor Lysyk also wrote a number of judgments dealing with Aboriginal people or issues, but his docket did not permit him to develop the broad themes in his earlier writings in any sustained way.[24] As a result, in determining the potential trajectory of his scholarship in Aboriginal law post-1982, one is left to ponder questions posed in his formative article on section 35, at the dawn of its development in the Constitution.

III. TRACKING TRAJECTORIES: APPLYING PROFESSOR LYSYK'S ARGUMENTS IN A CONTEMPORARY CONTEXT

This article will follow the contours of argument found in his 1982 article on section 35 and examine the implications of his observations to see if they can provide yet further guidance. Professor Lysyk's remarks about the content of Aboriginal and treaty rights under section 35 have proven sound and have paralleled the Supreme Court's jurisprudential developments. For example, Professor Lysyk wrote that the word 'recognized', in relation to section 35 rights, " ... implies the prior existence of such rights ...".[25] He observed that " ... the term 'aboriginal' connotes historically based rights traceable to the situation at the time of discovery and colonization by the Europeans."[26] In so noting, Professor Lysyk accurately predicted the broad framework structuring Aboriginal rights under section 35 of the *Constitution Act, 1982*.[27] His work foreshadowed the idea animating *R. v. Sparrow*[28]: Certain Aboriginal rights survived the assertion of Crown sovereignty and thus were capable of recognition under section 35. Professor Lysyk also correctly predicted that

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[24] Justice Lysyk's decision mentioning aboriginal peoples are few and far between, see *supra* note 5. He did not get to write many decisions considering issues that lie at the heart of section 35 of the *Constitution Act, 1982*.

[25] Lysyk, "Rights and Freedoms", *supra* note 2 at 478.

[26] *Ibid.*

[27] *Supra* note 8.

[28] [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.] ("As noted by Blair, J.A. academic commentary lends support to the conclusion that 'existing' means 'unextinguished', rather than exercisable at a certain time in history." at 1092).

Aboriginal rights would likely extend to matters of Indian title, hunting, fishing, and trapping.[29]

Professor Lysyk's reasoning on Aboriginal title and rights issues may be applicable to issues of Aboriginal governance. However, though he did not examine the concept in any detail, it must be noted that Professor Lysyk was not confident that constitutionalized Aboriginal rights would include "sovereignty or self-government".[30] Though he only spent two lines dealing with the issue, he wrote: "The present formulation of subs. 35(1), cast in terms of existing '*aboriginal*' rights, would seem to provide little, if any, constitutional support for asserting claims of this nature relating to new aboriginal government structures or powers."[31] So far, this prediction has also proven correct. Currently, there is no case from the Supreme Court of Canada that has explicitly recognized Aboriginal governance powers. Of course, Professor Lysyk could not have foreseen the detailed distinctions that would fill out the framework he foreshadowed. Nevertheless, since his writing, the law has further developed a distinction between 'old' and 'new' that may have important implications for Aboriginal governance and actually be supportive of Professor Lysyk's framework. In *Van der Peet* the Supreme Court held that Aboriginal rights were those practices that were integral to Aboriginal peoples prior to the arrival of Europeans.[32] *R. v. Pamajewon* held that the standard developed by the Court in *Van der Peet* would be used to test governance powers.[33] These tests hold that Aboriginal rights will not protect those practices that developed " ... solely as a response to European influences ... ." Thus, Section 35 protects 'old' (pre-existing) rights. As a result, it is possible to read Professor Lysyk's statements about governance as being technically true (new Aboriginal government powers not protected) while leaving wide scope for the recognition of pre-existing, continuing Aboriginal governance rights

Aboriginal governance powers may therefore be pre-existing 'old' powers in the way that Professor Lysyk reasoned that Aboriginal title and rights were 'old' or pre-existing powers. If this is the case it could be argued that Aboriginal governance is presumed to remain with Aboriginal peoples until

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[29] Lysyk, "Rights and Freedoms", *supra* note 2. He further observed that: "There remains considerable room for debate as to which of the other special rights enjoyed by [A]boriginal peoples [original occupancy, treaty provisions, constitutional clauses, legislation, custom, or other source] are drawn within the scope of [A]boriginal rights as employed in this subsection." *Ibid.* at 481.

[30] *Ibid.* at 481.

[31] *Ibid.* [emphasis added underline].

[32] *Supra* note 5.

[33] [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204 [*Pamajewon* cited to S.C.R.].

clearly extinguished by the Crown, or surrendered by First Nations in a treaty. This is consistent with the reasoning developed by Professor Lysyk in "The Indian Title Question in Canada".[34] As noted, it would also be consistent with his 1982 article. In the remainder of this article about Professor Lysyk, I will track the arc of his argument and submit that a broad range of Aboriginal governance powers would not be considered new matters, in the way that Aboriginal title was not considered by the courts to be a new matter in 1973. It could be argued that Aboriginal peoples have always governed themselves and that this activity was integral to their distinctive cultures prior to the arrival of Europeans. If this is the case Aboriginal governance could yet attract protection as an "existing" right under section 35(1) of the *Constitution Act, 1982*[35] consistent with Professor Lysyk and the court's broad approach to Aboriginal rights.

A. THE PRE-EXISTENCE OF ABORIGINAL GOVERNANCE IN CANADA

Aboriginal peoples exercised powers of governance in what is now Canada prior to Crown assertions of sovereignty.[36] In *Calder* Justice Judson wrote:

> [T]he fact is that when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries. This is what Indian title means.[37]

Organization is essential to governance. The fact that Aboriginal peoples were "organized in societies" prior to the arrival of Europeans implies that Aboriginal governance was an important element of their 'pre-contact' societies.[38] It demonstrates that their power of self-organization pre-existed the Crown's assertion of sovereignty and was in fact strong enough to claim rights to land. These governance powers were not voluntarily surrendered by the Crown's act of assertion.[39] Aboriginal peoples continued to exercise their

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[34] Lysyk, "Indian Title Question", *supra* note 2.

[35] *Supra* note 8.

[36] *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427 [*Sioui* cited to S.C.R.] (Chief Justice Lamer observed that Imperial powers treated Indians as independent nations, at para. 69).

[37] *Supra* note 17 at 328 [emphasis added].

[38] The reserved rights theory of aboriginal governance is also consistent with the proposition articulated in *Van der Peet*, *supra* note 5, where Chief Justice Lamer held that Aboriginal rights exist in section 35 because " ... when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" at para 30 [emphasis in original].

