

# **IMPLEMENTING ABORIGINAL SELF-GOVERNMENT: CONSTITUTIONAL AND JURISDICTIONAL ISSUES**

**by Peter W. Hogg and Mary Ellen Turpel**

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## EXECUTIVE SUMMARY

The purpose of this paper is to make suggestions about how Aboriginal self-government could be implemented without any amendment of the Constitution of Canada. The authors suggest that elements of the Charlottetown Constitutional Accord could be included in a political accord or accords, which could become the framework for selfgovernment negotiations. The authors discuss the nature of the powers that could be included in a self-government agreement, making extensive reference to the Yukon First Nation Self-Government Agreements. The issues that are examined include personal and territorial jurisdictions, concurrent and exclusive powers, the relationship of Aboriginal laws to federal and provincial (or territorial) laws, the administration of justice, and the financing of self-government. The authors recommend that self-government agreements should be constitutionally protected, and they explain how that can be accomplished under the existing Constitution. The applicability of the *Canadian Charter of Rights and Freedoms* is also discussed, and a recommendation made for the development of Aboriginal constitutions, which could include Aboriginal charters of rights.

# IMPLEMENTING ABORIGINAL SELF-GOVERNMENT: CONSTITUTIONAL AND JURISDICTIONAL ISSUES

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## INTRODUCTION

### *Post-Charlottetown Accord Context*

Since the defeat of the Charlottetown Accord in October 1992, there has been uncertainty about the future of Aboriginal self-government and particularly the implementation of the Aboriginal part of the proposed constitutional amendments. It seems evident that large-scale constitutional reform is not on the national political agenda in the wake of the 'no' vote. While many negotiations are under way between various Aboriginal peoples<sup>i</sup> and Canadian governments on issues ranging from criminal justice to land claims, the basis of these discussions and the shape of any agreements produced as a result of them, especially in terms of constitutional recognition or protection of rights, is not clear. Aboriginal peoples have repeatedly expressed their frustration with the premises, scope and the pace of the negotiations now under way, and the limited progress suggests that a fundamental rethinking of government policy and practice is in order.

The Royal Commission on Aboriginal Peoples' 1993 discussion paper, *Partners in Confederation*,<sup>ii</sup> provided some helpful clarification of the source of self-government and some ideas for progressing with implementation of the right of self-government. Moreover, the 1993 election of a Liberal majority federal government, whose policy agenda includes the commitment to recognize the inherent right to selfgovernment and implement it without re-opening constitutional discussions, suggests that a new political climate exists for progress on self-government issues.<sup>iii</sup>

The purpose of this paper is to explore the extent to which progress can be made immediately, within the existing Constitution of Canada, on implementing the inherent right of self-government. We do not consider arguments outside the Constitution of Canada in this paper, although we acknowledge that full political consideration of selfgovernment would involve exploring such arguments.<sup>iv</sup> In particular, we want to analyze the legal and constitutional issues involved in implementing the inherent right without the express constitutional amendments proposed in the Charlottetown Accord. These include the articulation of Aboriginal governmental

jurisdictions in light of existing federal and provincial laws of general application; the financing of selfgovernment; the constitutional status of self-government agreements; the resolution of disputes over inconsistent (Aboriginal and federal or provincial) laws; and the application of the *Canadian Charter of Rights and Freedoms* to Aboriginal governments.

### *Inherent Source of Aboriginal Right of Self-Government*

The Charlottetown Accord expressly recognized an "inherent" right of Aboriginal self-government.<sup>v</sup> This is important from both a political and a legal perspective. The right of self-government was understood by all participants in the Charlottetown negotiations to be a pre-existing right that is rooted in Aboriginal peoples' long occupation and government of this land before to European settlement. This is not a new concept for Canadian constitutional law. Although Canadian courts have not explicitly recognized the inherent right of self-government (because they have not yet been faced squarely with the issue), the courts have recognized other Aboriginal rights. The Supreme Court of Canada has expressly accepted that these rights derive from the fact that Aboriginal peoples have existed in Canada for a very long time and have exercised rights that must be respected by those who are more recent immigrants.<sup>vi</sup> As Professor Brian Slattery has shown, Aboriginal rights are rights that are held by Aboriginal peoples, not by virtue of Crown grant, legislation or treaty, but "by reason of the fact that aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada".<sup>vii</sup> This logic supports the fact that the rights that Aboriginal peoples enjoy in Canadian law are inherent in their own history and experience as First Peoples. Many treaties concluded between Aboriginal peoples and the Crown also demonstrate that Aboriginal peoples exercised their rights of self-government by structuring their relations with governments in Canada on the basis of consent and mutual recognition.

The inherent nature of the right of self-government does not provide the answer to the questions of what the right means today, and how it can be related to the existing constitutional and political structure of Canada. Uncertainties on these issues make high-level political discussions on what Aboriginal self-government means in a contemporary political context essential, because at present the issues are wide open to judicial interpretation if left to the courts, and indeed they are not really suitable for resolution by courts.<sup>viii</sup> It is in the best interests of both governments and Aboriginal peoples to explore options short of constitutional amendment

(although constitutional amendment would be the preferred approach).<sup>ix</sup> What other approaches are there, and how would they be viewed from a constitutional law standpoint? Answering this question is the purpose of our paper: we want to explore ways to move ahead on Aboriginal self-government in a peaceful and constitutionally viable fashion. Several options and approaches to the issue of jurisdiction, status of agreements and justiciability are explored in the pages to follow. The political feasibility of the ideas developed herein is for elected officials to evaluate; we are simply trying to suggest what is legally possible under the present Constitution.

### *Scope of Aboriginal Government Jurisdiction*

The Charlottetown Accord provided a mechanism for defining the scope of self-government rights for particular Aboriginal peoples. It also implied that Aboriginal governments would be equivalent in status to the existing two orders of government in Canada by describing Aboriginal governments as one of three orders of government;<sup>x</sup> in other words, Aboriginal governments were to be seen as sovereign in their own spheres. The Accord was not specific on many important points: it called for (in another draft accord) a process to work out problems that could arise in negotiations and jurisdictional conflicts. It also provided for a gradual transition to self-government based on negotiated agreements, delay in justiciability of the inherent right, and rules for dealing with inconsistent laws. It is fair to say that, while the recognition of an inherent right of self-government was an important feature of the Charlottetown Accord, what was far more significant, from a practical perspective, was the method proposed to invigorate the right. Although the negotiation of self-government agreements has been on the national agenda since the early 1980s, the Accord would have established for the first time a firm legal and policy framework to govern negotiations, to resolve preliminary issues such as identification of parties, to clarify the scope of Aboriginal jurisdiction,<sup>xi</sup> to ensure adequate funding for the process and for the resulting governments, and to provide for the constitutionalization of the self-government agreements and for their implementation. In our view, this comprehensive structure, which was agreed to by all governments, was the truly innovative feature of the Accord. This innovation can be built upon in fashioning a new path for the implementation of selfgovernment.

The provisions of the Charlottetown Accord are critical, because the conventional body of constitutional law in Canada is not easily squared with the inherent right of Aboriginal self-government. There are many notions in constitutional law, some quite foundational, that are

inconsistent with the recognition of Aboriginal self-government. Principal among these is the doctrine of exhaustiveness, which suggests that all available jurisdiction in Canada is currently divided between the federal and provincial governments by sections 91 and 92 (and the other jurisdictional provisions) of the *Constitution Act, 1867*.<sup>xii</sup> This doctrine appears to leave no room for Aboriginal self-government except as a delegated government under the federal or provincial division of legislative and administrative responsibility. Of course, the doctrine of exhaustiveness was developed without regard for the Aboriginal reality in Canada and, as the Royal Commission on Aboriginal Peoples has suggested, the doctrine of exhaustiveness may concern the scope of jurisdiction and not the exclusiveness of jurisdiction.<sup>xiii</sup> Moreover, the doctrine developed in the context of federal-provincial jurisdictional disputes in which Aboriginal peoples played no role.

The doctrine of exhaustiveness was also developed before section 35 of the *Constitution Act, 1982* was introduced into the Canadian Constitution to give more explicit constitutional protection to Aboriginal and treaty rights. It is an important task of constitutional lawyers and elected officials to review those doctrines that reflect the Eurocentric bias of Canadian constitutional law and government, like the doctrine of exhaustiveness, and embark on the reordering of institutions and doctrine that is required to give full expression to the long-standing Aboriginal presence in Canada. This review will become more urgent as the implementation of self-government progresses. However, suffice it to say here that the doctrine of exhaustiveness should not be an obstacle in the way of articulating Aboriginal government jurisdiction. It is a matter that requires discussion, but it is not fatal to the implementation of self-government within the existing constitutional framework.

## **EXPRESSING ABORIGINAL SELF-GOVERNMENT JURISDICTION**

### *Contextual Statement*

Beyond the recognition of an inherent right of self-government, for which there is a considerable political and legal consensus, the implementation of the right in the particular context of an Aboriginal people is a more complex legal challenge. There are different Aboriginal peoples with diverse government traditions, territories and aspirations. A flexible and creative approach is required to respond to these various situations. The Charlottetown Accord provided for a flexible method of expressing the scope of Aboriginal jurisdiction that is worth examining closely, because it is a helpful middle ground between two extremes. At one extreme is the simple

recognition of the inherent right without any guiding framework for implementation. This approach is broad and vague enough to respond to the diverse situations and aspirations of Aboriginal peoples, but its very breadth and vagueness makes concrete implementation more difficult. At the other extreme is a detailed blueprint for self-government that would apply to all Aboriginal governments without regard for their differing situations, cultures and aspirations.

The Charlottetown Accord proposed a middle ground between these two approaches. It proposed that a 'contextual statement' should form part of the Aboriginal self-government package of constitutional amendments. The idea of the contextual statement was to frame self-government jurisdiction in light of the purposes and objectives that should be served by the inherent right. It was designed to be flexible enough to accommodate different circumstances and conditions, yet detailed enough to indicate the general scope of self-government. The text of the proposed contextual statement is worth recalling in full, although we note that no final legal text was ratified:

The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples, each within its own jurisdiction.<sup>xiv</sup>

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies.<sup>xv</sup>

The contextual statement describes the purposes of self-government and the general functions of Aboriginal legislative bodies. Since this statement has been agreed to by governments and Aboriginal organizations, it should continue to be relevant in setting the general purpose or context for self-government negotiations. The statement emphasizes the authority of Aboriginal governments to enact and enforce laws that will enable Aboriginal peoples to control their own development as peoples, to set their own priorities in order to ensure the development of their members, and especially to protect their lands, languages and cultures.