[39] However, it has been held that 'discovery' diminished Indian rights to land (*Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.]).

powers of governance after the Crown's assertion of sovereignty in many ways.[40] These powers are evident in matters internal to their societies and in their external relationships with Canada, through treaties, trade and conflict.[41] Aboriginal peoples continue to live in organized societies down to the present day. They are governed by ancient and contemporary customs, laws and traditions that give meaning and purpose to their lives,[42] though there has been extensive regulation of these powers through instruments such as the *Indian Act*.[43] Fortunately, as the Supreme Court noted in *R. v. Sparrow*, " ... that the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished."[44]

Aboriginal governance could be recognized under Canadian law through the doctrine of continuity.[45] In *Mitchell. v. M.N.R.*, Justice McLachlin for a majority of the Court wrote:

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[40] The idea that Aboriginal governance was multifaceted, even after the assertion of sovereignty was articulated in *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832), at 548-49, 8 L. Ed. 483 (1832) [*Worcester* cited to U.S.] and accepted by the Supreme Court of Canada in *Sioui*, *supra* note 36. Citing *Worcester*, Lamer J. wrote: "Great Britain considered them [Indians] as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged." *Sioui*, *ibid.* at para. 70 [emphasis added by Justice Lamer]. As a result he wrote that: "The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible." *Sioui*, *ibid.* at para. 74.

[41] John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L. J. 291 [Borrows, "A Genealogy of Law"] (The ability of Aboriginal peoples to exercise their powers of governance through the post-confederation period was demonstrated every time a First Nations signed a treaty. Implied within the Aboriginal treaty-making power is that they had government authority which could bind the group).

[42] John Borrows, "Stewardship and the First Nations Governance Act" (2003) 29 Queen's L. J. 103 [Borrows, "Stewardship"].

[43] *Supra* note 14. For example, First Nations exercise pre-existing governance powers through the Indian custom council system under the *Indian Act*. For a definition of band custom, see the *Indian Act*, section 2(i), "council of the band". See also *Bigstone v. Big Eagle*, [1993] 1 C.N.L.R. 25 (F.C.T.D).

[44] *Supra* note 28 at 1097. See Borrows, "A Genealogy of Law", *supra* note 41, for an application of this principle in a specific community context.

[45] Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Services, 1993) (Chairs: René Dussault & Georges Erasmus) [RCAP, *Partners in Confederation*]. The doctrine of continuity should not be imposed "too strictly" (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 153, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.]) because of the risk of " ... perpetuating the historical injustice suffered by

> European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights ... .[46]

There is a strong argument in Canadian law that Aboriginal governance rights continued to exist prior to 1982 unless, as Chief Justice McLachlin wrote in *Mitchell*: "(1) [T]hey were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them."[47] Barring one of these exceptions, the practices, customs and traditions that defined the various Aboriginal societies as distinctive cultures continued as part of the law of Canada.[48] While Aboriginal peoples would strongly deny that the Crown ever possessed power to extinguish their governance rights at any time in history on the theory expressed in the *Mitchell* case, Canadian law has not always demonstrated great respect for Aboriginal views in this matter.

However, even if the Crown possessed the powers they claimed relative to Aboriginal peoples, it is doubtful that Aboriginal governance powers were extinguished prior to 1982 in the manner outlined in *Mitchell*.[49] There are sound arguments that Aboriginal governance is not incompatible with the Crown's assertion of sovereignty, was not surrendered by treaties and was not extinguished by clear and plain government legislation, if reconciliation is the lens through which the courts interpret the parties' relationships.[50]

Furthermore, it can be argued that section 35(1) of the *Constitution Act, 1982*[51] explicitly recognizes Aboriginal governance powers. This result may flow from the very wording of the section itself: "The existing Aboriginal and treaty rights of the Aboriginal *peoples* of Canada are hereby recognized and

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aboriginal peoples at the hands of the colonizers who failed to respect ... " aboriginal rights (*R. v. Côté*, [1996] 3 S.C.R. 139 at para. 53, 138 D.L.R. (4th) 385 [*Côté* cited to S.C.R.]).

[46] [2001] 1 S.C.R. 911 at para. 10, 199 D.L.R. (4th) 385 [*Mitchell* cited to S.C.R.].

[47] *Ibid.* See also Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

[48] *Calder*, *supra* note 17. See also *Mabo v. Queensland (no 2.)* (1992), 175 C.L.R. 1, 107 A.L.J.R. 1 (H.C.) [*Mabo* cited to C.L.R.], especially Brennan J. at 57, Deane and Gaudron JJ.,at 81-82, and Toohey J. at 182-83.

[49] *Campbell v. British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333 at para. 179, 79 B.C.L.R. (3d) 122 (S.C.) [*Campbell* cited to D.L.R.]; RCAP, *Partners in Confederation*, *supra* note 45 at 31-36.

[50] See *Van der Peet*, *supra* note 5 at para. 31, where Chief Justice Lamer wrote that "s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

[51] *Supra* note 8.

affirmed."[52] If 'peoples' rights of Aboriginal groups are an element of section 35, concepts relating to self-determination should more thoroughly permeate this provision. Aboriginal groups should be able to claim organizational political rights as 'peoples'. This is the point made by Professor Cathy Bell in a 1997 article about Métis rights.[53] She observed that section 35 came out of an international context where: "Growing activity at the United Nations aimed at ending colonial domination resulted in increased international pressure on nation states to recognize and protect the human rights of colonized peoples."[54] If section 35 was placed in this broader context, and recognized as a provision aimed at eradicating unconstitutional colonial domination, then principles of Aboriginal governance may be recognized as an important part of our Constitution's purpose, which is " ... the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions ... ."[55]

As noted earlier, Aboriginal governance was integral to organization of the distinctive cultures of Aboriginal peoples throughout Canada prior to the arrival of Europeans.[56] It remains so today. Aboriginal governance is an independent legal right, not dependent for its existence on any grant of authority from the executive or legislative bodies in Canada.[57] As noted, it is a pre-existing right that vested in Aboriginal groups prior to the arrival of the common law in Canada.[58] Aboriginal governance empowers Aboriginal peoples in many ways, including, but not limited to, the following: the ability

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[52] *Ibid.* [emphasis added].

[53] Catherine Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev.180.

[54] *Ibid.* at 183.

[55] *Van der Peet, supra* note 5 at para. 44. For a critique of section 35's development see generally, Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box?: Twenty Years of Section 35* (Penticton: Theytus Books, 2003).

[56] For the test to prove Aboriginal rights see *R. v. Van der Peet, supra* note 5.

[57] For cases involving the reception of First Nations law into Canadian law, see *Connolly v. Woolrich and Johnson* (1867), 17 R.J.R.Q. 75, 11 L.C.J. 197 (Qc. S.C.), affirmed as *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266, 1 Revue Legale 253 (Qc. Q.B.) ; *R. v. Nan-E-Quis-A-Ka* (1899), 1 Terr. L. R. 211 (N.W.T.C.A.); R *v. "Bear's Shin Bone"* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185, 36 W.W.R. 577 (N.W.T.T.C.); *Re Deborah*, [1972] 5 W.W.R. 203, 28 D.L.R. (3d) 483 (N.W.T.C.A.); *Michell v. Dennis and Dennis*, [1984] 2 C.N.L.R. 91, 2 W.W.R. 449 (B.C.S.C.); *Casimel v. I.C.B.C.*(1991), 58 B.C.L.R. (2d) 316, [1992] 1 C.N.L.R. 84 (S.C.); *Vielle v. Vielle* (1992), 93 D.L.R. (4th) 318, [1993] 1 C.N.L.R. 165 (Alta. Q.B.).