One issue that is not mentioned explicitly in the contextual statement is the objective of self-government implementation for those Aboriginal peoples with treaties. Many First Nations leaders speak of 'treaty government' and suggest that their treaties are an effective vehicle for



implementing the inherent right of self-government. Confusion over the relationship between treaties and the package of self-government amendments in the Charlottetown Accord was a source of dissension during the debate over the Accord in Aboriginal communities. Some clarification on this point is certainly required. As the President of the Union of Nova Scotia Indians suggested to the Royal Commission on Aboriginal Peoples,

We see our right of self-government as an inherent right which does not come from other governments. It does not originate in our Treaties. The right of self-government and self-determination comes from the Mi'kmaq people — it is through their authority that we govern. The Treaties reflect the Crown's recognition that we were, and would remain, self-governing, but they did not create our Nationhood... In this light, the treaties should be effective vehicles for the implementation of our constitutionally-protected right to exercise jurisdiction and authority as governments. Self-government can start with a process of interpreting and fully implementing the 1752 Treaty, to build on it to an understanding of the political relationship between the Mi'kmaq people and the Crown.<sup>xvi</sup>

Treaty implementation was dealt with in a separate section of the Charlottetown Accord,<sup>xvii</sup> although the relationship between treaty implementation and self-government implementation was not clearly linked. For some Aboriginal peoples, the implementation of the inherent right of self-government is inseparably linked to the fulfilment of a pre-existing treaty relationship.

We would suggest that a new version of the contextual statement, which could be used as part of a framework for implementing the inherent right, should reflect the central role of treaties and treatybased government for Treaty First Nations. This could be accomplished by adding to the concluding language of the contextual statement some additional language such as the following:

...and recognizing that for Treaty First Nations the implementation of self-government will mean the articulation of rights and responsibilities flowing from existing treaties, which should be fully honoured and implemented by Canadian governments as a central part of self-government implementation.

The text of the contextual statement contemplates that the "duly constituted legislative bodies" can act to achieve certain aims and objectives. The requirement of duly constituted legislative bodies would require the Aboriginal people in question to develop a constitution with provision for a law-making body and demonstrated support among the people for this institution.<sup>xviii</sup> While it is presumed that such a constitution would be written, it could also take another form more consistent with Aboriginal customs and traditions if so desired by the

particular Aboriginal people. For example, in the Iroquoian nation, wampum belts may be used to articulate the constitution and the respective responsibilities of legislative and other government bodies. Certainly some flexibility is required on this point, although it is probable that most constitutions would also be written.

The aims that the Aboriginal legislative body would pursue are defined by the contextual statement in subsections (a) and (b), and especially in the concluding clause, where the overall objective is that of determining and controlling the particular people's development according to their own values and priorities and in order to ensure the integrity of their society. This statement marks a dramatic break with the status quo of delegated and limited power under the *Indian Act* or other statutory schemes to which Aboriginal peoples are subject. The statement confirms the universal view that the *Indian Act* must be abandoned in favour of a new relationship based on the notion of internal self-determination.

It was never imagined that the contextual statement would settle the question of exactly what powers an Aboriginal government does or should possess, or that it would resolve the inevitable conflicts between Aboriginal laws and other laws. What the clause would do — and this is its enduring appeal — is to offer a broader prism through which to view the discussions on self-government between individual Aboriginal communities and governments that would resolve matters of jurisdiction. It is the foundation upon which a list of powers can be developed by a particular Aboriginal people and an agreement negotiated with government to clarify jurisdiction and even fiscal responsibility.

### *Options for a New Contextual Statement*

Because of the failure of the Charlottetown Accord, the contextual statement did not make its way into the Constitution, and it is only realistic to recognize that constitutional amendments on self-government are unlikely in the near future. Nonetheless, language close to the contextual statement could still provide the framework for progress on the development of self-government institutions. For example, there is nothing to prevent Aboriginal organizations and the federal and provincial governments from entering into a political accord or accords on a framework for implementing the inherent right of self-government.

In addition to the option of a political accord, Aboriginal peoples and governments may want to explore the option of federal legislation to provide such a framework. Provided such

legislation is the product of consent on the part of the Aboriginal peoples and their representatives, this option would enable the development of specific political accords with Aboriginal people and allow for flexibility in accommodating differences in the circumstances and priorities of Aboriginal peoples. One advantage of legislation is that it would be cost-efficient and expeditious rather than negotiating separate political accords on all framework issues with each Aboriginal people concerned. The legislation could establish basic principles that could then be particularized in specific accords.

Through either political accords or legislation, a reworked contextual statement could form a central component of a framework for implementing the right of self-government. We would suggest the following text for inclusion in a political accord or legislation:

The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples

- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and
- (b) to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies and recognizing that for Treaty First Nations the implementation of self-government will require the articulation of rights and responsibilities flowing from existing treaties, which should be fully honoured and implemented by Canadian governments.

### *Process for Negotiating Agreements*

The goal of a political accord or other framework for implementing the inherent right of self-government has to be the conclusion of negotiated agreements with particular First Nations, Inuit and Métis peoples on self-government jurisdiction, financing, and dispute resolution. We have a strong preference for a revived political framework leading to negotiated agreements. The alternative of inaction by governments would lead to unilateral initiatives by Aboriginal peoples, which would give rise to endless legal disputes, the resolution of which would be highly unpredictable.<sup>xix</sup> In our view, an agreed-upon contextual statement would help to facilitate self-government agreements, because it would provide the objectives of self-government that should guide the process of negotiations as well as the content of any agreement.

Any self-government agreement between a specific Aboriginal community and government(s) will of necessity include a list or lists of different heads of powers under which the Aboriginal government would have the discretion to legislate. Moreover, any such list of

powers should relate back to the contextual statement and be interpreted in light of its expression of objectives, in order to facilitate the proper implementation of the right of self-government. The contextual statement would not be the only guide to the development of heads of legislative power or the only interpretative aid. In the case of Treaty First Nations, for example, there may be treaty rights that would carry with them some jurisdictional responsibility.<sup>xx</sup> Modern land claims agreements will also contain powers of management of the lands and resources belonging to an Aboriginal people.

### **SCOPE OF ABORIGINAL JURISDICTION**

In this paper, we make frequent reference to the Yukon Indian selfgovernment agreements.<sup>xxi</sup> The Yukon agreements are helpful for the analysis here because they illustrate the kind of progress that is possible within the existing constitutional framework as well as the need for reconsideration of certain government policies and approaches that impede the implementation of self-government.<sup>xxii</sup> To understand those agreements, some background is necessary.

The Council for Yukon Indians, which represents the 14 First Nations in the Yukon, has entered into an Umbrella Final Agreement with the governments of Canada and the Yukon.<sup>xxiii</sup> This agreement contains the basic terms of the Yukon land claims settlement, but it is not a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*, and it is not legally effective unless and until its provisions are incorporated into a final agreement entered into by a Yukon First Nation. Four First Nations have entered into final agreements that incorporate all the terms of the Umbrella Final Agreement and also contain provisions specific to the First Nation. These four final agreements are land claims agreements within the meaning of section 35.

The Umbrella Final Agreement, and therefore all four First Nation final agreements, contemplated the negotiation of self-government agreements by the Yukon First Nations. However, at the insistence of the government of Canada, the Umbrella Final Agreement and the four First Nation final agreements provided, by paragraph 24.12.1, that self-government agreements would not create treaty rights within section 35 of the *Constitution Act, 1982*. The four Yukon First Nations that have entered into First Nation final agreements have also entered into self-government agreements. The self-government agreements are very similar to each other, being based on a model agreement negotiated by the Council for Yukon Indians in 1992. The

four agreements are to be given effect by self-government legislation, to be enacted by the Parliament of Canada and the Yukon Territorial Assembly. That legislation has now been enacted.<sup>xxiv</sup>

The jurisdictional provisions of one of the Yukon Indian selfgovernment agreements are reproduced in Appendix 1, and we will refer to those provisions from time to time. The jurisdictional provisions are set out in four lists of powers to enact laws. The first list (in paragraph 13.1) is a list of law-making powers that are exclusive to the First Nation. (The other law-making powers are concurrent. The terms exclusive and concurrent are explained later in this paper.) The second list (in paragraph 13.2) is a list of law-making powers that extend throughout the Yukon but are limited to First Nation citizens. This is an example of personal jurisdiction, which is explained later in this paper. The third list (in paragraph 13.3) is a list of law-making powers that are restricted to the First Nation's own land; the powers apply to everyone on the land, not just First Nation citizens. This is an example of territorial jurisdiction, which is also explained later. The fourth list of powers (in paragraph 13.4) is a list of emergency powers that confer on the First Nation certain special powers to cope with emergencies on First Nations land.

We recognize that the details of self-government will differ radically from one part of Canada to another. Solutions that work well in the sparsely populated Yukon may not work in the South. However, the Yukon agreements do provide examples of the kinds of jurisdiction that an Aboriginal government may wish to exercise. It should be emphasized, however, that it is not coincidental that the Yukon selfgovernment agreements were concluded shortly after an agreement on a comprehensive land claims settlement. For Aboriginal peoples, the issue of land is central to self-government jurisdiction. This paper does not focus on those connections, although it is important to emphasize that as part of the implementation of self-government, lands and resources issues will be pivotal to effective government. The existing land and resource base for most First Nations is inadequate for effective self-government, and this item will require immediate attention in the transition away from the *Indian Act* to self-government.

### *Territorial Jurisdiction*

One issue that must be addressed in any self-government agreement is the extent of a First Nation's power to make laws. One model is a list of powers that are confined to the territory of

the First Nation. It is obvious that every First Nation would require extensive powers over its own land. The management of the land, the regulation of activity on the land, including hunting, fishing, gathering, mining and forestry, the licensing of businesses, planning, zoning and building codes, environmental protection, and the administration of justice are among the subjects that a First Nation would probably wish to regulate on its own land. These kinds of powers would likely be confined to the First Nation's land.<sup>xxv</sup> The powers would not extend to Aboriginal people off First Nation land. However, the powers would apply to both non-Aboriginal and Aboriginal people on First Nation land.

In the Yukon First Nation self-government agreements,<sup>xxvi</sup> where there are four lists of powers, one list (in paragraph 13.3) is confined to the First Nation's settlement land. These powers are examples of territorial jurisdiction.

### *Personal Jurisdiction*

There are other powers that a First Nation might wish to exercise that should not be confined to First Nation land. The First Nation may wish to provide a range of social services to its citizens, including those who are living off First Nation land. Adoption, guardianship, and the custody and care of children cannot be confined to First Nation land. These issues are central to the achievement of the objectives described in the contextual statement, and arrangements for personal jurisdiction will be part of self-government implementation. Thus, a First Nation will probably require a second list of powers that are applicable to First Nation citizens on or off First Nation land. Laws enacted by a First Nation under this list would constitute a 'personal law' that followed First Nation citizens wherever they were. These laws would not apply to non-Aboriginal people.

In the Yukon First Nation self-government agreements, two of the four lists of powers (in paragraphs 13.1 and 13.2) are not confined to the First Nation's settlement land. They would apply to citizens of the First Nation throughout the Yukon. They are an example of personal jurisdiction.

The personal jurisdiction of an Aboriginal government, like its territorial jurisdiction, has the capacity to be compulsory. For example, an Aboriginal child who has been placed with a family living outside the Aboriginal territory would not become subject to provincial or territorial law respecting his or her custody. This would protect the child from the risk of

decisions made by non-Aboriginal bodies altering the arrangements put in place by Aboriginal law. Of course, it would be open to an Aboriginal government not to exercise the full extent of its personal jurisdiction, and this would be determined by the political process internal to the Aboriginal people. It should be noted as well that the *Canadian Charter of Rights and Freedoms* would probably apply to the exercise of personal (as well as territorial) jurisdiction by an Aboriginal government. (This issue is taken up later in the paper.)

Other First Nations will undoubtedly require some legislative powers that extend to their citizens regardless of residence. In the Yukon example, even personal jurisdiction was confined to the boundaries of the Yukon, and for other First Nations this personal jurisdiction may also be confined to a province or territory, or it may apply throughout Canada.

Aboriginal self-government could exist in urban areas of Canada in the form of institutions that deliver services to First Nations, Inuit or Métis citizens living off Aboriginal territories. Personal jurisdiction would be essential to these developments. A high level of co-ordination would be required among various Aboriginal governments to serve their citizenry in an urban setting in order to avoid duplication of services and enormous cost.

Personal jurisdiction will mean that Aboriginal citizens will 'take the law with them' when they leave Aboriginal territories. This is not a radical new concept, as it is already a part of Canadian law in many fields, like family law. We have a developed body of principles on conflicts of law to govern these situations. As well, agreements that now exist between provinces and foreign jurisdictions respecting the enforcement of maintenance and custody orders provide examples of the co-ordination of different legal regimes in the interests of effective governance. Similar devices will be available to Aboriginal governments. Moreover, in the Aboriginal context, we are already familiar with the notion of portability of rights, such as treaty rights to education, off a territorial base. Personal jurisdiction builds upon these pre-existing concepts to ensure that Aboriginal governments will have effective governing powers to enable them to accomplish governmental policy objectives like cultural protection in the context of child welfare.

### *Emergency Jurisdiction*

It may be desirable to provide for emergency jurisdiction over persons or territory in a self-government agreement. The Yukon First Nation self-government agreements (by paragraph 13.4)

attempt to anticipate some of the problems that could arise in a situation of emergency as a result of the territorial and personal restrictions on First Nations' powers. For example, a child might be in danger on settlement land, and the First Nation's child welfare officials might not know for sure whether the child was a First Nation citizen. Or a child might be in danger off settlement land, and it might not be clear which order of government had jurisdiction. To enable prompt action to be taken safely in these kinds of situations, the Yukon agreements empower the First Nation to act to relieve an emergency on settlement land, even if it is the laws of general application that are applicable. A similar power enables the Yukon territorial government to act to relieve an emergency off settlement land even if the situation is governed by First Nation law. In each case, as soon as practicable, the matter would be returned to the correct governmental authority.

### **EXCLUSIVE AND CONCURRENT POWERS**

Another issue that must be addressed in the jurisdictional provisions of a self-government agreement is which Aboriginal legislative powers are to be exclusive and which are to be concurrent. Exclusive powers are powers that are possessed only by the Aboriginal people; neither Parliament nor the provincial (or territorial) legislature would be able to exercise the same power. Concurrent powers are powers that are possessed not only by the Aboriginal people, but also by either Parliament or the provincial (or territorial) legislature. The disadvantage of exclusive powers is that they require the enactment of comprehensive laws by the Aboriginal people; no other laws will be available to fill gaps. The disadvantage of concurrent powers is that they give rise to the possibility of inconsistent laws, one enacted by the Aboriginal people and the other enacted by Parliament or the provincial (or territorial) legislature. Obviously, rules have to be developed to deal with inconsistency, and these are the topic of the next section of this paper.

In the *Constitution Act, 1867*, the law-making powers of Parliament, on the one hand, and the provincial legislatures, on the other, are set out in two lists, each of which is said to be exclusive. In practice, however, life does not organize itself into the tidy packages envisaged by the two lists, and considerable evolution and power sharing have been permitted through judicial interpretation since 1867. The tendency of the courts is to recognize a great deal of overlap between the two lists — in other words, concurrent powers. The protection of the environment is



a good example. It is not mentioned in either list, because the drafters of 1867 never thought that government would want or need to protect the environment. Modern Canadian courts have held that both orders of government possess extensive, overlapping powers to protect the environment. Many other examples could be given. The point is that many of the law-making powers possessed by Parliament and the provincial legislatures are concurrent. (In Australia and the United States, the constitutions establish only a few exclusive law-making powers; for the most part, law-making powers are concurrent.)

The Yukon First Nation self-government agreements (by paragraph 13.1) include a short list of exclusive powers. Generally speaking, the list encompasses the rules of internal management of the First Nation's affairs, and the administration of rights and benefits under its land claims agreement. The other lists, described in the previous section, contain concurrent powers.

#### **INTERGOVERNMENTAL CO-OPERATION IN CANADA**

The Canadian federation has existed since 1867. Throughout this time, federal and provincial governments have exercised governmental powers over the same territory and over the same people (although the exercise of jurisdiction by the federal and provincial governments 'over' Aboriginal peoples has been controversial). Despite many minor disputes and occasional lawsuits, the two orders of government have learned to live harmoniously together. No government is an island unto itself, and an extensive network of relationships has developed at the ministerial and official levels to share information and ideas and, where appropriate, co-ordinate policies. In many fields of concurrent jurisdiction, formal agreements have been entered into to ensure that both orders of government work together in pursuit of common goals.

For example, provincial health care plans and provincial social assistance plans are funded in part by the federal government pursuant to shared-cost agreements that define the basic principles underlying both kinds of plans. Another example is the policing agreements, under which the Royal Canadian Mounted Police provides policing services to eight provinces and many municipalities in return for provincial and municipal sharing of the cost of the services. Another example is the tax collection agreements, under which the federal government collects provincial income taxes on behalf of nine provinces in return for provincial agreement to use the same tax base as the federal income tax.

Aboriginal governments enter this complex network of federal-provincial relationships. They will find advantages in many of the techniques of co-operation that have been developed by the federal and provincial governments for meeting the needs of citizens in different regions and circumstances. For example, an Aboriginal government may enter into tax-collection agreements with another government. An Aboriginal government may choose to 'rent' the policing or prosecutorial services of another government. There may be responsibilities a First Nation prefers to assume gradually, allowing services to be rendered to First Nations citizens by another government until the First Nation has developed the capacity or policy to deliver the services itself.

The important point regarding intergovernmental co-operation is that self-government does not occur in a political vacuum. An Aboriginal government will not have to assume immediately all the functions of a modern government. Agreements of various kinds are required to make an order of government fully operational. Moreover, intergovernmental co-operation and sharing of jurisdiction and resources are the norm rather than the exception in Canadian federalism.

#### *Federal-Provincial Rules for Inconsistent Laws*

A self-government agreement must deal with the relationship between federal and provincial (or territorial) laws, on the one hand, and Aboriginal laws, on the other. In the federal-provincial context, conflicts between federal and provincial laws are resolved by the rule of federal paramountcy: the provincial law must yield to the inconsistent federal law. This rule is not as important as it might seem, because the courts accept a very narrow definition of inconsistency: only if one law expressly contradicts the other is there an inconsistency that triggers the rule of federal paramountcy. If the two laws can exist side by side without contradiction, there is no inconsistency, and both laws remain operative.

For example, in *Construction Montcalm v. Minimum Wage Commission*, the Supreme Court of Canada held that a federal law stipulating a minimum wage for federal contractors was not inconsistent with a provincial law that stipulated a higher minimum wage.<sup>xxvii</sup> The Supreme Court of Canada reasoned that the federal law did not prohibit a higher wage; therefore, both laws could co-exist. The practical result was that the federal contractor had to pay the higher Quebec minimum wage and could not rely on the lower federal figure. This case demonstrates

that the courts will go to great lengths to uphold validly enacted legislation and will be extremely reluctant to find inconsistency if the laws can be reconciled.

This narrow definition of inconsistency means that the doctrine of federal paramountcy applies only rarely. Most of the time, when federal and provincial laws are applicable to the same facts, the courts allow both laws to co-exist. There is nothing to suggest that this same approach would not be brought to an analysis of inconsistency in the context of Aboriginal laws.

### *Displacement of Federal and Provincial Laws*

Each self-government agreement must provide for the transition to self-government, so as to guard against a vacuum of laws during the initial period before the Aboriginal government has had time to make laws within its areas of responsibility. A similar problem arose in 1867 when the Parliament of Canada and the legislatures of Ontario and Quebec were first established and empowered. (The other provinces already had legislatures.) The solution in 1867 was embodied in section 129 of the *Constitution Act, 1867*, which sensibly provided that all laws in force in 1867 should continue in force until they were repealed, abolished or altered by the Parliament of Canada or the legislature of a province. This provided for the continued existence of pre-Confederation laws. Although the main purpose of section 129 was transitional, some pre-Confederation laws have never been replaced and continue in force today.

The Charlottetown Accord borrowed from section 129 in proposing a similar rule for the transition to self-government. The Accord provided (by clause 47) that "federal and provincial laws will continue to apply until they are displaced by laws passed by governments of Aboriginal peoples pursuant to their authority". This clause would have ensured that pre-self-government laws would continue to apply until they had been displaced by Aboriginal laws.

A transitional clause of this kind would not only govern the transition to self-government. It would also have a permanent effect. The clause would have established an important general rule that Aboriginal laws could 'displace' laws of general application. In other words, where Aboriginal laws were inconsistent with laws of general application, the Aboriginal law would be paramount and the law of general application would have to yield.

The Charlottetown Accord proposed (also by clause 47) one exception to the general rule of Aboriginal paramountcy. Where a federal or provincial law was "essential to the preservation of peace, order and good government in Canada", then that law would prevail over an

inconsistent Aboriginal law. The meaning of this peace, order and good government exception has been the topic of some debate,<sup>xxviii</sup> and certainly this provision was the most troubling for Aboriginal people during debate on the Accord. In our view, however, the exception would be given a narrow scope by the courts, drawing by analogy on the existing jurisprudence that has given a narrow interpretation to the words "peace, order and good government" in section 91 of the *Constitution Act, 1867*. Without going into detail,<sup>xxix</sup> the exception would probably cover emergency laws and laws designed to prevent injury or harm to non-Aboriginal people or land. It is perfectly reasonable that certain laws of this category (essential for peace, order and good government) should apply to Aboriginal peoples and should not be subject to displacement by Aboriginal laws. For example, if a province required all residents to be inoculated against an epidemic of smallpox, Aboriginal peoples should be subject to the same requirement as non-Aboriginal people. Indeed, no Aboriginal government would want to create health risks for Aboriginal people or their non-Aboriginal neighbours, so these kinds of limits on Aboriginal government jurisdiction would not be major issues from a pragmatic perspective.