[58] *Guerin, supra* note 39 at 378.

to pass on important names, divide territories, host feasts, raise memorials, engage in trade, sign treaties, participate in conflict resolution, exercise rights, build alliances, hold property, and, resist encroachments. Aboriginal governance is what enabled Aboriginal peoples to be here " ... when the settlers came, ... organized in societies and occupying the land as their forefathers had done for centuries."[59] In fact, Aboriginal peoples had to be the ones exercising governance powers prior to contact because they were the only game in town. It would stretch credibility to argue that non-Aboriginal peoples held governance powers over Indigenous peoples prior to their arrival in North America.

B. THE SCOPE OF ABORIGINAL GOVERNANCE AND TREATIES

One of the best examples of the governance power exercised by Aboriginal peoples through most of Canada's history is the power to negotiate treaties. Treaties have been called a grant of rights from the Indians, not to the Indians.[60] Aboriginal peoples exercised this authority from the Atlantic Ocean, to the Arctic Ocean, to the foothills of Rocky Mountains, and on portions of Vancouver Island, in many cases prior to the existence of sections 91 and 92 of the *Constitution Act, 1867*.[61] In fact, there were over three hundred and fifty treaties in Canada prior to Confederation.[62] The power to enter into treaties is not granted to Aboriginal peoples by the federal or provincial governments under sections 91 or 92 of the *Constitution Act, 1867*. The power of Aboriginal peoples to act in relation to external and internal interests, in regard to treaties, stems from their pre-existing rights to exercise this jurisdiction. In fact, many Aboriginal peoples entered into treaties with other Aboriginal groups prior to the arrival of Europeans in North America.[63]

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[59] *Calder*, *supra* note 17 at 328. See also *Van der Peet*, *supra* note 5 (When Europeans arrived Aboriginal peoples were " ... already here [in British Columbia], living in communities on the land, and participating in distinctive cultures, as they had done for centuries" at 538 [emphasis in original]).

[60] Aboriginal peoples have reserved rights not surrendered explicitly by them in a treaty, or extinguished by the Crown. See *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905) (the U.S. Supreme Court expressed this rule, when it wrote: "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,-a reservation of those not granted" at 381).

[61] *Supra* note 10.

[62] Canada, *Indian Treaties and Surrenders. From 1680 to 1890.—In Two Volumes* (Ottawa: Brown Chamberlin, 1891) [*Indian Treaties and Surrenders I-II*] and Canada, *Indian Treaties and Surrenders: From No. 281 to No. 483 Vol. III* (Ottawa: C.H. Parmelee, 1912) [*Indian Treaties and Surrenders III*].

[63] See Richard White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region 1650-1815* (New York: Cambridge University Press, 1991) (White explores this

It helps to understand Aboriginal jurisdiction in relation to treaty making by considering its alternative. If Aboriginal peoples do not possess the inherent authority to enter into treaties, then the whole treaty process is a sham. If the federal or provincial governments possessed governance power over First Nations relative to their authority to enter into treaties, then First Nations are at the table under false pretenses. It seems very clear from the positions put forward by First Nations at the tables that they have the jurisdiction to negotiate and ratify the terms and conditions of treaties to which they and the Crown will become subject. Treaties are not regarded as resting on jurisdiction or authority delegated to First Nations by the Crown. This has never been the theory of treaty negotiation in Canada; this has never been the factual reality.

Therefore, it can be argued that Aboriginal jurisdiction relative to treaty making was not extinguished by the creation of Canada. Treaty making survived as an integral aspect of First Nations' power relative to the Crown. It is not just an example of internal self-government; treaties demonstrate that Aboriginal governance can extend to external relations. As an aside, consultation and accommodation duties and powers represent similar governance powers that have external effects on the Canadian state.[64] In any event, the signing of Aboriginal treaties has been a near constant in the history of northern North America, with only a short pause from the 1920s until the 1970s. In addition to the over 350 treaties that were signed pre-confederation, there have been over 150 treaties signed in Canada in the post confederation period.[65] For example, in British Columbia, the existence of Treaty 8[66] and the

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thesis throughout his book); See also Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty of Visions of Law and Peace 1600-1800* (New York: Oxford University Press, 1997); See also William Fenton, "Structure, Continuity and Change in the Process of Iroquois Treaty Making" in Francis Jennings, *et al.*, *The History and Culture of Iroquois Diplomacy* (Syracuse: Syracuse University Press, 1985) 3; See Wilbur R. Jacobs, *Diplomacy and Indian Gifts: Anglo-French Rivalry Along the Ohio and Northwest Frontiers, 1748-1763* (Stanford: Stanford University Press, 1950); See Victor P. Lytwyn, "A Dish With One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region" in David H. Pentland, ed., *Papers of the Twenty-Eighth Algonquian Conference* (Winnipeg: University of Manitoba, 1997) 210.

[64] This power is also illustrated in how Aboriginal governance powers can be implied in the doctrines relating to consultation and accommodation, see *Haida*, *supra* note 19 and *Taku River Tlingit First Nations v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 245 D.L.R. (4th) 193, 2004 SCC 74 (If the Crown is going to consult with Aboriginal groups to secure their participation or feedback, implicit in such an exercise is the existence of an organized authority to give an appropriate response.)

[65] *Indian Treaties and Surrenders I-II* and *Indian Treaties III*, *supra* note 62.

[66] See Rene Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and 11*, rev. ed., (Toronto: McClelland and Stewart, 1996).

Nisga'a treaty[67] demonstrate that First Nations jurisdiction relative to treaties remains to this day, and has not been abrogated or extinguished.[68]

There may be some who question the scope of Aboriginal governance powers relative to the treaty making power. They may argue that the scope of Aboriginal governance powers begins and ends with the power to sign treaties; they may say that no other authority exists beyond this power. First, it should be noted that this concession would not be insignificant, basically agreeing that Aboriginal peoples possess significant jurisdictional powers to grant rights to the Crown in Canada in relation to a large number of legal matters. Second, it should be noted that once it is admitted that Aboriginal peoples have governance powers, it would be exceedingly difficult to draw a line around these powers. It is theoretically difficult to regard Aboriginal peoples as possessing treaty-making powers and at the same time contain the reach of Aboriginal governance power, without their agreement. The more firmly the Crown relies upon treaties to secure rights over Aboriginal territories, the more tightly they embed themselves within a framework that recognizes Aboriginal decision-making, governance powers in relation to those rights.

Furthermore, to constrain Aboriginal governance without their input or sound juridical reasons (especially post-1982) would be arbitrary, capricious, and contrary to fundamental principles underlying the rule of law.[69] Yet, people who take the view that Aboriginal governments have no jurisdiction beyond the power to sign treaties need to explain the reasons for their conclusions. Did the Crown gain the power to extinguish Aboriginal governments in Canada through: contact, discovery, assertion of sovereignty,

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[67] *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2.