The Charlottetown Accord did not indicate what was to be the definition of inconsistency for the purpose of the paramountcy provisions, but silence would probably mean that the narrow definition developed in the federal-provincial context would also apply here. For example, a First Nation might enact laws to regulate the discharge of waste material by a business located on First Nation land. The same business may be subject to controls enacted by the province. In this situation, the courts would probably hold that there was no inconsistency between the two laws: the business would be obliged to obey both the First Nation rules and the provincial rules. If the First Nation's rules were the stricter of the two, then the First Nation would in effect be the primary legislator.

### *Yukon Self-Government Agreements*

The Yukon First Nation self-government agreements, like the Charlottetown Accord, provide (by paragraph 13.5) that laws of general application shall continue to apply to the First Nation, its citizens and First Nation land. In the event of inconsistency between a law of the First Nation and a law of the Yukon, it is the law of the First Nation that is paramount. In the event of inconsistency between a law of the First Nation and a federal law, the self-government agreements are incomplete. They provide (by paragraph 13.5.2) for a future agreement between

the First Nation and Canada "which will identify the areas in which the laws of [the First Nation] shall prevail over federal laws". No such agreement has yet been entered into.<sup>xxx</sup>

We would interpolate the editorial comment that it is an unsatisfactory feature of the Yukon self-government agreements that they do not settle the precise form of the rules of paramountcy between federal and First Nations laws. Ideally, all jurisdictional issues should be settled in the self-government agreement and not postponed to some future process. We note, however, that the provision that was included does contemplate that there will be areas in which the laws of a First Nation will be paramount over federal laws.

With respect to inconsistency between a First Nation law and a Yukon law (where the rule is First Nation paramountcy), the Yukon agreements substitute a broader definition of inconsistency for the narrow common-law definition. According to clause 13.5.3 of the Yukon agreements, a Yukon law shall be inoperative "to the extent that it provides for any matter for which provision is made in a law enacted by [the First Nation]". This means that whenever a First Nation law covers a particular field that is also occupied by Yukon law, the Yukon law is displaced. It is not necessary to show that the two laws are inconsistent in the narrow sense of contradictory; the mere fact that they make provision for the same matter would cause the Yukon law to yield. The general idea here is that once a First Nation elects to provide a particular service (formerly provided by the Yukon) or regulate a particular activity (formerly regulated by the Yukon), then the First Nation would become the sole provider or regulator, requiring the Yukon territorial government to withdraw from the field.

## **ADMINISTRATION OF JUSTICE**

An Aboriginal government will require the power to enforce its own laws and may also wish to enforce those federal and provincial (or territorial) laws that continue to apply on Aboriginal land. The Aboriginal people will want policing, prosecutions, courts and corrections to operate so as to ensure a peaceful and law-abiding Aboriginal community. The people will also want all aspects of the justice system to be administered with sensitivity to Aboriginal ways and Aboriginal problems. Indeed, the administration of justice is a critical area given the numerous recent studies indicating that discrimination against Aboriginal people in the Canadian criminal justice system requires the development of new approaches to the field and greater autonomy for Aboriginal peoples to design and implement criminal justice measures in their communities.<sup>xxxi</sup>

The federal and provincial (or territorial) governments will also be concerned with enforcing their laws of general application on Aboriginal land. Given the continuing interests of the other two orders of government, and the limited resources of personnel and funds that are available to an Aboriginal government, it may be realistic and cost-effective for an Aboriginal government to exercise its power over the administration of justice in accordance with a justice agreement entered into with the other two orders of government. In that way, the Aboriginal government would gain access to services and funding that can be supplied by the other orders of government, and all three orders of government — federal, provincial (or territorial) and Aboriginal — would participate in the construction of a regime that is compatible with their legitimate objectives.

The Yukon First Nation self-government agreements provide one possible model for the administration of justice provisions. Under those agreements, a First Nation has, in its catalogue of legislative powers on First Nation land (paragraph 13.3.17), the power over "administration of justice".<sup>xxxiii</sup> However, the First Nation agrees (paragraph 13.6.3) not to exercise the power unilaterally for a period of ten years. For that time, the power can be exercised only in accordance with a justice agreement entered into with federal and territorial governments. The agreements (paragraph 13.6.1) oblige the First Nation and both governments to negotiate a justice agreement, and once an agreement is negotiated the First Nation would exercise its power over the administration of justice to give effect to the agreement until a justice agreement is reached; or, if no agreement is reached, there are (in paragraph 13.6.4) interim provisions for enforcing First Nation laws, jurisdiction of courts and corrections. The interim provisions are designed to be replaced by a justice agreement, but if no agreement is reached, the interim provisions expire at the end of the ten-year period (paragraph 13.6.6). At that time, the First Nation assumes full possession of its power over the administration of justice. If at that time there is a justice agreement in force, then of course the First Nation would be bound to act in accordance with the agreement.

## **JUSTICIABILITY OF SELF-GOVERNMENT**

Disputes of various kinds will inevitably arise out of the interpretation, administration or implementation of self-government agreements once concluded. Even before this, disputes will arise regarding the scope of Aboriginal government jurisdictions and fiscal matters. Many of

these disputes will raise legal issues and accordingly will come within the jurisdiction of the provincial (or territorial) or federal courts. Unless special courts are established to address legal issues relating to selfgovernment agreements — which would be constitutionally possible but complex — legal conflicts will come before Canadian courts for resolution. The additional burden on Canadian courts is bound to be significant, and active programs for continuing judicial education in the field of Aboriginal and treaty rights and the recruitment of Aboriginal people for judicial appointments are two steps that should be taken immediately to meet the inevitable legal challenges in the transition to self-government for Canadian courts.

In the broader context of dispute resolution, we contemplate that the kinds of disputes that will arise during this transition period will be both internal to the Aboriginal community and external to it. Internal disputes are those among citizens of Aboriginal communities or between citizens and Aboriginal governments. Internal disputes may be criminal or civil (including of a family nature) and will require community dispute resolution processes as part of the self-government arrangement. External disputes are those involving citizens of the Aboriginal community and non-Aboriginal governments or Aboriginal governments and non-Aboriginal governments. While Aboriginal peoples may wish to establish justice systems to govern internal relations between their citizens residing on their territories, and in some cases non-residents and visitors (and the Yukon example is a model here), there is an immediate need to consider how disputes of an external nature will be resolved.

To date, all disputes between Aboriginal peoples and governments have been brought before the Canadian courts. As the issues become more complex and specialized during the negotiation or implementation of self-government, the Canadian courts will not be the most efficient and cost-effective forum for dispute resolution.<sup>xxxiii</sup> They have also been questioned as appropriate forums for resolving the disputes between Aboriginal peoples and government on the basis that these disputes are intercultural and the courts do not reflect Aboriginal culture or even an equal power relationship between Aboriginal and non-Aboriginal people in Canadian society.<sup>xxxiv</sup> We are of the view that it is preferable to establish processes to facilitate the out-of-court resolution of disputes in a non-adversarial and informal atmosphere, using mediators, arbitrators and advisers who are familiar with the self-government agreement and with Aboriginal ways. Disputes arising from the negotiations process and from the process of implementing agreements are ripe for consideration in non-judicial forums like tribunals.

Moreover, a tribunal, which could be composed of individuals expert in the subject area, could be cost-efficient, expeditious and respectful of the different cultural and legal traditions of the parties. Such a tribunal could be established either in a self-government agreement or in a framework agreement that called for self-government negotiations.

The Yukon First Nations have set up alternative dispute resolution procedures of mediation and negotiation in their land claims agreements. The Yukon First Nation self-government agreements, by paragraph 24.0, make those procedures available for disputes arising under the self-government agreements. This model is an attractive one and could be followed in other agreements.

While various forms of alternative dispute resolution<sup>xxxv</sup> can be established to assist in the process of self-government negotiations and in the implementation of self-government agreements, legal questions will inevitably arise from time to time that will have to be resolved by the courts. It is likely that a Canadian court, when faced with disputes relating to the scope of self-government powers or other legal issues arising out of a self-government agreement, would approach this task with the large, liberal and purposive approach to the Constitution seen in Charter cases where other rights protections are being considered. This approach entails examining the purpose of the transition to self-government and the need to respect constitutionally protected Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. The fact that Aboriginal peoples are in a vulnerable position in their relations with the Crown, given that the Crown is more powerful politically and has more resources, would also influence the court in scrutinizing the conduct of government in its relations with Aboriginal peoples to ensure that its duties as a fiduciary were fully respected.

## **FINANCING SELF-GOVERNMENT**

For Aboriginal governments and Aboriginal jurisdictions to be meaningful, they must have an adequate financial basis. This means that Aboriginal governments should have access to the same fiscal arrangements as are available to other governments, namely levying taxes, transfers from the other orders of government, and borrowing when necessary. All these matters should be dealt with in the self-government agreements.



## *Taxation*

The *Constitution Act, 1867* (which says nothing about Aboriginal governments) confers taxation powers on Parliament and the provincial legislatures. It distinguishes between direct and indirect taxes. Direct taxes are those that are unlikely to be passed on by the initial payer of the tax.

Direct taxes have been held to include income taxes, property taxes and sales taxes (provided the tax is imposed on the consumer, not the vendor). Indirect taxes are those that tend to be passed on by the initial payer of the tax, so that it is hard to know where their burden ultimately falls.

Customs and excise taxes fall into the indirect category, because the importer or manufacturer is expected to include the taxes in the price charged for the imported or manufactured product, and the ultimate burden of the tax is passed on to the consumer.

Under the *Constitution Act, 1867*, the provinces are generally limited to direct taxes, the reasoning being that they should not be allowed to export the burden of their taxes to the residents of other provinces; the federal Parliament, on the other hand, is authorized to levy both direct and indirect taxes.<sup>xxxvi</sup> Because both orders of government have the power to levy direct taxes, the taxpayer is often in the position of having to pay taxes to two governments. In the case of the personal income tax, the federal government has entered into tax collection agreements with nine of the ten provinces, under which the federal government agrees to collect the province's share of the tax, and the provinces agree to use the same tax base as that of the federal tax. This relieves the taxpayer from the need to file two returns with different information and calculations.

There is also a level of taxation at the municipal level, which is exercised by municipalities under powers delegated to them by the provinces or territories. The most common municipal tax is a tax on real property in the municipality.

The obvious approach to Aboriginal taxation powers would be for Aboriginal peoples to have the same power to levy direct taxes as the provinces. This is not now the case with *Indian Act* bands, which under section 83(1)(a) of the *Indian Act* have the power to levy municipal-like property taxes, subject to the approval of the minister of Indian affairs. The *Sechelt Indian Band Self-Government Act* confers a power of taxation that is similar to the *Indian Act* power, although there is no requirement of ministerial approval.

The Yukon First Nation self-government agreements, by paragraph 14.0, confer on the First Nations not only the power to levy property taxes, but also the power to levy other kinds of

direct taxes on their citizens on settlement land. However, the agreements contemplate that the First Nations will enter into tax-sharing arrangements with the Yukon territorial government so that there is a sharing of tax room and general co-ordination between the tax systems of the two governments. Only pursuant to these intergovernmental arrangements would the First Nations acquire the power to levy taxes other than property taxes on non-Aboriginal people and corporations on settlement land. Yukon tax-sharing agreements have not yet been entered into, but they could, for example, provide for a single tax-collection agency for both Yukon and First Nation taxes, as well as agreements about the rates of tax that each government would impose, so that the tax-filing obligations and the total burden of taxation were reasonable and predictable.<sup>xxxvii</sup>

### *Transfer Payments*

Even with full powers of direct taxation, most Aboriginal communities lack the tax base that would enable them to raise enough revenue to provide services at a level that is appropriate for Canadian citizens. This is also true of the have-not provinces and both the territories, all of which are net beneficiaries of federal transfer payments. Section 36(2) of the *Constitution Act, 1982* provides as follows:

Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

This provision sets a standard for federal transfer payments to the provinces, but it says nothing about the territories or about Aboriginal governments.

In the discussions leading to the Charlottetown Accord, the Aboriginal organizations were unsuccessful in their efforts to secure an amendment to section 36(2) to extend it to Aboriginal governments. Instead, the Accord (by clause 50) provided that the financing of self-government was to be dealt with in a later political accord. That political accord would "commit federal and provincial governments to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments to govern their own affairs". The Charlottetown Accord (still in clause 50) required explicitly that Aboriginal governments had to be capable of "providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity". The Charlottetown Accord thus essentially accepted

the principle that transfer payments to Aboriginal governments should be sufficient to enable those governments to provide public services of similar quality to those provided by other orders of government. This standard should be reflected in financing agreements with Aboriginal peoples.

### *Yukon Example*

The Yukon First Nation self-government agreements, whose terms were settled before the Charlottetown Accord, oblige Canada (by paragraph 16.0) to enter into a "self-government financial transfer agreement" with each First Nation "with the objective of providing [the First Nation] with resources to enable [the First Nation] to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation". The language used obviously borrows from section 36(2) of the *Constitution Act, 1982*, and the reference to the Yukon (along with other provisions, notably paragraph 16.4.4) points the negotiators in the direction of the formula that is used for financing the Yukon territorial government. Some of the financing of First Nation governments would inevitably come out of existing transfers to the Yukon territorial government in recognition that services had been shifted from the Yukon to the First Nation. But the selfgovernment agreements, by paragraph 18.1, provide that a decrease in federal funding to the Yukon must not be so severe as to cause any reduction in the level or quality of Yukon services to non-Aboriginal Yukon residents.

The Yukon First Nation self-government agreements make provision (by paragraph 24) for a failure to agree upon the terms of the self-government financial transfer agreement. In that event, either party may refer the matter to a mediation process that is provided for in the land claims agreement; if mediation fails, then the matter can be referred by the parties to an arbitration process that is also provided for in the land claims agreement.

While jurisdictional issues must be settled in a self-government agreement, it is only the adequate financing of self-government that guarantees that an Aboriginal government will become operational. The Yukon model suggests one route, and certainly a combination of taxing powers and transfer payments is required to implement fully the inherent right of self-government.

## STATUS OF SELF-GOVERNMENT AGREEMENTS

### *Protection from Unilateral Alteration*

The Charlottetown Accord contemplated (in clause 46) that self-government agreements would create treaty rights that would be constitutionally protected by section 35(1) of the *Constitution Act, 1982*. Through section 35(1), as well as the express recognition of the inherent right, Aboriginal self-government would have been a constitutionally protected order of government within the Canadian federation. The failure of the Charlottetown Accord means that these provisions are not in the Constitution. Under the present Constitution, without the Charlottetown amendments, what is the status of self-government agreements?

A self-government agreement that was part of a land claims agreement would, of course, be constitutionally protected under section 35. A self-government agreement that was not part of a land claims agreement would, at least if it contained no language to the contrary, be a modern treaty, which would also be constitutionally protected under section 35. It is clear that "an exchange of solemn promises" is a treaty, even if no cession of land is involved.<sup>xxxviii</sup> It is also clear from subsection (3) of section 35 that the section applies to post-1982 treaties; the reference in subsection (3) to "land claims agreements" would not exclude other kinds of modern treaties. It follows that a self-government agreement would create treaty rights that would be constitutionally protected by section 35. This would mean that an attempt by the Parliament of Canada or a provincial (or territorial) legislature to alter the terms of a self-government agreement, without the consent of the affected First Nation, would be struck down by the courts.

The present policy of the government of Canada is to deny treaty status to self-government agreements. This policy is inconsistent with an effective transition to self-government and needs to be reconsidered. The Yukon First Nation final agreements provide that the self-government agreements are not to be regarded as creating treaty rights that are protected by section 35. The federal government's policy predates the Charlottetown Accord and reflects a hope that the constitutional status of Aboriginal self-government could be dealt with in a comprehensive constitutional amendment. The failure of the Charlottetown Accord removes the reason for the government's policy and will, we would hope, lead to a reversal of the policy; but this has not yet happened, and the policy remains in place. The policy of denying treaty status to selfgovernment agreements has been implemented by a clause in selfgovernment agreements (or, as in the Yukon case, in a land claims agreement that includes or contemplates a self-government

agreement) under which the federal government and the First Nation concerned agree that the self-government agreement is not to create treaty rights within the meaning of section 35. This kind of clause is considered effective in denying such agreements treaty status under section 35 of the *Constitution Act, 1982*.

A self-government agreement that has, by express agreement, been denied the status of a treaty may nevertheless be constitutionally protected. This is because section 35 protects Aboriginal as well as treaty rights, and the inherent right of self-government is an Aboriginal right. The self-government agreements can be regarded as giving form and structure to the Aboriginal right of self-government. The agreements do not create the right, which is inherent. The agreements are necessary, because in the twentieth century Aboriginal governments have to co-exist with federal and provincial (or territorial) governments; the agreements settle, among other things, mutually acceptable rules to govern the relationship between the three orders of government. It is still the case, however, that when a First Nation passes laws and exercises other powers of self-government it is exercising an inherent power of self-government that is protected by section 35. If this is so, then any attempt by the Parliament of Canada or a provincial (or territorial) legislature to change the terms of a self-government agreement without the consent of the affected First Nation would be struck down by the courts.

Our conclusion is that a self-government agreement that has, by express agreement, been denied the status of a treaty may still be constitutionally protected under section 35 of the *Constitution Act, 1982* as an expression of Aboriginal rights. In our opinion, this is another reason why the federal government should reconsider its policy of denying treaty status to self-government agreements. There is no point in denying treaty status to the agreements if the right of self-government, as elaborated by the agreements, is constitutionally protected anyway. Of course, as mentioned earlier, the understandable federal preference for a general constitutional amendment respecting self-government, which seemed to have been achieved at Charlottetown, is probably now beyond reach. In the absence of any realistic prospect of a general constitutional amendment, the best course is to accord treaty status to self-government agreements. That provides the Aboriginal order of government with secure constitutional protection under section 35. This would mean that changes in a self-government agreement could not be made by the unilateral action of Parliament<sup>xxxix</sup> but would have to be made by the amending procedures set out in the agreement, which would obviously involve the consent of the First Nation.

### *Application to Third Parties*

Where Aboriginal self-government enjoys the constitutional protection of section 35, either because it is based on a treaty, or because it is an exercise of an Aboriginal right, it is still desirable that legislation be enacted, certainly by the Parliament of Canada, and perhaps by the provincial (or territorial) legislature as well, to implement the underlying self-government agreement. (This is also true of land claims agreements.<sup>xi</sup>) The point of legislation is to make certain that the self-government agreement (and therefore all the powers of Aboriginal self-government) is binding on third parties. In the absence of legislation, non-Aboriginal persons or corporations to which an Aboriginal law was applied might be successful in arguing that they were not bound by the Aboriginal law, because they were not a party to the agreement that defined the scope of the Aboriginal government's power to make the law. The enactment of a statute precludes this line of argument, because a statute is obviously binding on non-Aboriginal and (subject to section 35) Aboriginal people alike.<sup>xii</sup>

### **LIMITATIONS ON ABORIGINAL GOVERNMENTS**

Like other modern governments, Aboriginal governments are subject to a variety of limitations. The limits are external and internal. In the external category are the *Canadian Charter of Rights and Freedoms* and international human rights standards. In the internal category are limitations imposed by Aboriginal peoples' own constitutions and laws, which must provide for checks and balances on Aboriginal governments and would include financial control and accountability procedures and standards for conflicts of interests and ethics of public officials. While these kinds of internal procedures may be 'foreign' in a sense to Aboriginal cultures and traditions, the values of public duty and responsibility are integral to good government, especially in a period of transition away from the *Indian Act*. In a contemporary government context, measures to deal with financial accountability and conflicts of interest are cornerstones of responsible and accountable government.<sup>xiii</sup>

### *Canadian Charter of Rights and Freedoms*

Aboriginal leaders, and particularly the First Nations leadership, have expressed reservations about the application of the Charter to Aboriginal governments. The reasons for their

reservations are twofold. First is the fact that the Charter was developed without the involvement or consent of Aboriginal peoples and does not accord with Aboriginal culture, values and traditions. Second, the Charter calls for an adversarial approach to resolving conflicts of rights before Canadian courts, and there is a concern that this litigation model of human rights dispute resolution would undermine Aboriginal approaches to conflict resolution that are just now being revived. On the other side of the issue, certain Aboriginal women's organizations, such as the Native Women's Association of Canada, have insisted that the Charter must apply to all Aboriginal governments to ensure that human rights standards are respected.

While a dialogue continues on the application of the Charter, many Aboriginal people see the application of the Charter as simply inappropriate, because it does not reflect Aboriginal values or approaches to resolving disputes. This is not to say that Aboriginal peoples have no concern about individual rights and individual security under Aboriginal governments. The concern rests more with the Charter's elevation of the guaranteed legal rights over unguaranteed social and economic rights, the emphasis on rights rather than responsibilities, the failure to emphasize collective rights, and the litigation model of enforcement. These are among the features of the Charter that are alien to many Aboriginal communities. The solution might be, as we describe below, the development of an Aboriginal charter (or charters) of rights that could exist alongside the Canadian Charter.