[68] Justice Williamson of the British Columbia Supreme Court in *Campbell, supra* note 49 at paras. 179-81 wrote about the continued existence of Aboriginal governance. As this decision makes clear, Aboriginal rights to governance and jurisdiction were not extinguished prior to or at the time of Confederation, and are not incompatible with Aboriginal governance. When the British Parliament enacted legislation dividing jurisdictional powers in Canada, it did not express any clear or plain intent to extinguish Aboriginal jurisdiction. In the absence of clear and plain intent to extinguish, Aboriginal rights to governance and jurisdiction therefore survived the assertion of British sovereignty. Furthermore, First Nations powers of jurisdiction in British Columbia have not been extinguished since confederation. The province is incapable of extinguishing First Nations jurisdiction, and the federal government has not extinguished this jurisdiction. Aboriginal jurisdictional powers remain despite the division of powers in section 91 and 92 of the *Constitution Act, 1867, supra* note 10.

[69] John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L. J. 537. See Joe Rabin, "Job Security and Due Process: Monitoring Administrative Discretion Through A Reasons Requirement" (1976) 44 U. Chi. L. Rev. 60 ("The very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so" at 77-78).

occupation, adverse possession or some other power? People who argue from this perspective may, in fact, point to the decision of the Supreme Court of Canada that stated: "There was from the outset, never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[70] However, with all due respect, it is clear " ... that taking the perspective of the Aboriginal peoples themselves on the meaning of their rights at stake",[71] there *was* from the outset, considerable doubt that assertions of Crown sovereignty vested Aboriginal governance in the Crown.[72]

Questions can be raised concerning the authority of non-Aboriginal governments to extinguish Aboriginal governance after contact, though such an inquiry might be unwelcome if one takes a more primitive view of the issue.[73] When Canada was formally created, it was done without the participation or consent of the Aboriginal peoples of the country.[74] Non-Aboriginal people sent their representatives to Charlottetown, Montreal and London to debate and draft the terms under which confederation would take place. The Imperial Parliament took most of the colonies' concerns into account and passed the *British North American Act, 1867* into law.[75] It appears as though the only Aboriginal representation that the Imperial Parliament received was from the Mik'maq leader Peter Cope, who secured assurances that their treaties would be honoured.[76]

If "[t]he Constitution of a country 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

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[70] *Sparrow*, *supra* note 28 at 1103.

[71] *Ibid.* at 1112.

[72] John Borrows, "Constitutional Law From a First Nation Perspective: Self-government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1.

[73] Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000).

[74] Principles of property, tort and contract law are, by and large, built upon the consent in the alienation and acquisition of land, the protection of the person, and the exchange of promises. Constitutional law depends on principles of consent to bring a constitutional order into being. See *Reference re Secession of Quebec*, [1998] 2 S.C.R 217, 161 D.L.R. (4th) 385. See also Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: University of Saskatchewan Native Law Centre, 1989).

[75] Now titled the *Constitution Act, 1867*, *supra* note 10.

[76] Ken Coates, *The Marshall Decision and Native Rights* (Montreal: McGill-Queen's University Press, 2000) at 45.

government",[77] Indigenous peoples question whether their will was expressed and whether sufficient restrictions were placed on governments respecting their fundamental rights at the time of confederation or union.[78] In the absence of First Nations participation in this exercise it could be considered an "extravagant and absurd idea" to contend that First Nations governance was extinguished by the assertion of Crown jurisdiction.[79] Such an approach could even be construed as racially discriminatory.[80] It could " ... perpetuate the historical injustice suffered by aboriginal peoples at the hands of the colonizers ... ."[81] Failure to recognize Aboriginal governance likely frustrates efforts to reconcile assertions of Crown sovereignty with the pre-existence and continuation of organized Aboriginal societies in Canada.[82]

C. ABORIGINAL GOVERNANCE AND CONQUEST, DISCOVERY, NON-ABORIGINAL OCCUPATION, AND ADVERSE POSSESSION

As noted, it is sometimes thought that Aboriginal governance was extinguished by others participating in so called acts of conquest, discovery, occupation, and adverse possession. These concepts invoke powerful myths concerning non-Aboriginal rights to land and governance in Canada.[83] While such ideas are nearly pervasive in popular consciousness they do not rest on a

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[77] *Reference re Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721 at para. 48, 19 D.L.R. (4th) 1 [*Manitoba Language Reference* cited to S.C.R.].

[78] For example, when British Columbia entered the union in 1871, the province's leaders did not represent Aboriginal peoples. In fact, one of the first acts of the provincial legislature was to exclude Aboriginal peoples from the franchise, see *An Act To Amend "The Qualification and Registration of Voters Amendment Act, 1871"* 1872 (BC) 35-38 Vict. No 39, s. 13.

[79] See *Worcester*, *supra* note 40 at 544-45, 547.

[80] *Mabo*, *supra* note 48. For commentary on racial discrimination and Aboriginal title in Australia, see Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Center, 2001) at 357-365; Richard H. Bartlett, *Native Title in Australia* (Sydney: Butterworths, 2003). For a discussion of this issue in South Africa see *Alexkor Ltd v Richtersveld Community and Others* (2003), 12 B. Const. L.R. 1301, (2004), 5 S.A. 460 (C.C.).

[81] Contrary to the injunction in *Côté*, *supra* note 45 at para. 53.

[82] The exercise of Aboriginal governance, and their participation in treaty processes to harmonize their jurisdictions with Canada, is the only path out of this constitutional impasse, see *The Queen v. Secretary of State For Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86, Lord Denning MR. (Eng. C.A.); For commentary see Douglas E. Sanders, "The Indian Lobby" in Keith Banting & Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) 301.

[83] Robert Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

sound factual or juridical base. The Crown in Canada does not possess land or governance based on these ideas.

There was no military or other *conquest* of Aboriginal peoples in Canada that extinguished Aboriginal governance rights to control their own affairs.[84] As Chief Justice McLachlin succinctly stated, "[p]ut simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered."[85] The British Crown may have conquered the French in Canada in the 1700s,[86] but their informal and official actions in this period acknowledged

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[84] See David MacKay's statement before the Royal Commission in 1888. Reported in *Calder*, *supra* note 17 at 319:

> [W]hat we don't like about the Government is their saying this: "We will give you this much land". How can they give it when it is our own? We cannot understand it. They have never bought it from us our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land.

See also the statement of Nisga'a Gideon Minesque before the Royal Commission of 1915. Reported *ibid.* at 359:

> [W]e have been living here from time immemorial—it has been handed down in legends from the old people and that is what hurts us very much because the white people have come along and taken this land away from us. I myself am an old man and as long as I have lived, my people have been telling me stories about the flood and they did not tell me that I was only to live on this land for a short time. We have heard that some white men, it must have been in Ottawa; this white man said they must be dreaming when they say they own the land upon which they live. It is not a dream—we are certain that this land belongs to us. Right up to this day the government never made any treaty, not even to our grandfathers or our great-grandfathers.

[85] *Haida*, *supra* note 19 at para. 25.