### *Section 32*

The extent to which Aboriginal self-government is constrained by the Charter is not entirely clear. Section 32 of the Charter provides that the Charter applies to "the Parliament and government of Canada" and "the legislature and government of each province". The Supreme Court of Canada has held that this is an exhaustive statement of the bodies that are bound by the Charter.<sup>xliii</sup> Section 32 does not contemplate the existence of an Aboriginal order of government. That is why the Charlottetown Accord draft legal text (by clause 27) proposed the amendment of section 32 to make it include an express statement that the Charter also applies to "all legislative bodies and governments of the Aboriginal peoples of Canada".

Despite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the Charter.<sup>xliv</sup> This would certainly be the result where self-government institutions have been created or empowered by statute, because

the Charter applies to all bodies exercising statutory powers.<sup>xliv</sup> 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, however, as noted earlier, the self-government agreement needs 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.

### *Section 25*

Assuming that the Charter is applicable to Aboriginal governments, it is necessary to consider the effect of section 25 of the Charter. Section 25 provides that the Charter is not to 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". The main purpose of section 25 is to make clear that the prohibition of racial discrimination in section 15 of the Charter is not to be interpreted as abrogating Aboriginal or treaty rights possessed by a class of people defined by culture or race. In other words, it is designed as a shield to guard against diminishing Aboriginal and treaty rights in situations where non-Aboriginal people might challenge the special status and rights of Aboriginal peoples as contrary to equality guarantees. However, because Aboriginal governments were not contemplated by the drafters of the Charter, it is not clear to what extent section 25 might be interpreted to exempt the exercise of Aboriginal self-government from the Charter.

In our opinion, it is unlikely that a court would regard section 25 as giving Aboriginal governments blanket immunity from the Charter, even though the governments were exercising powers of self-government derived from a treaty or from an Aboriginal right (the inherent right). However, it is likely that some actions of Aboriginal governments would be exempt from the Charter by virtue of section 25 and that the Charter would be interpreted in a manner deferential to and consistent with Aboriginal culture and traditions. Immunity from Charter application might occur, for example, where an Aboriginal government had taken measures to implement or self-regulate Aboriginal or treaty rights of harvesting, hunting, and fishing or the management of Aboriginal lands and resources. In that case, the Aboriginal government is invoking not only a



right of governance, but also another Aboriginal or treaty right.

Interpretations of the Charter that are consistent with Aboriginal cultures and traditions would likely be found when the court is faced with a situation where different standards apply and the difference is integral to culturally-based policy within an Aboriginal community. For example, if an Aboriginal juvenile justice system were created in which legal counsel was not provided to an accused person, would this be considered unconstitutional as denying a legal right to an accused person? If the juvenile justice system reflected Aboriginal culture and traditions, section 25 would shield such practices from attack based on the values expressed in the legal rights provisions of the Charter. In other words, the legal rights provisions would be given a new interpretation in light of Aboriginal culture and traditions.

The important point here is that the application of the Charter, when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style of government of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws that are different, for legitimate cultural reasons, and have these reasons considered relevant should such differences invite judicial review under the Charter. Section 25 would allow Aboriginal governments to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices.

### *Aboriginal Charters of Rights*

The uncertainties just described in the application of the Charter to Aboriginal governments would be diminished by the development of Aboriginal charters of rights. Because of the cultural differences of Aboriginal communities and the need to break out of the tradition of imposed legal norms and instruments, restrictions on the powers of Aboriginal governments should be defined by Aboriginal peoples themselves. There has been some discussion among Aboriginal people of the development of Aboriginal charters of rights that would either displace the Canadian Charter or exist alongside the Canadian Charter in its application to Aboriginal governments.

It is only realistic to recognize that a single Aboriginal charter would be very difficult to develop, given the diversity of Aboriginal peoples. A number of Aboriginal charters is more likely than a single one. Nor should we forget the difficulty (or perhaps impossibility) of securing the amendment of the Constitution of Canada that would be required to displace the Canadian Charter. These realities lead us to recommend that each First Nation, Métis and Inuit

group should develop its own human rights provisions as part of its own constitution. Such provisions would afford protection for those human rights that each community regarded as paramount and could also provide for procedures to reconcile human rights disputes when they arise. In the absence of a constitutional amendment, these provisions could not completely displace the Canadian Charter, but they would not be ignored by the courts, which would then be more likely (invoking section 25) to respect laws and decisions that had been made by an Aboriginal government within the framework of its constitution.

## CONCLUSION

Co-operation, imagination and political will are needed in order progress in the achievement of Aboriginal self-government. But in our opinion, there are very few significant constitutional impediments to the achievement of Aboriginal self-government in Canadian constitutional law. Section 35 of the Constitution Act, 1982 provides the base upon which Aboriginal peoples and governments can construct selfgovernment agreements and invest the agreements with constitutional status.

There are many important inducements to proceed with implementing Aboriginal self-government in Canada. Legally, the litigation of matters of self-government is very open-ended, and the outcomes are unpredictable. The issues are complex, and legal proceedings are lengthy and costly.<sup>xlvi</sup> Moreover, the outcome of litigation is usually more negotiation, as courts have never imposed an agreement on the parties and perhaps could not because of the nature of third-party interests in some of the litigation. It is clearly in the best interests of all parties to come to a negotiation table where an agreement can be reached based on reasoning broader than that permitted by legal doctrine and constitutional remedies. Such an agreement provides the certainty that is so conspicuously lacking in the general law of Aboriginal rights. The achievement of self-government agreements requires significant change in government policy and new priorities directed at rebuilding relationships between the federal government and Aboriginal peoples, as well as with provincial and territorial governments.<sup>xlvi</sup>

Many specific Aboriginal policies need to be reconsidered by government to facilitate a successful negotiation process. Some policies that were part of government approaches to Aboriginal peoples before the Charlottetown Accord need to be evaluated and abandoned in favour of approaches more consistent with the commitment to implement an inherent right of

self-government. The Yukon example, while it may not be useful for all Aboriginal peoples, is worth evaluating carefully not only in terms of its creative approaches to jurisdiction and financing but also in terms of problems like the absence of treaty protection of rights in the agreements.

Our conclusions regarding implementation of the inherent right of self-government can be summarized as follows:

1. The defeat of the Charlottetown Accord should not be permitted to halt movement toward implementing Aboriginal selfgovernment. Indeed, the remarkable consensus at Charlottetown on the nature of the inherent right and the process to invigorate it should encourage the movement to self-government.
2. Many of the terms of the Charlottetown Accord, and certainly the recognition of the inherent right and the contextual statement, could be included in a political accord between governments and Aboriginal organizations that could form the framework for specific self-government negotiations. This framework could be comprehensive for all Aboriginal peoples or it could involve separate frameworks for Treaty First Nations and non-treaty Aboriginal peoples.
3. Self-government should be implemented by self-government agreements between governments and First Nations. Agreements will avoid the need for unilateral initiatives by Aboriginal peoples, which would be bound to lead to disputes and litigation with unpredictable outcomes.
4. Self-government agreements should include agreed-upon lists of the powers that are suitable and required for governance for the particular Aboriginal people. Some powers may be exclusive and others concurrent. Some powers may be based on a personal jurisdiction over a particular Aboriginal people; others may be based on a territorial jurisdiction over the Aboriginal people's territory. Emergency jurisdiction may also be needed.
5. Self-government agreements must include transitional provisions for the application of laws of general application during the start-up period before an Aboriginal people has enacted the laws and assumed the responsibilities that are contemplated by its agreement.
6. Self-government agreements must include provisions to resolve inconsistencies between the laws of an Aboriginal people and laws of general application. These

provisions would stipulate what kinds of laws took priority in a situation of conflict.

7. Self-government agreements may include provisions for coordination between the policies of an Aboriginal people and those of the federal or provincial (or territorial) government in fields of concurrent jurisdiction. The administration of justice and taxation are two of the areas where a sharing of resources and agreement on common policies are likely to be advantageous to Aboriginal peoples.

8. Self-government agreements should confer jurisdiction on the courts to settle questions of law arising from the interpretation or administration of the agreements. Agreements, including a framework agreement, should establish alternative dispute resolution procedures for resolving disputes on issues of process and implementation of the right of self-government.

9. Self-government agreements must make secure provision for the financing of self-government by taxation and transfers from other orders of government.

10. Self-government agreements should be constitutionally protected so that they are not vulnerable to alteration by unilateral action by Parliament or a provincial legislature. This does not require an amendment to the Constitution, because a self-government agreement can be a modern treaty within the protection of section 35 of the *Constitution Act, 1982*. The federal government's policy of denying treaty status to self-government agreements should now be reversed.

11. Self-government agreements, even if constitutionally protected, should still be implemented by federal and perhaps provincial (or territorial) legislation to make sure that the terms of the agreements are binding on third parties that were not parties to the agreement.

12. The *Canadian Charter of Rights and Freedoms* probably applies to Aboriginal governments, but would probably be interpreted as permitting Aboriginal peoples to pursue culturally-based policies that are respectful of individual rights but that differ from the practices of federal or provincial governments.

13. All Aboriginal peoples will have to adopt constitutions setting up the institutions that will exercise the powers of self-government. Those constitutions could include a charter of rights that was considered to be appropriate to the values and aspirations of the particular Aboriginal people. Any such Aboriginal charter would need the support of the

Aboriginal people, and it could be interpreted alongside the Canadian Charter, although it would not replace the *Canadian Charter of Rights and Freedoms*.

## NOTES

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**APPENDIX 1**  
**EXAMPLE FROM YUKON SELF-GOVERNMENT AGREEMENTS:**  
**THE TESLIN TLINGIT COUNCIL SELF-GOVERNMENT AGREEMENT**

**PART III**  
**TESLIN TLINGIT COUNCIL LEGISLATION**

**13.0 Legislative Powers**

13.1 The Teslin Tlingit Council shall have the exclusive power to enact laws in relation to the following matters:

13.1.1 administration of Teslin Tlingit Council affairs and operation and internal management of the Teslin Tlingit Council;

13.1.2 management and administration of rights or benefits which are realized pursuant to the Final Agreement by persons enrolled under the Final Agreement, and which are to be controlled by the Teslin Tlingit Council; and

13.1.3 matters ancillary to the foregoing.

**13.2** The Teslin Tlingit Council shall have the power to enact laws in relation to the following matters in the Yukon:

13.2.1 provision of programs and services for Citizens in relation to their spiritual and cultural beliefs and practices;

13.2.2 provision of programs and services for Citizens in relation to their aboriginal languages;

13.2.3 provision of health care and services to Citizens, except licensing and regulation of facility-based services off Settlement Land;

13.2.4 provision of social and welfare services to Citizens, except licensing and regulation of facility-based services off Settlement Land;

13.2.5 provision of training programs for Citizens, subject to Government certification requirements where applicable;

13.2.6 adoption by and of Citizens;

13.2.7 guardianship, custody, care and placement of Teslin Tlingit children, except licensing and regulation of facility-based services off Settlement Land;

13.2.8 provision of education programs and services for Citizens choosing to participate, except licensing and regulation of facility-based services off Settlement Land;

13.2.9 inheritance, wills, intestacy and administration of estates of Citizens, including rights and interests in Settlement Land;

13.2.10 procedures consistent with the principles of natural justice for determining the mental competency or ability of Citizens, including administration of the rights and interests of those found incapable of responsibility for their own affairs;

13.2.11 provision of services to Citizens for resolution of disputes outside the courts;

13.2.12 solemnization of marriage of Citizens;

13.2.13 licences in respect of matters enumerated in 13.1, 13.2 and 13.3 in order to raise revenue for Teslin Tlingit Council purposes;

13.2.14 matters necessary to enable the Teslin Tlingit Council to fulfil its responsibilities under the Final Agreement or this Agreement; and

13.2.15 matters ancillary to the foregoing.

**13.3** The Teslin Tlingit Council shall have the power to enact laws of a local or private nature on Settlement Land in relation to the following matters:

13.3.1 use, management, administration, control and protection of Settlement Land;

13.3.2 allocation or disposition of rights and interests in and to Settlement Land, including expropriation by the Teslin Tlingit Council for Teslin Tlingit Council purposes;

13.3.3 use, management, administration and protection of natural resources under the ownership, control or jurisdiction of the Teslin Tlingit Council;

13.3.4 gathering, hunting, trapping or fishing and the protection of fish, wildlife and habitat;

13.3.5 control or prohibition of the erection and placement of posters, advertising signs, and billboards;

13.3.6 and regulation of any person or entity carrying on any business, trade, profession, or other occupation;

13.3.7 control or prohibition of public games, sports, races, athletic contests and other amusements;

13.3.8 control of the construction, maintenance, repair and demolition of buildings or other structures;



- 13.3.9 prevention of overcrowding of residences or other buildings or structures;
- 13.3.10 control of the sanitary condition of buildings or property;
- 13.3.11 planning, zoning and land development;
- 13.3.12 curfews, prevention of disorderly conduct and control or prohibition of nuisances;
- 13.3.13 control or prohibition of the operation and use of vehicles;
- 13.3.14 control or prohibition of the transport, sale, exchange, manufacture, supply, possession or consumption of intoxicants;
- 13.3.15 establishment, maintenance, provision, operation or regulation of local services and facilities;
- 13.3.16 caring and keeping of livestock, poultry, pets and other birds and animals, and impoundment and disposal of any bird or animal maltreated or improperly at-large, but the caring and keeping of livestock does not include game farming or game ranching;
- 13.3.17 administration of justice;
- 13.3.18 control or prohibition of any actions, activities or undertakings that constitute or may constitute, a threat to public order, peace or safety;
- 13.3.19 control or prohibition of any activities, conditions or undertakings that constitute, or may constitute, a danger to public health;
- 13.3.20 control or prevention of pollution and protection of the environment;
- 13.3.21 control or prohibition of the possession or use of firearms, other weapons and explosives;
- 13.3.22 control or prohibition of the transport of dangerous substances; and
- 13.3.23 matters coming within the good government of Citizens on Settlement Land.

#### **13.4 Emergency Powers**

- 13.4.1 Off Settlement Land, in relation to those matters enumerated in 13.2, in any situation that poses an Emergency to a Citizen, Government may exercise power conferred by Laws of General Application to relieve the Emergency, notwithstanding that laws enacted by the Teslin Tlingit Council may apply to the Emergency.
- 13.4.2 A person acting pursuant to 13.4.1 shall, as soon as practicable after determining that a person in an Emergency is a Citizen, notify the Teslin Tlingit Council of the action taken and transfer the matter to the responsible Teslin Tlingit Council authority, at which

time the authority of the Government to act pursuant to 13.4.1 shall cease.

13.4.3 A person acting pursuant to 13.4.1 is not liable for any act done in good faith in the reasonable belief that the act was necessary to relieve an Emergency.

13.4.4 On Settlement Land, in relation to those matters enumerated in 13.2, in any situation that poses an Emergency to a person who is not a Citizen, the Teslin Tlingit Council may exercise power conferred by laws enacted by the Teslin Tlingit Council to relieve the Emergency, notwithstanding that Laws of General Application may apply to the Emergency.

13.4.5 A person acting pursuant to 13.4.4 shall, as soon as practicable after determining that a person in an Emergency is not a Citizen, notify Government or, where the person in an Emergency is a citizen of another Yukon First Nation, that Yukon First Nation, of the action taken and transfer the matter to the responsible authority, at which time the authority of the Teslin Tlingit Council to act pursuant to 13.4.4 shall cease.

13.4.6 A person acting pursuant to 13.4.4 is not liable for any act done in good faith in the reasonable belief that the act was necessary to relieve an Emergency.

13.4.7 Notwithstanding 13.5.0, in relation to powers enumerated in 13.3, Laws of General Application shall apply with respect to an Emergency arising on Settlement Land which has or is likely to have an effect off Settlement Land.

## **13.5 Laws of General Application**

13.5.1 Unless otherwise provided in this Agreement, all Laws of General Application shall continue to apply to the Teslin Tlingit Council, its Citizens and Settlement Land.

13.5.2 Canada and the Teslin Tlingit Council shall enter into negotiations with a view to concluding, as soon as practicable, a separate agreement or an amendment of this Agreement which will identify the areas in which laws of the Teslin Tlingit Council shall prevail over federal Laws of General Application to the extent of any inconsistency or conflict.

13.5.2.1 Canada shall Consult with the Yukon prior to concluding the negotiations described in 13.5.2.

13.5.2.2 Clause 13.5.2 shall not affect the status of the Yukon as a party to the negotiations or agreements referred to in 13.6.0 or 17.0.

13.5.3 Except as provided in 14.0, a Yukon Law of General Application shall be inoperative to the extent that it provides for any matter for which provision is made in a law enacted by the Teslin Tlingit Council.

13.5.4 Where the Yukon reasonably foresees that a Yukon Law of General Application which it intends to enact may have an impact on a law enacted by the Teslin Tlingit Council, the Yukon shall Consult with the Teslin Tlingit Council before introducing the Legislation in the Legislative Assembly.

13.5.5 Where the Teslin Tlingit Council reasonably foresees that a law which it intends to enact may have an impact on a Yukon Law of General Application, the Teslin Tlingit Council shall Consult with the Yukon before enacting the law.

13.5.6 Where the Commissioner in Executive Council is of the opinion that a law enacted by the Teslin Tlingit Council has rendered a Yukon Law of General Application partially inoperative and that it would unreasonably alter the character of a Yukon Law of General Application or that it would make it unduly difficult to administer that Yukon Law of General Application in relation to the Teslin Tlingit Council, Citizens or Settlement Land, the Commissioner in Executive Council may declare that the Yukon Law of General Application ceases to apply in whole or in part to the Teslin Tlingit Council, Citizens or Settlement Land.

13.5.7 Prior to making a declaration pursuant to 13.5.6, the Yukon shall:

13.5.7.1 Consult with the Teslin Tlingit Council and identify solutions, including any amendments to Yukon Legislation, that the Yukon considers would meet the objectives of the Teslin Tlingit Council; and

13.5.7.2 after Consultation pursuant to 13.5.7.1, where the Yukon and the Teslin Tlingit Council agree that the Yukon Law of General Application should be amended, the Yukon shall propose such amendment to the Legislative Assembly within a reasonable period of time.

## **13.6 Administration of Justice**

13.6.1 The Parties shall enter into negotiations with a view to concluding an agreement in respect of the administration of Teslin Tlingit Council justice provided for in 13.3.17.

13.6.2 Negotiations respecting the administration of justice shall deal with such matters as adjudication, civil remedies, punitive sanctions including fine, penalty and imprisonment for enforcing any law of the Teslin Tlingit Council, prosecution, corrections, law enforcement, the relation of any Teslin Tlingit Council courts to other courts and any other matter related to aboriginal justice to which the Parties agree.

13.6.3 Notwithstanding anything in this Agreement, the Teslin Tlingit Council shall not exercise its power pursuant to 13.3.17 until the expiry of the time described in 13.6.6, unless an agreement is reached by the Parties pursuant to 13.6.1 and 13.6.2.

13.6.4 Until the expiry of the time described in 13.6.6 or an agreement is entered into pursuant to 13.6.1 and 13.6.2:

13.6.4.1 the Teslin Tlingit Council shall have the power to establish penalties of fines up to \$5,000 and imprisonment to a maximum of six months for the violation of a law enacted by the Teslin Tlingit Council;

13.6.4.2 the Supreme Court of the Yukon Territory, the Territorial Court of Yukon, and the Justice of the Peace Court shall have jurisdiction throughout the Yukon to adjudicate in respect of laws enacted by the Teslin Tlingit Council in accordance with the jurisdiction designated to those courts by Yukon Law except that any

offence created under a law enacted by the Teslin Tlingit Council shall be within the exclusive original jurisdiction of the Territorial Court of the Yukon;

13.6.4.3 any offence created under a law enacted by the Teslin Tlingit Council shall be prosecuted as an offence against an enactment pursuant to the Summary Convictions Act, R.S.Y. 1986, c. 164 by prosecutors appointed by the Yukon; and

13.6.4.4 any term of imprisonment ordered by the Territorial Court of the Yukon pursuant to 13.6.4.1 shall be served in a correctional facility pursuant to the *Corrections Act*, R.S.Y., 1986, c. 36.

13.6.5 Nothing in 13.6.4 is intended to preclude:

13.6.5.1 consensual or existing customary practices of the Teslin Tlingit Council with respect to the administration of justice; or

13.6.5.2 programs and practices in respect of the administration of justice, including alternate sentencing or other appropriate remedies, to which the Parties agree before an agreement is concluded pursuant to 13.6.1 and 13.6.2.

13.6.6 The provisions in 13.6.4 are interim provisions and shall expire five years from the Effective Date or on the effective date of the agreement concluded pursuant to 13.6.1 and 13.6.2, whichever is earlier. If the Parties fail to reach an agreement pursuant to 13.6.1 and 13.6.2 during the five year period then the interim provisions shall extend for a further term ending December 31, 1999.

13.6.7 All new and incremental costs of implementing the interim provisions in 13.6.4 incurred by the Yukon shall be paid by Canada in accordance with guidelines to be negotiated by the Yukon and Canada.

## NOTES

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<sup>i</sup>In this paper we use the term 'Aboriginal peoples' to refer to First Nations (Indian), Inuit and Métis peoples collectively. When reference is made to particular negotiations or agreements, the more specific terminology is used.

<sup>ii</sup>Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Services, 1993).