[86] For example, in 1763, Minavavana, an Ojibway Chief from west of Manitoulin Island at Michilimackinac declared:

> Englishman, although you have conquered the French you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread-and pork-and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.

that they had not conquered the Indians.[87] Instead, Canada entered into peace treaties and pursued a policy of acquisition of rights through negotiation, purchase and cession. It did not engage in war with the Indians subsequent to the French conquest.[88] In any event, under traditional principles of law, a country was no more justified in exploiting another through force than was a private individual.[89] Furthermore, the doctrine of conquest only operates if the conquered territory was actually annexed and possessed by the conqueror. In terms of Indigenous lands in Canada these criteria were not met, as no state of war against them was declared.[90] The doctrine of conquest as a ground for

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Englishman, our Father, the king of France, employed our young men to make war upon your nation. In this warfare, many of them have been killed; and it is our custom to retaliate, until such time as the spirits of the slain are satisfied. But, the spirits of the slain are to be satisfied in either of two ways; the first is the spilling of the blood of the nation by which they fell; *the other, by covering the bodies of the dead*, and thus allaying the resentment of their relations. This is done by making presents.

Englishman, your king has never sent us any presents, nor entered into any treaty with us, wherefore he and we are still at war; and, until he does these things, we must consider that we have no other father or friend among the white man, than the king of France.

... you have ventured your life among us, in the expectation that we should not molest you. You do not come armed, with an intention to make war, you come in peace, to trade with us, to supply us with necessities, of which we are in much want. We shall regard you therefore as a brother; and you may sleep tranquilly, without fear of the Chipeways-As a token of our friendship we present you with this pipe, to smoke.

Quoted in Alexander Henry, *Travels and Adventures In Canada and the Indian Territories Between the Years 1760 and 1776*, ed. by James Bain. (Edmonton: M.G. Hurtig, 1969) at 44-45 [emphasis in original].

[87] The Crown chose not to pursue the course of war and conquest but peace, through treaty making, though there was a century of dishonour. This theme runs through Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, Vol. 1* (Ottawa: Minister of Supply and Services, 1996) (Chairs: René Dussault & Georges Erasmus) at 1–253 [RCAP, *Looking Forward*].

[88] In this respect Canada is similar to early U.S. dealings with the Indians. See Francis Paul Prucha, "American Indian Policy in the Formative Years: Indian Trade and Intercourse Acts, 1790-1834" in David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., eds., *Federal Indian Law*, 4th ed. (Minneapolis: West Publishing, 1998) (The government, "*[h]aving waived the right of conquest*, it determined to compensate the Indians fairly for lands given up and to protect them in the lands they still retained" at 89 [emphasis added].)

[89] A.M. Hamilton & M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* Vol. 1 (Winnipeg: Queen's Printer, 1991) at 134.

[90] See *Status of Eastern Greenland Case* (1933), 3 W.C.R. 148, P.C.I.J. (Ser. A/B) No. 53 ("[The doctrine of conquest] only operates as a cause of lack of sovereignty when there is a war between two States and by reason of the defect of one of them sovereignty over territory passes from the loser to the victorious State" at 171.)

extinguishing Aboriginal rights is, in the words of Professor Lysyk, "extremely difficult to sustain".[91]

Discovery is also a fragile premise to rely upon as grounds for the extinguishment of Aboriginal governance powers. The so-called doctrine of discovery only gives rights if territories are *terra nullius* (literally meaning barren and deserted). The lands that comprised Canada at the time of contact were not barren or deserted. Aboriginal peoples had already discovered most of the land in what is now called Canada prior to the arrival of Europeans. Therefore, if any legal consequences flow from so-called 'discovery' they should vest in favour of Aboriginal peoples, not the Crown. However, some may take a contrary view and argue that only European nations could invoke the doctrine of discovery to claim rights. Such a result would be inappropriate because it would assume that Europeans were somehow superior to Aboriginal peoples, gaining additional rights to discovery based upon some unexplained 'higher' order of law to which only they could adhere. The High Court of Australia has characterized the framing of the doctrine of discovery in these terms, tied to *terra nullius*, as "unjust and discriminatory".[92] In any event, even if European Nations were the only powers able to assert the doctrine of discovery, there are strong arguments that its effects should be limited, and not affect Aboriginal rights, as was held in *Worcester*.[93]

Occupation also has weaknesses as a doctrine that would exclude Aboriginal peoples from exercising governance powers over their own affairs. These weaknesses are related to those found in the doctrine of discovery. According to the *Island of Palmas* case, a claim based on occupation was considered incomplete until accompanied by "effective occupation of the region claimed to be discovered".[94] The term "effective occupation" incorporates the notion or "uninterrupted or permanent possession". The *Western Sahara* case precludes a region from being termed uninhabited and thus subject to occupation if nomadic or resident tribes with a degree of social

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[91] Lysyk, "Indian Title Question", *supra* note 2 at 476.

[92] See *Mabo*, *supra* note 48 at 42. The doctrine of discovery was rejected in *Island of Palmas (Mingas) Case* (1928), 2 R.I.A.A. 829, reprinted in (1928) 22 Am. J. Int'l L. 867 [*Island of Palmas* cited to Am. J. Int'l L.].

[93] *Supra* note 40 ("This principle ... regulated the right given by *discovery* among the European discoverers, but *could not affect the rights of those already in possession*, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man." [emphasis added] at 544). Professor Lysyk took a similar view in Lysyk, "Indian Title Question", *supra* note 2 at 467-77.

[94] *Supra* note 92 at 884. For a discussion of international principles relative to Indigenous rights see, James S. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2000); Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton: Theytus Books, 1998).

and political organization are present in the area.[95] Following these rules, the only ones capable of successfully claiming occupation of Canada at the time of contact were the Aboriginal peoples. Thus, non-Aboriginal occupation alone would be insufficient to undermine Aboriginal governance powers.

Finally, the assertion of adverse possession on the part of the Crown does not necessarily assist in arguments that Aboriginal governance powers were extinguished prior to 1982. Adverse possession requires that an area be openly occupied over a period of time and the original owner acquiesces to that presence. It also requires a de facto exercise of sovereignty that is peaceful and unchallenged. Applying these principles to Canada's factual context reveals that the Crown's exercise of sovereignty in Canada has not always been peaceful, it has disrupted Aboriginal peoples' lives, and that in turn has led to disruptions in the wider body politic. Furthermore, Aboriginal peoples have continually challenged Crown actions relative to their governance and there is much evidence that Aboriginal peoples in Canada have not acquiesced to Canada in matters of Aboriginal governance.[96] In fact, in both its broad scope and narrow detail, Aboriginal legal history of Canada is one of Aboriginal resistance to Crown assertions adverse to Aboriginal governance interests.

Since conquest, discovery, occupation, and adverse possession are less than satisfactory as explanations for Crown powers relative to Aboriginal governance, the Crown must turn to Aboriginal peoples for an honourable settlement of the question.[97] From contact, through the assertion of Crown sovereignty, to the time of confederation down to the present day, most Aboriginal peoples would say Aboriginal governance powers relative to their affairs have not been ceded.[98] Therefore, in the absence of such agreement it is

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[95] [1975] 1 I.J.C. 12.