<sup>iii</sup>Statement of Liberal leader Jean Chrétien in Saskatoon, Saskatchewan, 8 October 1993, when he unveiled the Aboriginal platform of the Liberal Party of Canada. The Liberal Party platform, usually referred to as the Red Book (Liberal Party of Canada, "Creating Opportunity: The Liberal Plan for Canada" (1993), p. 2), contains several critical policy commitments, including a commitment that "The Liberal government will act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right within the meaning of section 35 of the *Constitution Act, 1982*".

<sup>iv</sup>For example, we do not consider arguments rooted in Aboriginal peoples' nation-to-nation relationship with the Crown or Aboriginal law and spirituality or the international legal arguments on self-determination.

<sup>v</sup>*Consensus Report on the Constitution of August 28, 1992* (Ottawa: Minister of Supply and Services, 1992), p. 12 [referred to hereafter as Consensus Report].

<sup>vi</sup>*R. v. Sparrow* [1990] 1 S.C.R. 1075. In this case, Dickson C.J. and La Forest J., writing for a unanimous Supreme Court of Canada, expressly recognized the right of a member of the Musqueam Indian band to fish for salmon in the Fraser River "where his ancestors had fished from time immemorial".

<sup>vii</sup>Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *Queen's Law Journal* 8 (1983), p. 242. See also Slattery, "Understanding Aboriginal Rights" *Can. Bar Rev.* 66 (1987), p. 314.

<sup>viii</sup>The issues are not suitable for resolution by courts because only political discussions can adequately address matters of jurisdiction, financing and intergovernmental co-operation. Legal reasoning in the constitutional context is not broad enough to embrace all of these dimensions.

<sup>ix</sup>In our view, comprehensive constitutional amendments on Aboriginal self-government would be the preferred approach because they would assist in clarifying the status and nature of Aboriginal governments in light of the already defined federal and provincial jurisdictional structure of the Canadian federation. Moreover, comprehensive constitutional amendments would ensure that Aboriginal government jurisdiction not be 'inferior' in status to the existing two orders of government, which already have a secure constitutional footing with established rules for the resolution of jurisdictional conflicts. This is not to say that the courts would not support exclusive Aboriginal jurisdiction over certain subject matters without constitutional reforms, but that comprehensive amendments would save resources on litigation and acrimonious jurisdictional conflicts.

<sup>x</sup>Consensus Report, p. 12.

<sup>xi</sup>The Accord included provisions allowing for Aboriginal peoples who already have treaties with the Crown to elect a treaty review/renovation process as a vehicle for implementing their inherent right of self-government.

<sup>xii</sup>This principle was articulated in *A.G. Ont. v. A.G. Can.* (Reference Appeal) [1912] A.C. 571, 583, in which the Judicial Committee of the Privy Council said that "whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act".

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<sup>xiii</sup>*Partners in Confederation*, cited in note 2, p. 32.

<sup>xiv</sup>The expression "each within its own jurisdiction" was added to make it clear that an Aboriginal government will exercise its authority within its jurisdiction. In our opinion, this is redundant and could be eliminated without taking away from the meaning of the statement.

<sup>xv</sup>Consensus Report, p. 17.

<sup>xvi</sup>Testimony from Alex Christmas, President, Union of Nova Scotia Indians, to the Royal Commission on Aboriginal Peoples, 6 May 1993, Eskasoni, Nova Scotia.

<sup>xvii</sup>Consensus Report, p. 13.

<sup>xviii</sup>The contextual statement does not impose a certain political structure. This is an internal matter for Aboriginal peoples to determine and, once agreed upon internally, to demonstrate community support for the institutions and structures of government.

<sup>xix</sup>We do not mean to suggest that Aboriginal governments must wait for the conclusion of agreements in order to exercise jurisdiction. The Royal Commission on Aboriginal Peoples has already accepted this point in *Partners in Confederation* (cited in note 2, p. 36) where it was recognized that Aboriginal peoples could move immediately in areas of core jurisdiction without negotiated agreements. We do not doubt that this is the case as a matter of constitutional law. However, the path of negotiation is the path of social peace as well as the path that will not divert resources to the courts over abstract and complex legal battles.

<sup>xx</sup>For example, Treaty 6 requires the chiefs to maintain peace and order among their people and in the dealings of their people with non-Indians. To implement this agreement one would imagine that jurisdiction over the administration of justice would be required.

<sup>xxi</sup>There are four self-government agreements: The Champagne and Aishihik First Nations Self-Government Agreement; the First Nation of Nacho Nyak Dun Self-Government Agreement; the Teslin Tlingit Council Self-Government Agreement and the Vuntut Gwichin Self-Government Agreement. All four agreements were signed in Whitehorse on 29 May 1993, and all four have been published by Supply and Services Canada, under the authority of the Minister of Indian Affairs and Northern Development, under these titles.

<sup>xxii</sup>Another example of a self-government agreement is the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27. The Sechelt model was path-breaking, but it was developed in the pre-Charlottetown era, so that its suitability in the post-Charlottetown era is questionable, and we note that many Aboriginal peoples have stated expressly that they do not want the Sechelt model.

<sup>xxiii</sup>The Umbrella Final Agreement between the government of Canada, the Council for Yukon Indians and the government of the Yukon was signed in Whitehorse on 29 May 1993. It was published by Supply and Services Canada under the authority of the Minister of Indian Affairs and Northern Development.

<sup>xxiv</sup>*Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; *First Nations (Yukon) Self-Government Act*, S.Y. 1993, c. xx; settlement legislation (to give effect to the land claims) was enacted at the same time: *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34; *Yukon Land Claim Final Agreements Act*, S.Y. 1993, c. xx.

<sup>xxv</sup>The fact that both land claims and self-government agreements were concluded in the Yukon suggests that the resolution of land issues is closely connected to progress on self-government jurisdiction. This is important to remember when applying the Yukon model to other contexts.

<sup>xxvi</sup>The jurisdictional provisions are reproduced in Appendix 1.

<sup>xxvii</sup>*Construction Montcalm v. Minimum Wage Commission* [1979] 1 S.C.R. 754.

<sup>xxviii</sup>See A. Bissonnette, "Analyse posthume d'un accord mis à mort", *Recherches Amérindiennes au Québec* 80 (1993), pp. 83-84.

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<sup>xxix</sup>For a more complete analysis of the existing peace, order and good government provision, see P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (1992), chapter 17.

<sup>xxx</sup>The *Sechelt Indian Band Self-Government Act*, cited in note 22, provides, by sections 37 and 38, that federal and provincial laws of general application apply to the band, its members and Sechelt lands. In the case of provincial laws, however, the laws of the band take priority. Thus, in the event of inconsistency between a provincial law and a band law, the band law is paramount. However, in the event of inconsistency between a federal law and a band law, the federal law is paramount. The Sechelt Act is silent on the definition of inconsistency, so that the narrow express contradiction test would probably apply.

<sup>xxxi</sup>See Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System—Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993).

<sup>xxxii</sup>The Yukon agreements do not recognize First Nations' jurisdiction over 'criminal law', which is now reserved exclusively to the federal government. Some First Nations may want at least concurrent jurisdiction over criminal law making, as well as the administration of justice, which now rests with provincial governments.

<sup>xxxiii</sup>Indeed, current litigation — such as *Delgamuukw v. Attorney General of British Columbia* (1993) 104 D.L.R. (4th) 470 (B.C.C.A.), which involved more than 350 trial days, thousands of exhibits, and several months of appeal hearings — makes it clear that the burden placed on the courts to deal with these claims within conventional law is unworkable. The Court of Appeal in *Delgamuukw* expressed a very strong preference for political resolution of Aboriginal disputes. The Supreme Court of Canada, which has granted leave to appeal, has given the parties an 18-month delay in order to encourage them to reach a negotiated agreement.

<sup>xxxiv</sup>See M.E. Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Interpretive Monopolies, Cultural Differences", *C.H.R.Yb.* 6 (1989-90), p. 3.

<sup>xxxv</sup>An appropriate dispute resolution process would need to be a product of agreement and would need to reflect Aboriginal culture and ensure Aboriginal representation.

<sup>xxxvi</sup>*Constitution Act, 1867*, ss. 91(3), 92(2).

<sup>xxxvii</sup>Under section 87 of the *Indian Act*, there is an exemption from federal and provincial taxes for "the personal property of an Indian or band situated on a reserve". Section 87 has been held to provide an exemption from sales taxes and income taxes for status Indians. The exemption is confined to reserves, and this has led to legal decisions attempting to define the nature of the connection with a reserve that is needed to qualify for the exemption. Section 87 applies only to federal and provincial (or territorial) taxes and would not preclude a First Nation from levying taxes on status Indians on reserves.

The four Yukon First Nations that have concluded land claims agreements have decided to give up the section 87 exemption (Council for Yukon Indians, *Umbrella Final Agreement*, 1993, clause 20.6) in return for a capital sum that constitutes compensation for the loss of the exemption. The buy-out of the exemption is delayed for three years to give the First Nation time to get ready for the introduction of taxes.

Section 87 provides a tax exemption for an *Indian Act* band, as well as for individuals. It goes without saying that, under self-government, the First Nation itself and its corporations should continue to be exempt from federal and provincial taxes. This is provided for in the *Sechelt Indian Band Self-Government Act*, cited in note 22, section 35, and in the Yukon First Nation self-government agreements, paragraph 15.0.

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<sup>xxxviii</sup>*Simon v. The Queen* [1985] 2 S.C.R. 1025, 1043.

<sup>xxxix</sup>Without constitutional protection, an intergovernmental agreement can be altered unilaterally by the federal Parliament: *Re Canada Assistance Plan* [1991] 2 S.C.R. 525.

<sup>xl</sup>Andrew R. Thompson, "Land Claim Settlements in Northern Canada", *Sask. L. Rev.* 55 (1991), p. 127.

<sup>xli</sup>The Yukon First Nation self-government agreements (as well as the Yukon land claims agreements) have been implemented by federal and territorial legislation, cited in note 24.

<sup>xlii</sup>It is worth noting that in the United States many tribes have laws and procedures for addressing alleged conflicts of interests on the part of public office holders. The Navajo Nation has an Office of Conflicts and Ethics in Government that hears complaints by members of the tribe and provides direct redress for violation of the Navajo Code of Ethics.

<sup>xliii</sup>*RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 573.

<sup>xliv</sup>Kent McNeil Contra, "Aboriginal Government and the Canadian Charter of Rights and Freedoms: A Legal Perspective", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994).

<sup>xlv</sup>Hogg, *Constitutional Law of Canada*, cited in note 29, section 34.2(b).

<sup>xlvi</sup>The *Delgamuukw* litigation, described in note 33, is a case in point.

<sup>xlvii</sup>Perhaps with the platform of the Liberal Party of Canada ("Creating Opportunity", cited in note 3), we will see this kind of new direction. The platform recognizes the inherent right of self-government, although it does not detail an implementation plan or process. The Liberal government elected in 1993 on this platform has not yet taken steps to implement the inherent right.