[96] RCAP, *Looking Forward, supra* note 87 at 105-245.

[97] Michael Asch, "First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology" in Curtis Cook & Juan D. Lindau, eds., *Aboriginal Rights and Self-Government* (Montreal: McGill-Queen's University Press, 2000) 148.

[98] Most First Nations assert that they have not relinquished their governance through treaties. For examples of these perspectives see H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); Treaty 7 Elders and Tribal Council *et al.*, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996); Fumoleau, *supra* note 66; Howard Adams, *Prison of Grass: Canada from the Native Point of View* (Toronto: New Press, 1975); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford Press, 1999); Daniel N. Paul, *We Were Not The Savages: A Mi'kmaq Perspective on the Collision between European and Native American Civilizations*, rev. ed. (Halifax: Fernwood Publishing, 2000); Deanna Christensen, *Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and Their Struggle*

arguable that Aboriginal jurisdiction survived and remained a vital force after contact, asserted Crown sovereignty, Confederation, and union.

It should also be noted that after Confederation or union the provinces would have no power to extinguish Aboriginal jurisdiction because, to do so, would be beyond their grant of powers in section 92 of the *Constitution Act, 1867*.[99] The province could not establish jurisdiction to extinguish Aboriginal jurisdiction through laws of general application: " ... [P]rovincial laws which single out Indians for special treatment are *ultra vires*, because they are in relation to Indians and therefore invade federal jurisdiction."[100] The Court in *Delgamuukw* also held that the province could not extinguish Aboriginal title through referential incorporation because section 88 of the *Indian Act*,[101] which allows referential incorporation in some cases, " ... does not evince the requisite clear and plain intent to extinguish aboriginal rights."[102]

Finally, after 1982, Aboriginal governance could not be extinguished, and could only be justifiably infringed (according to non-Aboriginal law) if a government demonstrates a valid legislative objective and acts in a manner that preserves the honour of the Crown, in accordance with the test in *Sparrow*.[103] In any event, there are no indications that the government has taken steps to explicitly and validly justify infringements of Aboriginal rights to governance subsequent to 1982.

In fact, the federal government has recognized that Aboriginal peoples possess unextinguished inherent rights to govern themselves. A policy statement was released in 1995 that stated: "The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the Constitution Act, 1982.[104]"[105] "The Government of Canada's

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for Survival, 1816-1896 (Shell Lake, Sask.: Ahtahkakoop Publishing, 2000); Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989).

[99] *Supra* note 10.

[100] *Delgamuukw*, *supra* note 45, at 1119. (The Court continued, "[a]s a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside of provincial jurisdiction." at 1120-21) For further commentary on the jurisdictional implications of *Delgamuukw*, see Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317.

[101] *Supra* note 14.

[102] *Delgamuukw*, *supra* note 45 at 1122.

[103] *Supra* note 28 at 1111-14.

[104] *Supra* note 8.

[105] Canada, Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: Executive Summary* (Ottawa: Minister of Indian Affairs and Northern Development, 1995) at 1.

recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources."[106]

An important question raised by the 1995 policy is how Aboriginal governance must be proved, and who has the burden of proof in such a question. While the logic underlying the wording of the policy seems to indicate that Aboriginal governance is presumed to exist ("inherent", "existing"), which means the government bears the burden of showing it does not exist in a particular case, there is another view of the matter, found in *Pamajewon*.[107] The *Pamajewon* case would place the burden of proof for Aboriginal governance on Aboriginal peoples. The court seemed to say that Aboriginal self-government could only exist if the practice over which governance was being claimed has continuity with a practice that was integral to their distinctive culture at the time Europeans arrived.[108] This test would require that Aboriginal peoples introduce detailed evidenced that demonstrated that the practice they sought to regulate in the contemporary era, had a continuity with a practice that was integral to their distinctive culture prior to the arrival of Europeans.

While this is certainly one view of the matter, it is possible to argue that the Court may have not completely settled the standard for proof of Aboriginal governance in *Pamajewon*. The Courts may yet accept presumptions concerning the continued existence of Aboriginal governance. In *Delgamuukw*,[109] Chief Justice Lamer expressed some hesitation in applying the *Pamajewon* case to the claim of self-government in that case. He wrote: " ... [T]his is not the right case for the Court to lay down the legal principles to guide future litigation."[110] He further observed: "We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the

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[106] *Ibid.* at 2.

[107] *Supra* note 33.

[108] *Ibid.* (Chief Justice Lamer seemed to take the view that " ... claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard" at paras. 24-25); see also *Van der Peet*, *supra* note 5 at para. 46 (Chief Justice Lamer reiterated that the test for identifying aboriginal rights was that "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.").

[109] *Supra* note 45.

[110] *Ibid.* at paras. 170-71.

Court to step into the breach."[111] These words imply that the courts have not definitively settled the standard of proof for Aboriginal self-government and that further legal guidance is still needed. Whether the Chief Justice's hesitation to apply the *Pamajewon* test to *Delgamuukw*[112] flows from the complexity of the facts in the *Delgamuukw* case, or the need to have a more nuanced test for governance, or both, the fact remains that the Court has not yet issued the last word on Aboriginal governance. As a result, another view of Aboriginal governance is still very much alive in the cases and commentary on this subject.[113]

D. QUESTIONING CROWN ACTIONS IN RELATION TO ABORIGINAL GOVERNANCE

To return to an earlier point, most Aboriginal people would say that the federal government could also not extinguish Aboriginal rights without their participation. There is case law to the contrary, however, that says the Imperial or Federal Crown could unilaterally extinguish Aboriginal rights prior to 1982,[114] as long as the extinguishment was "clear and plain".[115] Under these doctrines it could be argued that Aboriginal governance rights were extinguished or restricted by the Crown's assertion of sovereignty.[116] However, for the Court and the Crown to say that Aboriginal jurisdiction was extinguished by mere bare words is tautological.[117] It is like saying something "is so" because it "is so"; the rule of law requires reasons that go beyond assertions. Mere assertion does not even begin to persuade people to the justice of the Crown's position, especially when Aboriginal peoples were

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[111] *Ibid.*

[112] *Supra* note 45.

[113] The other view of the source of aboriginal governance is the one developed in this paper to this point, and is articulated by the Royal Commission on Aboriginal Peoples, that Aboriginal governance is an existing right recognized and affirmed under section 35(1) of the Constitution. See Canada, Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol. 2, pt. 1 (Ottawa: Minister of Supply and Services, 1996) (The Commission wrote, "the sphere of inherent Aboriginal jurisdiction under section 35(1) of the *Constitution Act, 1982* comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere is divided into two sectors: a core and periphery" at 167).

[114] *R. v. Sikyea*, [1964] 2 C.C.C. 325, 43 D.L.R (2d) 150 (N.W.T.C.A.), aff'd. [1964] S.C.R. 642; *Sparrow*, *supra* note 28 at 1091-93; *Delgamuukw*, *supra* note 45 at para. 172.

[115] This "clear and plain" intent standard of extinguishment is found in *Calder*, *supra* note 17 at 404.

[116] *Delgamuukw*, *supra* note 45 at 1099.

[117] Borrows, "Wampum at Niagara", *supra* note 6.

already exercising governance prior to the Crown's assertions. Assertion is not reconciliation. Imagine how incongruent it would be for Aboriginal peoples to go to some other country, land on their shores and assert sovereignty, and have their governance upheld merely because Aboriginal peoples said they had such jurisdiction. While there is considerable discussion in case law that implies that Aboriginal rights could be extinguished by "clear and plain intent" of Parliament prior to 1982, the issue should be considered anew in light of the requirement of upholding the honour of the Crown in transactions dealing with Aboriginal peoples. The issue should also be re-considered in light of emerging legal standards that problematize unilateral assertions of sovereignty. As the Supreme Court of Canada cited with approval in *Sparrow*:

> [T]he context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[118]

This quote highlights the point that the Court can question sovereign claims made by the Crown.[119]

E. 'EVEN IF' ... , QUESTIONING THE SCOPE OF CROWN EXTINGUISHMENT

Even if one were to accept the questionable proposition that Aboriginal governance was extinguished by Crown action at some point it does not mean that one has to accept the further proposition that all Aboriginal governance powers were extinguished in their entirety. Such a result is not 'clear and plain' from the Crown's actions. In fact, the scope of Aboriginal jurisdiction subsequent to Crown assertions of jurisdiction could be very wide. One strong argument is that the right to Aboriginal governance was merely regulated in great detail, never extinguished, and when regulation is removed, the inherent nature of the right remains in robust form. As noted, it could also be argued that 'discovery' only gave the Crown enough authority to oust other European claimants to jurisdiction in the territory that now comprises Canada. Following the approach in *Worcester*, it could be held that Aboriginal governance rests with Aboriginal groups and continues with them until treaties are signed that deal specifically with this subject.[120] This result is also

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[118] Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 46 Osgoode Hall L.J. 95 at 100, cited in *Sparrow*, *supra* note 28 at 1106.

[119] Further support for this proposition is found in Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 118-31.

[120] *Supra* note 40. (The leading statement of the idea that Aboriginal governance survives the assertion of sovereignty as a reserved right comes from this case where Chief Justice Marshall writes, in speaking about British policy to which the U.S. was successor, "[t]he Indian

consistent with the so-called 'doctrine of discovery' as applied to land in the *Delgamuukw*[121] case.

There is another line of argument that has implications for the scope of Aboriginal governance that has recently appeared regarding the extinguishment of Aboriginal rights, though only as a minority opinion. This argument holds that Aboriginal rights could be extinguished when they are incompatible with Crown sovereignty. In *Mitchell* Justice Binnie wrote that: " ... [S]overeign incompatibility continues to be an element in the s. 35(1) analysis".[122] This argument would not likely find favour with Aboriginal people. Making Crown sovereignty the outside measure of Aboriginal rights does not easily facilitate reconciliation, unless courts simultaneously recognize that Crown sovereignty can also be found incompatible with Aboriginal rights, thereby allowing Aboriginal rights to prevail. Despite the doctrine's potential one-sidedness, and fortunately for Aboriginal peoples, sovereignty incompatibility arguments may also leave wide scope for Aboriginal governance. Justice Binnie himself expresses this point. He says sovereign incompatibility was given excessive scope prior to the enactment of section 35.[123] He also cautions that the idea of sovereignty incompatibility should be 'sparingly applied',[124] perhaps because this line of reasoning is such a strong departure from the conventional approach to extinguishment under section 35(1), which requires clear and plain intent. He notes there is wide scope for Aboriginal governance in the United States under a similar theory.[125] Finally, he places further potential limits on the reach of his idea by writing that he was not expressing an opinion about whether a sovereign incompatibility analysis had any application to internal institutions of Aboriginal governance.

Therefore, even under Justice Binnie's minority views, sovereignty incompatibility may be far from providing wide grounds for the extinguishment of Aboriginal governance. In fact, it is possible to argue that Aboriginal sovereignty is not only compatible with Crown sovereignty but also *necessary* for Crown sovereignty to exist. For example, there are strong

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nations had always been considered as distinct, independent political Communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial... . a weaker power does not surrender its independence – its right to self-government, by associating with a stronger and taking its protection" at 559-61.)

[121] *Supra* note 45.

[122] *Supra* note 46 at 154.

[123] *Ibid.* at 151.

[124] *Ibid.* at 154.

[125] *Ibid.* at 160, 162-63, 165-70.

arguments that the Crown can only receive the right to occupy Aboriginal lands and exercise accompanying privileges by receiving them through treaty.[126] This is the ultimate in compatibility; Crown sovereignty is subsequent to and dependent upon Aboriginal sovereignty under our law's formulation. Without an exercise of Aboriginal sovereignty legitimating or perfecting Crown sovereignty in a certain area, assertions of Crown sovereignty always remain less than honourable or complete.[127] In an era of constitutional interpretation where overlapping spheres,[128] rather than watertight compartments,[129] characterize the scope of jurisdictional power in Canada's constitution, it is very difficult to find inconsistency between jurisdictional powers in this country.[130] Consistency and harmonization between political actors in Canada is the norm.[131] These same standards relative to jurisdiction should be applied to recognize Aboriginal governance powers in Canada. Conflict between Aboriginal and non-Aboriginal governance powers should recognize that "[t]he resulting 'untidiness' or 'dis-

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[126] See Saskatchewan Office of the Treaty Commission, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998) ("*Non-Aboriginal Canadians forgot that they, too, gained rights through treaty – rights to the rich lands and resources from which they have benefited greatly. They also forgot about the partnership formed at the time of treaty-making. The benefits of the treaties were to be mutual, assisting both parties. The wealth generated from these lands and resources has provided little benefit to Treaty First Nations*") at 74 [emphasis added].).

[127] It is interesting to place the sovereignty incompatibility analysis in the light of ideas of inconsistency in the Aboriginal title debate. In the case of Aboriginal title, there is also wide scope for consistency between the two titles if interpreted appropriately. See Lysyk, "Indian Title Question in Canada", *supra* note 2 (Professor Lysyk observed, " ... it would seem clear that there is no inconsistency in locating the underlying title, or fee, in the Crown while recognizing the contemporaneous existence of Indian title" at 470).

[128] *Starr v. Houlden*, [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641.

[129] *Canada (A.G.) v. Ontario (A.G.) (The Labour Conventions Case)*, [1937] A.C. 326 at 354, [1937] 1 D.L.R. 673 [*Labour Conventions Case* cited to A.C.].

[130] The Canadian Supreme Court has developed doctrines that permit a great deal of overlap, see *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, 42 D.L.R. (3d) 68; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 [*Multiple Access* cited to S.C.R.]; for a somewhat contrary view see *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, [*Hall*] though the effect of *Hall* was reinterpreted and somewhat attenuated in *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453, 128 D.L.R. (4th) 1. However, the court has since returned to its *Hall* analysis in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 205 D.L.R. (4th) 577, 2001 SCC 67 and *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 200 D.L.R. (4th) 419, 2001 SCC 40.

[131] Constitutional Law Group, *Canadian Constitutional Law*, 3d ed., (Toronto: Emond Montgomery, 2003) at 254-55.

economy' is the price we pay for a federal system in which economy 'often has to be subordinated to ... provincial autonomy.'"[132] As a result, Aboriginal jurisdiction in the Canadian Constitution could be very wide.

An example of the wide scope of Aboriginal governance powers was recently identified in *Campbell*, even though it was formulated upon the impoverished view of Aboriginal rights derived from the so-call doctrine of discovery.[133] *Campbell* dealt with the allegation that the Nisga'a Treaty was inconsistent with the division of powers granted to Parliament and the Legislative Assemblies of the Provinces by Sections 91 and 92 of the *Constitution Act, 1867*.[134] The position taken by the opponents of the treaty was that the Agreement was of no force or effect, *to the extent* that it purports to provide the Nisga'a Government with legislative jurisdiction, or provides that the Nisga'a Government may make laws that prevail over federal and provincial laws. Justice Williamson ruled against the challenge, finding Aboriginal governance was a constitutionally protected right within the Nisga'a Agreement. He held that Aboriginal governance was a pre-existing right, not extinguished by contact, the assertion of sovereignty or the divisions of powers under the *Constitution Act, 1867*.[135] Justice Williamson described these protections in the following terms, in discussing the Supreme Court of Canada's approach to the Constitution:

> [T]he object of the division of powers in ss. 91 and 92 between the federal government and the provinces was not to extinguish diversity (or aboriginal rights), but to ensure that the local and distinct needs of Upper and Lower Canada (Ontario and Quebec) and the maritime provinces were protected in a federal system.
>
> ... the [Supreme] Court spoke of the explicit protection for aboriginal and treaty rights in ss. 25 and 35 of the *Constitution Act, 1982*, as being consistent with a tradition of respect for minority rights reflecting 'an important underlying constitutional value'. ...
>
> The unique relationship between the Crown and aboriginal peoples, then, is an underlying constitutional value. ...
>
> A consideration of these various observations by the Supreme Court of Canada supports the submission that aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the

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[132] *Multiple Access*, *supra* note 130 at 190 [footnotes omitted].

[133] *Supra* note 49.

[134] *Supra* note 10.

[135] *Campbell*, *supra* note 49 at paras. 78-81.

> unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division 'internal' to the Crown.[136]

Justice Williams thus found that Aboriginal governance was protected as an unwritten value underlying Canada's Constitution, consistent with an unwritten constitutional tradition of respect for minority rights, and affirmed as an existing Aboriginal right under section 35(1) of the *Constitution Act 1982*.[137] This case illustrates that Aboriginal governance can be protected and given broad scope in Canada (even if one accepts the view that Crown sovereignty diminished Aboriginal power to a certain extent).

IV. CONCLUSION: PROFESSOR LYSYK, CANADIAN FEDERALISM, AND ABORIGINAL GOVERNANCE

Professor Lysyk was on the right course when he argued that Aboriginal rights and title were pre-existing rights that survived until their recognition and affirmation in section 35(1) of the *Constitution Act, 1982*. This article has attempted to track the trajectory of his arguments and apply them to the issue of Aboriginal governance in Canada.

On a concluding note, a brief contextualization of Professor Lysyk's more general reflections on Canadian federalism show support for this paper's premises. In a 1979 lecture entitled 'Reshaping Federalism', Professor Lysyk gave his opinion about how to best achieve balance in our federation, though in his lecture he largely put "to one side for a moment the question of native peoples ...".[138] Implications relating to Aboriginal governance can be drawn from his lecture though we are admittedly left to speculate in some measure about his specific views on the topic.

First, Professor Lysyk believed that a balanced, somewhat decentralized federal state was one of the country's great strengths. He celebrated its potential for " ... experimentation in the 'social laboratory' that each constituent part ... " of our federation encourages. While he was speaking about provinces, his views could be equally applicable to Aboriginal governments.[139] The recognized existence of Aboriginal governments with

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[136] *Ibid.* at paras. 79-81.

[137] *Ibid.* at paras. 70, 180, 181 (discussing *Constitution Act, 1982*, *supra* note 8).

[138] K.M. Lysyk, "Reshaping Canadian Federalism" (1979) 13 U.B.C. L. Rev. 1 at 22 [Lysyk, "Reshaping"].

[139] For example, he wrote that a province " ... with both legislative jurisdiction and the wherewithal to exercise it is able to pioneer programs which, if their worth is demonstrated, may commend themselves for adoption elsewhere in the country." (*Ibid.* at 7) Aboriginal

unburdened legislative authority could lead to useful experimentation and innovation in solving many of Canada's pressing problems.

Second, Professor Lysyk believed that democracy could be stifled if authority was too centralized. He believed society was better served if decision-making authority was closer to the people.[140] In keeping with this idea it could be argued that Aboriginal peoples would be better served in Canada's federation if they had the recognition and resources to refine law in accordance with their perspectives. The central and provincial governments are more remote from Aboriginal peoples, physically and culturally, and tend to be less responsive to the Aboriginal electorate than would their own governments exercising greater responsibility for their own affairs.[141]

Third, Professor Lysyk thought that there was a stronger place for Aboriginal peoples to assert themselves culturally within Canada. He was somewhat critical of the bi-culturalism and bi-elitism that sometimes infects our constitutional debates. He felt that Aboriginal cultures should be given due place in Canada's constitutional policies. Professor Lysyk was conscious of Canada's cultural diversity and wanted to ensure that French and English ancestry and longevity were not the sole reason for determining the country's constitutional rights. He felt it was "presumptuous" to employ phrases such as 'two founding races' or 'two charter groups' or 'two founding peoples' in relation to Canada's genesis when "there are no claims which can compete with those of the true first Canadians — the Indian and Inuit inhabitants of this country."[142] He observed: "In historical perspective the first white men invited themselves to this continent just the other day, so to speak."[143] Thus, it would appear the Professor Lysyk would have given a measure of support for the protection of Aboriginal culture through greater rights to governance. As he said: "History suggests ... that the claims of Indian and Inuit cultures should rank second to none in the Canadian mosaic."[144]

These, and many other legal and policy reasons exist to sustain implications concerning Aboriginal governance in Canada that can be drawn from Professor Lysyk's work. Aboriginal rights to governance can be

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governments could also develop innovative programs and approaches that may be adopted elsewhere in the country.

[140] See *ibid.* ("Another reason for guarding against undue centralization has to do with the desirability, in general, of keeping democratic decision-making as close as possible to the citizenry" at 8-9).

[141] Borrows, "Stewardship", *supra* note 42.

[142] Lysyk, "Reshaping", *supra* note 138 at 22.

[143] *Ibid.*

[144] *Ibid.* at 23.

classified as pre-existing and unextinguished, with the potential to make Canada more innovative, democratic and culturally diverse.